Effects of the initiation of the insolvency procedure on the debtor's ongoing agreements

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- Thesis summary -

The initiation of the insolvency procedure on a professional produces major consequences on the ongoing legal reports wherein such professional is involved, with effects which may vary from their amendment up to the denunciation of contracts by the insolvency practitioner and discontinuation of their effects for the future. The issue of implementing ongoing agreements, in the context of a collective procedure, associates the law of collective procedures of enterprises in difficulty, with the classical law of obligations, for the purpose of ensuring that professionals who have the necessary economic viability are safeguarded. This symbiosis leads to the occurrence of a specific legal regime which combines *special rules* (for example, the debtor's contractual partner is compelled to continue the agreement despite the existence of debts foregoing the procedure's initiation, certain contractual clauses are rendered ineffective, or the debtor undergoing the procedure denunciates the agreements for the purpose of maximizing its assets) with *common law rules* whereby, the legislator reminds that the initial parties are under obligation to observe agreements undertaken and continued throughout the procedure.

The legal regime applicable to ongoing agreements at the time when the insolvency procedure is initiated, or the consequences incurred by the parties in this new context represent subjects of analysis which preoccupy legislators, the praxis and legal doctrine of al law systems

ever since the time when insolvency procedures of debtors in difficulty were regulated. The analysis and reformation of these institutions are continuous in all national jurisdictions so as to respond to practical and theoretical issues identified.

The insolvency procedure confuses contractual reports and, from this perspective, the law of collective procedures is classified as an extremely pragmatic branch of law because it intervenes in classical contractual reports which are characterized by stability. Classical contractual principles will be debated again from the standpoint of provisions set-forth by the law of collective procedures, based on arguments of public order and, certain contractual clauses, accepted without a doubt by the parties, will never be applied.

The enterprise, as an abstract entity, related in the economic environment, obtains its resources, distributes its products, and supports its entire existence through the intercession of agreements entered into. Their total or partial preservation is essential both for the purpose of restructuring, safeguarding and restoring the company, as well as for the assignment of activities to an investor willing to take it over as a whole. Even the liquidation of the debtor's estate in the best conditions justifies the preservation of certain agreements. In the opposite hypothesis where contracts are denunciated, the opposing contracting party of the debtor subjected to the insolvency procedure is granted the opportunity to choose the payment of compensation. The special normative act settling the insolvency procedure, Law no. 85/2014 contains explicit provisions grouped under articles 123 to 131 which find their correspondent in article L622-13 through L622-15 of the French Commercial Code and paragraph 325 of the United States of America Bankruptcy Code.

The subject is current is of practical interest, with impact on legal reports as a whole and especially on insolvency procedures. The scientific research endeavour proposes the in-depth analysis of three main directions which, in their turn, may be subdivided into several secondary themes: researching the relevant internal doctrine for the proposed theme, of the relevant jurisprudence from internal law and, a third permanently related direction, through reference and comparison with the first two, researching the relevant doctrine and elements of case law of French law, British law, and American federal legislation. Remarks and conclusions asserted are permanently highlighted in a comparative manner.

In the introductory part, the thesis approaches *an analysis of judicial reports between professionals.* In what concerns the evolution of the conception regarding the contract and debt, the legal document is dominated in the context of commercial reports, by its economic value making it ever simpler to conclude it. The contract is organically integrated in the mechanisms of demand and offer, a mechanism which is essential in market economy. The reciprocal influence between civil law and business law (commercial law) is frequent and enriched every one of these

branches of law. Initially, commercial law in general, and the commercial contract especially, borrowed rules from civil law which represented common law but commercial law included special rules with limited application in the economic field. Presently, the trend is inverted and numerous evolutions of civil law are owed to commercial law in general, and especially to collective procedure law. An eloquent example is to be found in the field of insolvency procedures of natural persons. The level of indebtedness of natural persons is inscribed in an economic logic and represents both a determining benchmark of individual prosperity and collective economic security alike. As such, economic logic is added to the civil contractual reasoning.

The new goal undertaken in collective procedures namely, of safeguarding viable enterprises, has changed legal reports between contractual partners subsequently to the initiation of the insolvency procedure. The striving debtor is no longer perceived as any other contractual partner subject of common judicial law. Contrary to the classical conception which viewed indebtedness and business risks as a negative phenomenon, presently, indebtedness and reasonable patrimonial or budget deficits are perceived as factors generating economic growth and development. The image of the bad-paying debtor has evolved and such became a victim of the legal and economic system who compelled him to assume numerous financial risks. Or, in this context, all creditors are called-upon to prove solidarity and make concessions.

The thesis analyzes arguments justifying the regulation of exceptions from the fundamental rules of contracts' incumbency. The debtor's difficult financial status and the need to maximize such debtor's estate in order to restructure the enterprise and cover liabilities now represents the central idea around which all procedures regulated by the Law no. 85/2014 on procedures for the prevention of insolvency and procedures of insolvency were created.

The analysis means explaining essential terminology constructs: For example, the notion of "*ongoing agreement"* in the sense set-forth by article 123 of Law no. 85/2014 did not benefit from sufficient attention from national doctrine but, compared law doctrine provides a detailed approach of the notion and the possibility to extract certain concepts and useful benchmarks. *A definition of "ongoing agreement"* is the one whereby ongoing agreements are "those agreements which, at the time when the insolvency procedure is initiated, have not completely been performed by the debtor or by the debtor's contractual partner...." This definition corresponds to the benchmarks outlined in internal law through article 123, paragraph 1 of Law no. 85/2014 whereby: "the official receiver or trustee in bankruptcy may denounce any agreement, non-expired leases, other long-term agreements, as *long as such agreements have not been fully or substantially performed by all parties involved".*

For an agreement to be classified as "ongoing" *it is not necessary for both parties' performances to be substantially not performed at this time of reference but, it is enough for the*

debtor to be substantially in default of his commitments." This is the manner wherein this collocation may be construed: *"Not performed by all parties involved"...* As long as one of the parties has significant obligations which are substantially not performed, the conditions of default is met "by all parties" *from a cumulative perspective.* This definition removes all provided compared law examples but serves the purpose of achieving the goals of the procedure.

From a procedural standpoint, the thesis provides a detailed presentation of actual mechanisms for contract denunciation, with its two essential components: *denunciation through the manifestation of will of the official receiver and denunciation following intercessions initiated by the debtor's contractual partner.* The conditions, deadlines, actual denunciation manners, effects of certain procedural acts concluded in this context, all are analyzed in detail starting with the relevant legal provisions set-forth by article 123, paragraph 1, second thesis, items a and b of Law no. 85/2014. In addition to the debtor undergoing the procedure, there is also an interest of the first's contractual partner in clarifying the evolution of contracts ongoing at the date of initiation of the procedure, as soon as possible. The lack of predictability and risks assumed by the debtor's contractual partner are prejudicial for the latter.

A thorough analysis of special provisions set-forth by article 123, paragraph 1 of Law no. 85/2014 commands the *analysis and determination of the range of application of legal provisions which prohibit the insertion, into the contract, of clauses* whereby the parties would agree on the reversal of ongoing contracts, lapse from the maturity benefits or declaration of advanced payability in the context of opening of the insolvency procedure.

Subsequent to choosing from available options, of the one allowing for the contract to be maintained, special attention should be given to the *manner of performance of the continuing contract* throughout the period of observation or application of the restructuring plan, as well as to the *consequences of default.* Other events with legal significance which may occur throughout the development of the agreement, evoked as examples in the contents of article 123, paragraph 5 of Law no. 85/2014 are widely analyzed within the thesis: amendment of contracts with the parties' consent, invoking the institution of unpredictability regulated by article 1271, paragraph 2 of the Civil Code or assignment of agreements for the maximization of the debtor's estate. Each of these institutions requires special attention in the context of collective procedures by highlighting the features commanded by the essential principle of maximizing the debtor's estate, as well as from the standpoint of compared law references.

Denunciation and assignment of the agreement are two legal institutions which exclude each other Only an agreement which initially was continued by the official receiver/trustee in bankruptcy may be assigned if, throughout the development of such agreement, an economic analysis reveals that the assignment is the best solution for maximizing the debtor's estate.

Between the moment of initiation of the insolvency procedure and the one of assertion of the option entitlement by the official receiver or trustee in bankruptcy, as long as the option regarding the continuation or denunciation of the agreement was not exercised. For commitments executed throughout this time span, the contractual partner benefits, as per article 5, items 21 and 102, paragraph 6 of Law no. 85/2014, from the favourable treatment of liabilities arising during the procedure, and will be paid with priority compared to creditors who hold receivables foregoing the initiation of the procedure.

The thesis also includes an analysis for the contradicting hypothesis wherein the contract was denounced and will no longer continue. The debtor's contractual partner is also provided with the opportunity to formulate an action for compensation seeking reparation for the prejudice caused by the debtor represented by the official receiver/trustee in bankruptcy by denouncing the agreement. In this context, it appears necessary to examine the *correlation between contract denunciation, the action for compensation, and the principle of maximization of the debtor's estate.*

The benchmarks pursued in the case of each legislative system under analysis relate to various aspects associated with the outcome of agreements confronted with the initiation of the insolvency procedure, in reference to one of the contracting parties. It is necessary to assert, for each legislative system in part, the legal regime applicable to contracts ongoing on the date of initiation of the procedure in reference to one of the parties: when does the classical principle of private law namely, *pacta sunt servanda* which means compliance with entitlements contractually gained by the debtor's contractual partner apply, and when does the principle of *paritas creditorum* which means the application of an equal regime for all creditors, including for the contractual partner apply?

Additionally, the paper outlines whether ongoing contracts are deemed *ope legis* assumed or denounced by the debtor subjected to the insolvency procedure through the new legal representative or, on the contrary, should the procedure’s administrator make an explicit and unequivocal choice which should be notified to the debtor's contractual partner. And, in the case of each of the cited hypotheses, do the consequences for the parties resulting from the assumption or denunciation of an ongoing contract present practical relevance? Further, as a direct consequence of initiation of the insolvency procedure against one of the parties, it is significant to discuss about the legal regime of contractual clauses which would affect or amend the manner of continuation of the agreement and its effects on the parties under various aspects or would even stipulate termination of the agreement due to the procedure's initiation, known in the common law legal system as *ipso facto clauses* or *flip clauses*.

Throughout the compared law part, the paper analyzes for each of the three legal systems in part, whether a decision to assume or denounce an agreement should be confirmed by a court

of law or by other creditors. Also of practical interest is clarifying the circumstance of whether contracts may only be partially undertaken and "*per a contrario"*, partially denounced, expressly or inferentially, as well as the possibility to expressly assume contracts with changes, in an amended form like for example, eliminating from the agreement clauses which prevent assignment of such agreement or of clauses which are burdensome for the debtor undergoing the procedure and which, upon elimination, would provide balance for reciprocally undertaken performances. In this context, special attention is given to contracts whose scope is *intuitu personae* obligations.

In the event of assumption of an ongoing contract, the applicable rules and consequences arising from such an action are also enounced. For instance, should the procedure administrator pay, before assuming the agreement, obligations already due, owed as per the agreement or, should it be necessary, simultaneously with the assumption of the agreement, to put-forth pledges for the performance of obligations to arise pursuant tot his agreement after the initiation of the procedure or in order to execute the ones arising before the initiation of the procedure.

In terms of the second fundamentally possible option, contract denunciation, it is also proper to emphasize the consequences of such a gesture, both for the debtor's estate and development of the procedure, as well as for the situation of contractual partners who are put in a situation of losing opportunities wherefore they had legitimate expectations. It is necessary to identify, within each system subjected to analysis, the means of compensation of the contractual partner in this context.

A global overview on the onset of the procedure in internal law reveals the existence of two distinctive, properly outlined phases. Initially, all of the debtor's contracts wherein such is party are preserved and integrated into a network whereon the entire activity of the debtor is based. Subsequently, each contract is analyzed and regarded *"ut singuli"* as well as part of a whole, for the purpose of identifying the economic usefulness of each contract for the debtor's restructuring and improvement of the latter's economic status. In this context, ongoing contracts which are indispensable to the restructuring process may be identified. Utilities providers represent an example of indispensable creditors but, the notions do not overlap. The economic concept of this separate class of indispensable, unsecured creditors is based on the idea that, without continuing this legal report with such providers, the debtor's activity could no long carry-on in normal conditions. It is not mandatory for the entity in question to be the sole provider for that particular service, raw material, material, or utility but, it is essential for such provider to not be exchanged for another without additional costs and interruptions in the debtor's activity.

In the context of initiation of the insolvency procedure, the treatment of ongoing contracts may be analyzed also by reference of the incidence of institutions which lead to significant consequences: *legal compensation, lien entitlements, and exception of contract non-performance.*

Another essential aspect whereon the thesis insists on is the *legal prohibition of contractual clauses of reversal of ongoing contracts, lapse from the maturity benefits or declaration of advanced payability* due to the opening of the insolvency procedure (article 123, paragraph 1, first thesis of Law no. 85/2014). Any negative consequences on the debtor's contractual situation determined exclusively by the opening of the insolvency procedure, generated by clauses protecting the debtor's contractual partner are strictly prohibited. These clauses are stricken by absolute nullity because they contradict special norms of the insolvency procedure, its purpose and rules whose first goal is to protect, restructure, and safeguard the debtor.

An analysis of this type of clauses identifies the incidental sanction (absolute nullity), the declarative or limitative character of the legal citation of clauses from the declared contract, as well as the practical identification of clauses which might be classified within the declared pattern. The essential conclusion leans towards the legal citation being declarative and not limitative, *making all those clauses which burden the debtor's contractual situation null through the mere opening of the insolvency procedure.* Ongoing contracts are not preserved for the purpose of their simple existence but are preserved with the same existing clauses and effects as in the event wherein the initiation of the insolvency procedure would not have occurred for one of the contractual parties. Only such an interpretation ensures the result pursued by the legislator namely, to not burden the contractual status of the debtor through such initiation of the insolvency procedure.

The imperative principle of continuation of contracts allows the official receiver/trustee in bankruptcy to request the continuation of the contract's development even if some of the debtor's own obligations due before the initiation of the procedure have not been executed For these receivables, the creditor contractual partner is entitled to formulate a statement of receivables for registration in the preliminary table, similarly to any creditor holding receivables foregoing the continuation of the procedure. The existence of these debts foregoing the initiation of the procedure does not prevent the continuation of the agreement, the sole criterion being the usefulness of this contract for the continuation of activity or for the proper development of the procedure, independently of the existence of previous arrears. The termination or cancellation of the agreement cannot be requested based on the existence of such debts foregoing the initiation of the procedure, nor may someone invoke the exception of contract non-performance.

Regarding the period following the initiation of the procedure, the legislator goes back to common law and the reciprocal effect of contracts so that, any delay in payment or in the performance of another obligation may substantiate both an exception of non-performance as well as the ruling, by the syndic judge, of contract termination or cancellation. Despite the provisions of article 123, paragraph 3 of Law no. 85/2014 referring explicitly only to termination, because

many of the ongoing contracts are contracts with successive performance, for identity of reasoning, such will be applied also in the case of cancellation of contracts undertaken and continued after the initiation of the procedure. To prevent such litigious situation, the legislator commands the insolvency practitioner, in the event wherein the contract is continued, to "state, every quarter, within activity reports, whether the debtor has the necessary liquidity to pay the value of goods or services provided by the other contracting party" (article 123, paragraph 2 of Law no. 85/2014).

For the correct application of these principles, it is completely necessary to legally classify receivables as previous or after the initiation of the procedure. A practical application is useful in the case of bank credit agreements (chapter IV.2). Special attention should be also granted to the current bank account contract, a legal report frequently encountered in judicial praxis, indispensable to the proper operation of an economic entity.

A comparative analysis of special provisions set-forth by Law no. 85/2014 and those of article 1417 of the Civil Code which stipulate lapse from spread-out maturities benefits in the event of initiation of the insolvency procedure reveals the fact that these provisions of the Civil Code will be applicable in the case of insolvency procedures of natural or legal entities who do not hold the capacity of professional, as well as in the case of private insolvency procedures which relate to professionals (others than the one regulated by Law no. 85/2014), already existing or to be regulated in the future.

In terms of competence to denounce ongoing agreements, the insolvency practitioner holds exclusive competence to this end. He does not act in his own name, as a third party in terms of the denounced agreement, but as representative of the debtor who is the actual contracting party. There is no procedural mechanism whereby he/she may be compelled to adopt such a decision or to support it with other arguments.

The option of denouncing an ongoing agreement is based on an analysis carried out by the insolvency practitioner and, from a procedural standpoint, it represents a measure including in a periodic activity report compiled by the latter, a report which may be challenged for reasons of illegality, as per the provisions of article 59, paragraph 5 of Law no. 85/2014, by any interested person. The first party interested in challenging these measures is, of course, the debtor's contractual partner who incurs a prejudice through such unilateral act of denunciation. A legitimate interest in challenging the measures may be had also by the debtor undergoing the procedure, represented by the official receiver, in the context of a conflict of interests between the insolvency practitioner and the represented debtor.

Judicial praxis and doctrine have found that the legal character of the manner of enforcement of provisions set-forth by article 123 of Law no. 85/2014 may constitute the scope of judicial verification by way of gainsaying. The analysis of economic aspects or of the pertinence

of the measure enforced by the official receiver/trustee in bankruptcy cannot be censored by someone else than the syndic judge as the issue is about the exercise of managerial responsibilities which pertain exclusively to the insolvency practitioner or exceptionally, to the debtor if the latter's rights of administration have not been restricted.

The essential condition of legality is fulfilled when at least a minimum advantage is obtained for the debtor's estate. Fulfilment of this obligation should be explained by the insolvency practitioner within an activity report, through a description of the procedural context and a reasoning of the measure of denunciation of an ongoing agreement, as is the procedure with any other adopted measure. The fact that subsequently, the analysis is not confirmed by economic evolutions and the goal of estate maximization is invalidated or accomplished only partly does not constitute grounds for cancellation of the measure. The legality of the denunciation measure is analyzed based on the fulfilment of conditions at the time of their adoption, and not based on possible subsequent evolutions.

The legitimate dilemma in this context is whether, in the analysis performed by the insolvency practitioner, finalized through a reasoned decision, one should consider the compensation whereof the debtor's contractual partner is entitled as per the provisions of article 123, paragraph 4 of Law no. 85/2014? The answer must be an affirmative one and to take into account the fact that, from the ensemble of benefits obtained by the debtor by denunciating the agreement, one must mitigate the amount required to cover the prejudice incurred by the contractual partner through the gesture of denunciation. The official receiver/trustee in bankruptcy should opt for denouncing the agreement only if, when taking into account the prejudice that must be repaired for the contractual partner, denunciation remains an intercession profitable for the debtor.

Also useful is a comparative analysis between the denunciation of agreements and cancelation of fraudulent documents concluded by the debtor during the suspicious period (article 117 Law no. 85/2014). While the purpose of "common law" nullity of the legal document is to punish failure to observe essential conditions of validity of the agreement, at the time of their signature, the nullity of legal documents concluded during the suspicious period foregoing the initiation of the insolvency procedure against the debtor has a different end purpose. For *sui generis* reasons, contracts presumed to be fraudulent by reference to the objectives of the insolvency procedure even if, the same agreements are valid as per common law. Cancelation of the document in the circumstances cited by article 117 of Law no. 85/2014 means the existence of a fraudulent contract, stricken by a reason for nullity out of the ones set-forth by article 117, ever since the time of its conclusion. On the other hand, denunciation of agreements is an institution which involves a fully valid ongoing agreement, both from the perspective of article 117 of Law

no. 85/2014 as well as from that of common law. The two institutions are nevertheless convergent in terms of the goal pursued namely, to enhance the debtor's chances of revival by eliminating prejudicial contracts, either those concluded and executed during the suspicious period, either those still ongoing on the date when the procedure is initiated.

In terms of the compensation action set-forth by article 123, paragraph 4 of Law no. 85/2014 which may be filed" by the contractual partner against the debtor", all conditions for compensations are those included in contractual civil liability. Even if unilateral denunciation by the insolvency practitioner is justified by the principles of maximization of the debtor's estate, the intercession of the contractual partner remains based on the debtor's refusal or inability to perform undertaken contractual obligations.

There is also a need to perform a comparative analysis between the common law provisions of article 1350, paragraph 2 Civil Code which regulate contractual liability respectively, those of article 1530 Civil Code which provide the creditor with entitlement to damages in the event of default from contractual obligations, both in correlation with the special provisions of article 123, paragraph 4 of Law no. 85/2014. In the hypothesis under analysis, the legal text expressly confers the right to compensation in the context of contract denunciation even if we are not in the presence of default with intent but a justified default allowed by the legislator in view of accomplishing a legitimate purpose.

The conclusion arising from the comparative analysis indicates that *we are in the presence of a singular situation derogatory from common law whereby, contractual liability is applied in full even in the context of justified default and in the hypothesis of a lack of fault of the debtor who pursues a legitimate, legally regulated goal.* Law no. 85/2014 allows for the elimination of two of the four essential conditions of contractual civil liability: the illicit action and fault. The fact generating liability will be invariably and abstractly, in all situations, the measure of denouncing the agreement and, the insolvency practitioner exercises a legal capacity, independent of any fault. It is therefore on us to analyze only those two other conditions of civil liability respectively, prejudice and causality relation.

In terms of the temporal coordinates of the prejudice, only the prejudice to arise or which will arise during the period subsequent to denunciation, *ex nunc*, will be repaired, and not the prejudice arising from possible non-performances foregoing denunciation, without relevance in this intercession. For outstanding and non-performed obligations foregoing the insolvency procedure initiation, the creditor may formulate a statement for registration of the receivable into the preliminary table; and based on the obligations outstanding between the date of initiation of the procedure and the date of denunciation of the agreement, the debtor's contractual partner is the holder of a current receivable to be paid with priority even in the absence of an enforceable title,

based on an application addressed to the official receiver/trustee in bankruptcy as per article 5, item 21 corroborated with article 102, paragraph 6 of Law no. 85/2014.

With regard to the *nature of the receivable arising as compensation* for reparation of the prejudice incurred due to contracts being denounced, such will have the legal regime of current receivables, *inferior* to advanced procedural expenses, financing expenses throughout the procedure, as well as receivables pertaining to labour reports, but a rank of priority *superior* to other important receivables: budget receivables, the ones arising from bank credits, rents, bonds, deliveries of products, renderings of services. *The comparative analysis of the law systems approached within the first chapter of this thesis highlights the fact that, this preferential legal treatment within internal law is one truly privileged by reference to the other ones under analysis.*

The paper approaches an ample analysis of the prejudice notion, insisting on the distinction between reparation in kind of the prejudice and reparation in equivalent, as well as on the three methods of assessment of the prejudice: judicial, legal, and conventional. *Damages assessed judicially* by the court will include the actual loss incurred by the creditor, *damnum emergens*, but also the profit not achieved due to contract denunciation, *lucrum cessans.* Furthermore, we may include, in the sphere of *actual prejudice*, both the *current prejudice* (failure to surrender goods, to complete works), the *future prejudice* (article 1532, paragraph 1 Civil Code), as well as the *prejudice resulting from loss of opportunity* (article 1532, paragraph 2 civil code) occurring through the blocking of possibilities to attend a tender or access a financing program. But, it is highly improbable for such prejudice to be *predictable* at the time when the contract is signed, another indispensable feature for prejudice reparation. The predictable character relates to "*the nature and spread of the prejudice"* and not to its pecuniary correspondent which may fluctuate.

The amount of the prejudice to be repaired essentially depends on the creditor observing his obligation to mitigate the prejudice (*article 1534, paragraph 1 and 2 Civil Code*) *the creditor's efforts to mitigate the prejudice in order to remove or mitigate the negative consequences resulting from the non-performance of the agreement.* In the particular case of ongoing contracts' denunciation, a possible *passiveness of the creditor should be capitalized at the time of assessment of the occurring damage.* For example, if by recurring to the debtor's notification mechanism, with the consequence of legal denunciation of the agreement, one would expediently clarify the future development of the agreement, the prejudice would also be lesser.

The prejudice should be estimated based on its value on the date of issuance of the final court decision. If, between the time of issuance of the solution by the first instance court and the time of ruling of the appeal court decision, there are changes occurring in the assessment of the prejudice, such will be taken into consideration as long as the judicial control court is procedurally vested. The court will consider variations of the prejudice arising after its occurrence, regardless

of whether we are talking about changes in the sense of its intrinsic deterioration or improvement, or of changes in the pecuniary equivalent of the prejudice embodied in damages awarded, independently of cause of such fluctuations.

The legal assessment of the prejudice is applicable in the event of non-performance of obligations relating to the performance of giving an amount of money (article 1535 Civil Code) in addition to obligations of doing something which may be assessed in money (article 1536 Civil Code). Obligations consisting in giving an amount of money may always be performed in kind, with the exclusion of damages being awarded. In addition to the default interest, the creditor is also entitled to be compensated for any additional prejudice besides the one incurred due to the delayed payment of the amount of money, as long as there are no moratory damages contractually determined or as longs as such do not exceed the default interest.

A third possibility of prejudice assessment is the conventional one, the criminal clause whereby the parties determine in advance the deliverable undertaken by the debtor in the event of default from main obligations (article 1538, paragraph 1, Civil Code)

The thesis presents the actual enforcement of theoretical notions in a few situations inspired by practical reality, relevant for the judicial assessment of the prejudice. Many agreements signed by professionals nevertheless include criminal clauses which exclude such a judicial assessment of the prejudice. This a reflex generated by the practical experiences of the business environment which capitalizes on the institution's benefits: the comminatory role of the criminal clause for the on-time performance of obligations or avoidance of burdens of proof as to existence and assessment of the prejudice. The paper presents actual hypotheses of assessment of the prejudice in the case of a contract for the supply of a product (in particular the electric energy supply agreement), the distribution agreement, the lease agreement with deadlines, the contracting agreement, the factoring agreement, and master agreement. These examples highlight the fact that, assessment of the certain and predictable prejudice at the time of conclusion of an agreement is not an easy task. A decision of the official receiver/trustee in bankruptcy to denounce an ongoing agreement, apparently useful within the procedure, should be substantiated on a thorough analysis and a reasoned estimation of the prejudice incurred by the contractual partner creditor so that it is achieved for the purpose of maximizing assets.

Even in the advantageous situation wherein the compensation obtained has the features of a current receivable which, in theory, will be paid with priority, the status of contractual partner creditors is not a favourable one. After the initiation of the insolvency procedure, the contractual partner creditor, party to an ongoing agreement, cannot know what his actual chances of recovering the prejudice throughout this labyrinth of deadlines, capacities, competencies, and necessary intercessions are.

Subsequent to the presentation of these general arguments, it is necessary to analyze *legal provisions and special hypotheses* w*hich regard certain special ongoing agreements,* confronted with the initiation of the insolvency procedure against one of the parties of the legal report. The legal provisions under analysis refer to the s*ales-purchase agreement including a property reservation clause* (article 123, paragraph 6 of Law no. 85/2014). The cited normative text is applicable in the strict interpretation hypothesis wherein the insolvent debtor holds the capacity of buyer. Another provision with a certain practical interest refers to *sales-purchase agreements for goods in transit (article 124 of Law no. 85/2014).* Such is regulated in the context of the insolvency procedure in a special hypothesis of provisions set-forth by article 1973 of the Civil Code which institutes an entitlement of disposition subsequent to dispatch m, in favour of the dispatcher.

Lease agreements, a typical example of agreements with successive performance, benefit from special provisions inserted through article 123, paragraph 7 and article 128 of Law no. 85/2014. The norms regard both hypotheses wherein a debtor may find himself, tenant or landlord. In those cases wherein rent is lower than the usual market one, should the owner of the leased property be the debtor in the insolvency procedure, the lease agreement is discontinued *ex lege.*

The special provisions of articles 126 and 127 of Law no. 85/2014 regulate the status of commission based agreements and consignment agreements and serve the purpose of clarifying the affiliation of goods in the debtor's estate, as well as facilitating the recovery of goods by the contractual partner which are held by the debtor. The insolvency code also includes special norms for the settlement of the status of financial lease agreements ongoing on the date of initiation of the insolvency procedure, provisions with a clear practical applicability since this type of agreement is frequently used for the procurement of machines, equipment, vehicles of various types and other type of installations by professionals (article 123, paragraph 11). Contrary to rules with a general character, in the case of initiation of the insolvency procedure against the use of an item, the main protagonist is not the insolvency practitioner but the sponsor within the lease agreement who holds extensive capacities by comparison to any other of the debtor’s contractual partners.

In terms of the labour agreement, unlike in French law, where, for the purpose of protecting jobs, the labour agreement is expressly exempted from the specific treatment of ongoing agreements, in Romanian law, the legislator did not choose such a differentiated treatment and therefore, such agreements may be denounced. Article 130 of Law no. 85/2014 includes explicit provisions regarding the Company Contract. The initiation of the insolvency procedure may surprise the debtor as limited or unlimited liability shareholder, or as shareholder. The insolvency practitioner may *request the liquidation of the debtor's entitlements within that particular*

company, as per the last approved financial records, or will be provided with the alternative to propose for the debtor to remain shareholder only subject to the consent of the other shareholders.

Furthermore, at the time of initiation of the insolvency procedure, the debtor may be entangled in legal reports concluded in consideration of his personal capabilities like, the performance of certain specialized services, mandate agreements, concessions for an operational license, etc. We are talking about *intuitu personae* agreements wherein, the result to be obtained may be decisively determined by certain particular features of the contractual partner.

A special regulation, with wide practical applicability and a central position in the present survey relates to the particular case of *synallagmatic sales-purchase promissory agreements concluded between debtors, as promissory seller, foregoing the initiation of the insolvency procedure* wherein such debtor is the subject. A first regulation was inserted through the provisions of article 93^1 of Law no. 85/2006, taken over in a more complex form through the provisions of article 131 of Law no. 85/2014. The legislator's intention swindled between the unconditional protection of the promissory buyer, regardless of the latter's capacity, of the destination and nature of the asset constituting the scope of the promissory agreement and protection, presently, of the interests of creditors who have a cause of preference over the same asset.

The experience of the past 20 years of investments in the Romanian real-estate sector reveals the fact that the practice of contracting apartments in the "project stage" by signing promissory sales-purchase agreements is a risky one. Practical reality provides examples wherein housing properties, totally or partially contracted ever since the project phase, were no longer finalized or were finalized without complying with the building permit, with the consequence of legal blocking of acceptance and registration of the property in the land registry so that they may enter into the civil circuit.

An analysis of the application of provisions set-forth by article 131 of Law no. 85/2014 with permanent reference to doctrine and jurisprudence approaches the *imperative and cumulative conditions regulated for the signing of the sales-purchased agreement in authenticated format.* The legal text refers, in essence, to the *certified date of the promissory sale agreement*, mandatory to forego the initiation of the insolvency procedure against the promissory seller, *to the creditor's possession of the property* and a *minimum amount of the price paid or to be paid and* which should not be less than the circulation value of the property. Furthermore, it is absolutely necessary to verify the condition regarding the *absence of the property's importance for the success of the restructuring plan*. Each of these conditions may be deemed "classical" as they are still settled through the previous provisions of article 93^1 of Law no. 85/2006, are analyzed in detail. New conditions were introduced through article 131 of Law no. 85/2014: *Provisional registration in*

the property's land registry booklet of the promissory agreement and ensuring the adequate protection for creditors who hold actual lien rights over the real-estate property constituting the scope of the promissory sales-purchase agreement.

Through brief considerations' extracted from an ample analysis, one must argue that, in terms of the sales price, *any estimation of the market value for a property burdened with encumbrances leads to a natural conclusion that the property's price is lesser than the circulation value of that same asset, not burdened with encumbrances.* Another aspect is that one cannot overlook the circumstance whereby t*he price referred in the legal text under analysis is, hypothetically, the price determined through a promissory sales-purchase agreement* giving rise to a receivable entitlement in the estate of the promissory buyer. Or, *the price of a promissory sales-purchase agreement is lower than the price within an authenticated sales-purchase agreement which ensures the transfer of ownership rights* because, in the case of the first, transfer of ownership is conditional to the performance of subsequent intercessions. In this context, *a much more practical and more connected to the legal and economic reality solution would consist in reporting the price to a percentage margin determine around the circulation value.*

The legal conditions of payment of the price and circumstances wherein such may be deemed as accomplished have led to an analysis, within the jurisprudence, of a possibility to *extinguish a price payment or a price difference payment obligation, through reckoning.*

In terms of the *condition of possession*, provisions stipulate that the asset must be in possession of the promissory buyer at the time of assertion of the motion for performance of obligations undertaken by the debtor through the synallagmatic sales-purchase promissory agreement. Because the norm does not make distinctions, the condition is fulfilled also in the case when, the asset came into the possession of the promissory buyer creditor after the initiation of the procedure. In tight connection with the possession of the property, one must rightfully argue a condition indispensable to the signing of the authenticated sales-purchase agreement namely, *the completion of the real-estate property, from both perspectives: physical completion as well as legal completion of the property*, proven through the development of all stages of the administrative process of acceptance and registration in the land registry.

In terms of the *provisional registration of the bilateral sales-purchase promissory agreement into the land registry,* this condition was introduced through the provisions of article 131 of Law no. 85/2014. This is a condition whose application generates multiple difficulties. The main impediment consists in the non-existence of land registry booklets for many properties at the time when the bilateral promissory agreements are signed. In judicial praxis, the enforcement of the legal provisions under analysis was requested precisely in the case of bilateral sales-purchase promissory agreements who related to housing spaces in various states of construction: either

precisely in the incipient stage of licensed project, either under construction. Or, the completion of real-estate advertising formalities, through the opening of individual land registry booklets and assignment of a cadastral number is accomplished at a much later time. By way of consequence, from the perspective of the newly regulated imperative condition, for many practical situations, the enforcement of provisions set-forth by article 131 of Law no. 85/2014 will be impossible since, at the time of signing of the promissory agreements, there are no individual land registry booklets for each housing unit therefore allowing for provisional registration of the legal document.

A newly added condition through the provisions of article 131 of Law no. 85/2014 will in its turn mitigate the practical applicability of the normative texts quoted. We are talking about the need to provide sufficient guarantees for creditors benefiting from rights of preference over the property which constituted the scope of the promissory agreement and who risk loosing that particular guarantee following the acquisition of the property, free of burdens, by the promissory buyer.

As a direct consequence of these conditions being enforced, the property is not available for sale by the debtor through the insolvency practitioner until after the status of the lien burdening the property is clarified, with the creditor's consent. Additionally, the creditor has priority, as per the law, to the distribution of any amount of money which the promissory buyer still has to pay as price or price difference. *Protecting the interests of this diligent creditor and conserving his actual lien rights represents a imperative condition which must be fulfilled for the completion of the procedure for the signing of the authenticated sales-purchase agreement (article 131, paragraph 2, item b of Law no. 85/2014).* Should the creditor benefiting from a clause of preference with regard to the property constituting the scope of the promissory agreement not obtain the amount representing the market value of the property or another guarantee of the same value among the ones cited in the legal text, the promissory buyer will not acquire the property free of encumbrances. *There is no impediment to the signing of the authenticated sales-purchase agreement but, the property will not be acquired free of encumbrances but only accompanied by a clause of preference established in favour of the secured creditor.*

Another conclusion of the analysis reveals that *promissory agreements entered into by the debtor, even if such are ongoing agreements on the date of initiation of the procedure, cannot be denounced by the official receiver as per article 123, paragraph 1 of Law no. 85/2014 if all legally settled explicit and cumulative conditions of the analyzed norms, regarding the authentication of the deed, are met.* If such conditions for authentication of the deed are met, the obligation of the insolvency practitioner to sign, on behalf of debtor, the authenticated sales-purchase agreement becomes an imperative one.

If cumulative conditions are not met, the option of the promissory seller creditor is to seek reparation for the entire incurred prejudice. A reasonable refusal to sign an authenticated sales-purchase agreement equates to a denunciation of the promissory agreement and makes it possible to initiate a motion for compensation as per the provisions of article 123, paragraph 4 of Law no. 85/2014 for the purpose of recovering the entire prejudice incurred through denunciation, not just the price advance. This hypothesis excludes the issuance, by a court, of a decision to take the place of the authenticated deed, as per the conditions set-forth by article 1669, paragraph 1 of the Civil Code because, after the initiation of the insolvency procedure, capitalization of the promissory-buyer creditor receivable entitlement, attained through the promissory agreement may be exclusively accomplished as per article 131 of Law no. 85/2014.

In the event wherein the property constituting the scope of a synallagmatic sales-purchase promissory agreement is removed from the estate of the debtor undergoing the insolvency procedure, the remedy provided by the provisions of article 84, paragraph 1 of Law no. 85/2014 whereby all acts, operations, and payments performed by the debtor after the initiation of the procedure are rightfully null.

By corroborating the legal purpose of the insolvency procedure with the possibility of denunciation of ongoing agreements, *denunciation of the debtor's ongoing agreement should be an effect of such initiation of the procedure and not the main purpose upon the initiation of a procedure based on an artificially created state of insolvency for this end result.* The procedural context favourable to the debtor who is provided with mechanisms whereby he may avoid the obligation of performing certain contracts may constitute a temptation to initiate the insolvency procedure on his own and not for the purpose legally and publicly assumed of restructuring his activity and covering his liabilities, but with dissimulated intent to denounce certain agreements whose performance has become too costly.

In the Romanian legislative context, unlike for example, in French legislation, there is no obligation of the insolvency practitioner or of the court to analyze the denunciation of ongoing agreements from the perspective of injuring the interests of the debtor's contractual partner. In internal law, denunciation of ongoing agreements by the insolvency practitioner should not pursue but the interests of the debtor and the maximization of the latter’s estate and, from the perspective of any contractual partner, it seems to have a discretionary character.

The limit value of the uncontested, liquid, and enforceable liabilities required for the initiation of the insolvency procedure is *40.000 RON in all procedural hypotheses of procedure initiation, regardless of the debtor’s turnover, the range of his activities, number of employees, span of legal reports wherein the company is committed, et*c. The application of the same limit value for all debtors who intend to petition for the initiation of the procedure is not consistent with

the procedure's purpose. A mere economic circumstance (major investment, doubled by delays in payment by own debtors) may generate a temporary shortage of liquidities and a false state of insolvency as per the provisions of article 5, item 29 of Law no. 85/2014 even if, for average-term, the economic status is far from the rigours of the text. A legal solution would consist in determining the limit value of receivables using a percentage in reference to the turnover.

In the context of advantages provided by the procedure, the access of a debtor to the procedure should not ne an absolute entitlement. One may imagine the situation of an enterprise without major financial difficulties who becomes the subject of the procedure in order to maximally use the multiple advantages provided: adjournment of all judicial, extrajudicial or enforcement procedures being carried-out against it, blockage of the default interest or of contractual penalties, attainment of favourable terms for the payment of liabilities, mitigation or elimination of certain liabilities, through the restructuring plan, cancellation of prejudicial agreements concluded during the suspicious period, or denunciation of certain ongoing agreements which became unprofitable. The evidence to be pursued by the court in order to distinguish between an actual and objective state of insolvency and a mere conjectural difficulty could consist in verifying any possible intercessions made by the debtor before filling for the motion, for the purpose of financial recovery: proposals addressed to creditors, negotiations in view of a credit restructuring or actual accords to this end, seeking of viable financing alternatives, recapitalization of the company, payment of a part of debts in order to stop the accumulation of penalties. A remedy provided to creditors whereby such may invoke the illegality of the insolvency procedure initiation, including by misappropriating the procedure from its legal purpose is represented by the procedure of challenging the writ of initiation of the procedure, regulated by article 71, paragraph 2 of Law no. 85/2014.

Judicial praxis provides the example of an insolvency procedure of wide scope, whose manner of development presents clues about a simulated behaviour, as the procedure is used as a "screen" for giving effect to actual intentions consisting in the denunciation of unprofitable ongoing agreements. Highlighting these possible actual intentions of the debtor, inconsistent with the purpose and principles of the insolvency procedure becomes possible by analyzing procedural stages and exposing the relevant actions of participants. Shortly after the opening of the procedure, while carrying-on the same activity and without making any significant change in the debtor's organization, payment staggering and renegotiation of debts was obtained. Moreover, all due receivables enlisted in the final table were paid-up shortly after confirmation of the alleged restructuring plan. Or, all of these liabilities' optimization and debts' payment operations could have been achieved outside an insolvency procedure.

The restructuring plan voted by the creditors and confirmed by the syndic judge was implemented in a mere six days. The resources required to pay these receivables were identified in the debtor's estate because the restructuring measures implemented throughout the procedure were not capable of generating such a huge volume of liquidity need to pay all receivables not staggered. The restructuring plan should have generated the revival of activity and attainment of profit required for the payment of liabilities, but interventions of this kind on the debtor's activity were minimal.

The debtor continued its activity in the same conditions and the main steps undertaken by the official receiver consisting in denouncing some of the ongoing agreements signed with contractual partners who did not accept the renegotiation of essential elements within such agreements. These agreements were not advantageous and brought-forth constant loss for the debtor's estate. A first decision to denounce an ongoing agreement was adopted after merely six days after the initiation of the insolvency procedure, a time span insufficient for notifying, taking over all documents and performing a complex economic and financial analysis.

The main challenge in this context consists in identifying the remedies provided for the party injured through an abuse of the law, in order to recover the prejudice borne due to this behaviour. The syndic judge should be the first to censor the intention of derail the procedure from its natural purpose by rejecting the petition for the initiation of the insolvency procedure when, he reaches the conclusion that the situation is not an actual insolvency state but a mere momentary financial difficulty which could be remedied. If the syndic judge opened the procedure due to a superficial analysis of evidence, either because he/she was not provided with sufficient data to notice the simulated behaviour of the debtor, the sole procedural remedy of creditors consists in formulating a motion for opposition against the civil writ whereby the procedure was initiated. And if the elements outlining a possible abuse of law appear subsequently and can no longer be invoked through a motion for opposition to the petition of initiation of the procedure, the only remaining course of action is the attainment of equivalent reparation, by compelling the debtor to pay all damages incurred by creditors in tort.

All these aspects, presented at theoretical level, as well as through jurisprudence benchmarks, reveal the significance of the approached theme. Far from being exhausted, the treatment of ongoing agreements within the insolvency procedure will remain in the attention of theorists and practitioners because it consistently requires approaches and clarifications as the practical interest is obvious.

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