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THE ROLE OF THE SYNDIC JUDGE IN THE INSOLVENCY PROCEDURE. THE EUROPEAN TREND

Anca Roxana BULARCA[1]

Abstract: *The insolvency procedure is a complex procedure because it combines 3 components, namely: an economic one, a judicial one and a social one. Consequently, the judge's intervention in this procedure is more limited, compared to the common law civil process. The syndic judge is an actor in the insolvency proceedings, having a role, a competence and attributions expressly provided by law. The role, powers and importance of the syndic judge in insolvency proceedings, but also in insolvency prevention proceedings, involves a changing analysis at the level of the member states of the European Union.*

Key words: *procedure, insolvency, syndic judge, court, control, powers.*

1. Introduction

The insolvency procedure applies to debtors who are in a patrimonial state of non-payment.

Over time, the doctrinal and jurisprudential opinions regarding the state of cessation of payments have been different.

Many years ago reaching such a state was severely punished. The evolution of modern societies has led to a different conception of situations of financial difficulty, but also of insolvency, in which a debtor can be found.

Similar to a sick person who can recover, so a debtor in a deficient patrimonial state can recover.

The new European conception of insolvency, inspired by the American legislation, but not only, pointed out the need to give a second chance to the honest debtor by reorganizing his activity.

Several participants are involved in an insolvency procedure. Obviously, the main actor is the debtor, and the beneficiaries of the procedure are the creditors. However, in order to achieve the goal of the insolvency procedure, the participation of specialized people is necessary: economists and lawyers.

From this perspective, the insolvency procedure has an economic component, but also

[1] *Transilvania* University of Braşov, roxana.bularca@unitbv.ro, corresponding author

a legal one.

Related to this reality, the question often arises as to whether this procedure should be carried out in the spirit of a civil process or if it represents something totally different.

At the level of the member states of the European Union, the specialized doctrine is not uniform, considering that those who support the judicial procedure most often do not take into account the major deficiencies faced by the domestic judicial systems.

2. Internal Procedure

The Romanian insolvency code, materialized in Law no. 85/2014 on insolvency prevention and insolvency procedures, introduced in article 4 a number of 13 principles on which to base the application of this normative act, and among them the principle was legislated by the administration of insolvency prevention and insolvency procedures by insolvency practitioners and their conduct under the control of the court.

Law no. 85/2014 established for the first time specific principles in the light of which the provisions of this law must be applied in its regulatory field. These principles must be respected by the bodies that apply both the insolvency prevention procedures and the insolvency procedures, but also by the other participants in these procedures, who must perform all specific acts and operations in the spirit of these principles (Țăndăreanu, 2014, p.19).

The principles on which the application of the provisions of the special insolvency law is based contribute to the achievement of the purpose of these procedures, being adopted for the uniform interpretation and application of the provisions contained in the Insolvency Code (Nasz, 2008, p.26).

The Romanian legislator established that insolvency procedures have a judicial component, the Insolvency Code establishing in art. 342 par. 1 that this law is supplemented by the provisions of the Civil Procedure Code and the Civil Code, to the extent that they do not contravene.

Thus, the insolvency procedure is regulated by a special law and is subject to a certain extent to the rules applicable to the civil process. In the matter of insolvency, it is emphasized that this special procedure has its actors, in the specialized doctrine (Adam, 2016, p.125) talking about the participants in the insolvency procedure, about the subjects of the procedure and the bodies that apply it.

According to art. 40 par. 1 of Law no. 85/2014, the bodies that apply the insolvency procedure are the courts, the syndic judge, the judicial administrator and the judicial liquidator.

The regulations regarding the organization of the activity of insolvency practitioners for insolvency procedures in Romania can be found in Law no. 86/2006. It follows from the economy of these legal provisions that insolvency proceedings are conducted by insolvency practitioners. As a result, the decisive role in the insolvency proceedings rests with the insolvency practitioners, but they, although they constitute a liberal profession, in the event that they administer such procedures, they perform a public function, being subject to a control of the activity carried out, which is exercised by the syndic judge.

The insolvency code establishes express attributions for insolvency practitioners, in

exercising the function of judicial administrator or judicial liquidator, these appear as legal obligations, and for the activity carried out they are entitled to a remuneration.

Related to what was presented, we note that the role of the syndic judge in insolvency proceedings is to exercise control over the activity of the judicial administrator, respectively the judicial liquidator, by virtue of the legal means made available by the special law, and we can refer here, for the purposes the title for example, to the following: the appeal against the measures of the judicial administrator, the replacement of the judicial administrator/judicial liquidator, the appeal against the tables of claims, the appeal against the decisions of the meetings of creditors, confirmation of the reorganization plan, etc.

The Insolvency Code provided for the first time, as I have shown, expressly, that the insolvency practitioner's activity is carried out under the control of the court (Comșa, 2011, p. 10).

Regarding the notion of a court of law, we must take into account, on the one hand, the first-instance competence in matters of insolvency that belongs to the courts (as a vertical jurisdiction) and within which syndic judges function, respectively judges appointed by the governing boards for the instrumenting of cases that have as their object the prevention of insolvency. From a legal point of view, the syndic judge is a body that applies the insolvency procedure, but this is a magistrate judge, who is appointed within the court or the specialized court to fulfill this attribution.

This legal and special competence for the judge who performs the function of syndic judge must presuppose a certain specialization, and the desirability of specialized insolvency courts remains in our opinion not only an expectation for the economic environment, but even a necessity considering that insolvency can be considered a form of recovery for economic agents.

The mentality and the concept of insolvency has changed rapidly recently, economic-financial crises seem to have a certain cyclicality, and the closing and opening of roads for participants in the economic circuit appears more and more as a normality (Turcu, 2005, p. 216).

That is why we consider that the bodies that apply the insolvency procedure, including syndic judges, represent the entities, which, beyond the fulfillment of legal duties, have a superior role in society, namely that of contributing to the management of crisis situations (Piperea, 2008, p. 28).

It is necessary to specify here that the legislator provided attributions for the syndic judge in art. 45 of Law no. 85/2014, but did not provide attributions for the court of judicial control, although it is a body that applies the procedure, and from this we draw the conclusion that the decisions of the syndic judge are censurable according to the general rules applicable to the appeal, contained in the Code of Civil Procedure, with some particularities. The syndic judge's control over the activity of insolvency practitioners is exclusively legal (Dinu, 2014, p. 732).

The syndic judge, like any magistrate judge, has the obligation to verify his competence to solve the case with which he was invested, according to art. 131 of the Code of Civil Procedure, the exception of incompetence can also be invoked ex officio by the syndic judge, not only by the interested party.

Thus, the material competence regarding the adjudication of insolvency cases belongs to the court. In the insolvency procedure, the provisions relating to the material jurisdiction of the court according to the value of the claims do not apply, respectively the court will judge the opening requests regarding the insolvency regardless of the extent of the claim for which the opening of the procedure is requested.

Moreover, the court or specialized court has substantive jurisdiction over all insolvency claims, including in the situation where an arbitration clause is included in the contract that regulates the fundamental relations of the parties (Cărpenaru, 2014, p. 117).

The territorial competence of the court for the cases which have as their object the insolvency procedure is attracted by the corporate/professional headquarters owned by the debtor at least 6 months prior to the date of referral to the court. We are in the presence of an exclusive territorial competence attracted by the location of the debtor. If a special insolvency section has been created within the court, it has the competence to carry out the procedures provided for by the Insolvency Code.

According to art. 45 par. 1 of Law no. 85/2014, the main duties of the syndic judge are the following:

1. Reasoned pronouncement of the decision to open the insolvency procedure and, as the case may be, to enter into bankruptcy, both through the general procedure and through the simplified procedure.

The syndic judge can be assigned to resolve a request to open insolvency proceedings by both the debtor and the creditors. The motivation for opening the insolvency procedure must refer to the state of facts and the legal grounds, it must cover all the measures ordered by the operative part of the decision.

Depending on the debtor's manifestation of will regarding the reorganization of his activity and in relation to the existence of some cases that make the opening of the simplified insolvency procedure an incident, the syndic judge will order either the opening of the general insolvency procedure or the opening of the simplified insolvency procedure, these being the forms of the insolvency procedure.

2. Judgment of the debtor's appeal against the creditor's introductory request to start the procedure.

In the event that the creditor/creditors file a request to open the insolvency procedure of a debtor, the latter is entitled to contest the state of insolvency. Thus, through the preliminary court application, the claimant-creditor claims that he has a definite, liquid and enforceable claim against the debtor, higher than the threshold value, and that the debtor is in a state of insolvency.

The debtor-defendant's appeal to the state of insolvency is formulated within the same insolvency file, within 10 days of receiving the claimant-creditor's request. In our opinion, the debtor's appeal against the state of insolvency has the legal nature of a counterclaim and not an objection, because the defendant-debtor does not defend himself against the creditor-claimant regarding the claim made by him, but invokes the non-existence of the state of insolvency, similarly to a declaratory action.

In the event that the appeal against the state of insolvency is accepted, the creditor's request for the opening of the insolvency procedure will be denied. If the appeal to the

state of insolvency is unfounded and will be rejected, that situation does not automatically lead to the admission of the creditor's request, having as its object the opening of the insolvency procedure, the syndic judge having the obligation to verify, even ex officio, whether the creditor's claim meets the requirements to be clear, liquid, enforceable and above the threshold value.

If the syndic judge orders the opening of insolvency proceedings, he will not only rule on the request of the creditor and/or the debtor, in the sense of admitting or rejecting this main request, but will also have the obligation to order other measures that the law provides expressly.

We find that from this point of view, the syndic judge, when admitting the request to open insolvency proceedings, rules on more than what was requested by the court's preliminary request. Here, from this point of view, the Insolvency Code deviates from the provisions of the Civil Procedure Code (Turcu, 2002, p. 18).

3. Judgment of the creditors' opposition at the opening of the procedure.

In the event that the request to open the insolvency procedure is made by the debtor, and it is accepted by the syndic judge, the debtor's creditors can file an opposition against the syndic judge's decision to open the insolvency procedure. Such an opposition may be admitted in the event that the debtor in bad faith requested and was granted the opening of his insolvency proceedings. In the event of the admission of the opposition, which is resolved by the same syndic judge, within the same insolvency file, he orders the revocation of the decision opening the insolvency procedure by pronouncing a sentence. In the doctrine, the question was raised as to what liability occurs if the debtor made a premature request with the object of opening his insolvency procedure, with the aim of suspending a process or forced execution, and the answer was that a tortious civil liability would occur regarding the property of the debtor-natural person or of the statutory representatives of the debtor-legal person, which will be resolved by the syndic judge.

As far as we are concerned, we consider that we are indeed in the presence of a form of tortious civil liability of the natural person who decided and assumed the voluntary request to open the insolvency procedure, but this liability action, which would be entitled to promote it to the debtor's creditors, does not fall within the competence of the syndic judge, considering that he does not have such a power provided by the Insolvency Code.

4. The motivated designation, as the case may be, of the provisional judicial administrator/provisional judicial liquidator, requested by the creditor who submitted the request to open the procedure or by the debtor, if the request belongs to him.

One of the measures that the syndic judge must order, through the sentence opening the insolvency procedure, is to appoint the judicial administrator or the judicial liquidator, depending on the form of procedure he opens, respectively the general procedure or the simplified insolvency procedure. In the absence of a proposal made by the debtor or by any of the creditors, the insolvency practitioner will be appointed from among those registered in the National Union of Insolvency Practitioners in Romania, who had submitted their offer of services to the case file. The appointment of the judicial administrator/judicial liquidator is provisional, it covers the actual administration

of the procedure only until the insolvency practitioner is confirmed by the debtor's creditors, under the conditions provided by law.

5. Confirmation of the judicial administrator or the judicial liquidator appointed by the meeting of creditors or by the creditor who owns more than 50% of the value of the claims.

In the event that the creditors, in the meeting of creditors of the debtor, or the majority creditor of the debtor, have confirmed the judicial administrator/provisional judicial liquidator, and against the decision of the meeting of creditors or the decision of the majority creditor, no objections have been formulated, the syndic judge has the obligation to order the confirmation of the insolvency practitioner.

With the confirmation of the insolvency practitioner, the syndic judge will also take note of his fee, approved by the debtor's creditors.

At the first meeting of creditors, the agenda must necessarily refer to the confirmation of the provisional insolvency practitioner appointed by the syndic judge and his remuneration. As can be seen, the prerogative of the final choice of the judicial administrator or the judicial liquidator and the determination of his remuneration belongs to the debtor's creditors.

6. Replacement, for valid reasons, of the judicial administrator or the judicial liquidator.

According to art. 57 in par. 4 of Law no. 85/2014 at any stage of the procedure, the syndic judge, ex officio or following the adoption of a decision of the meeting of creditors in this regard, with the vote of more than 50% of the value total of the receivables with voting rights, may replace the judicial administrator or the judicial liquidator, as the case may be, for valid reasons. We appreciate that the replacement of the insolvency practitioner, as it was previously confirmed, by the creditors, at their first meeting, is only possible if the existence of good reasons is proven, and this condition is valid both for the syndic judge, who can notify ex officio, as well as for the meeting of creditors, convened for this purpose.

In this sense, in the doctrine (Sărăcuț, 2013, p. 18) it was emphasized that the replacement of the judicial administrator or the judicial liquidator represents a form of his liability, which intervenes mainly for fraud or gross negligence.

7. Judgment of requests to revoke the debtor's right to continue conducting his activity.

The withdrawal of the right of administration constitutes a sanction that can be applied to the debtor in general insolvency proceedings, in the cases expressly provided by law. If bankruptcy has been ordered against the debtor, the right of administration is withdrawal by law. The withdrawal of the debtor's right of administration can be ordered ex officio even by the decision to open the general insolvency procedure or during its development.

8. Judging requests to hold members of the management bodies responsible for the debtor's insolvency.

Pursuant to art. 169 of Law no. 85/2014 at the request of the judicial administrator/judicial liquidator, the syndic judge can order that part or all of the liabilities of the debtor who has reached a state of insolvency, without exceeding the

damage causally related to the said deed, be borne by the members of the management and/or supervisory bodies within the legal entity, as well as by any other persons who contributed to the state of insolvency of the company.

9. Judgment of the actions introduced by the judicial administrator or the judicial liquidator for the annulment of some fraudulent acts or operations and actions for the nullity of payments or operations performed by the debtor, without right, after the opening of the procedure.

The judicial administrator or the judicial liquidator, as well as the creditors' committee, if the insolvency practitioner does not promote it, can file actions to the syndic judge for the annulment of the debtor's fraudulent acts or operations to the detriment of the creditors' rights, in the 2 years, respectively 6 months, prior to the opening of the insolvency procedure, according to art. 117-122 of Law no. 85/2014.

10. Judging the appeals of the debtor, the creditors' committee or any interested person against the measures taken by the judicial administrator or the judicial liquidator.

The measures taken by the judicial administrator or the judicial liquidator can be contested by the natural person debtor, the special administrator of the legal person debtor, any of the creditors or any other person who proves an interest.

11. Confirmation of the reorganization plan, after its voting by the creditors.

The judicial reorganization procedure involves drawing up, approving, confirming, implementing and complying with a reorganization plan. If the reorganization plan is proposed by the entitled persons and is accepted by the creditors, it is subject to confirmation by the syndic judge. In order to confirm a reorganization plan, the syndic judge has the obligation to verify its legality requirements, respectively the mandatory mentions that it must include, such as: the payment schedule; the categories of claims that are not disadvantaged; the method of payment of current claims, what compensations are to be offered to the holders of all categories of claims, compared to the estimated value that would be received by distribution in case of bankruptcy; the appropriate measures for its implementation, according to art. 133 par. 5 of Law no. 85/2014; the activities that the debtor proposes to carry out for the recovery of his activity; the financing resources of the business during the period of judicial reorganization, etc. If the reorganization plan complies with all the conditions imposed by law and it is viable, it will be confirmed by the syndic judge by court decision.

12. Resolving the request of the judicial administrator or creditors to interrupt the judicial reorganization and bankruptcy procedure.

In the situation where the judicial administrator or the creditors committee, following the measures taken through the judicial reorganization plan, sees that the recovery of the debtor is not envisaged, or that the purpose envisaged at the time of the confirmation of the plan cannot be put into practice, they address the syndic judge with a bankruptcy petition of the debtor. Thus, if the debtor does not comply with the plan or the conduct of his activity brings losses or accumulates new debts to creditors, any of the creditors or the receiver may at any time request the syndic judge to order the debtor to enter bankruptcy.

13. Resolving objections to the reports of the judicial administrator or the judicial liquidator.

Distinct from the right conferred by law to challenge the measures of the judicial administrator or the judicial liquidator, the legislator also provided for the right to challenge the reports of the judicial administrator or the judicial liquidator.

14. Judgment of the action to annul the decision of the meeting of creditors.

The decision of the meeting of creditors can be annulled by the syndic judge for reasons of illegality, at the request of the creditors who voted against the taking of the respective decision and had it recorded in the minutes of the meeting of creditors, as well as at the request of the creditors who were absent from the meeting of creditors or whose votes were not recorded in the prepared minutes.

The decision, except for the one by which he was appointed, can be challenged, for reasons of illegality, also by the judicial administrator/judicial liquidator.

15. Judging the requests of the judicial administrator/judicial liquidator in situations where a decision cannot be made in the meetings of the creditors committee or in the meetings of the meeting of creditors due to the lack of quorum, caused by the non-appearance of legally summoned creditors, at least two of their meetings having the same.

16. Disposition of convening the meeting of creditors, with a specific agenda.

17. Pronouncing the decision to close the procedure.

The closing of the insolvency procedure represents the final operation of this procedure, and it can be ordered by the syndic judge only in the cases expressly provided for by law.

The closing of the insolvency procedure is carried out in relation to the phases of the insolvency procedure, namely judicial reorganization and bankruptcy.

18. Any other duties provided by law.

Analyzing these powers of the syndic judge, we can draw the conclusion that the Romanian legislator granted him a particularly important role in the insolvency procedure, throughout it, increasing his powers as compared to those regulated by the former insolvency law, respectively Law no. 85/2006.

According to art. 45 par. 2 of Law no. 85/2014, the duties of the syndic judge are limited to the judicial control of the activity of the judicial administrator and/or the judicial liquidator and to the processes and requests of a judicial nature related to the insolvency procedure.

The managerial duties belong to the judicial administrator or the judicial liquidator or, exceptionally, to the debtor, if he has not been deprived of the right to administer his assets.

The managerial decisions of the judicial administrator, the judicial liquidator or the debtor who has retained the right of administration can be controlled under the aspect of opportunity by the creditors, through their bodies. In terms of legality, the acts and operations undertaken by the judicial administrator/judicial liquidator are subject to verification by the syndic judge, through the legal channels (appeals) expressly provided by law.

However, there are situations in which the legislator has expressly provided

attributions for the syndic judge in the sense of taking expedient measures and in these situations the syndic judge, according to his specialization, will have to make a judgment in equity.

As I have shown, according to art. 342 par. 1 of the Insolvency Code, its provisions are supplemented by the provisions of the Civil Procedure Code and the Civil Code, to the extent that they do not contradict each other. In principle, in our legal system, the court applies the law to the case brought to trial, from which it follows that the Romanian judge administers justice by making the state of facts conform to the state of law.

We note an expansion of the role of the syndic judge, considering that the legislative solutions chosen had practical considerations in mind, the insolvency law being a special law, and the legislator of the new Romanian Civil Code, but also that of the new Romanian Civil Procedure Code, have attributed in some places to the judge the right to judge in fairness and to establish reasonable situations.

A controversial issue related to the duties of the syndic judge is whether the enumeration in art. 45 par. 1 of Law no. 85/2014 is enumerative or limiting.

In the judicial practice of the 15 courts of appeal, there is the opinion according to which the duties of the syndic judge are limited to those expressly provided by law, but there are also minority opinions according to which the syndic judge has the right to resolve any issues related to the debtor against whom the procedure of insolvency is being implemented.

I personally agree with the majority opinion considering the character of a special law, but also a procedural law of the Insolvency Code according to which the general principle of law must be applied, which constitutes a source of law, according to art. 1 par. 1 of the Civil Code, in the sense that insolvency law is a law of strict interpretation and application, and where the law does not distinguish, neither can the interpreter.

Consequently, the last attribution of the syndic judge, respectively any other attributions provided by the law cannot be interpreted extensively, but it must takes into account situations provided by other normative acts that would complete the insolvency law, such as for example the Fiscal Procedure Code.

3. Conclusions

From the analysis of the powers and legal duties of the syndic judge, but especially from the practical experience resulting from the insolvency proceedings, the question arises whether the role of the syndic judge in insolvency proceedings should be diminished, or on the contrary, expanded.

It stems from a principle, which seems to be increasingly used, namely the principle of efficiency, which is also referred to for the execution of the judicial act, but considering the aspect that the insolvency procedure has mostly an economic component, personally I believe that insolvency proceedings should mostly be conducted out of court.

Practical experience is increasingly proving that a strict application of legal rules can be economically damaging.

The administration of justice does not always ensure the administration of justice.

That is why, for legal systems where judgment is not carried out in fairness, the solution of expanding the role of the syndic judge in the insolvency procedure is not, in our opinion, appropriate.

To the extent that the states intend an increased control over the insolvency procedures, we believe that the syndic judge's activity should be guided by a business specialist to support him in making decisions that go beyond the scope of a legality control. Such a solution would allow a better harmonization of the legal component with the economic component, but also with the social component, specific to the insolvency procedure.

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