

## **The compatibility of Law's no.85/2006 dispositions with the ones of the Civil Procedural Code regarding the insolvency procedure**

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**Abstract.** This analysis of the compatibility between the dispositions of the two regulations is motivated by the necessity of knowing in what extent, within the insolvency procedure, can the application of the dispositions in the Civil Procedural Code be used. In this context, article 149 in Law no.85/2006 expressly specifies that its dispositions are completed by the ones in the Civil Procedural Code, inasmuch as the compatibility allows it. The insolvency procedure law is a special law and because of that the civil procedure norms it comprises take precedence before the common law norms. But, in case the special law does not cover all the situations that might occur during the procedure, the instances, depending on the case, apply the provisions of the Civil Procedural Code, inasmuch as they are compatible. We have to mention the fact that the two regulations aim at recovering the claims from the debtor. The law regarding the insolvency procedure has regulated the procedure of patrimonial liability and the execution of such a decision is made by the judicial executor, according to the Civil Procedural Code.

**Keywords:** insolvency procedure, creditor, collective procedure, procedural incidents, patrimonial liability, forced execution.

### **1 Introduction**

A good functioning of the free market economy implies a good legislation, both from the point of view of the civil procedural law, as well as from the point of view of the material law (substantial) for the reclamation of commercial activity with a direct effect on the market of those economic operators that find themselves in an insolvency situation or imminent insolvency .

Law no.85/2006 on the insolvency procedure , hereafter called Insolvency Law, regulates the sequence of insolvency procedure of the debtor from the court intimation until the closure of the procedure, stage in which the sums resulted from forced execution are divided by the bailiff according to the law in force. Although the insolvency law comprises norms of procedure that expressly regulate the insolvency procedure, art.149 stipulates that “its dispositions are completed, if possible, by those of the Civil Procedure Code, Civil Code, Commercial Code and Regulation (EC) no.1346/2000 on the insolvency procedures, published in the Official journal of the European Communities no.L160/ 30 June 2000”. Thus, the Insolvency Law, as a special law in this matter is completed with the “common law”, namely the dispositions in the Civil Procedure Code, as it does not regulate the entire judging procedure of the requests, under this Law. Even if the legislator wouldn't have expressly provisioned the abovementioned completion norm, the principle according to which the special norm is completed by the general norm is applied. The purpose of the insolvency law is to institute a common procedure for covering the passive of the debtor in an insolvency state (article 29), the insolvency procedure being deployed under the dispositions of the special law. Both regulations aim first at recovering the receivables of the creditors enlisted in the creditors table and second at the elimination of the companies that deploy commercial activities, inconsistent with the law and that cause the “chain” bankruptcy of the economic operators.

## **2 The compatibility of the two regulations during the insolvency procedure**

### **2.1 The summoning and communication of procedure acts in the insolvency procedure**

According to article 85 of the Civil Procedure Code, “The judge cannot decide upon a request until after the summoning or the attendance of the parties, unless the law provisions different”. Respecting these dispositions ensures the compliance with the principle of the right to defense, the principle of contradictory and the right to fair trial and their violation sanctions the decision with absolute nullity.

In the insolvency procedure, the summoning of the parties and the communication of any procedure acts, convocation and notifications are made through the Insolvency Procedure Bulletin. This publication was established by Government Decision no.460/19.05.2005 and came into force on 3.06.2005. Respecting the abovementioned principles, article 7, al.1 of the Insolvency Law stipulates that the participants at the trial, whose headquarters, home or residence is abroad, are to be summoned, receive a communicate of the notifications and summons, according to the Civil Procedure Code. Only the creditors that weren't identified in the list presented by the debtor will be notified using the Insolvency Procedure Bulletin (article 7, al.3, a.-II). The insolvency procedure bulletin was meant to be an important achievement in solving the causes, as the special insolvency procedure implies a great number of parties and a great diversity of procedural acts, involving high costs for the judicial authorities .

Actually, in the practice of the judicial instances, right after the transition to this procedure of summoning and communication of procedure acts, it has been observed that some creditors and debtors, especially those in the rural areas, had not been acquainted with the opening of the insolvency procedure, as they didn't have Internet access.

It has also been observed that the right to defense and the right to fair trial have been violated for those persons against which some actions are formulated after the opening of insolvency procedure, situations in which the competence of the syndic-judge is involved. In this case, we mention the actions that involve the patrimonial judicial liability of the members of management bodies that led to the debtor's insolvency (article 138 of Insolvency Law); the third parties that obtained goods and values of the debtors, in good or bad faith (article 80 of the same law).

Subsequently, the legislator's intervention was necessary and by Government Emergency Ordinance no.173/2008, article 7 of the Insolvency Procedure was completed with al.3, stipulating: “other than the provisions in alin.1, the first communication of the procedure acts to the persons against whom actions are brought, according to the present law and subsequent to the opening of procedure insolvency, will follow the Civil Procedure Code”. We believe that article 7 of the Insolvency Law, according to its amendments and completions, now ensures the correct summoning and notification of parties involved in the insolvency procedure. Bearing in mind that in an insolvency cause, most of the times more than one creditors are involved and the abovementioned law stipulates the summoning, notification and communication of procedure acts, we consider that the Bulletin guarantees the right to defense and the right to fair trial. Some authors , whose opinion is not shared by us, have stated that communication of the measures taken by the administrator or liquidator is not necessary for all the creditors. It is true that the creditors are represented by the creditors' committee but when the law expressly stipulates the obligation to summon, notify and communicate the procedure acts (of the judicial instance or parties, the judicial instance or the judicial liquidator have to comply with the dispositions. In the practice of the judicial control instance it has been observed that often, the judicial liquidator didn't comply with the content of article 129 of the Insolvency Law by not communicating the final report to all the creditors and debtor, which led to the disposal of the syndic-judge's decision and reference to retrial.

In the situation in which the judicial liquidator did not communicate the final report to one of the creditors and the creditor did not participate at the debate of the cause, stating that it does not have any objections to the final report, the syndic-judge correctly proceeded to the closure of the debtor's insolvency .

The closure of the insolvency procedure can be made under article 131, al.1 of Insolvency Law, according to which the procedure provisioned by this law can be closed in any stage of the procedure "in case it is observed that the debtor does not own propriety..." In this case, the dispositions of article 129 on communicating the final report (article 131, al.2) are not applicable.

## **2.2 Disposition acts of parties in the insolvency procedure**

The content of article 246 of Civil Procedure Code regulates the waiver of trial in civil trials and the conditions in which the judicial instance can act upon this request, respecting the principle of availability. In what concerns the claimant's request in applying article 246 in the Civil Procedure Code, the judicial instance acts by a closure that cannot be appealed . In the insolvency procedure, in case there is a plurality of creditors and one of them asks the court to notify that it gives up the trial of his request, motivating that the debtor has paid the receivable, the syndic-judge can notify this request applying the dispositions of article 246 in the Civil Procedure Code, but will not end the trial and will proceed according to the law with the other creditors. The continuation of the trial is imposed by the collective feature of the insolvency procedure in which the creditors, whose receivables have been enlisted in the creditors' list, participate together in following and recovering their receivables, according to the special law.

In what concerns the waiver of trial in the practice of judicial instances in Galati , the syndic judge, following the request formulated by the judicial liquidator in an action involving the termination of some contracts, at the term of the debate, took action in waiving the trial, as the dispositions of article 246, al.4 of the Civil Procedural Code were violated. It is true that in the civil trial, the principle of availability prevails, but both the parties in dispute as well as the court have to respect the procedural judicial norm that regulates the term for soliciting the waiver of trial.

In case the debtor paid the receivable to the creditor that opened the insolvency procedure, even if these parties in dispute request the procedure's closure, the syndic judge cannot dispose the closure of the procedure, if there are other creditors whose receivables haven't been satisfied . In case there is only one creditor involved who, within the appeal declared by the debtor against the decision to open the insolvency procedure, presents the payment order used to pay the receivable and, under article 246, al.1 of the Civil Procedural Code, requests the notification of waving the trial, the appeal judicial instance takes action in waiving the trial .

We thus ask the question if the syndic-judge can take note of the transaction between the creditor who formulated the writ of summons, with the purpose of opening the insolvency procedure and the debtor. Following the example abovementioned (the case in which there are more than one creditors with receivables registered and not paid), the syndic judge cannot take note of the transaction between the two parties, even if the conditions imposed by articles 271-273 in the Civil Procedural code have been respected.

We assert that in case one of the creditors abandons the right claimed, under the provisions of article 247 in the Civil Procedure Code, the syndic judge can take note of waiving the trial by this creditor, and in case there is more than one creditor, the procedure will be continued by them until they recover the receivables.

### **2.3 Procedural incidents in insolvency procedures**

The application of the dispositions concerning the suspension of judging the cause stated by article 242, article 243 al.1, 1-4, article 244, article 155, al.1 of the Civil Procedure Code we assert that they are not compatible with the insolvency procedure because of the principle of celerity, mentioned in article 5, al.2 in the Insolvency Law, as well as because of the purpose of this law, namely the maximization of the debtor's possessions in order to satisfy the creditor's receivables.

The special law mentioned above states in article 36 of the Insolvency law that "starting with the opening of the procedure, all the judicial actions or the forced execution in order to recover the receivables against the debtor or his possessions will be suspended, with the exception of the debtor's appeal".

During the insolvency procedure, the parties can formulate unconstitutionality exceptions for some dispositions of the Insolvency Law, in case they are related to the cause, situation in which the syndic judge will suspend the trial and will send the cause to the Constitutional Court . But the syndic judge can also not dispose the suspension of the cause, in the situations in which the dispositions considered as being unconstitutional have represented the object of at least one disposition issued by the Constitutional Court (article 8, al.7).

### **2.4 Incidents related to the judicial instance regarding the full court**

The migration of the cause in the insolvency procedure can be requested for the reasons and according to the provisions of articles 37-40 in the Civil Procedure Code. In what concerns the incompatibility, the content of article 12 states that "the dispositions of article 24, al.1 in the Civil Procedure Code regarding incompatibility are not applicable to the syndic judge that successively decides in the same cause, except for the retrial, after the cassation of the decision in appeal". The objection and abstention of judge syndic in the insolvency procedure are made complying with the dispositions if articles 27-34 in the Civil Procedure Code.

### **2.5 Competence**

It is important that the competence norms are well regulated and known in solving a request, as only the knowledge of this domain ensures the elimination of unnecessary material and time costs. In the trial activity, when we talk about competence, we report it to the trial instance or to a jurisdictional body and not to judges. The civil procedure code contains numerous texts that clearly specify the fact that the competence norms are reported to the instance and not the full court.

The insolvency law regulates the material and territorial competence in article 6, al.1 as follows: "all the procedures provisioned by the present law, except the appeals mentioned in article 8, belong to the competence of the insolvency section of the court in whose jurisdiction the headquarter of the debtor is located, as it results from the registration within the Trade Register, namely in the agricultural companies or associations' and foundations' registry and are exerted by the syndic judge". The material competence of the syndic judge is regulated in article 11 of the Insolvency Law . Although in the content of article 11 seems that the attributions of the syndic judge are clear and does not leave room for interpretations in what concerns the competence of the syndic judge, in practice the parties in dispute invocated the exception of its incompetency . We assert that the content of article 11 results in the fact that these norms have an illustrative character and not an exhaustive one. By the phrasing "processes and requests of judicial nature deriving from the insolvency procedure are the competence of the syndic judge. The debtor involved in the insolvency procedure must not beneficiate from a privileged judicial treatment, as this would lead to the violation of the rights to a fair trial guaranteed by article 6 in paragraph 1 of the European Convention on Human Rights of the other parties involved" .

## **2.6 Ensuring measures**

Given the collective character of the insolvency procedures and the principle of solving a case with celerity, as well as the danger of decreasing the active patrimony of the debtor, ensuring measures can be instituted in the insolvency procedure . As well as like in the regulation of the Civil Procedure Code, the insolvency law provisions the possibility to formulate such requests and subsequently introduce actions stipulated in article 138, al.2. The content of article 138, al.1 states that establishing the bail at 10% of the total value of the claim is mandatory . In what concerns the trial procedure in the institution and application of ensuring measures, the dispositions of Civil Procedure Code in the 6th Book, Chapter 4- “Ensuring measures” are applicable.

## **2.7 Forced execution**

In what concerns the forced execution the content of article 142, al.1 in the Insolvency Law expressly states that “forces execution against the persons mentioned in article 138, al.1 is made by the judicial executor, according to the Civil Procedure Code”. The Appeal Court of Galati has a unitary judicial practice in what concerns the interpretation of the abovementioned text.

## **2.8 Conditions for being a party in a civil trial**

Article 109, al.1 in the Civil Procedure Code stipulates that “anyone that claims a right against another individual has to make a request before a competent judicial instance”. But in order to refer to the court, the person interested must meet some conditions such as the procedural capacity, procedural quality, violation of civil subjective law, interest. Thus, the access to justice as a fundamental right is guaranteed to any individual.

In what concerns the insolvency matter, it can be possible that a creditor enlisted in the creditors’ list is not able to satisfy the receivable, because the article 138, al.1 in the Insolvency Law recognizes the active procedural quality in promoting an action regarding the liability of the management bodies’ members only to the judicial administrator and the judicial liquidator, and article 138, al.3 of the same law expressly provisions that such a request can only be formulated by the Creditor’s Committee or the creditor that own more than a half of the total value of receivables. But the latter can address a request based on the dispositions of article 138 (a-g) only if the following conditions are met: if the judicial administrator or the liquidator has omitted to indicate, in the report on the insolvency cause, the individuals wrongful for the state of insolvency of the debtor’s (legal person) patrimony or if he omitted to formulate the action stipulated in al.1 and the liability of the individuals mentioned in article 1 threatens to be prescribed. In the practice of judicial instances it has been noticed that in case the creditors’ committee couldn’t be constituted as only tow creditors were present and the general assembly (constituted by the two creditors under the conditions stipulated in art.16, al.2, thesis 2) does not solicit the authorization to start an action involving liability (because one of the creditors, the one with a bigger receivable than the other agrees with the closure of the procedure) the creditor with a smaller receivable than the other within the general assembly cannot recover the receivable, as it doesn’t have an active procedural quality. We assert that the intervention of the legislator is necessary, so that the creditors have access to justice and the right to fair trial during the procedure, until the receivables are paid, according to the law.

In case the titular of the request based on article 138, al.1 (a-g) in the Insolvency Law was the judicial liquidator and his request was rejected as being groundless, the creditor does not have an active procedural quality to formulate an appeal against that decision .

The civil procedure code stipulates in article 109, al.2 that the request of the proceedings has to contain also the proof of the prior procedure, according to the law.

In the insolvency procedure, the legislator did not stipulate the undergoing of this procedure.

### 3 Conclusion

The insolvency procedure is part of the special judicial procedures, being regulated by a special law, namely Law 85/2006 on the insolvency procedure that contains civil procedure norms specific for this procedure. The dispositions of the insolvency law are completed, if compatible, with the provisions of the Civil Procedure Code. In the scientific demarche above I have underlined the fact that the civil procedure norms in the special law are completed by those of the “common law”, as well as the necessary intervention of the legislator in amending and completing the content of article 138, al.3, so that the full access to justice is guaranteed for all creditors, in order to complete the receivables. The fact that the right of any creditor to formulate a request involving the patrimonial liability of the management bodies’ members of the creditor in insolvency state would be enacted does not lead to the conclusion that it would make the insolvency procedure more difficult. In case more than one creditor would formulate such a request, the causes can be connected according to article 164 C of the Civil Procedural Code. In case a creditor’s request is accepted it is certain that the sum that represents the most part of the passive will not be collected only by the creditor titular of the request, but will be divided between the creditors according to the final table of receivables. Thus, the action based on the dispositions of article 138, al.3 is not a claim action, as the creditor does not have access to an action that forces the former administrator of the debtor to bring within the patrimony of the debtor society the assets alienated with the purpose of fiddling the creditors. The legislator’s intervention would be beneficial also for the establishment with more attention and precision of the syndic judge’s attributions, motivated by the fact that in front of the judicial instances, the exception of material incompetency of syndic judge was invocated, as mentioned above. A last completion proposal of the civil procedure norm, this time related to the Civil Procedure Code, allows us to make a reference at the article 50, namely to establish the term in which such an accessory intervention request can be made in the interest of a person. In practice, in appeal are creditors that in contempt of the law (article 8, al.3 in the Law on insolvency procedure states that “the appeal will be trialed within 30 days by specialized full courts, within 30 days from registering the file in the appeal court”; art.723, al.1 in the Civil Procedure Code states that “the procedural rights have to be exerted in good faith and according to the purpose in view of which they have been recognized by law”) formulate captious accessory intervention requests.

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