PARTICIPANTS IN INSOLVENCY

RAREŞ-SEBASTIAN PUIU-NAN*

Abstract
The article examines the officials and other participants in insolvency. The main purpose of the insolvency procedure is to cover all the debts of the debtor side, in favor of his creditor side.
The most important regulations regarding this issue consist in Law no. 85/2006, according to it in the insolvency procedure are to be appointed the following officials: insolvency courts of justice, insolvency judge, receiver, liquidator. All these officials have to act in celerity, in order to promptly perform acts and operations provided by law and to respect and provide other participants' rights and obligations.
My article present in the beginning the insolvency courts of justice, their material and territorial competence and the procedure rules. Next chapters are dedicated to the insolvency judge, receiver and liquidator and analyze the following issues: their appointment, their powers, their auxiliary officials and their ceasing of the powers. Some regards on the British law and French law are also included. The next chapter is dedicated to the participants to the insolvency procedure: the creditors general assembly, creditors committee and special administrator, followed by conclusions and recommendations.

Keywords: *insolvency, judge, receiver, liquidator, creditors general assembly.*

Introduction

My paper work is about the participants in insolvency, about the authorities and persons taking part in such procedure.

The companies have a very important role in the economy of a nation. They represent the force that sustains the economy, the bases for the future development and a source of stability. Any massive decline of one the companies could produce a "chain reaction" and could compromise the national economy. For these reasons, based on legal previsions, it is extremely important to avoid the bankruptcy of such companies and its consequences. Thus, it is very important for each legal system to adopt a clear and efficient legislation in this matter. It is also important to create and maintain a mechanism to supervise and prevent the insolvency of the companies. When insolvency of a company appears, it is thus important to know the parties, persons and authorities involved in.

The purpose of this paper is to realize a detailed analysis of the participants in insolvency, their duties and powers. The analysis of this issue will help the persons involved in such procedures or which are about to be involved to have a concrete image of all the applicable laws regarding the participants in insolvency. The narrow meaning of the concept of participants in an insolvency includes the bodies and the parties. The bodies appointed to enforce the proceeding are: legal courts, bankruptcy judges, trustees in bankruptcy and liquidators. The parties in insolvency are: the debtor and the creditors.

Taking into consideration its collective nature, other stakeholders take part in the insolvency proceeding: creditors' general meeting, creditors' committee and the special administrator.

This issue, based on present regulation, was analyzed before, but this paper tries to add different regulations in other European legal systems, so it is my duty to create a proper and a most accurate image of different legal reglementation regarding the participants in insolvency.

* Assistant Lecturer, Ph. D. candidate, Law Faculty, "Nicolae Titulescu" University, Bucharest (email: raryseb@gmail.com).

Paper content

Chapter 1: Introduction. Overview

The insolvency proceeding is a complex procedure whose accomplishment requires the intervention of parties or bodies compelled to or interested in participating in such procedure in order to solve the situations caused by the lack of the debtor's cash flow so that his payables to creditors be covered.

The people working together as part of the insolvency procedure in order to attain its goal are called participants.

As rightly emphasized in the legal literature, the concept of participants in a civil trial differs from the content of the same concept in the civil law. While in the civil law, participants are only the subjects of the legal civil relationship, in a civil trial, the participants are the bodies and people summoned to contribute to the progress of the civil trial. In the insolvency proceeding, by overlaying the scopes of the two concepts, we can notice that, for the purpose of the civil law, participants will mean the debtor and the creditor.

As understood from the above, the broader meaning of participants in a civil trial encompasses all the official or private subjects who actually take part in the activities of the insolvency proceeding. For this purpose, the participants include: the parties, the judicial bodies and other participants.

The narrow meaning of the concept of participants in an insolvency includes the bodies and the parties.

The parties in insolvency are:

a) the debtor – the private law natural or legal entity who is among the entities stipulated in art.1 of the law and who is undergoing insolvency

b) the creditors

The law distinguishes among various creditor categories, defining them as follows:

A *creditor* is a natural or legal entity holding a right of creditors against the debtor's property and who has expressly requested the court that its receivables be recorded in the definitive receivables table or in the consolidated receivables table and who can duly prove its receivables against the debtor's property (art. 3 point.7 of the law).

A *creditor who is entitled to request the commencement of insolvency* means a creditor whose receivables against a debtor's property are certain, liquid and have been claimed for more than 90 days. The creditors, including the state-owned entities, may request the commencement of insolvency only if, after settling any mutual debts, the amount owed to them exceeds the amount stipulated by point. 12 (art. 3 point 6 of the law).

A *creditor entitled to participate in the insolvency proceeding* means such creditor who has formulated and has been partially or fully admitted a petition for the recording of the receivables on the debtor's list of creditors and who has the right to participate and vote in the creditors' meeting, including to vote for a legal reorganization plan endorsed by the bankruptcy judge, to be appointed as a member of the creditors' committee, to take part in the distribution of the funds collected as a result of the debtor's legal reorganization or of the debtor's property liquidation, to be informed or notified on the progress of the procedure and to participate in any other proceeding regulated by this law. The debtor's employees have the capacity of creditors *entitled to participate in the insolvency proceeding* without having to submit personally a statement of claim (art. 3 point 8 of the law).

The bodies appointed to enforce the proceeding are: legal courts, bankruptcy judges, trustees in bankruptcy and liquidators.

Taking into consideration its collective nature, other stakeholders take part in the insolvency proceeding: creditors' general meeting, creditors' committee and the special administrator.

As we have talked about the parties earlier herein, we will continue by presenting the categories of the bodies that implement the insolvency proceeding and of the other participants.

Chapter 2: Bodies implementing the insolvency procedure

Subchapter 1: Preliminary Explanations

The nucleus of the matter is article 5 and subsequent articles of Law no. 85/2006, according to which the bodies implementing the insolvency proceeding are:

- the legal courts (regulated by the provisions of art. 6-8 of Law no. 85/2006);
- the bankruptcy judge (regulated by the provisions of art. 9-12 of Law no. 85/2006);
- the trustee in bankruptcy (regulated by the provisions of art. 19-23 of Law no.85/2006);
- the liquidator (regulated by the provisions of art. 24 and 25 of Law no. 85/2006).

In the *French law*, the bodies implementing this procedure are:

- the legal courts;
- one or more *juges-commissaires*;
- the public ministry;
- the legal agent;
- one or more trustees in bankruptcy;
- the liquidator.

In *the British law*, the bodies implementing this procedure are:

- *the Court*;
- *the administrator*;
- *the official receiver*;
- *the administrative receiver*;
- *the supervisor or nominee*;
- *the liquidator* or *provisional liquidator*;

Subchapter 2: Legal courts

A. Preliminary explanations

Law no. 85/2006 consecrates the traditional concept according to which the main part in implementing collective proceedings is played by the legal courts. During the proceeding, certain disputable aspects may occur (having a litigation nature), which may require the trial of the case under contradiction circumstances, and the only authorities able to intervene and order over such disputes are the legal courts. According to the law, the legal courts entitled to implement the insolvency procedure are the tribunal (as a first instance) and the court of appeal (as an appeal instance).

B. The tribunal

a) Principles

The law grants full authority to a tribunal; thus, according to the provisions of art. 6 of Law no. 85/2006, „*all the proceedings required by this law, except for the appeal stipulated by art.8, shall fall under the responsibility of the tribunal under whose jurisdiction the debtor's registered office is*

located...", as registered with the Trade Registry or with the agricultural company registry or with the registry of associations and foundations and shall be exercised by the bankruptcy judge.

Therefore, the bankruptcy judge has the authority of trialling both main requests and ancillary or incidental petitions: intervention requests[1] or injunction reliefs[2]. The purpose of granting full authority is that of making effective the principle of celerity of insolvency proceedings and of ensuring continuity in the completion of the procedures required by insolvency.

b) Authorities

b.1. venue of the court

By analyzing the provisions of art. 6 of Law. 85/2006, the first instance venue is the tribunal, irrespective of the value of the creditors' receivables (less than 500,000 RON or more than 500,000 RON). Such provisions have a special nature and derogate from the general matter provisions (art. 2 letter b of the Rules of Civil Procedure), according to which the tribunals trial as first instance the civil lawsuits and claims whose subject-matter exceeds 500,000 lei (RON). Therefore, if the receivables value is 500,000 RON or less, the venue of the court authorized to settle the case is the tribunal and not the city court, as required by the general regulations.

b.2. jurisdiction of the court

According to art. 6 of Law no. 85/2006, the sole criterion to determine the jurisdiction of the court (and of the insolvency department – if such department has been created) is the debtor's head office, as registered with the Public Registers.

The jurisdiction of the court is determined on the day the court is informed by means of a petition for an order of relief so that, even if the debtor changes its registered office during the proceedings to the jurisdiction of another tribunal, the original tribunal (where the debtor had its original registered office) shall have the authority to settle the case (according to the provisions of art. 6 par. 3 of the Law no.85/2006).

Should a debtor under insolvency proceedings be a subsidiary of a trade company, the jurisdiction of the court shall be the tribunal under whose jurisdiction the company is registered, as, according to art. 42 of Law no. 31/1990, such subsidiary is a legal entity.

The situation is different for a branch of a trade company. In this case, as a branch is not a legal entity, the jurisdiction of the court is the tribunal where the parent-company is registered, as the debtor in such a case is the latter and not the former.

b.3. functionality of the court

Law no.85/2006 does not require the establishment of a dedicated insolvency department within a tribunal, but, where such department exists, „*it is the one authorised to carry out the proceedings stipulated by this law*".

[1] Bucharest Court of Appeal, 5th Commercial dept., decision no. 276/2007, published in C.A.B., Anthology,1, 2007, page199.

[2] Bucharest Court of Appeal, 5th Commercial dept., decision no. 1088/2007, published in C.A.B., Anthology,1, 2007, page210.

c) Proceeding rules

The proceeding rules established by Law no. 85/2006 are aimed at making effective the celerity principle and have mainly a derogatory nature from the common law (The Rules of Civil Procedure) in terms of subpoenas and the communication of the proceedings documents, namely:

- subpoenaing the parties, as well as communicating any proceeding documents, summons and notifications are carried out by the Insolvency Proceedings Bulletin, except for the following cases (when the provisions of the Rules Of Civil procedures apply):
- participants having their registered office or residence abroad (art.7 par.1 thesis 2);
- communication of the proceeding documents which precede the commencement of the proceedings and the notification concerning the commencement of the proceedings (art.7 par.3);
- first subpoena and the communication of the proceeding documents to the parties against whom a lawsuit is filed, by virtue of law no. 85/2006, after opening the insolvency proceedings (art.7 par.3 ind.1);
- the creditors having submitted requests for the admission of receivables, who are supposedly aware of the hearing date and, therefore, will not be subpoenaed (art.7 par.7);
- in the litigation proceedings regulated by Law no. 85/2006 shall be subpoenaed as parties only the entities whose rights or interests are referred to the bankruptcy judge to be settled, under contradiction circumstances; in any other cases shall apply the provisions of the Rules of Civil Procedure on the non-litigation proceedings, to the extent to which they do not violate any express provisions of this law (art. 7 par. 2);

The notifications, except when they are the responsibility of other bodies enforcing the procedure, shall be carried out by the trustee in bankruptcy or liquidator, where appropriate (art. 7 par. 6).

Should the debtor be a company traded on a regulated market, the bankruptcy judge shall communicate the order forrelief to the Securities National Commission (art. 7 par. 4).

B. The Court of Appeal

a) Authority

According to the provisions of art.8 of Law no. 85/2006, the court of appeal is the venue authorized to trial the appeal filed against the decisions passed by the bankruptcy judge.

b) Proceedings rules

The law sets deadlines and special proceedings, which are derogatory from the relevant common law, concerning the trial of the appeal:

- the appeal deadline is 7 days after the decision has been communicated, unless the law specifies otherwise;
- the right of appeal against the decisions of the bankruptcy judge is to be held only by the participants in the proceedings in the cases and under the conditions provided by law; the creditors who have not applied for a statement of affairs do not hold such right; on the other hand, the creditors who have applied for a statement of affairs and their application has been rejected are entitled to such right;
- the appeal shall be trialed by specialized panels no later than 10 days after the files was registered with the court of appeal;
- the subpoenaing of the parties in the appeal and the communication of the passed decisions shall be carried out according to the provisions of the Rules of Civil Procedure;

- by derogation from the provisions of art. 300 par. 2 and 3 in the Rules of Civil Procedure, the decisions of the bankruptcy judge cannot be suspended by the appeal court, unless the appeal concerns:
- the decision rejecting the debtor's contestation, filed by virtue of art. 33 par.4;
- the judgment whereby it has been decided to enter the simplified proceedings;
- the judgment whereby bankruptcy has been decided upon, passed according to art. 107;
- the judgment settling the appeal against the plan of distributing the funds obtained following liquidation and collection of the receivables, filed by virtue of art. 122 par.3 of the law.
- for all the appeals filed against the decisions passed by the bankruptcy judge as part of the proceedings a single file shall be constituted.

Subchapter 3: Bankruptcy judge

All the proceedings concerning insolvency falling under the authority of the tribunal, according to Law no. 85/2006, are exercised by the bankruptcy judge. Thus, such judge plays the main role in applying the insolvency proceedings.

A. Capacity of bankruptcy judges

The bankruptcy judges have the legal capacity of a judge – a court judge. Bankruptcy judges have a public position of general interest and they organize and run the entire insolvency proceeding, from its opening to its closure. Therefore, to fulfill their duties, bankruptcy judges do not act as representatives of the creditors' or debtors' interests. They act as judges, their orders are binding for all the participants in the insolvency proceedings.

In the French law, such a judge is called a *juge-commisaire* and is appointed by the tribunal (several *juges-commisaires* may be appointed if necessary)[3].

***B.* Appointing bankruptcy judges**

According to art. 9 of Law no.85/2006, the assignment of the cases whose subject-matter is the proceedings stipulated by this law to the judges appointed as bankruptcy judges is carried out randomly and computer-based in compliance with the provisions of art. 53 of the Law no. 304/2004 on judicial organization[4], republished.

C. Duties of bankruptcy judges

The main duties of bankruptcy judges are regulated by art. 11 of Law no. 85/2006, namely:

a) the justified order for relief and, where applicable, for bankruptcy, both within general and simplified proceedings;

b) consideration of debtor's appeal against the creditors' first claim for the commencement of proceedings; consideration of creditors' opposition to the commencement of proceedings;

c) the appointment justified by the judgment for an order for relief of a temporary trustee in bankruptcy or, where applicable, of a liquidator, among the compatible insolvency practitioners having submitted an offer for this purpose to the case file, who will manage the proceedings until his/her confirmation or replacement by the creditors' meeting or by the creditor holding at least 50%

[3] Dominique Legeais, *Droit commercial et des affaires*, pct. 813.
[4] Published in the Official Gazette no. 576/29th June 2004.

of the receivables; the determination of remuneration in compliance with the criteria set by the law on insolvency practitioners, as well as of their obligations for such period. The bankruptcy judge shall appoint the temporary trustee in bankruptcy or liquidator requested by the creditor who has submitted the petition for the commencement of proceedings or by the debtor, if such petition has been filed by the latter. Should the party having submitted the petition for an order for relief not request the appointment of a trustee in bankruptcy or liquidator, such appointment shall be performed by the bankruptcy judge among the practitioners who have submitted offers in the case file. In case of a file merger, the debtors' petitions shall be considered based on the value of receivables or on the debtor's petition, if there is no petition filed by a creditor;

d) the confirmed appointment, by means of a conclusion, of the trustee in bankruptcy or liquidator designated by the creditors' meeting or by the creditor holding at least 50% of the receivables, as well as the acknowledgement of the fee agreed upon. If there are no appeals against the creditors' meeting decision or against the decision of the creditor holding at least 50% of the receivables, such acknowledgement shall be performed in council chambers, without subpoenaing the parties, no later than 3 days after the creditors' meeting decision or the main creditor's decision was published in the Insolvency Proceeding Bulletin;

e) the replacement on solid grounds and by means of a conclusion of the trustee in bankruptcy or liquidator;

f) the consideration of the petitions requesting the removal of the debtor's right of running his business;

g) the consideration of petitions for personal liability for the members of management who have contributed to the debtor's insolvency, according to art.138, the intimation of the investigating bodies concerning the offences stipulated by art. 143-147;

h) the consideration of actions filed by the trustee in bankruptcy or the liquidator for the cancellation of some fraudulent documents and of some estate-related establishments or transfers preceding the commencement of proceedings;

i) the consideration of the appeals of the debtor, the creditors' committee or any other stakeholders against the measures taken by the trustee in bankruptcy or liquidator;

j) the admission and approval of the reorganization plan or, where applicable, the liquidation plan, after it has been voted by the creditors;

k) the settlement of the petition of the trustee in bankruptcy or |the creditors' committee to discontinue the reorganization and bankruptcy procedures;

l) the settlement of the contestations submitted against the reports of the trustee in bankruptcy or liquidator;

m) the consideration of the action for the annulment of the creditors' meeting decision;

n) the delivery of the judgment on the decision of closing the proceeding.

The bankruptcy judge is not the debtor's manager under insolvency. The management duties belong to the trustee in bankruptcy or liquidator or, exceptionally, to the debtor itself if such debtor has not been deprived of the right to manage his property.

According to art.11 par. 2 of the law, the duties of the bankruptcy judge are restricted to the judicial control of the activity of the trustee in bankruptcy and/or the liquidator and to the judicial processes and petitions related to the insolvency proceedings. The management decisions may be controlled in terms of opportunities by the creditors, through their bodies.

In order to fulfil its obligations, a bankruptcy judge may ask for the opinions of experts in various fields. Such experts may be appointed, by means of a conclusion, by the bankruptcy judge upon the proposal of the trustee in bankruptcy or liquidator. Such experts are entitled to receive a remuneration whose value shall be determined by the bankruptcy judge, by means of a conclusion; such remuneration shall be paid out of the debtor's estate or, in the absence of liquidities, out of the fund stipulated by art.4 par. 4 of Law no.85/2006.

D. Decisions of the bankruptcy judge

The decisions of the bankruptcy judge shall be definitive and enforceable as of the day they have been passed. They can be appealed (art.12 par.1). By derogation from the provisions of art. 300 par. 2 and 3 of the Rules of Civil Procedure, the decisions of the bankruptcy judge shall not be suspended by the appeal court unless in case the appeal concerns:

a) the sentence whereby the debtor's contestation is rejected, filed by virtue of art. 33 par.4;
b) the judgment whereby it has been decided to enter the simplified proceedings;
c) the judgment whereby bankruptcy has been decided, passed according to art. 107;
d) the judgment settling the appeal against the plan of distributing the funds obtained following liquidation and cashing the receivables, filed by virtue of art. 122 par. 3 of the law.

The bankruptcy judge is authorized to pass successive resolutions in the same file. This status quo does not lead to incompatibility, according to the provisions of art. 24 par.1 of the Rules of Civil procedure, unless there is a case of retrial after the resolution was written off during appeal. (art. 12 par. 2 of Law no. 85/2006).

A. Cessation of the duties of the bankruptcy judge and the specialist personnel appointed by the former

The duties of the bankruptcy judge shall cess as of its replacement, as well as in case of closure of the insolvency proceedings.

a) replacement of the bankruptcy judge

Unlike the old regulation (law no.64/1995), Law no.85/2006 does not regulate the conditions in which the bankruptcy judge may be replaced. Nevertheless, in practice, the question of replacement may occur in case of incompatibility (other than that stipulated by art. 12 par.2 of Law no.85/2006), abstention or recusal. We believe that in such a case a new bankruptcy judge will be appointed randomly and computer-aided in compliance with the provisions of art. 9 of Law no. 85/2006.

b) closure of proceedings

According to art. 136 of the law, upon the closure of the proceedings, the bankruptcy judge, trustee/liquidator and all other participating entities are relieved from any duties and responsibilities regarding the proceeding, the debtor and his estate, the creditors,, security holder, the partners and shareholders.

Should the bankruptcy judge have been assisted by experts, their duties cess in the same manner. We believe that, as the appointment of experts was carried out by the bankruptcy judge, their duties may cess also by their replacement by the bankruptcy judge or by their removal.

Subchapter 4: Trustee in bankruptcy

A. Capacity of a trustee in bankruptcy

An important role in the insolvency proceeding, along with the bankruptcy judge, is played by the trustee in bankruptcy. The trustee in bankruptcy is *the compatible natural or legal entity practising insolvency, duly authorised and appointed to perform the duties required by law during the observation period and during the reorganisation procedure* (art. 3 point 27).

According to the provisions of art. 19 par. 5, the trustee in bankruptcy, a natural or legal entity, including its representative, shall have the capacity of an insolvency practitioner. The legal

status of insolvency practitioners is regulated by the Emergency Government Order no.86/2006 on insolvency practitioners[5].

B. Appointing a trustee in bankruptcy

The trustee in bankruptcy shall be appointed in compliance with the provisions of art. 19 of the law.

B.1 the process of appointing a temporary trustee in bankruptcy

The person who wants to be appointed as a trustee in bankruptcy in an insolvency file shall submit in advance a documentation including:

- the proof of their capacity of insolvency practitioners;
- copy of the professional insurance policy;
- bid of taking over the position of a trustee in bankruptcy in the relevant file.

Among these people, by means of the judgement for the commencement of the general proceeding, the bankruptcy judge shall designate one of the bidders as a temporary trustee in bankruptcy, and by means of the judgement for the commencement of simplified proceeding, the bankruptcy judge shall designate a temporary liquidator. For the temporary appointment of the trustee in bankruptcy, the bankruptcy judge shall take into consideration all the submitted offers, of the petitions submitted by the creditors and, where applicable, by the debtor, if the first petition belongs to the debtor.

Therefore, when the first petition is formulated by the debtor, the latter may propose a trustee in bankruptcy. The creditors, by means of their petition submitted to the court, have the same possibility of proposing a trustee in bankruptcy. Should the holder of the first petition not propose a trustee in bankruptcy, the bankruptcy judge shall appoint a temporary trustee in bankruptcy among the bidders. Should no insolvency practitioners have submitted any offer to the file, the bankruptcy judge shall appoint temporarily, until the first creditors' meeting, an insolvency practitioner selected randomly out of the Table of the National Union of Insolvency Practitioners (art.19 par.1).

B.2 the procedure of appointing a temporary trustee in bankruptcy

Upon the recommendation of the creditors' committee, during the first creditors' meeting or later, the creditors' holding at least 50% of the total receivables may decide upon the appointment of a trustee in bankruptcy/liquidator, determining their remuneration (art.19 par.2). The creditors may decide to acknowledge the trustee in bankruptcy who has been temporarily appointed by the bankruptcy judge or may appoint another insolvency practitioner.

Should one of the creditors hold more than 50% of the total receivables, such creditors may decide upon the appointment of a trustee in bankruptcy and set their remuneration without consulting the creditors' meeting. In such case, such creditor may also acknowledge the person that has been temporarily appointed by the bankruptcy judge or may appoint another insolvency practitioner.

The creditors' decision or the decision of the creditor holding more than 50% of the total receivables concerning the acknowledgement of the temporary trustee in bankruptcy /liquidator appointed by the bankruptcy judge or concerning the appointment of the trustee in bankruptcy /liquidator (who is another insolvency practitioner than that temporarily appointed by the bankruptcy judge) may be contested by the creditors only on grounds of unlawfulness. Such contestation shall be formulated and submitted to the file no later than three days after any of the decisions mentioned above has been published in the Insolvency Proceeding Bulletin.

[5] Published in the Official Gazette no. 944/22.11.2006, approved by Law no. 254/2007 (Official Gazette no.507/30.07.2007).

All the contestations shall be settled simultaneously and urgently by the bankruptcy judge by means of a conclusion which may order the following:

- reject all contestations and appoint the designated trustee in bankruptcy/liquidator acknowledged by the decision of the creditor(s) holding more than 50% of the total receivables;
- admit the contestation, in which case the meeting of the creditors/ the creditor holding more than 50% of the total receivables shall be requested to designate another trustee in bankruptcy /liquidator;

If within three days after either of the decisions mentioned above has been published in the Insolvency Proceeding Bulletin no contestation is formulated, by means of a conclusion, the bankruptcy judge shall appoint the trustee in bankruptcy proposed by the creditors or the creditor holding more than 50% of the total receivables.

By means of a conclusion, upon the appointment of the trustee in bankruptcy (who is another insolvency practitioner than that temporarily appointed), the bankruptcy judge shall order the cessation of all duties of the temporarily designated trustee in bankruptcy.

In order to protect the debtor's and creditors' interests, the law requires the trustee in bankruptcy to have concluded a professional liability insurance which he shall show before his appointment and keep it, without reducing the insured amount directly or indirectly. In case of violation of these obligations, the trustee in bankruptcy shall be removed and shall pay potential damage (art.19 par.9).

In the *British law*, as part of the *administrative receivership*, the „administrator receiver" is designated by the creditor among the insolvency practitioners. The creditor designates such receiver by means of a document that is binding provided that the designated receiver accepts such position. Such acceptance shall be given until the end of the working day following the day when the designated receiver received the appointment document. In the old regulation, a designated receiver could be replaced by the creditor having appointed him. Nowadays, a receiver's replacement may be ordered only by the court[6].

As part of the procedure called *administration*, the administrator is a person appointed in compliance with sch B1 of the Insolvency Act 1986, in order to manage daily activities, business and assets of the companies. Such administrator is an *officer of the court* and is appointed among the insolvency practitioners by the court, the majority creditor, by the company or its managers.

In the *French law,* according to needs, one or more trustees in bankruptcy may be appointed, whose duties are determined by the court and may consist of assisting the debtor in managing the company or even in administering it, fully or partially.

C. Duties of the trustee in bankruptcy

According to art. 20 of Law no. 85/2006, the main duties of a trustee in bankruptcy, for the purpose of this law, are:

a) to examine the debtor's economic status and the documents submitted in compliance with art. 28 and 35 and to draw up a report whereby either the simplified proceeding or the continuation of the observation period as part of the general proceeding is proposed, then to submit the report to the bankruptcy judge within a period set by the latter, which cannot exceed 20 days after the trustee in bankruptcy has been appointed;

b) to examine the debtor's business and draw up a detailed report on the causes and circumstances leading to insolvency, by mentioning the people to which such insolvency may be imputed, as well as on the existence of the conditions leading to their liability, in compliance with art. 138, as well as on the real possibility of debtor's actual business reorganization or on the reasons which do not allow such reorganization and to submit the report to the bankruptcy judge within a

[6] Roy Goode, *Commercial law*, page 847.

period set by the latter, which cannot exceed 40 day after the trustee in bankruptcy has been appointed;

c) to draw up the documents stipulated by art. 28 par. 1 if the debtor failed to fulfill their relevant obligation within legal deadlines, as well as to verify, correct and supplement the information in the relevant documents, when they have been presented by the debtor;

d) to develop the debtor's business reorganization plan based on the content of the report mentioned in letter *a* above and in the terms and conditions stipulated by art. 94;

e) to supervise the operation of debtor's estate management;

f) to manage fully or partially the debtor's business; if partially, such management shall be performed in compliance with the express requirements of the bankruptcy judge concerning his duties and the terms of payment out of the debtor's account;

g) to convene, chair and ensure the secretariat of the creditors', shareholders', partners' meetings or of the meetings of the debtor's members who are legal entities;

h) to file actions for the annulment of the fraudulent documents concluded by the debtor to the damage and prejudice of the creditors' rights, as well as of some property related transfers, of business operations concluded by the debtor and of some securities granted by the latter which will supposedly damage the creditors' rights;

i) to inform immediately the bankruptcy judge if they find that the debtor has no assets or that such assets do not suffice to cover administration expenses;

j) to maintain or terminate some contracts concluded by the debtor;

k) to check the receivables and, where applicable, to formulate objections to such receivables, as well as to develop receivables tables;

l) to collect receivables; to follow the collection of receivables concerning the debtor's property or the amounts transferred by the debtor before the commencement of the proceeding; to formulate and support claims for the collection of the debtor's payables, even by means of attorneys;

m) provided that the following are endorsed by the bankruptcy judge, to conclude transactions, bankruptcy discharges, to discharge fidejussors, to wave security interests;

n) to inform the bankruptcy judge about any matter that may require settling by the latter.

By means of a conclusion, the bankruptcy judge may set for the trustee in bankruptcy any additional duties to those mentioned in art. 20 par. 1, except for the duties which the law requires as the authority of the former.

The trustee in bankruptcy shall be remunerated for the performance of his duties. Such remuneration shall be determined by the bankruptcy judge by means of the order for relief which may be later amended by creditors..

In addition to the duties above, the trustee in bankruptcy shall submit on a monthly basis a report including the description of how they have fulfilled their duties, as well a rationale for the expenses spent to manage the proceeding or for any other expenses made out of the funds in the debtor's property, including their remuneration, as well as of the method such remuneration has been calculated.

To exercise his duties, the trustee in bankruptcy is entitled to designate certain experts (art.23). The appointment and remuneration of experts shall be submitted to the approval of the creditors' committee, and, should the remunerations of such people be paid of the liquidation fund, the appointment and the remuneration shall be approved by the bankruptcy judge.

In the *British law*, the concept of a trustee may have two meanings, each for a different procedure:

a) administrative receiver, who is appointed for a creditor's interest;

b) administrator, appointed in the procedure of *administration*;

a) What is characteristic for the procedure performed by the administrative receiver is that such procedure has the legal status of a judicial enforcement and not of a collective insolvency procedure. According to law, an administrative receiver shall ensure with priority the covering of secure party creditors. His main obligation is to serve the interests of the *debenture holder* who has appointed him, and his main duty is to make sure that the payables of the debtor appointing him are paid, either by liquidating debtor's assets and distributing the collected price to the creditor, or by managing the business, collecting the profit and distributing it to the creditor. Therefore, even if such receiver acts on behalf of the debtor, his duties are subordinated to the creditor's interests[7].

The administrative receiver holds two kinds of powers: i) powers *in rem* and ii) *agency powers*. The powers *in rem* have their source in the securities accompanying the credit and include the right of possessing and collecting the fruit and of using the assets constituting the security. Carrying out such powers in not influenced in any way by the order for relief.

By virtue of his managing powers, the administrative receiver may run the debtor's business, may hire or lay off employees, may conclude or terminate debtor's contracts. Such powers cess on the day of the order for relief[8].

b) The administrator's legal status is more similar to the status of the trustee in bankruptcy in our law system. The main difference from the administrative receiver is that the administrator is appointed to represent the debtor and to serve his interests and the interests of the creditors' group, who shall be consulted before his appointment. The proceeding carried out by the administrator (called „administration") has the following characteristics: transparency, responsibility and collectivity and may have two forms: rescue or asset liquidation and distribution of price. The objective to be achieved by the administrator is, in the order of priority[9]:

- rescuing the company;
- recovering some receivables in an amount for the group of creditors that is greater than the amount should the liquidation have been applied, without a preceding administration;
- liquidation of company's assets in order to ensure the payment for one or more secure party creditors or priority creditors.

The effect of this procedure is the discontinuity of the judicial enforcement on the debtor's real property or debtor's rights of claim[10].

The powers of the administrator are identical to those of the administrative receiver (in rem and managing), which have been mentioned above; furthermore, the administrator may remove or appoint directors and may convene the creditors' general meeting.

D. Contestations against the measures taken by the trustee in bankruptcy

The measures taken by the trustee in bankruptcy when carrying out his/her duties may be contested in compliance with art. 21 of Law no. 85/2006. The law acknowledges the locus standi of suing in making the contestation:

a) natural person debtor;
b) special administrator of legal entity debtor;
c) creditors;
d) any other stakeholder.

The contestation shall be registered no later than 3 days after the report by the trustee in bankruptcy to the bankruptcy judge and shall be trialed no later than 5 days after its registration, in

[7] Roy Goode, *Commercial law*, page 845.
[8] Roy Goode, *Commercial law*, page 847.
[9] Roy Goode, *Commercial law*, page 851-0852.
[10] Roy Goode, *Commercial law*, page 852.

chambers by subpoenaing the claimant, the trustee in bankruptcy and the creditors' committee. Upon the claimant's request, the bankruptcy judge may suspend the enforcement of the contested measure.

The bankruptcy judge cannot cancel by default the measures taken by the trustee in bankruptcy which have not been contested, if such measures have been taken in compliance with the law. However, if such measures are unlawful, taking into consideration the role of the bankruptcy judge, in accordance with art. 11 par. 2 of the law, such judge shall have the obligation to cancel any unlawful measure taken by the trustee in bankruptcy, even if such measure has not been contested by the parties entitled to do it.

E. Replacing the trustee in bankruptcy

The trustee in bankruptcy may be replaced by the bankruptcy judge at any stage of the proceeding, on solid grounds in compliance with the provisions of art. 22 of the law. The replacement of the trustee in bankruptcy may be ordered by default or upon the request of the creditors' committee. The replacement shall be ordered by means of a conclusion which, in order to ensure transparency and prevent abuse, shall be explained. The conclusion whereby replacement is ordered shall be passed urgently in Council Chambers by subpoenaing the trustee in bankruptcy and the creditors' committee.

In *the British law*, the replacement of the trustee in bankruptcy may be ordered by the court upon the former's request or following the request of a creditor or partner/shareholder of the debtor company, when the administrator has acted or is acting or intends to act wrongly, so that to damage the claimant's interests[11].

F. Sanctions that may be applied to the trustee in bankruptcy

In order to make effective the principle of celerity of deeds and operations concerning the insolvency proceeding, the law requires that, if the relevant practitioner refuses his appointment as a trustee in bankruptcy or, once he has been appointed in such capacity, he fails to fulfil or delays the fulfilment of his duties stipulated by law or set by the bankruptcy judge, such trustee in bankruptcy may be fined with a judicial fine by the bankruptcy judge.

F.1 Refusal of appointment

An insolvency practitioner designated for the case may refuse the appointment; for this purpose, such practitioner shall communicate the refusal to the court no later than 5 days after the appointment notification. Failing to communicate his refusal timely, without solid grounds, shall be sanctioned by the bankruptcy judge with a judicial fine ranging between RON 500 to 1000. In such case of refusal, a new insolvency practitioner shall be appointed, in compliance with art. 19 of the law.

F.2 Failing or delaying the fulfillment of duties

Should the trustee in bankruptcy, by fault or bad faith, fail to fulfill his duties or delay same fulfillment, such trustee may be sanctioned by the bankruptcy judge with a judicial fine ranging between RON 1000 to 5000. Should damage have been caused following the failure or delay of duty fulfillment, upon the request of any stakeholder, the bankruptcy judge may force the trustee in bankruptcy to pay damages.

For the enforcement of the fines and damages, the provisions of art. 108 ind.4 and ind.5 of the Rules of Civil Procedure shall apply.

[11] Roy Goode, *Commercial law*, page 853-854.

Subchapter 5: Liquidator

A. Capacity of liquidator

An important role in the insolvency proceeding is played by the liquidator. For the purpose of Law no. 85/2006 (art 3 point 28), the liquidator is a natural or legal entity practicing insolvency and being duly authorized, appointed to run the debtor's business and carry out the duties required by law for both the general and simplified bankruptcy proceeding.

B. Appointing the liquidator

According to the provisions of art. 24 of Law no. 85/2006, the liquidator is appointed following the same rules as the trustee in bankruptcy, the provisions of art. 19 of the law applying appropriately.

The law allows that a formerly designated trustee in bankruptcy be appointed as a liquidator.

On the day the liquidator's duties have been set by the bankruptcy judge, the mandate of the trustee in bankruptcy cesses.

B. Duties of liquidator

According to art. 25 of Law no. 85/2006, the main duties of a liquidator are:

a) to examine the business of the debtor undergoing the simplified procedure against the actual status and drawing up a detailed report on the causes and circumstances leading to insolvency, by mentioning the people to which such insolvency may be imputed, as well as on the existence of the conditions leading to their liability, in compliance with art. 138, and to submit the report to the bankruptcy judge within a period set by the latter, which cannot exceed 40 day after the liquidator has been appointed, provided that such report was not drawn before by the trustee in bankruptcy;

b) to run the debtor's business;

c) to file actions for the annulment of the fraudulent documents concluded by the debtor to the damage and prejudice of the creditors' rights, as well as of some property related transfers, of business operations concluded by the debtor and of some securities granted by the latter which will supposedly damage the creditors' rights;

d) to apply seals, list assets and take appropriate measures for their preservation;

e) to maintain or terminate some contracts concluded by the debtor;

f) to check the receivables and, where applicable, to formulate objections to such receivables, as well as to develop receivables tables;

g) to follow the collection of receivables concerning the debtor's property resulting from assets or amounts transferred by the debtor before the commencement of the proceeding; to collect receivables, to formulate and support claims for the collection of the debtor's payables, even by means of attorneys;

h) to receive payments on behalf of the debtor and record them in the debtor's property account;

i) to sell assets from the debtor's property, in compliance with the provisions of this law;

j) provided that the following are endorsed by the bankruptcy judge, to conclude transactions, bankruptcy discharge, to discharge fidejussors, to wave security interests;

k) to inform the bankruptcy judge about any matter that may require settling by the latter;

l) any other duties set by the bankruptcy judge by means of a conclusion.

The liquidator shall be remunerated for the performance of his duties. As for the trustee in bankruptcy, such remuneration shall be determined by the bankruptcy judge by means of the order for relief which may be later amended by creditors.

In addition to the duties above, on every proceeding hearing, the liquidator shall submit a report including the description of how he has fulfilled his duties, as well a rationale for the expenses spent to manage the proceeding or for any other expenses made out of the funds in the debtor's property. The report shall contain the activities performed every month or for a few months.

To exercise his duties, the liquidator is entitled to designate certain experts (art.23 and 24 of the law). The appointment and remuneration of experts shall be submitted to the approval of the creditors' committee, and, should the remunerations of such people be paid of the liquidation fund, the appointment and the remuneration shall be approved by the bankruptcy judge.

D. Contestations against the measures taken by the liquidator

The measures taken by the liquidator when carrying out his/her duties may be contested in compliance with art. 21 par.2 and art. 24 of Law no. 85/2006. The law acknowledges the locus standi of suing in making the contestation:

a) natural person debtor;
b) special administrator of legal entity debtor;
c) any of the creditors;
d) any other stakeholder.

The contestation shall be registered no later than 3 days after the report by the liquidator has been submitted to the bankruptcy judge and shall be trialed no later than 5 days after its registration, in chambers by subpoenaing the claimant, the liquidator and the creditors' committee. Upon the claimant's request, the bankruptcy judge may suspend the enforcement of the contested measure

The bankruptcy judge cannot cancel by default the measures taken by the liquidator, which have not been contested, if such measures have been taken in compliance with the law. However, if such measures are unlawful, taking into consideration the role of the bankruptcy judge, in accordance with art. 11 par. 2 of the law, such judge shall have the obligation to cancel any unlawful measure taken by the liquidator, even if such measure has not been contested by the parties entitled to do it.

E. Replacing the liquidator

The liquidator may be replaced by the bankruptcy judge at any stage of the proceeding, on solid grounds in compliance with the provisions of art. 22 par. 2 and art. 24 of the law. The replacement of the liquidator may be ordered by default or upon the request of the creditors' committee. The replacement shall be ordered by means of a conclusion which, in order to ensure transparency and prevent abuse, shall be explained. The conclusion whereby replacement is ordered shall be passed urgently in Council Chambers by subpoenaing the liquidator and the creditors' committee.

F. Sanctions that may be applied to the liquidator

As for the trustee in bankruptcy, the liquidator who refuses the appointment or fails to fulfill or does not fulfill his duties appropriately may receive a fine in compliance with the law.

In order to make effective the principle of celerity of deeds and operations concerning the insolvency proceeding, the law required that, if the relevant practitioner refuses his appointment as a liquidator or, once he has been appointed in such capacity, he fails to fulfill or delays the fulfillment of his duties stipulated by law or set by the bankruptcy judge, such trustee in bankruptcy may be fined with a judicial fine by the bankruptcy judge.

F.1 Refusal of appointment

An insolvency practitioner designated for the case may refuse the appointment; for this purpose, such practitioner shall communicate the refusal to the court no later than 5 days after the appointment notification. Failing to communicate his refusal timely, without solid grounds, shall be sanctioned by the bankruptcy judge with a judicial fine ranging between RON 500 to 1000. In such case of refusal, a new insolvency practitioner shall be appointed, in compliance with art. 19 of the law

F.2 Failing or delaying the fulfillment of duties

Should the liquidator, by fault or bad faith, fail to fulfill his/her duties or delay same fulfillment, such liquidator may be sanctioned by the bankruptcy judge with a judicial fine ranging between RON 1000 to 5000. Should damage have been caused following the failure or delay of duty fulfillment, upon the request of any stakeholder, the bankruptcy judge may force the liquidator to pay damages.

For the enforcement of the fines and damages, the provisions of art. 108 ind.4 and ind.5 of the Rules of Civil Procedure shall apply .

Chapter 3: Other participants in the insolvency proceeding

Besides the bodies authorized to enforce the procedure, who have been analyzed above, other participants in insolvency are the creditors' general meeting, the creditors' committee and special administrator.

Chapter 4: Conclusions

The purpose of the insolvency proceeding is the establishment of a collective procedure to cover the liabilities of the debtor undergoing insolvency, by paying the debtor's payables to the creditor(s), which shows the concern of the lawmakers for ensuring the protection of creditors' interests.

Among others, the insolvency proceeding is a legal and collective procedure, as shown in the chapter on the characteristics of the insolvency proceeding. Therefore, all deeds and operations involved in the insolvency proceeding are regulated by the law and are performed under judicial control by the bodies authorized to enforce them (legal courts, bankruptcy judge, trustee in bankruptcy and liquidator). Taking into consideration its collective nature, other stakeholders participate in the insolvency proceeding (creditors' general meeting, creditors' committee and special administrator).

Conclusions

We believe that the new regulations on insolvency should greatly emphasize the efficiency of this procedure, mainly conditioned by the quick performance of the process stages. The repeated legislative reforms have shown care for speed, for shorter solution periods, but, at least so far, they have not proven efficient enough, as the proceedings are carried out over long period of times – years. These procedures modified and gave more powers and duties to the participants, being more clear and concrete.

The efficiency of the procedure may also be given by the advantages, but especially by the disadvantages it generates to the debtors and creditors (for creditors – the possibility of a compulsory payment of a legal security, stopping of the calculation of any interests, increases and penalties, the possibility of maintaining some ongoing contracts, contrary to the creditors' interests, the debtor's discharge of debts, and for the debtors – the interdiction of a repeated reorganization application,

removal of debtor's right to administer his assets, possibility of forcing the debtor to submit a legal security for provision of services).

The soundness, transparency and efficiency of these regulations will ensure the stability and dynamics necessary to the business environment, will encourage trade in good faith and will deter the ill-meaning traders, will allow for a safe circulation of capital and will prevent financial blockages.

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Legislation

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