

BANKRUPTCY OFFENCES IN THE CONTEXT OF THE ECONOMIC CRISIS AND LEGISLATIVE CHANGES

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Abstract

Considering the relation it has with the economic and legal realities it reflects, but also in the context of such realities, mainly the economic crisis and the current and future legislative changes, bankruptcy remains a very modern issue.

By incriminating simple and fraudulent bankruptcy offences, some of the facts or acts committed by the debtor's representatives to fraud the creditors are sanctioned, being in close connection with the creditor's insolvency status.

The express incrimination of such crimes in the new Criminal Code under title II, chapter III, "Offences against patrimony through ignorance of trust" creates the conditions necessary to strengthen the security of legal and economic relations upon which any commercial activity rely, through mutual trust that should exist among traders.

Keywords: offences, simple bankruptcy, fraudulent bankruptcy, insolvency.

JEL Classification: G01, G20, H20, H26, K14, K20, K42

1. Introduction

Contrary to official statements, the financial and economic crisis has not been overcome, and, even if this is not an intrinsic cause of the bankruptcy of economic agents, it significantly influences their number (Tuleașcă, 2009).

In the same context, the frequent and important changes of the tax and social insurance legislation and policy made in a short interval, encouraged tax payers, including economic agents and their representatives, to find "alternatives" in order to avoid paying their fiscal obligations (Ioniță, 2011), including those considered bankruptcy offences.

Major legislative changes operated or which are to be implemented, namely the entry into force of a new Civil Code and the enforcement of the other three new codes (of civil procedure, criminal and of criminal procedure) represents an additional stress.

Time has brought only the change of means leading to apparent or real bankruptcy and, considering this situation, the lawgiver's role is still to adjust through regulations to the subtle changes that occur in the economic environment (Diaconu, 2005).

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2. Insolvability and insolvency

The two main notions (Tuleaşcă, 2009) used in national legislations, insolvability and insolvency, must not be used interchangeably.

Whereas insolvability means the relationship of assets to liabilities, insolvency represents the impossibility of the trader to cover its commercial debts with the liquidities (cash) it has, regardless of the relation between the assets and liabilities of its patrimony.

Insolvency was deemed an “accident” in the existence of trading companies (Tuleaşcă, 2009).

A legal definition of insolvency is provided in art. 3 point 1 of Law no.85/2006 on the insolvency procedure: “[...] that condition of the debtor’s patrimony which is characterized by insufficient funds available to pay for the certain, liquid and due debts [...]”. According to letter a) of this point insolvency is presumed to be obvious “[...] when the debtor, 90 days after the due date, failed to pay its debt to the creditor; the presumption is relative” and according to letter b), insolvency is imminent “[...] when it is proven that the debtor will not be able to pay on the due date its committed due debts with the funds available on the due date”.

Internationally, the specifics of the causes to initiate the collective procedure, which are determined by the law governing this procedure or the analysed historic and legislative moment, cannot indicate significant differences in approaching this essential issue of the enforcement of the bankruptcy procedure (Tuleaşcă, 2009).

However, transborder insolvency raises many and complex problems which are caused by legislative differences (of substantial and procedure law), jurisdiction and law conflicts (on the state where the debtor’s insolvency has to be pronounced), conditions for the initiation of the procedure, the governing law, its international effects etc. (Tuleaşcă, 2011).

3. The concept of bankruptcy

Etymologically, bankruptcy comes (depending on the source) from the terms “bancarotta” (in Italian), “banqueroute” (in French), “bankrott” (in German). This term may have originated in medieval Italian law and refers to the situation of the trader who ceased to make payments and whose bench, where he usually displays his goods, is symbolically broken in order to show the other traders that the said person is excluded from their community (Diaconu, 2005).

In our opinion, the Dictionary of Modern Romanian (the 1958 edition) captures best the meaning of this term, reaching a consensus with the meaning given by the lawgiver through incrimination as simple and fraudulent bankruptcy. According to the dictionary (even if there was an explanatory note “in capitalist regimes”), bankruptcy was a “Situation of a bankrupt trader, who was at fault for poor administration or fraud to the detriment of its creditors”.

4. Bankruptcy incrimination as offence

Most states incriminate in one form or another certain acts and acts of the debtor or of persons related thereto, which result in the insolvency condition.

Thus, we may notice that most European states, incriminate in their criminal codes (not in special laws), under various names, bankruptcy and other dangerous acts related to debtors' insolvency (Boroi, 2008).

Among the law European systems that incriminate bankruptcy (Diaconu, 2005) in their criminal codes there are Germany, Finland, Sweden, Spain, Luxembourg, and from among those that incriminate it in normative acts (other than the Criminal Code), there are Italy (*Legge fallimentare*) and Great Britain (*Insolvency Act 1986*).

As regards Romania, for the moment it belongs to the category of European countries that incriminate bankruptcy in a special law, namely Law no. 85/2006. As we mentioned above, such offences are incriminated in the new Criminal Code as well, whose enforcement is foreseen for next year.

4.1. Incrimination in the Romanian Commercial Code

The Romanian commercial code incriminated the simple and fraudulent bankruptcy offences in a distinct title, VIII "On criminal offences with respect to bankruptcy", in chapter I "On bankruptcy".

Thus, according to art. 879, the trader was guilty of simple bankruptcy "[...] if, prior to declaring being bankrupt and only to facilitate being granted a moratorium, awarded to itself, against truth, part of the assets or simulated inexistent debts in order to encourage partially or wholly fictitious creditors to appear in meetings".

According to art. 880, the trader was guilty of fraudulent bankruptcy "[...] if he stole or forged its registers, distracted, hid or dissimulated part of its assets and/or the trader who, for another reason than as indicated in the previous article, presented inexistent debts or who, in its ledgers, written documents or authentic or private acts or in the balance, indicated fraudulently debts that it did not have [...]". "Fraudulent bankrupt companies" could also be those "[...] traders who, prior to declaring being bankrupt, estranged part of the goods or assets at smaller prices than their cost, for the fraudulent purpose of frustrating their creditors".

4.2. Incrimination in the Law on trading companies

Law no. 31/1990 on trading companies incriminates only fraudulent bankruptcy as offence.

Thus, according to art. 282, one of the following acts is deemed fraudulent bankruptcy offence:

a) the forgery, theft or destruction of the company ledgers or the hiding of part of the company assets, the presentation of inexistent debts or the presentation in the

company ledger, in another document or in the financial statement, of undue amounts, each of them being performed for the purpose of apparently diminishing the value of the assets;

b) estrangement of a significant part of its assets, to the creditors' detriment, in case of company bankruptcy;

were punished with imprisonment from 3 to 12 years.

4.3. Incrimination in the Law on the insolvency procedure

Article 143 of the current Law no. 85/2006 on the insolvency procedure incriminates both simple and fraudulent bankruptcy.

The simple bankruptcy offence, according to paragraph 1) of this article, consists in failure to submit or late submittal by the debtor natural person or the legal representative of the debtor legal entity, of the application for the opening of the procedure, within a term which exceeds by more than 6 months the term stipulated at art. 27 and is punished with imprisonment from 3 months to one year or with a fine

Art. 27, paragraph (1) creates a term of maximum 30 days as of the occurrence of the insolvency condition, when the debtor (who is in this condition) has to submit to the court an application to be subjected to the insolvency procedure.

In paragraph (1¹) of this article, if on the expiry date of the above-mentioned term, the debtor is involved, in good faith, in extrajudicial negotiations for the restructuring of its debts, the term is 5 days beginning on the failure of such negotiations.

The fraudulent bankruptcy offence, according to paragraph (2) of this article, is sanctioned with imprisonment from 6 months to 5 years and consists in the act of the person who:

a) forges, steals or destroys the debtor's ledgers or hides part of its assets;

b) presents inexistent debts or presents in the debtor's ledgers, in another document or in the financial statement, undue amounts, each of such acts being performed to the creditors' detriment;

c) estranges part of the assets, to the creditors' detriment, in case of the debtor's insolvency.

4.4. Incrimination in the new Criminal Code

In the new Criminal Code, the crimes of simple or fraudulent bankruptcy are incriminated in art. 240 and 241, title II, "Offences against patrimony" of chapter III, "Offences against patrimony through ignorance of trust".

According to art. 240 paragraph (1), the simple bankruptcy offence consists of failure to submit or late submittal by the debtor natural person or the legal representative of the legal entity, of the application for the opening of the insolvency

procedure, within a term exceeding by more than 6 months the term stipulated by the law related to the occurrence of the insolvency condition, and is punished with imprisonment from 3 months to one year or with a fine.

According to art. 241 paragraph (1), the fraudulent bankruptcy offence consists of the act of the person who, to the creditors' detriment:

- a) forges, steals or destroys the debtor's ledgers or hides part of its assets;
- b) presents inexistent debts or presents in the debtor's ledgers, in another document or in the financial statement, undue amounts, each of such acts being performed to the creditors' detriment;
- c) estranges part of the assets, to the creditors' detriment, in case of the debtor's insolvency.

and is punished with imprisonment from 6 months to 5 years.

5. Instead of conclusions, issues taken from the registered casuistry

5.1. Through criminal decision no. 527 of October 9, 2001, the Court of Iasi sentenced A.C., among others, to 5 years of prison for the fraudulent bankruptcy offence as stipulated at art.276 letter b) of Law no. 31/1990 republished.

The evidence revealed that, after April 21, 1999, following the application formulated by SC M. MUREȘ SA, the procedure for the bankruptcy of SC G. IMPEX SRL was initiated, the defendant A.C. estranged the company patrimony to the detriment of its creditors. Thus, on May 7, 1999, the syndic signed a report whereby he informed A.C. that the bankruptcy procedure was initiated, a report which was signed by the defendant. Administrator P.T. tried several times to contact the defendant, but he had left the commercial space held on 20 Poitiers Bvd., estranged the goods, and subsequently, on September 17, 1999, he assigned the share parts of SC G. IMPEX SRL to the defendant V.V.

It was considered that this offence involves the estrangement to the creditors' detriment, in case of bankruptcy, of a significant part of the assets and this unquestionably results from the acts and works of the file, namely from the syndic's report of April 21, 1999, which initiated the bankruptcy procedure and the reports signed by administrator P.T. that the defendant A.C., well aware of the facts, proceeded to the estrangement of company SC G. IMPEX SRL, although he knew about the bankruptcy procedure and expressed his availability to fully pay the amount due to SC M. MUREȘ SA, by June 1, 1999.

An appeal was declared against the above-mentioned decision, appeal which was rejected through criminal decision no. 146 of May 16, 2002 of the Court of Appeal of Iasi.

The appeal of the defendant against this decision was also rejected as ungrounded, under decision no. 72 of January 9, 2003 of the Supreme Court of Justice, Criminal Section.

5.2. Criminal sentence no. 87 of January 29, 2004 given by the Court of Iasi in file no. 11.878/2002, sentenced the defendant B.I., among others, to 4 years of prison for the offence stipulated at art. 276 of Law no. 31/1990, with the application of art. 37 letter a) of the Criminal Code.

The evidence revealed that the defendant B.I., citizen of the Republic of Moldova, obtained in 1999 the Romanian citizenship; then, in November 1999, he set up a trading company, S. SRL, where he was sole associate and administrator. The same month, he changed the company name into SC A.I., and on January 17, 2001, he became the administrator of SC M.A. SRL Iași, whose name he also changed into SC A.I.T. SRL Iași. At the end of the year 2000 and in August 2001, the defendant gave the witness A.I. the amount of 19,000 German pounds, namely 13,000 German pounds, in order to buy 2 cars, an Audi 100 TDI and a WV PASSAT, both initially registered under the witness's name and then on the name of SC A.I. Iași. Wishing to obtain a fraudulent profit from these transactions, on November 4, 2001, the defendant drafted a false invoice which certified that SC A.I.T. bought the two cars from SC S. SRL, although this latter one had stopped operating in November 1999 and wrote down the purchasing price of ROL 1,147,000,000, although he procurement value had been ROL 500,000,000.

It was considered that by drafting on November 4, 2001, a fiscal invoice and then 4 money orders, which indicate a situation incompliant with reality, in the meaning that SC A.I.T. owed the amount of ROL 1,147,000,000 to SC S. SRL, the defendant B.I. was found guilty of the fraudulent bankruptcy offence as stipulated at art. 276 letter a) of Law no. 31/1990, republished, considering that the objective aspect of this offence consists of the presentation of those inexistent debts in order to diminish the patrimony of the company.

Criminal decision no. 217 of June 15, 2004 of the Court of Appeal of Iasi (file no. 1811/2004) accepted the appeal promoted by the Parquet near the Court of Iasi against the decision no. 87 of January 19, 2004, which it partly destroyed, with completion with "paragraph (1) and letter a)" of the legal classification stipulated by the provisions of art. 276 of Law no. 31/1990 and that stipulated by the provisions of art. 23 of Law no. 21/1991.

Decision no. 6042 of November 16, 2004 of the High Court of Cassation and Justice, the criminal section, accepted the appeal of the defendant, and the criminal decision no. 217 of June 15, 2004 of the Court of Appeal of Iasi was cancelled, the court deciding on the reconsideration of the matter by the same court, with the legal summoning of the defendant, who had not been summoned, at the new address, on which he had informed the court.

Thus, the cause was reregistered with the Court of Appeal of Iasi under no. 6856/2004, and criminal decision no. 224 of June 7, 2005 of the Court of Appeal of Iasi accepted the appeals formulated by the Parquet near the Court of Iasi and the defendant B.I., against criminal sentence no. 87 of January 29, 2004 of the Court of Iasi (file no. 11.878/2002) which it partly destroyed, with respect to the legal classification of the acts and the punishment.

The retrial divided the punishments applied to the defendant B.I. and set their individuality.

According to the provisions of art. 334, the Code of criminal procedure changed the legal classification, among others, of the fraudulent bankruptcy offence from art. 276 of Law no. 31/1990 with the application of art. 37 letter a) of the Criminal Code, into art. 276 letter a) of Law no. 31/1990, with the application of the provisions of art. 37 letter a) of the Criminal Code and sentenced the defendant B.I. to 3 years of prison.

The defendant appealed against this decision, but the appeal was rejected as ungrounded through decision no. 1501 of March 8, 2006 of the High Court of Cassation and Justice, Criminal Section.

5.3. Criminal decision no. 146 given by the Court of Bistrița Năsăud in file no. 1712/112/2007, under art. 334 Code of criminal procedure, decided, among others, on the change of the legal classification of the acts for which the defendant M.O. was sent to trial, from the simple bankruptcy offence as stipulated at art. 143 paragraph (1) of Law no. 85/2006, with the application of art. 41 paragraph (2) of the Criminal Code, and the simple bankruptcy offence as stipulated at art. 143 of Law no. 85/2006, into a single simple bankruptcy offence as stipulated at art. 143 paragraph (1) of Law no. 85/2006, and the defendant was sentenced to 2 months of prison for this offence.

The evidence revealed that in the period 2004-2006, SC M.O.A. SRL Bistrița represented by the defendant closed several sale-purchase agreements for cars, under which it cashed various amounts without fulfilling the obligations indicated in these documents. Following the poor administration, SC M.O.A. SRL Bistrița became insolvent in the meaning that it no longer had the funds necessary to procure cars or to cover its debts to various creditors. It became evident that the defendant was aware of the insolvency condition of his company prior to signing the sale-purchase agreements with the damaged parties B.A.F. and P.L., an aspect which was proven both through the debts registered by his company to various natural persons and legal entities and through the debts registered to the State Budget. However, the defendant meant to cash and obtain for himself various amounts, knowing that he will not make available to the buyers the ordered cars and that he will not refund them the cashed amounts. For these reasons, the court considered that the elements that make the simple bankruptcy offence are cumulatively met, proving a direct intention, because the defendant was aware of the company insolvency condition and meant to produce the result by failure to submit or late submittal of the application for the insolvency procedure within the term stipulated by the law.

The court considered that the insolvency condition, the initiation of the procedure of legal reorganization and bankruptcy, the suspension of the administration right and the appointment of a legal administrator, in this particular case, SC C.M.U. SRL Unirea, can only be set once and bear effects to all creditors and debtors of the company which are notified under the terms of art. 75 of the law.

Once the court notes the insolvency condition of a company upon the request of a creditor, the decision being final, the pronouncement of similar decisions upon the request of other creditors is no longer justified. In this situation, upon the request of creditors B.N., civil decision no. 400 of April 28, 2006 of the Court of Bistrița Năsăud, commercial and administrative section, noted the insolvency condition of SC M.O.A. SRL Bistrița, and subsequently, the civil decision no. 879/COM/2006 imposed the opening of the simplified insolvency procedure.

It was considered that the defendant's failure to submit, as legal representative of SC M.O.A. SRL Bistrița, with the Court of Bistrița Năsăud, commercial section, the application for the opening of the insolvency procedure within 30 days as of the occurrence of the insolvency condition, triggers his liability for the simple bankruptcy offence as stipulated by art. 143 paragraph (1) of Law no. 85/2006, a act which, for the above-mentioned reasons, is not susceptible of being committed in a continued form. Therefore, the court considered that, although against the defendant there were three criminal complaints for the simple bankruptcy offence (those of the damaged parties B.A.F. f. 19-23 and P.L. f. 31-35 of File no. 3099/112/2007), and the complaint submitted by the legal administrator f. 158 vol. I File of criminal incrimination no. 1712/112/2007, this situation does not entail retaining the act under continued form, considering the nature of this offence, according to which the insolvency condition once noted bears effects continuously, and cannot be interrupted through successive requests of other interested creditors.

The criminal decision no. 49/A of April 14, 2010 given by the Court of Appeal Cluj, criminal section, accepted the appeal declared by the defendant M.O. against the above-mentioned criminal decision, which it destroyed from the civil aspect of the cause referring to the civil parties A.M., B.I.L., but the remaining provisions of the decision were maintained.

The defendant declared an appeal against this decision, but the appeal was rejected as ungrounded through decision no. 3854 of November 1, 2010 of the High Court of Cassation and Justice, Criminal Section.

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