PUBLIC AND PRIVATE LAW

The Liability of the Judicial Liquidator

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Abstract: In our article, we analyze the liability of the judicial liquidator, based on a real court case. The interest of such a study resides in the material implications of the engagement of patrimonial liability and in the rarity of the judicial requests for engaging this liability. We underline a recent terminological change in the insolvency legislation. Thus, according to Law no. 85 of 2006 on the insolvency proceedings[2] (further referred as "old Insolvency Law"), the insolvency practitioner managing the bankruptcy procedure was called "liquidator", while the one managing the observation period was called "judicial administrator", thus being distinguished from the "special administrator" who is the representative of the associates/shareholders and of the debtor.

Keywords: insolvency; judicial liquidator; syndic-judge; liability

1. General Aspects Regarding the Liability of the Judicial Liquidator

At the beginning, we underline a recent terminological change in the insolvency legislation. Thus, according to Law no. 85 of 2006 on the insolvency proceedings[3] (further referred as "old Insolvency Law"), the insolvency practitioner managing the bankruptcy procedure was called "liquidator", while the one managing the observation period was called "judicial administrator" (thus being distinguished from the "special administrator" who is the representative of the associates/shareholders and of the debtor).

Law no. 85 of 2014 on the procedures for preventing insolvency and for insolvency[4] (further referred to as "the Insolvency Law"), which repealed the old Insolvency Law, transforms the liquidator in "judicial liquidator". This way, the law unifies the terminology, which became conformable to the judicial practice that was already using this expression.

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[2] Published in the Official Gazette of Romania no. 359 of 21 April 2006.

[3] Published in the Official Gazette of Romania no. 359 of 21 April 2006.

[4] Published in the Official Gazette of Romania no. 466 of 25 June 2014.

The patrimony liability of the judicial liquidator is regulated by art. 63 par. 1 and art. 60 par. 2 and 3 of Law 85 of 2014, as follows: *(2) The syndic-judge shall sanction the judicial administrator with a judicial fine from RON 1.000 to RON 5.000 in case that he, by his fault or by ill intention, does not fulfill or fulfils with delay the powers provided by law or established by the syndic-judge. (3) If, by the deed provided in paragraph (2), the judicial administrator caused damage, the syndic-judge may, at the request of any party concerned, oblige the judicial administrator to cover the damage caused.*

This legal solution is the same previously provided by art. 24 par. 1 and art. 22 par. 2 and 3 of the old Insolvency Law, so the conclusions of our study, although referring to the old legislation, are also incident under the provisions of Law no.85 of 2014.

The liability of the judicial liquidator is a special form of civil liability for damage due to misfeasance or nonfeasance, nature constantly recognized by the juridical doctrine[1]. Therefore, the common features are compulsory, together with the specific elements provided by the Insolvency Law. The requirements for engaging the liability are:

- the misconduct of the judicial liquidator, who does not fulfil or fulfils with delay the powers provided by law or established by the syndic-judge;
- the plaintiff must have suffered a loss;
- the negligent act must have been the proximate cause of the loss, which means that it directly caused the loss so that if the proximate cause didn't happen, then the harm would not have happened;
- the judicial liquidator must have acted by his fault or by ill intention.

The patrimony liability of the judicial liquidator is not the only form of liability regulated by the Insolvency Law. Art. 169-173, under the section "Engaging the liability for going in the state of insolvency", settle the civil liability of the management bodies' members that contributed to the state of insolvency of the debtor. In this case, too, the special character of the regulation results from the separate conditions for engaging the liability.

2. Arguments of the Litigation Parties and the Decision of the First Instance

[1] Țăndăreanu, N., *Insolvența în reglementarea Legii nr. 85/2006*. Bucharest, Editura Universul Juridic, 2012, pp. 402-406. Piperea, Gh., *Insolvența: legea, regulile, realitatea*. Bucharest, Editura Wolters Kluwer, 2008, p. 737.

One of the creditors, a bank (further referred as "the Bank") claimed the engagement of the civil liability of the judicial liquidator of the debtor (further referred as "the Liquidator") consisting in the payment of an amount of money representing the value of the property of the debtor that was sold at an auction organized by the Liquidator.

The Bank underlined that, the day before the auction took place, it filed all the necessary documents in order to participate at the auction. However, the Bank was disqualified by the liquidator for the reason that the indemnity bond, issued to guarantee the conclusion of contract in case of winning the auction, revealed that the sum was payed to the Liquidator's bank account, not the debtor's one. The Bank obtained a court decision stating that it was illegally disqualified, so the misconduct of the judicial liquidator is proven.

As proximate cause of this misconduct, the Bank suffered a loss equal to the value of the sold property, because, if the Liquidator did not disqualify, it would have won the auction (as its offer was higher than of the actual winner), thus becoming the owner of the property. All the conditions for the engagement of the Liquidator's liability are met, as the said decision also stated it had acted by ill intention when disqualifying the Bank.

The defendant argued that the conditions of tort law are not met. He pointed out that the exclusion of the Bank from participation in the auction was based on his liquidator attributions conferred by the law and the measure could be challenged by the Bank according to the procedure specifically regulated by the law in this respect.

The syndic-judge ruled against the Bank, holding that, in order to oblige the judicial liquidator to cover the damage suffered, the damage must be the consequence of his failure to fulfill his obligations or of his delay in doing so. In the case, the alleged damage, namely the fact that the Bank did not adjudicate on the bid, did not occur due to the failure or late fulfillment of the liquidator's duties, but it is the consequence of a measure taken by the liquidator under its statutory duties. As all the conditions of tort liability must be met cumulatively, and there is no unlawful act in the way provided by Law no.85 of 2006, the action is ill founded.

The Bank appealed against the sentence, alleging that the interpretation given to the law by the syndic-judge is faulty, in its opinion the misdemeanor consisting exclusively in the failure to fulfill the duties or in their late fulfillment. However, this interpretation equates to a refusal to hear the case.

Thus, the illicit act may consist both in action and in lack of action, the essential condition being that it is contrary to the law or provisions given

by the syndic-judge. The appellant objects, stating that is contrary to the letter and spirit of the law, to the view that the liquidator may take action or act in the proceedings without sanction, on the grounds that the law penalizes only his inaction or delayed action. In this case, the first regulated situation, when the liquidator fails to perform his duties provided by the law or established by the syndic judge, is met. Among the attributions is the one stated in art. 24 letter i) of the old Insolvency Law, namely the sale of the debtor's possessions. The liquidator did not fulfill the measures provided by the law, the consequence being the annulment of the tender documents. Consequently, the failure to comply with the measures provided by the law – the unlawful act – consists in the violation of the power granted by art. 24 letter i) through the procedure of selling in violation of the law, which attracted the annulment.

The liquidator filed an answer in which he claimed that the appeal is ill unfounded. He pointed out that his measure of exclusion of the Bank from the auction was taken in accordance with the provisions of art. 21 of the old Insolvency Law, given that the bidders had to pay the guarantee according to the specifications (on behalf of the debtor), and the appellant wrongfully paid to the liquidator's account. The Bank challenged the exclusion measure and the court ordered its cancellation by a final decision.

In order for him to be held liable, the three conditions of the tort liability[1], namely the existence of a faulty action, the damages occurred and the causal relation between the first two must be met cumulatively. In the case, a measure was taken in accordance with the law, a measure that can be confirmed or denied by the court. The liquidator's liability cannot be the consequence of a measure that he ordered, nor is the syndic-judge applying the procedure according to art. 5 of the Law no. 85 of 2006.

The provisions invoked by the Bank are not applicable as there is no fault in the performance of the duties. The action was brought in bad faith and can even be considered an attempt to unjust enrichment, as the proceeds of the sale of the good at auction were distributed to the creditors, including the Bank, so the later wants to collect profit from both the debtors and the liquidator.

[1] The arguments are presented as stated by the parties, but the liability conditions are in number of four, as we already pointed out at no. 2. See also, Boroi, G.; Stănciulescu, L. *Instituții de drept civil în reglementarea noului Cod civil*. Bucharest, Editura Hamangiu, 2012, pp. 239-255. Stătescu, C.; Bîrsan, C., *Drept civil. Teoria generală a obligațiilor*. Ediţia a 9-a, Bucharest, Editura Hamangiu, 2008, pp. 183-184.

3. The Judgment of the Court of Appeal

Our analysis continues with the decision of the Court of Appeal. The Court allowed the appeal and partially reversed the sentence of the court below, but granted the Bank a smaller amount of money than it claimed.

For easier understanding of the court's legal reasoning, we will recall that art. 304[1] of the 1865 Civil Procedure Code (under which the case was heard) granted to the court the power to rehear the case.

The Bank's legal action was filed based on the assertion that the tort may result although the liquidator committed a lawful act under its jurisdiction. In the case, the alleged fact was the measure taken by the liquidator to exclude the Bank from participation in the auction. Both parties agreed and the court held that the liquidator has the legal power to sell the debtor's assets – according to art. 25 letter i) of the Law no.85 of 2006, currently art. 64 letter. i) of the Law No. 85 of 2014. Therefore, the liquidator can check the compliance with the sale rules and may decide to exclude any tenderer from the procedure.

However, the exclusion measure cannot be taken in any condition (only as a form of expression of the liquidator's will), but it must be in accordance with the law. In order to ensure this compliance, the measure is censored by the court. In the case, the measure, although permitted by law (as an abstract act), was irrevocably abusive, and was annulled by the court (as a concrete act). In other words, under the appearance of legality, the liquidator committed an abuse, an illegal act.

Generally, any tort creates the obligation to compensate for the damages (according to art. 1349 of the Civil Code – Law no. 287 of 2009[1], previously provided by art. 998-999 of the Civil Code of 1864). This civil (patrimony) liability occurs regardless of whether the person has committed an act or has refrained from committing one that he/she should have done (abstaining).

Art. 22 par. 4, and art. 24 par. 1 of the old Insolvency Law regulates a special form of tort liability but, by separate regulation, the solution of liability for both action and abstention has not been changed. Therefore, by the "failure to perform the duties of the liquidator", the law means both the abstention and the realization of an act that has only the appearance of legality, being in fact unlawful.

It is worth underlining the comparison made by the liquidator between his actions and those of the syndic-judge. He pointed out that, as the syndic-judge fails to answer for its judgments reversed by the court of appeal,

[1] Republished in the Official Gazette of Romania no. 505 of 15 July 2011.

neither the liquidator should do so in respect of the acts committed during the proceedings. He, therefore, claimed an alleged immunity similar to that of the judge.

The argument is ill founded because the syndic-judge, as judge, is responsible for all the sentences he passes. His liability is patrimonial, according to art. 96 par. 2 of the Law no.303 of 2004 on the statute of judges and prosecutors[1], when the judge sit in bad faith or with serious negligence. We observe the similarity of regulation, as for both the liquidator and the magistrate, the guilt can take the form of bad faith or negligence. So, the liquidator is also responsible for all the acts he commits.

In order to upheld that the liquidator committed tort, the court checked if the legal conditions have been fulfilled. The condition of existence of an illegal act is fulfilled because the decision that declared the Bank's exclusion from the bidding procedure to be illegal is final; therefore, the misconduct is the exclusion measure itself.

The condition that the liquidator be guilty is also fulfilled, as the Law no.85 of 2006 requires the author's bad faith (the intention) and the final decision uphold that the exclusion measure was abusive, so intentionally committed by the liquidator.

In regard of the damage, the appellant argued that it existed and was equal to the valuation price of the property sold. The Court of Appeal agreed with the existence of the damage, but stated that it cannot predict at what price it would have been sold the possession if the Bank and the other bidder (the adjudicator) participated together in the auction. But, in such case, the price should have been at least equal to the value offered by the bank (¾ of the valuation price of the property) and, in order to adjudicate, the actual adjudicator would have had to offer more. However, in the absence of the competitor, the adjudicator offered less, so there is a difference that constitutes the basis of the damage suffered by the Bank.

The Court did not accept the full valuation amount of the asset as the minimum value that could have been obtained by auctioning, subject to the participation of the Bank, since, in order to adjudicate, the actual adjudicator should have provided more than the Bank, therefore no more than ¾ of the valuation price, but not over the whole valuation price. Or, trying to make an estimate of the amount that would actually have been put into the auction brings us to assess the price at which the good would have been sold, had the Bank participated in the auction together with the

[1] Republished in the Official Gazette of Romania no. 826 of 13 September 2005.

other bidder, and thus to violate the authority of the previous judgment (which has determined that such an evaluation is not possible).

The Bank, trying to substantiate the amount of compensation claimed, also argued that the valuation price is even the market value of the good. In reality, market value is the least predictable of the values that can be assigned to a possession. For example, in the case, it could have been established only by conducting a competitive bidding (i.e. in the presence of at least 2 serious competitors, for example the Bank and the other bidder). Had it accepted the appellant's argument, the court would again have been in a position to estimate the price at which the good would have been sold in the absence of the abusive act of the liquidator, so it would have violate the previous judgment.

The court agreed that the damage was suffered exclusively by the Bank, although it was not the only creditor of the debtor, since it had a security related to the property and a claim greater than its valuation price, so the whole price was distributed to the Bank (according to art. 121 of the old Insolvency Law, now art. 159 of the Law no.85 of 2014). Therefore, the Bank alone is entitled to the full amount of the damage.

In both situations – the hypothetical participation in the tender and the actual absence of the bid – the Bank had to bear, from the price obtained for the good, the selling and procedural expenses. In the case, these costs were assessed (by unqualified reports of the liquidator), so they were deducted from the previously recorded value of the loss. Only this last result is the actual damage suffered by the bank (and is lower than the claim in action).

The legal doctrine emphasizes that in order for the damage to be recovered, it must not have been covered yet, because reparation of the damage has the purpose to completely eliminate the effects of the tort and not to create a source of additional income[1]. From this perspective, in the case, the most appropriate form of repair would have been to revert the successive transfers of the property sold and to return it to the debtor. However, an earlier claim in this respect had already been set against by the court, so there was no form of reparation for the damage.

The Court of Appeals also rejected the liquidator's argument that there was unjust enrichment of the Bank, since the compensation only covers that part of the loss (the possession) that could not be obtained by the Bank, due to abusive elimination from the auction, and not the part actually obtained (the price paid by the auctioneer minus the expenses).

[1] Stătescu, C.; Bîrsan, C., *op. cit.,* pp. 198-201.

The fourth condition – the causal relation between the action and the damage – was also fulfilled: the failure of the appellant to participate in the auction (as a result of the unlawful act committed by the liquidator) resulted in the adjudication of the building at a lower price than it would have been in the case of the Bank's participation (and the amount itself is the loss suffered by the court). The court concluded that the conditions for the liability of the liquidator were fulfilled, thus allowing the appeal and reversing the first instance judgment in that it granted to the Bank an amount of money – to be paid by the liquidator – but less than stated in the complaint.

4. Conclusions regarding the Liability of the Judicial Liquidator

The case analysis allows us to formulate some conclusions regarding the involvement of the (special) tort liability of the liquidator.

Firstly, the illegal actions are also included in the tort category of "non-fulfillment of the duties provided by the law". The conclusion is important because, from the formulation of the law (the "failure to perform the duties", it appears that only the lack of action is punishable (the omission in the sense of the absence of any material act), while the realization of an act, albeit unlawful, goes beyond the sphere of the law[1]. We agree with the court's conclusion that not only the absence of any material act (inaction), but also actions in the form of acts that are only apparently legal (but found to be contrary to the law), should be considered as not fulfillment of the duties. In the case, there was a material act (the disqualification of the Bank from the auction), but it had a value of failure to perform an assignment (the task of analyzing the fulfillment of the conditions for bidding and eliminating those who do not fulfill them) the illegality of which has been established.

The legal doctrine emphasizes that liability is related to the failure to perform an activity or to the failure to take action when the activity or measure has to be taken by a person, and there is a legal obligation not to remain passive[2]. Examples of torts that accrue liability include the omission to signal the danger of an accident involving a ditch dredged in a street if the accident occurred, and the failure of the medical practitioner to refuse medical attention to an injured person resulting in his death. But what happens when the danger of an injury is signaled, but in a wrong manner

[1] For a whole analysis of the liability, see Stătescu, C.; Bîrsan, C., *op. cit.,* pp. 227-228.
[2] *Ibidem*, p. 228; Bulai, C.; Filipaş, A.; Mitrache, C., *Instituţii de drept penal*. Bucharest, Editura Trei, 2001, p. 28.

(the warning sign is placed too far away from the trench) or when the doctor gives care but unfit and the injured person dies? Liability will be related to action or to the lack of action? As can be seen, the answer to this question has no practical effect, since the wrong signal has the same consequence as the lack of signaling (i.e. the accident), and the failure to provide care has the same consequence as giving some wrong (i.e. the death). The law covers all situations, either by failing to perform the obligation or by failing to do so (art. 1349 of the Civil Code).

From the same perspective, we stress that although the wording of art. 998 of the 1864 Civil Code was in the sense that it attributed liability to "any tort" causing damage, it has never been concluded that the liability was excluded in the situation the author did not commit an action, but only abstained from; in conclusion, the law has always understood both action and lack of action.

Similarly, but from a reverse perspective, the court has determined that "failure to perform an action" is also understood to be contrary to the law. In practice, the court held the liquidator's obligation to perform his duties in accordance with the Insolvency Law. The solution is logical, but the expression is not superfluous, given the argument put forward by the liquidator in the present case. If we did not accept this solution, it would be sufficient for the liquidator to carry out a material act, whatever it may be, even an obviously abusive one, in order to avoid liability, invoking the existence of the act and thus the failure to fulfill the condition about a "non-performance attribution." The purpose of the law is obviously the other, namely that the liquidator performs his duties according to the law and not in any form and even less in an abusive one.

We also notice that, in the desire to be as explicit as possible, the legislator has come to create the imprecision of the law, imprecision speculated by those for whom there is a risk of accountability. Equivoque is also taken over by the new Insolvency Law, so that, until a possible change in the text, the situation will generate new litigation.

Secondly, in the case, the unlawfulness of the act committed by the liquidator had already been found by a previous final decision. However, the question arises whether this unlawful character may be upheld by the court judging the very act of attracting the liquidator's liability. We appreciate that the answer is affirmative, since the law does not make any distinction as to when the material act is abusive, and where the law does not distinguish the interpreter of the law must not distinguish[1].

[1] Boroi, G.; Anghelescu, C. A., *Drept civil. Partea generală.* Ediţia a 2-a revizuita si adaugita, Bucharest, Editura Hamangiu, 2012, pp. 43-50.

Thirdly, it should be stressed that both the liquidator and the judicial administrator are subject to the tort law. The liability of the liquidator is governed by a referral rule (art.63 par. 1 of the Law no.85 of 2014, respectively art.24 par. 1 of the old Insolvency Law) regarding the civil liability of the administrator (provided by the art. 60 par. 2, 3 of the Law no.85 of 2014, art.22 par. 3-4 of the old Insolvency Law). The clarification is important as attributions of capitalizing the debtor's assets – the ones that determined the disputed litigation – has not only the liquidator, but also the judicial administrator (in this respect, the provisions of art.39 par. 6 of the Law no.85 of 2014 on the sale of non-essential assets for reorganization to cover procedural expenses).

Last but not least, we underline that the existence of the liability of liquidator (and of the judicial administrator), based on art. 60 par. 2, 3 and art. 63, par. 1 of the Law no.85 of 2014, has an exceptional nature. The rule, explicitly introduced by art.57 par. 11 of the Insolvency Law, is that the insolvency practitioner, as body which applies the procedure, shall not be sanctioned or obliged to pay any legal costs, fines, damages or any other amount, by the court or by other authority, for facts or omissions imputable to the debtor.

The provision aims to eliminate some hesitations and inconsistencies in judicial practice. For example, there were sentences compelling the insolvency practitioner to incur personal costs against the adverse party when he brought actions to bring personal liability to the members of the debtor's governing bodies (under art. 138 of the old Insolvency Law) or to cancel the fraudulent acts or operations of the debtor to the prejudice of the creditors' rights (based on art. 79-85 of the old Insolvency Law).

5. Conclusion

In conclusion, careful consideration must be given to situations in which the insolvency practitioner is to be held liable and must be distinguished from the cases in which the patrimonial liability is borne by the debtor himself. However, for the case considered, we consider that the solution would have been the same, even in the case of the application of Law no.85 of 2014, the conditions of special civil liability being clearly fulfilled.

6. References

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