

Bankruptcy Proceedings and the Violation of Shareholders' Rights in the Context of Special Legal Protection Conferred by Copyright Law in Romania

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Abstract

Insolvency law creates a privileged position of the creditor, which is provided with a lever to manipulate the property while the debtor can deprive shareholders of the wording of any application or appeal, and thus violating the management of property rights, arising from the right ownership' on the social shares. The lack of Romanian legislation gives no possibility of the shareholder to protect his property rights in case the company loses its legal personality while it still has assets with a non-concluded legal regime until the bankruptcy procedure is closed. Therefore, as the same problem appears in case a company which acts as a shareholder in another legal entity lose its legal personality, it has to give effectiveness to the related civil norms of inheritance, other than the remaining assets will remain without owner.

Key Words: *film producer, insolvency law, legal personality, property right*

Introduction

Although the Romanian Law no. 85/2006 of bankruptcy is considered to be in line with European standards, it contains gaps in the legal protection of shareholders rights of a bankrupt company. Such a company can be a victim of abuse and bad faith of the liquidator, as this is the one who by law exclusively over management duties property (rights and obligations), and the courts.

From all over the law, with the rise of the right of administration of statutory manager (court ordered by the sentence of bankruptcy), the law provides no legal wording of the statutory manager of any application or appeal. Legislation governing insolvency proceedings/bankruptcy is ineffective against the express purpose set out in art. 2 Law 85/2006, that "a procedure to cover liabilities collective insolvent debtors."

Basically, for the shareholder/administrator, there is no legal possibility (in the sense of quality to bring proceedings) that it can censure the abuses committed by the liquidator if he does not verify claims or if he does not exercise the appeals. This legislative gap is itself prejudicing the right of administration on company property (on the assets).

Specifically, the law itself creates a privileged position of the creditor, which is provided with a lever handle debtor assets while depriving shareholders of the opportunity formulation or review of any application, and thus the violation of property management, resulting in ownership of shares.

In such a situation, under the pretext of lack of quality to bring proceedings, it creates the premises as belonging ownership itself, ultimately, shareholder through the holding of shares, to emerge from protection under the law, thus masking the possible judicial procedures of confiscation/nationalization/requisition of property, the state made by alleged representatives - public institutions.

Case study prerequisites

Thus, in a case study, the application registered on the role of the Bucharest Tribunal - Insolvency Section, a public institution (the text „C.N.C.”) with the object of management of filmmakers from Romania, called for opening of insolvency proceedings against a company focused on the film production activity (the text „Company”), a company in which one parent was a producer and film works.

The company and its shareholder in their own name, together with co-producers international, have made a feature film completed and running today.

Initially, the C.N.C. lent (in the form of a credit agreement) the producing company, to complete the film. Subsequently, this credit agreement was entered into an addendum. According to art. 2 of this addendum, "The negative of the film, which was the production company's ownership, passes to the Romanian State ownership and C.N.C. management."

Because of this addendum intervention, but also because C.N.C. has created a series of damage the producer, the failure to timely pay the installments of the loan agreement, the company producing sued this institution. The first trial ended with the refusal of the proceedings covering contractual liability, given the intervention of extinctive prescription.

During the course of insolvency proceedings, the debtor claims to recover and maximize its assets, the receiver appointed by the insolvency court and associate producer as special administrator, have filed a new application for the proceedings of the C.N.C.. At first instance the application was rejected as being res judicata ruling from the previous case, the sentence was abolished in the appeal of the appeal, the Court of Appeal decision, a decision upheld by the decision of the High Court of Cassation and Justice, with the consequence of sending the first instance to resolve the merits of the case

By this application of summons, the defendant has applied for the C.N.C. to pay money in compensation under liability, absolute nullity part of the addendum to the contract of credit, namely art. 2, 3, 5, and under the provisions of Law no. 8 / 1996 (special law on copyright), recognition of property rights arising from a producer of the cinematographic work and consequently ordered the defendant to pay the amounts due to producers of film distribution. Requested and repair damage caused producers, following the court order the defendant to pay compensation for material created negative economic consequences and assets of the company to pay damages for the loss of image created.

At one time the file the bankruptcy court, bankruptcy court was evident that the process the company into insolvency act as a plaintiff-creditor was still pending before the High Court of Cassation and Justice, depositing the evidence in this regard including the claims which form the subject of that file, whose resolution to hang herself whether or not a state of insolvency, and return the assets of the company to negative film - C.N.C. confiscated property, the lender ordering the company to enter the procedure.

To these issues is requested suspension of the trial pending resolution of bankruptcy cases at HCCJ merits. This request was made and by suspending the receiver for a previous term, but remains unresolved.

Despite this situation of law, the bankruptcy court rejected the request for suspension reasons that "disputes that are not critical to bear debtor insolvency proceedings if the debtor claims that have been established according to the table became final." At the same time, the court ordered the closure procedure and removal company in the Trade Register. C.N.C. appeal by the HCCJ was rejected by the date the cancellation decision was published, when, by law, the company loses its legal personality.

In this context, the C.N.C. file acts as debtor-defendant returned to the fund at the Bucharest Tribunal hearing. Closing sentence unlawful to insolvency proceedings, which put the company and its shareholder in a position to lose the rights arising from associates, including ownership of the film negative, shareholder-special administrator appealed. Criticism of illegality consisted essentially in that, according to Law no. 85/2006, insolvency proceedings cannot be closed, with the consequent cancellation of the debtor in the Commercial Register, as long as wealth (assets) company, which will enter the amounts claimed by the company in insolvency proceedings that are pending in court pool, is not cleared.

In this respect, the liquidator is required to maximize the wealth of the debtor, by capitalizing on its due rights (Article 25 letter g Law no. 85/2006), in the interests of creditors and members of company who are entitled to the assets of the company or residual amount. Also in the property / asset to be included VAT recovered, for which the requested documents were submitted to the Financial Administration, the recovery is not completed by the liquidator. Not clarified the situation of wealth (assets) the debtor, which includes both rights and copyrights debt due the debtor as a film producer, the court ruled background in breach of art. 131 al. 1 of Law no. 85/2006.

Bankruptcy court had regard to the specific business activities conducted by companies in insolvency and thus applicable law, which copyright law no. 8 / 1996 and film law that gives special protection and rights of producers of cinematographic goods. Thus, the company in insolvency proceedings is the producer of a movie completed in 2005. The company as a producer makes them be recognized by Law no. 8/1996 all rights and prerogatives of patrimonial character arising from work created – international co-production feature films.

The company holds a right related to copyright, is non-property rights and economic rights that are due to the exploitation of film rights whose duration is, by law, 50 years after first premiere.

According to art. 25 of Government Emergency Ordinance no. 67/1997, in force at the time of conclusion of the C.N.C. addendum (and taken over by the new legislation the cinematography), "*ownership of negative and all exploitation rights belong to the producer of the film*".

According to legislation, the producer - the company into insolvency deserves a share of 12.5% of the full film's budget for its implementation. In other words, the producer is entitled to cast future income for a period of 50 years and ownership of the negative film - heritage debtor, producer of the film holding, therefore, goods/assets. These issues were evident in the first court of bankruptcy, but there were ignored, being wrongly said that the company has no assets (even if these are, obviously, considered as non-tangible goods).

Ruling for the purposes of closing the proceedings, the court ordered also the debtor company removal from the Register of Trade, which results in termination of the company's capacity utilization and thus unable to continue proceedings in progress, aimed at satisfying the creditors, as and distribution of any goods/waste amounts to the shareholders, after the complete liquidation of the asset.

Questions to be answered

As the Romanian law does not provide the possibility of restoration of the dissolute company, as the The Companies Act (2006) provide in U.K. (Part 31), and also as the Romanian Courts are not able to pronounce onto the effect of restoration to the register where property has vested as *bona vacantia* (even if the in the analyzed case the Romanian state did not declare *bona vacantia*), some legal questions raised.

The question naturally arises in is what happens to assets whose legal situation is not clarified at the time of the closure procedure, the more since the company's assets are included not only economic components but also components of non-property rights related to copyright, arising from a producer of a movie?

In other words, who will exercise these rights of the author and to whom ownership rights are transferred, in the context of the insolvency procedure is closed, the company is struck, and the

court decision does not provide on the distribution portion of unused asset? In this context, the sentence under appeal could be considered as fair in relation to the interests of creditors, but evidently, judgment consequences prejudicial to the interests of shareholders.

Thus, the sentence under appeal may contain elements of legality only if the appeal court, admitting the appeal, it ruled transmission assets consisting of rights related to copyright and ownership of the negative, ordering the closure procedure under art. 133 of the Law no. 85/2006 (under which, if residual values, they are passed in ownership – individuals to the shareholders, according to the rates of participation in capital).

Another possible solution could be as the court enforces the provisions of art. 237 al. 10 of the Law no. 31/1990, republished, sending goods to the shareholders, as another possible measure to protect these specific rights protected by Law no. 8/1996 and the cinematographic legislation.

It was also shown that the judgment contains foreign reasons, as the court expressly retaining that "in terms of creditor litigation bore C.N.C. cutting for recovering debts, the debtor's request was rejected, the right of action is barred."

Times, because that was to be resolved on the merits by the Court, following the quashing of reference, there was no prescription. With all these allegations, the court of appeal dismissed the appeal without going into its background, motivated by the fact that shareholder, acting as administrator of the company, is not a legal appeal of its own, being a third party to insolvency proceedings, regardless of whether he was personally cited as defendant throughout the case, given the quality of special administrator.

In this context, it is easy to note that ownership' rights on the film cannot be defended in any way, it remains in state ownership, although the extent of taking over the negative of the film (and thus of economic rights and prerogatives of ownership resulting negative) defies the law.

Moreover, with the object to a retrial ordered defendant to pay damages, although the shareholder-producer himself made the request to intervene in the above self-interest before the removal company from the trade register becomes irrevocable, the court acknowledged lack of capacity utilization than the company, raised by the C.N.C., rejecting action. The sentence became final, dismissing the appeal brought by a person without standing active, motivated by the fact that shareholder-producer, although the owner of demand for action, not acquire the status of „party“ in the procedural sense, the demand for intervention being discussed with priority with lack capacity of use of the company.

The reason on which the shareholder should act

Analyzing the content of the preamble of the loan contract that caused the dispute forming the subject of the case, results that the parties of the contract are the company, as a beneficiary, and C.N.C., as a creditor. At the time the addendum was signed, the parties intended to

supplement the financial support of the C.N.C. to complete the film, making it clear that the legal nature of the addendum to the credit contract is the same parent, loan, with the specificity required by law applicable in the field.

C.N.C. as a "creditor" has imposed certain requirements for such financial support. The first condition is the one provided by art. 2, namely that the negative film "goes the Romanian state ownership." According to the author, we are faced with a forced crossing - requisition / expropriation / nationalization, etc., as the contract does not provide any way to compensate the film producer for disposal by him of ownership of the film, for third parties - the Romanian state.

It is clear that it was not faced a donation or even an offer of donation, as it is well known that, according to the Romanian provisions, ad validitatem donation form is required to be authentic and accepted by grantee. None of these actions has been met. For these reasons, we consider that this clause has no effect, the consequence being that the producer retains the rights deriving from ownership of the negative. In terms of art. 3, 4 and 5 of the addendum, the conditions imposed by the C.N.C. focused exercise by it, upon completion of the film, of all rights to exploit the full recovery film to financial support.

Moreover, by art. 5, C.N.C. is declared exempt from any obligation to the other co-financiers Romanian with whom the producer have cooperation agreements. According to art. 23 of GEO 67/1997, in force at the time the addendum (and taken over by the new legislation the film): "(1) Loans under this emergency ordinance shall be refunded the National Office of Cinematography in revenue through the use or exploitation scenario or film, made with these loans. (6) Where an economic operator, natural or legal person, or distribution contributes to a movie with more than 10% of the budget, the recovery of the contributions is a priority. "

The provisions of art. 3, 4 and 5 of the addendum are the expression of a dominant position of C.N.C. in the contractual relation, highlighting the pressures on the producer to sign the addendum. From this point of view, his consent was vitiated. Moreover, corroborating these contractual provisions reveals that fully C.N.C. approaches and their priority distribution rights from the film, while the producer had a contribution to film financing over 10%, while other donors was 70% .

Participation in financing the film with a share of over 10% gives the producer the right provided in imperative norms to prior recover the contributions. Appropriating and all rights arising from the operation of the territories listed in the film co-production contract until full recovery of financial support, C.N.C. puts the producer unable to receive any income from the production of the cinematographic work. Since the art. 2 provided that the negative film passes to the state, that even after recovery of financial support will not benefit the film's producer, ever, no income.

Or, C.N.C., abusing his position violated by inserting in the convention of art. 3, 4 and 5, just the mandatory rules of law, the penalty imposed being the absolute nullity of such contractual provisions.

It is not legally argued that we are in front of an assignment of rights pursuant to C.N.C., as the operation is provided by the Law no. 8/1996 of the rights of the author, as art. 41 specifically provide that "the contract of transfer of economic rights shall provide rights transferred and specify, for each of them, use patterns, timing and extent assignment and pay the copyright owner. The absence of any of these provisions shall entitle the interested party to request cancellation of the contract. "

From the content of the addendum, it does not allow any element to its interpretation as a contract assignment. In this case, negative film was never taught by the producer based on the C.N.C. minutes, which was acquired by C.N.C. directly from Kodak laboratories. In the standard copy, the producer has not been convened to agree on its final form it, as required by legal provisions. Standard copy form will result unilateral by C.N.C., which, after lifting it from Kodak laboratories, organized premiere.

The consequences of clauses inserted in the addendum deal to the conclusion that these clauses do not have a legal and moral question/purpose, which would have required their absolute nullity. In these circumstances, the request for release of insolvency proceedings and to attract liability administrator, while the C.N.C. will be able to suffice objective of the company's future revenues, resulting from the exploitation film, available only to them, is an abuse, sanctioned by the decision, which became irrevocable, terminating the proceeding, removal from the register of trade and thus to remove indirect means of protecting property rights in company - remain in illegal "possession" of C.N.C..

Conclusions

Summarizing the facts presented, despite the fact that the cause was tried by a court, it did not rule on specific civil rights violations, but by way of exception, court decision which leaves amid empty right that was violated.

Bankruptcy court's decision violates the right under art. 13 of the European Convention on Human Rights, at least by depriving shareholder-producer of the opportunity to effectively address a court, by suppressing the exercise of the appeal against the unlawful decision terminating the insolvency proceedings of the company.

Decision violates the right of property recognized by art. 1 of the Additional Protocol to the European Convention on Human Rights. In its capacity as shareholder, it has a property right onto the shares, as well giving a right of ownership of social assets, consisting of all rights and obligations with economic content belonging to the company.

The creditor's claims in bankruptcy case are, at the same time, the object of judicial investigation in civil case in which this acts as a debtor. So, it's right on the claims that were entered in the table definitive claims should be considered an imperfect right. The fate of this right depends exclusively on the fate of civil action, as a rejection of the solution brought by a person without legal capacity is become predictable and, in the context of existing legal frame, defendant impossible.

Background that the court has not suspended the bankruptcy trial until the settlement of C.N.C's claims been pending file, and the insolvency procedure was completed, with the consequence of the removal company Commerce Register, the debtor's property rights and thus company's shareholder's rights were affected.

Courts have not ruled on the effects of extinction capacity utilization of the applicant during the trial, in order to clarify the legal situation of property of the remaining assets of the removed company – by finding the transmission assets and the exercise of rights on these assets to the shareholders.

This is imperative to be solved, according to the regulations which, in the absence of express provision in the commercial law regarding the transmission of goods in the cases the insolvency procedure is closed, as not being in a position of denying the law, the court is required to apply general rules transmission assets to shareholders of the company.

From this perspective, the request for intervention made by the shareholder's self-interest should have addressed in relation to his own legal interest, which was to make possible the transmission of assets to the company's followers, which are the shareholders, as in the present company's assets remaining without ownership (as the Romanian law provides certain situation in which the remaining assets are able to be declared as *bona vacantia*, and the case presented is not included).

Active standing in the trial is deeply „grafted” on the protected legitimate interest, so evaluating the quality of reporting only to the abstract quality of party to the proceedings is a wrong application of law, imposing to give efficiency to general rules on liquidation of the company, which, if the company has, after liquidation, assets (broadly, as movable as well as rights claims), they are transmitted to the shareholders, who has, indissolubly, also the exercise rights over such property, including legal means for their protection.

Even if this case is not an ordinary one, it is obvious that the Romanian law does not provide the legal frame on the case that a company lost its legal entity, but, in the same case, it has assets consisting of property rights (but also as social shares in other companies), which are not liquidated before the erasing of the company from the Commercial register.

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