Many questions arise when a contractual partner enters into insolvency. One question is what happens with the debtor's ongoing contracts when the insolvency starts? Are they maintained or terminated?

One of the main principles governing insolvency proceedings states that the debtor's reorganisation should be sought before bankruptcy. To this end, the Romanian Insolvency Law (RIL) provides a series articles supporting the debtor's potential reorganisation.

The first paragraph of article 86 RIL provides that all of the debtor's ongoing contracts are maintained following the start of the insolvency procedure, whereas all contractual clauses terminating contracts due to the start of insolvency procedure are null and void. On the other hand, based on the same article, the debtor's judicial administrator may terminate ongoing contracts to maximise the debtor's estate.

Ongoing contracts

The qualification of a contract as ongoing is of interest only when the contract is deemed useful in continuing the debtor's activity and thus increasing its chances of undergoing reorganisation.

The qualification as on-going contract entails, first, that the contract exists at the date the insolvency procedure starts. This means that the contract (i) was concluded before the insolvency procedure started, and (ii) was not terminated and/or fully executed by such date. Under Romanian case law, ongoing but unfinished negotiations do not qualify as ongoing contracts and thus do not qualify under article 86 above.

Second, the contract must be ongoing, meaning its performance is ongoing at the date when the insolvency procedure started. Nevertheless, the judicial administrator will most likely not express its option right after the start of the insolvency procedure; usually, such option is made after the administrator determines whether the contract is useful in the debtor's reorganisation. Depending on the company and its activity, and upon the administrator's performance, this usually takes from one up to several months. Thus, the contract must be also ongoing at the date when the judicial administrator calls his option on continuation of the contract.

Who is entitled to call the option?

Under article 86, the judicial administrator (or the receiver if the debtor is in bankruptcy) may call the option to continue or terminate the ongoing contract. However, the call option initiative also lies with the debtor's contracting party, who may serve the judicial administrator with a notice requesting the latter to express his option to continue the contract. Under article 86 RIL, the judicial administrator must respond within 30 days from receipt of notice. Failure to respond within this term results in the contract being terminated.
So the judicial administrator (or the receiver, if the debtor is in bankruptcy) may call the option in two ways: (i) expressly, by serving the debtor’s contractual partner with a notice to terminate or continue the contract; or (ii) tacitly, by not answering the debtor’s contractual partner's notice within the 30-day term provided by article 86, in which case the contract is deemed terminated.

"Partial termination" of the ongoing contract

The judicial administrator's option may refer exclusively to the termination or continuation of the contract. As an exception to the mandatory force of contracts, the judicial administrator’s option must be restrictively interpreted. Given the above, partial termination of the ongoing contract in not possible.

Nevertheless, it is not uncommon for the judicial administrator to try to renegotiate contracts deemed useful for the debtor's reorganisation, and terminate the contract only if the negotiations fail, always observing the principle of maximisation of the debtor’s estate.

Maximisation of the debtor's estate

When deciding whether to terminate, the judicial administrator must make a thorough analysis of the benefits of maintaining against the benefits of terminating the contracts. Such analysis/calculation must always weigh the damages the debtor might have to pay for early termination of the contract.

Effects of the call option

When deciding whether to continue the contract, the judicial administrator must ensure that the debtor has all the necessary resources, including the necessary funds, to execute its obligations under the contract. The contract will be maintained under the terms and conditions initially agreed by the contractual parties; the judicial administrator may not unilaterally amend the contract.

A question arises when the judicial administrator calls his option, namely whether such manifestation is binding and irrevocable, or revocable. Some of the legal doctrine states that once the judicial administrator has called his option, he cannot change, even if continuing the contracts becomes more costly, qualifying such manifestation as irrevocable.

But such a restrictive opinion should be tested on a case-by-case basis. For instance, if the judicial administrator called his option with a view to supporting the debtor’s reorganisation, and if the reorganisation is no longer possible and the debtor enters into bankruptcy, we deem such essential event to sufficiently support the judicial administrator’s decision to reverse course.

On the other hand, if the contract entails regular payments, even if the administrator called his option, we deem he may change his initial option if the debtor no longer has the necessary funds to pay under the contract.

Claim for damages

If the judicial administrator decides to terminate the ongoing contract, the debtor's contractual party may file a claim for damages against the debtor based on the provision of article 86 paragraph (2) RIL. In such case, the syndic judge will be exclusively competent to rule upon such claim and contractual clauses on dispute settlement and arbitration remain without effect.
The Romanian doctrine is not uniform in the treatment of such damages. One opinion is that they are subject to registration with the creditors' table without the possibility of their registration being denied as late. Other opinions qualify such damages as current (i.e., born after the commencement of the insolvency procedure) and thus subject to payment within the procedure when becoming due (i.e., once the court decision granting such damages becomes enforceable).

We consider the second opinion to correspond with reality. Since the judicial administrator is the one who has the right to call the option, and he is appointed after the insolvency procedure starts, it would be illogical to qualify the damages as being born before the start of the insolvency procedure and thus subject to registration with the creditors' table.

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