Law Review ● special issue, Decembre 2019, pp. 219-226

ABOUT THE RES JUDICATA AUTHORITY OF THE REORGANIZATION PLAN AND/OR OF THE MEASURES TAKEN BY THE JUDICIARY ADMINISTRATOR OR LIQUIDATOR WITHIN THE FRAME OF THE INSOLVENCY PROCEDURE*

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Abstract: *This paper examines the legal force of various procedural acts delivered within the frame of the insolvency procedure as regulated by Law 85/2014. The study aims to assert the res judicata effects of the syndic judge judgments and to find out if the related procedural acts approved or scrutinized by the syndic judge or issued by the insolvency administrator or liquidator during the insolvency procedure enjoy such effects, concluding that, while not all these acts enjoy res judicata, all of them have binding legal force upon all participants to the procedure and even upon third parties.*

Key words: *Private Law, Civil Procedural Law, Insolvency Procedure, Res Judicata, Reorganization Plan, Procedural Acts, Administrator/Liquidator*

Introduction

As it was noted in the dominant doctrine, the basic principle of *res judicata (*in Romanian Language - *autoritate de lucru judecat*), while enjoying a wide recognition in international law and case law, it varies, in terms of application, as between jurisdictions. While the common law jurisdictions are dividing the effects of res judicata in two categories (regarding the cause of the action and the issues already decided in previous proceedings), many civil law jurisdictions apply res judicata only to the cause of action and only to the dispositive part of the judgment or award, not to the reasons[1]. Nevertheless, since it is concerning the effects of the judgments or awards, the *res judicata* is governed by *lex fori.*

* The article was prepared for the International Law Conference, "Current Issues within EU and EU Member States: Converging and Diverging Legal Trends", 3rd edition, held in Braşov (Romania) and organized by the Faculty of Law – Transilvania University of Braşov on the 29th and 30th of November 2019. All links were last accessed on 4 November 2019.

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1 See *Redfern and Hunter on International Arbitration*, Oxford University Press, Fifth Edition, 2015, p. 559, para. 9.174.

According to Article 430 para. (1) and (2) of the Romanian Civil Procedure Code (RCPC), the judgments deciding on the merits of the case or on a procedural exception or incident enjoys *res judicata* (*autoritate de lucru judecat*), as from its issuance date, in what regards both the dispositive part and the reasoning of the judgment.[2]

The res judicata effects concern both the cause of the action (the negative or preclusive effect, preventing the parties to file the same action against the same party, in the same quality, for the same cause and object) and the legal issues decided (the positive or the conclusive effect, allowing the parties to invoke the legal issues previously decided, if they are in relation with the solution of the latter file).[3]

While these texts are only making reference to the state court judgments, there is a unanimous understanding that arbitral awards, having a final and binding effect[4], are also subject to the *res judicata*.

1. The Judgments of the Syndic Judge and the Reorganization Plan

The insolvency procedure is a judicial procedure, that meaning that it is organized and supervised, according to the law, by the judicial power. Within the frame of the insolvency procedure, the competent court (Tribunalul) will perform its legal responsibilities through the syndic judge, which is a specialized magistrate, assigned to an insolvency case, in accordance with the rules of judicial organization.

According to Article 45 of the Insolvency Law[5], the syndic judge will render various judgments in order to decide upon the matters brought to his/her attention, like the opening or closing of the procedure or the ruling upon different requests filed by the debtor, the administrator/liquidator or creditors. All the judgments handed down by the syndic judge are, undeniably, enjoying the res judicata effect, insofar they are deciding, in whole or in part, on the merits of the case or are ruling on a processual exception or any other procedural incident.

According to Insolvency Law, the judicial reorganization of the insolvent debtor aims to allow for the payment of its debts in accord with a reorganization

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[2] Article 430 para (1) and (2) RCPC read as follows: (1) *The court judgment that is deciding, in whole or in part, on the merits of the case or it is ruling on a processual exception or any other incident, has, as from its issuance, res judicata regarding the decided issue.* (2) *Res judicata regards the dispositive part as well as the reasons on which it is based, including those that are deciding on a litigious matter.*

[3] Article 431 para (1) and (2) RCPC read as follows: (1) *No one can be sued twice, in the same quality, for the same cause and for the same object.* (2) *Any of the parties may oppose the issue previously decided in another litigation, if it is related to the solution of the latter.*

[4] Article 606 RCPC reads as follows: *The arbitral award communicated to the parties is final and binding.*

[5] Insolvency Law is Law no. 84/2006 regarding the insolvency procedure, under whose *imperium* was opened the insolvency procedure of the Claimant.

plan, which may provide (a) for operational or financial restructuring of the debtor, (b) for corporative restructuring through the modification of the share capital as well as (c) for contraction of the activity of the debtor through total or partial liquidation of the debtor estate [Article 3 (1) pt. 54 of the Insolvency Law].[6]

The reorganization plan is approved by the creditors assembly and it is confirmed by the syndic-judge, who is endorsing the reorganization plan by rendering a judgment (the Confirmatory Judgment), which, according to the law [Article 46 (1) of the Insolvency Law], is executory and is subject only to appeal.

Without any doubt, the Confirmatory Judgment of the syndic-judge is enjoying every effect of a court decision, including the *res judicata* authority. Article 430 RCPC states that the court decision that resolves, in whole or in part, the substance of the case or it is ruling on a procedural exception or on any other incident has, as from the ruling, the *res judicata* authority on the settled issue. The *res judicata* authority concerns both the dispositive part as well as the reasoning that decisively supports the solution, including those considerations through which a litigious issue has been resolved.

According to Article 431 RCPC there are two main effects of the *res judicata* authority: one negative and one positive. The negative one is that nobody may be sued twice in same quality, for the same cause and for the same object. The positive one is that any party may oppose the matter judged in another previous case, if it has a connection with the latter case.

As any other judgment, the Confirmatory Judgment is enjoying *res judicata* authority both for the solution givens as well as for the decisive consideration on which that solution is grounded. That effect is a temporary one starting from the ruling until the solution of the appeal and a final one from the moment when the Confirmatory Judgment has become definitive.

Under these circumstances, the problem that needs an answer is if the reorganization plan confirmed through the Confirmatory Judgment is enjoying the same *res judicata* effects as the judgment itself? There are several arguments that support a rather affirmative but nuanced answer to that question.

As soon as the judgment delivered by the syndic-judge has entered into force, the creditors' claims and rights are amended according to the previsions of the plan [Article 140 (1) of the Insolvency Law]. That means that the provisions of the

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[6] Article 5 (1) pt. 52 of Insolvency Law reads as follows: *The judicial reorganization is that procedure that is applied to the insolvent debtor, legal person, for the payment of its debts, according to the claims' payment programme. The reorganization procedure involves the preparation, approval, confirmation, implementation and compliance of a plan, called a reorganization plan, which may provide, without limitation, together or separately:* a) *the operational and/or financial restructuring of the debtor;* b) *the corporative restructuring through the modification of the share capital;* c) *the contraction of the activity of the debtor through total or partial liquidation of the debtor estate*

reorganization plan attain legal force as results of their sanction through a court judgment, delivered in the conditions provided by the law[7].

As mentioned in the legal doctrine, this effect is not a result of the approval of the plan by the assembly or meeting of the creditors, but a direct consequence of the confirmation given by the syndic-judge to the plan. As long as the syndic-judge does not proceed to the analysis of the compliance of the plan and of the voting by the creditors with the mandatory requirements of the law, validating the whole procedure by his/her judgment, the vote of the various creditors' categories does not have the power to generate the reorganization, even if the plan is approved by those creditors.[8]

Another legal scholar mentioned that, as a result of its confirmation through a definitive judgment, the reorganization plan becomes mandatory for the debtor and all his/her creditors whose claims are born before the opening of the insolvency procedure, even if part of the creditors have voted against the plan.[9]

On the other hand, as a legal scholar, I have mentioned[10] that the judgment confirming the plan is similar to the court decision validating the agreement of the parties to end or to settle a court or out of court dispute, as provided for by Article 438 RCPC. But, unlike the later judgment, which is incorporating the parties' settlement the Confirmatory Judgment does not incorporate the reorganization plan, which is still attached to the confirmation judgment, although not necessarily in its substance.

Although, when confirming the reorganization plan, the syndic-judge is not analysing its intrinsic merits but, merely, the meeting of all the conditions required by the law in order to reach that stage of the procedure, he is entitled to take the opinion of an insolvency specialist regarding the feasibility of the plan and, consequently, to reject the confirmation of the plan if the specialist's opinion is negative.

In this regard, the Romanian courts have determined that the syndic judge may refuse to confirm the plan only when the plan is missing, obviously, mandatary mentions provided by the law or when the present mentions lack,

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[7] According to the same Article 140 (1) of the Insolvency Law, in case of the opening of the bankruptcy procedure (i.e. the liquidation of the assets of the debtor) the receivables of the creditors will be established through the definitive table of receivables, approved by the syndic judge after deciding upon all the appeals filed by the creditors and after deducting the amounts already received by the creditors through the reorganization period.

[8] V. Moga-Shaban, *Short considerations regarding the possibility to amend (complete) the reorganization plan before the phase of the confirmation to be given by the syndic-judge*, 22.07.2017, available at https://www.juridice.ro/495431/scurte-consideratii-asupra-posibilitatii-completarii-unui-plan-de-reorganizare-inaintea-etapei-confirmarii-de-catre-judecatorul-sindic.html

[9] See N. Țăndăreanu, *The Judiciary Reorganization Procedure (Procedura reorganizării judicare)*, All Beck Publishing House, 2000, p. 215.

[10] See I. Schiau, *The Legal Regime of the Commercial Insolvency (Regimul juridic al insolvenței comerciale)*, All Beck Publishing House, 2001, pp. 212-213.

manifestly, any substance; if those mentions exist and the analysis of the plan involves a choice of opportunities, this task exceeds the legal competencies of the judge, being the solely attribute of the creditors, which have approved the plan.[11]

Consequently, by confirming the reorganization plan, the syndic-judge confirms not only the meeting of the required procedural conditions but also the content of the plan, although he/her has very limited competence to interfere with that content.

In addition, the confirmation of the reorganization plan is one of the principal duties of the syndic-judge, as provided by Article 45 (1) letter l) of the Insolvency Law. According to the paragraph 2 of the same Article, the duties of the syndic judge are limited to the judicial control of the activity of the insolvency administrator and/or liquidator and to the processes and requests of judicial nature that are related to the insolvency procedure.

That means, clearly, that when confirming the reorganization plan the syndic-judge is not performing a simple administrative task but one of its principal judicial duties, delivering a judgment whose object and/or solution regards the fate of the reorganization plan.

More, there is an indestructible connection between the Confirmatory Judgment and the reorganization plan. Naturally, any amendment of the confirmed reorganization plan, will not enter into force unless it is confirmed by the syndic-judge. Also, the termination of the reorganization plan, either successful or aborted, will be decided by the syndic-judge, through a judgment, as provided for by Article 145 (1) of the Insolvency Law.

All this argumentation may allow the conclusion that the content of the reorganization plan, once confirmed by the syndic-judge, becomes inwardly linked to the Confirmation Judgement and enjoys the same effect as this judgment. When confirmed, the reorganization plan is not, anymore, an autonomous document approved by the creditors, but part of the Confirmation Judgment, even if it is not materially incorporated in that judgment and from that moment on it will be considered as a final and irrevocably judgment. Therefore, as part of the Confirmatory Judgment, the confirmed reorganization plan enjoys the *res judicata* authority.

2. The Judgments of the Syndic Judge and the Acts or Measures of the Insolvency Administrator or Liquidator

On the other hand, when examining the effects of the measures adopted by the insolvency administrators or liquidators, in fulfilment of their procedural duties, one must, obviously, observe that they are not delivering court judgments, since

[11] Timişoara Court of Appeal, civil Section II, *civil Decision no. 1215 of 18 June 2012*, available at https://lege5.ro/Gratuit/gm4danjrgi/procedura-insolventei-hotarare-de-confirmare-a-planului-de-reorganizare-judiciara-critici-de-oportunitate-consecinte.

they are not magistrates but just representatives or proxies of the insolvency procedure, subordinated to the syndic-judge.

Still, according to Article 59 (5) of the Insolvency Law, the creditors, the insolvent debtor and any interested person may dispute/challenge the acts and the measures of the insolvency administrator or liquidator, in the special limitation period affixed by the law. If these persons do not file an opposition in due time, then they are barred to do so in the future.

That means that the acts and the measures taken by the insolvency administrator or liquidator become final/definitive as well as mandatory and produce similar effects to the res judicata that is:

(a) Any party may oppose the acts generated or the measure taken by the insolvency administrator or liquidator during the insolvency procedure, if there is a connection between these acts or measures and a procedural or substantial issue to be decided by the courts of justice or arbitration and

(b) The said matter cannot be revisited in a second case having the same object and cause, involving the same parties, in the same qualities.

But, in my opinion, this effect of the acts and measures of the insolvency administrator or liquidator becoming binding and final, is not a proper *res judicata* authority; it is rather a consequence of the joint action of various causes, as presented herein after.

1. The first circumstance that requires consideration is that linked to the expiry of the limitation period that deprives the interested parties of their right to ask the court to repeal the acts and the measures taken by the insolvency administrator or liquidator. Indeed, Article 59 (6) of the Insolvency Law state that the debtor, any of the creditors and any interested (concerned) person may file an appeal against the measures of the insolvency administrator (or liquidator), in 7 days as from the filing of the administrator's periodical report. This seven-day term is a special limitation period, which, if not observed, terminates the right to appeal of those persons, with the consequence that the acts and measures of the insolvency administrator or liquidator become uncontested and incontestable, i.e. definitive and binding.

2. On the other hand, there is a legal presumption that the acts and the measures of the insolvency administrator or liquidator that were not contested by the debtor, creditors or any concerned person are valid and correct. For instance, according to Article 102 (9) of the Insolvency Law, all the receivables admitted and registered by the administrator, if not contested by the concerned parties, are deemed to be correct and valid. Likewise, according to Article 112 (2) of the Insolvency Law, after the registration of the final receivable list (including undisputed receivables and those admitted or modified by the syndic-judge's judgment, upon an appeal of the concerned parties), only the creditors whose claims were registered in the list may participate to distribution of the sums recovered during the insolvency procedure. More, the undisputed acts and

measures of the insolvency administrator or liquidator may be revoked by the syndic-judge only if it is proved that they were result of forgery, fraud or essential error [Article 113 (1) Insolvency Law].

3. A significant reason that supports the final and binding character of the acts and measures of the administrator or liquidator is based upon the final approval of the activity of the insolvency administrator or liquidator, hand out by the syndic-judge. As a prerequisite to the closure of the insolvency procedure, the administrator or the liquidator has to prepare and to present a final report, accompanied by the financial situations of the insolvent debtor's estate; this report may be disputed by the creditors and the syndic-judge will decide upon all these challenges and, thereafter, will approve the final report, as it was presented or, respectively, amended (Article 167 of the Insolvency Law). This approval of the final report and the attached balance sheets it is a result of the judicial control exerted by the syndic-judge upon the acts and measures of the insolvency administrator or liquidator and it is an endorsement of his/her overall activity, making final and binding his/her acts and measures.

4. The collective, concursual and egalitarian character of the insolvency procedure are principles that impede a creditor that did not take advantage of its processual rights and did not dispute the measures of the administrator or liquidator in the insolvency procedure to do so after the closure of the procedure, by that aiming to avoid to be subjected to those equal measures, to the same extent as the other creditors.

5. Likewise, another relevant principle of the insolvency procedure refers to the material and procedural certainty and predictability of the insolvency process. This necessity embraces in the Insolvency Law the form of two entwined principles; according to Article 4 point 4 and 5 of the Insolvency Law, the procedure has to ensure (i) a high grade of transparency and predictability and (ii) the acknowledgement of the existing creditors' rights and the observance of the priority rang of the receivables, based upon a set of clearly determined rules, uniformly applicable. Such predictability, based upon a set of uniform rules, presuppose that the acts and measures of the insolvency administrator or liquidator, that were not appealed and repealed by the syndic-judge, enjoy a binding, undisputed and final authority, clearly required for the conduct of the procedure in conditions of transparency, stability and orderly conduct. Indeed, it is not conceivable that the limits of a receivable (in terms of amount, conditions, privileges), established in the insolvency procedure, will be amended or ignored in another jurisdictional procedure.

Therefore, one may say that the acts and measures of the insolvency administrator or liquidator that were not challenged by the concerned persons or reversed by the syndic-judge enjoy a final and binding authority that impedes their contestation in another proceeding.

On the other hand, insolvency administrator's or liquidator's measures, summons, reports, verifications and any other documents or actions that are ratified or confirmed, through judgments, by the syndic-judge, in accordance with his/her legal powers, when solving the various oppositions or appeals that any of the creditors, the debtor, the special administrator of the debtor or any interested persons are allowed to file against the insolvency administrator or liquidator, enjoy a proper *res judic*ata authority.

According to Article 45 (1) of the Insolvency Law, the syndic-judge is judging various requests filled by the insolvency administrator or liquidator as well as various appeals filed by the debtor, creditors or any interested person that contest the measures taken or the documents emanated by the insolvency administrator or liquidator.

If, within the judgment given when deciding on these requests or appeals, the syndic-judge is confirming the measures taken or the acts emanated by the insolvency administrator or liquidator, such consideration or solution enjoy the *res judicata* authority. But, as one may observe, such *res judicata* authority does not pertain directly to the measures or acts of the insolvency administrator or liquidator, but to the judgment delivered by the syndic-judge, although the object of that judgments regards the said measures or acts.

Conclusions

The syndic judge judgments, as any other judgments, undoubtedly enjoy *res judicata* authority in what regards both the dispositive part and the reasoning of the judgment. Naturally, the Confirmatory Judgments has the same authority.

The reorganization plan, being approved through a judgments and consisting, from a practical point of view, part of that judgment, is also impregnated with the *res judicata* authority, being unconceivable that a court will decide, regarding the existence and extent of a receivable, otherwise than provided for in the approved and judicially confirmed reorganization plan.

Following the same rationale, the acts and the measures of the insolvency administrator or liquidator that were approved through the judgments of the syndic judge are enjoying res judicata authority. The unchallenged act and the measures of the insolvency administrator or liquidator that were not challenged by the interested persons become final and binding and may be opposed to all parties to the insolvency procedure as well as to interested third parties (i.e. creditors that were not participating to the procedure).