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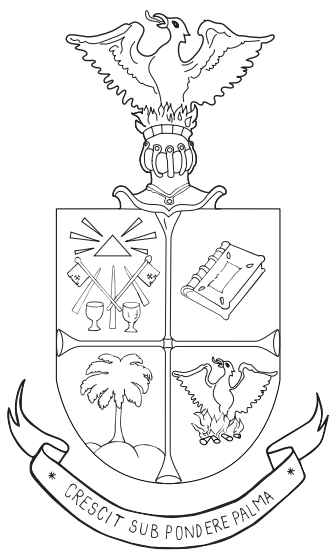

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Muzsalyi, Róbert[1] **– Csőke, Andrea**[2] **– Nastasie, Nicoleta Mirela**[3]

The Undertaking as an Alternative to Secondary Insolvency Proceeding in Romania and in Hungary – A comparative analysis

Introduction

The differences between Member States with regard to substantive and procedural rules a common source of difficulties in cross-border dimension. The same is true for insolvency proceedings.

Among others, Regulation 2015/848 of the European Parliament and the Council on insolvency proceedings (hereinafter: EIR-R) provides some new legal instruments to limit the possibility of secondary insolvency proceedings. Undertaking (Art. 36.) is one of the new features, and was not known before in Continental legal systems.

We consider that the application of an undertaking in different insolvency regimes also causes some difficulties. To demonstrate this assumption, we will compare the Romanian and the Hungarian legislation in this field and show the differences and similarities.

1. Undertakings: the new legal tool

The context is as follows: the main proceeding was opened in one Member State and the debtor has an establishment in another Member State, where secondary proceeding could be opened. The practitioner of the main insolvency proceeding wants to avoid the opening of the secondary proceeding, because he wants to dispose of the assets that are situated in this country.[4] For this reason, the insolvency practitioner gives a unilateral undertaking – a promise – to those local creditors who are entitled to file for the opening of secondary proceeding. In this undertaking he promises that, when distributing those assets or the proceeds received as a result of their disposal, he will comply with the distribution and priority rules under national law that creditors

1 Assistant Research Fellow, Department of Civil Procedure Law
2 Judge, Supreme Court, Hungary
3 Judge, Bucharest Tribunal, Romania
4 Björn Laukemann, 'Instruments to avoid or postpone secondary proceedings' in Burkhard Hess et al. (eds.), *The implementation of the New Insolvency Regulation. Recommendations and Guidelines* (Max Planck Institute 2017) 56-62

would apply if secondary insolvency proceedings were opened in that Member State.[5] Giving an undertaking is a deviation from the law of the main proceeding, because the ranking of claims in the main proceeding is different to the ranking of claims in the Member State where the undertaking has been given.[6]

The precedent used by UK lawyers, which gave the idea to put it into the EIR-R – known as "*ex parte James*"[7] – contains very similar rules to hold back creditors who have the right to file for the opening of secondary proceeding.[8] This brand-new instrument is not well detailed in the EIR-R; the gaps in the rules give national legislators the possibility of filling them, and this is why we can find diverse solutions in the Member States.

Giving an undertaking in a different Member State from where the main proceeding was opened is a great opportunity but also a great challenge. The insolvency practitioner of the main proceeding must be familiar with the rules governing the insolvency, the procedure of the courts and other formalities.

In the following chapters, we will summarise the relevant rules relating to the undertaking issue in the Romanian and the Hungarian jurisdictions and make some remarks on the questions raised.[9]

2. Essential features of the insolvency proceedings in Romania

Insolvency proceedings in Romania are mainly governed by Law no. 85/2014 regarding preventive insolvency proceedings and insolvency proceedings (hereinafter: Insolvency Code).[10] The Code of Civil Procedure is also relevant for insolvency proceedings.[11]

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5 For a more detailed description see: Csőke Andrea, *A határon átnyúló fizetésképtelenségi eljárások* (The cross-border insolvency proceedings) (HVG-ORAC 2016) 366-380. See also: Björn Laukemann, 'Art. 36.' in Moritz Brinkmann (ed.), *European Insolvency Regulation* (Beck-Hart-Nomos 2019)

6 See in this context: Ilya Kokorin, 'Contracting Around Insolvency Jurisdiction: Private Ordering in European Insolvency Jurisdiction Rules and Practices' in: Vesna Lazić and Steven Stuij (eds), *Recasting the Insolvency Regulation. Improvements and Missed Opportunities* (Springer 2020) 22-54.

7 *Re Condon, ex parte James* [1874] LR Ch App 609.

8 Following practical experience gained from the English proceedings in MG Rover Belux SA/NV [2007] BCC 446., Collins & Aikman Europe SA [2006] EWHC 1343 (CH), Nortel Group [2009] EWHC 206 (Ch), the new regime empowers the court at the request of the main insolvency practitioner to postpone or even refuse the opening of secondary proceedings in specific situations. See: Björn Laukemann, 'Instruments to avoid or postpone secondary proceedings' in: Burkhard Hess et al. (eds.), *The implementation of the New Insolvency Regulation. Recommendations and Guidelines* (Max Planck Institute 2017) 56-62

9 On the implementation of Article 36 EIR-R at the domestic level, see: Realisation of the EU Insolvency Regulation (EIR 2015) in national (procedural) law of the Member States, CERIL Report 2018-1 on Insolvency Regulation (Recast) and National Procedural Rules, 2018.

10 *Law no. 85/2014 on insolvency prevention and insolvency procedures* was published in the Official Journal of Romania, Part I, no. 466 of 25 June 2014.

11 The Romanian legal framework has recently undergone very significant changes: most im-

2.1. Types of insolvency proceedings

The insolvency procedures currently regulated by the Romanian insolvency law are:

- pre-insolvency proceedings: ad-hoc mandate procedure ("*mandatul ad-hoc*") and concordat preventive ("*concordatul preventive"* – the insolvency practitioner is the "*administrator concordatar*"), and
- insolvency proceedings, in the form of a judicial reorganisation ("*reorganizarea judiciara"* – the insolvency practitioner is the "*administrator judiciar")* or of a winding up procedure/liquidation (*procedura falimentului* – the insolvency practitioner is the "*lichidator judiciar*").

The *ad hoc mandate* is a confidential procedure, opened at the request of the debtor, involving the appointment of an ad hoc agent *("mandatar ad-hoc*") by the court to negotiate a deal with one or more creditors.

The *concordat preventive* is characterised by the possibility of suspending compulsory winding-up for as long as several months while the agreement with the creditors is negotiated.

The *judicial reorganisation procedure* requires the drafting, approval and implementation of a reorganisation plan subject to the approval of the general meeting of creditors. During the reorganisation period, the debtor is represented by a special administrator, appointed by the general meeting of shareholders.

The *winding-up procedure* leads to the liquidation of the debtor's estate and distribution of proceeds in satisfaction of its liabilities. During this procedure, the debtor is represented only by the judicial liquidator. The judicial liquidator manages the debtor's activity exclusively for the purposes of the liquidation; he is entitled to file actions for declaring any fraudulent acts concluded by the debtor and prejudicing the creditors' rights as void; he sells the debtor's assets and distributes the proceeds among the creditors.[12]

2.2. Creditors' rights

After the opening of the insolvency proceedings, the creditors are notified to file requests for the admission of their claims. The deadline for submitting their requests

portantly, the jurisdiction counts on a new Code of Civil Procedure and a new Civil Code, both of which interact significantly with the insolvency framework*; New Civil Code- Law 287/2009*, published in Official Bulletin no. 505/2011, in force from 1 October 2011; *New Civil Procedure Code- Law 134/2010,* republished in Official Bulletin no. 545/2012, in force from 15 February 2013.

12 See more details about Romanian insolvency proceedings, see Alina Valeanu, 'Romania' in: Frank Heemann and Stela Ivanova (eds.), *Insolvency & Restructuring, Central and Eastern Europe* (Bnt CEE Insolvency Survey 2020/2021) 63-70. See also: Ileana Glodeanu 'Romania' in Christian Hoenig and Christian Hammerl (eds.), *Insolvency and Restructuring Law in Central & Eastern Europe* (Linde 2014) 355-393

cannot exceed 45 days from the opening of the insolvency proceedings. The claims are analysed by the insolvency practitioner in order to be registered in the list of claims ("*tabelul de creante*") or rejected. If the creditor doesn't file his claim, he is not considered a creditor in the proceedings; his preclusion from them is established by the insolvency practitioner.

As a rule, the notification of foreign creditors falls within the competence of the judicial administrator or the judicial liquidator. National legislation regulates both a general system of publicity and a special system of publicity through individual notification of the debtor's creditors. The place where one can see "summons, convening notices, notifications and service of process issued by the courts of law, the judicial administrator/judicial liquidator after the opening of the insolvency proceedings" is the IPB (Insolvency Proceedings Bulletin)[13] - www.bpi.ro/

If an insolvency proceeding has been opened, all creditors must participate in such proceedings in order to satisfy their claims against the debtor. No other separate or out-of-court procedure is possible. The insolvency proceeding is monitored by creditors through the general assembly of creditors, which is convened and chaired by the judicial administrator or liquidator. A creditors' committee can be formed, which aims to provide creditors with a centralised decision-making body in order to monitor the course of the proceedings in the best interests of the creditors. The creditors' committee is responsible for analysing the debtor's situation and making recommendations with respect to the debtor's activity, negotiating with the insolvency administrator or liquidator, reviewing their reports, etc.

2.3. Preparing the undertaking

Romanian law does not give an undertaking the meaning and the effects provided by EIR-R. The official authorities in the insolvency proceedings are the court, the syndic judge, the general meeting of creditors, the special administrator and the judicial administrator/liquidator. The activity of the syndic judge in general is limited to judicial control of the practitioners' activity and litigation related to insolvency procedures. Management or administrative decisions related to the debtor's estate are not within the judiciary's competence. The control of the management in the procedure is exercised by creditors, through their own bodies. The syndic judge has coordination duties, while the administrator or liquidator has mainly executive duties.

13 Law 85/2014, Section 2 – Definitions, Art. 5(6) *"Insolvency Proceedings Bulletin, hereinafter referred to as the IPB, means the bulletin published by the National Office of the Trade Register which registers summons, convening notices, notifications and service of process issued by the courts of law, the judicial administrator/judicial liquidator after the opening of the insolvency proceedings as stated herein, as well as other instruments which need to be published according to the law".*

2.4. Undertaking when the main insolvency proceeding is in Romania

In Romanian law there are no special provisions for the application of an undertaking, so the EIR-R is the only source in this issue. We consider that there are two possible options.

In the reorganisation procedure, the judicial administrator could propose and give an undertaking, which could be part of the reorganisation plan, as a tool for an efficient administration of the main insolvency proceeding, in direct relation to the complexity of the restructuring process. The undertaking during the implementation of the reorganisation plan is possible taking into consideration its purpose and effects on the debtor's estate. It is the creditors' right to approve the reorganisation plan.

In the winding-up procedure, the insolvency practitioner is entitled to make a proposal for an undertaking. The courts have limited power in relation to the management and the estate of the debtor. The general assembly of the creditors has the right to approve the insolvency practitioner's proposed undertaking.

There are no provisional or protective measures according to the national law to ensure compliance by the insolvency practitioner with the terms of the undertaking, except general rules related to the insolvency practitioners' competences, duties, liability for their activity in the procedure.

2.5. Undertaking when the main proceeding is opened in another Member State, and the main insolvency practitioner wants to give an undertaking in Romania

There is no exclusive jurisdiction for conducting secondary proceedings in the country or controlling the undertaking procedure. According to the Romanian provisions in relation to the national competent court for the opening of a secondary insolvency proceeding, "*all proceedings in this law…… fall under the scope of competence of the tribunal or, where applicable, of the specialised tribunal in the jurisdiction of which the debtor had its corporate/professional seat for at least six (6) months before the court was notified"* [Art.41. (1) Law no.85/2014].

There are no formal conditions of the undertaking given by the main insolvency practitioner to the local creditors according to the rules of your insolvency law, other than those written in Art. 36. Romanian creditors should be informed of the opening of a main insolvency proceeding in another Member State, the intention of the insolvency practitioner to provide an undertaking and the contents of the undertaking and the arguments supporting it, including the effects on creditors' rights and the local debtor's estate.

Creditors vote on a reorganisation plan and are divided into five categories: preferential claims, wageholders' claims, tax claims and unsecured claims. The reorganisation plan must be approved by an absolute majority in each category, in relation to the claims, not the number of creditors.

The conditions for confirming a reorganisation plan are the following: at least two, three, or half (depending on the number of categories) of the categories of claims listed in the payment schedule must accept the plan, but on condition that at least one of the disadvantaged categories also accepted the plan and creditors jointly holding at least 30 per cent of the aggregate claims value has accepted the plan; each disadvantaged category of claimants who rejected the plan shall be treated correctly and fairly in the plan; and receivables that shall be fully repaid within 30 days from the confirmation of the plan or in accordance with the credit or leasing agreements from which they originate are considered non-disadvantaged claims whose holders have accepted the plan.

How can the status of local creditors in the voting process, including the justification and the amount of their claim, and how to bring together all creditors or just relevant creditors, financial, budgetary ones, be established; how can the balance between the rights of local creditors and the general purpose of undertaking for the main proceeding and the debtor's estate be ensured? Even though there is no provision in the national law, the Romanian syndic judge may consider an application on the legal basis of Article 36 (5) EIR-R admissible, to take note and verify the legal requirements of the undertaking and its approval, but it is just a presumption, in the absence of any relevant jurisprudence. The Romanian insolvency law has kept the traditional view that, in applying the procedure, the main role lies with the courts, thus certifying the essentially judicial nature of collective proceedings.

In relation to other requirements for the approval and the EIR – R referral to "*the rules on qualified majorities and voting procedures that apply to the adoption of restructuring plans"*, if this provision is broadly interpreted, it may require the involvement of the court (syndic judge) to supervise the voting procedure, if they are subject to litigation. A formal confirmation of the Romanian court decision to approve the undertaking does not seem necessary, but there exists the possibility for a Romanian judge to consider it his duty to examine *ex officio* some formal requirements, such as the approval by a qualified majority of local creditors, the publication and notification of the undertaking and the real possibility for unknown creditors to find out about the undertaking.

Regarding the interaction between the parties and the court, in the context of digitalisation, there is the possibility of sending the petition to the court by e-mail. In an out-of-court procedure – preparing the undertaking – this route cannot be used.

3. Essential features of insolvency proceedings in Hungary

The Hungarian Insolvency Act[14] (hereinafter: HIA) came into force in 1992, and has been modified several times. It deals with companies and any other economic organisations. The insolvency of natural persons and individual entrepreneurs is not covered by the HIA.[15]

14 Act XLIX of 1991 on Insolvency Proceedings

15 See more details about the Hungarian insolvency proceedings: Csőke Andrea *Nagykommen-*

3.1. Types of the insolvency proceedings

The HIA regulates two types of insolvency proceedings: "*csődeljárás*" means a procedure conducted by the debtor itself, the goal of which is to get an agreement with creditors to avoid insolvency. In this, the court appoints an insolvency practitioner *("vagyonfelügyelő"),* whose role is to control the debtor's activity and evaluate creditors' claims against the debtor.

The other insolvency proceeding is "*felszámolási eljárás*", which is a type of winding up procedure. The role of the appointed insolvency practitioner ("*felszámoló"*) is to terminate the business activities of the debtor and distribute its assets among creditors according to a ranking provided for by HIA. At the end of the procedure the debtor legally terminates and is deleted from the register.

There are no other proceedings, such as a pre-insolvency or hybrid procedure in Hungary relating to economic organisations.

3.2. Creditors' rights

Information on the opening of insolvency proceeding is available for Hungarian creditors in the Official Journal (www.cegkozlony.hu), and for foreign creditors in the insolvency register (https://fizeteskeptelenseg.im.gov.hu). However, according to Art.54. of the EIR-R, insolvency practitioners also have the duty to give information to foreign creditors on the opening of the insolvency proceeding.

Two conditions need to be satisfied to become a creditor. Creditors must file the claims with the insolvency practitioner within 30 days for a *csődeljárás*, and within 40 days in the case of a *felszámolási eljárás* from the opening of the proceeding, and the creditors have to pay a registration fee, which is 1% of their claim.

The creditors may form a creditors' committee for the protection of their interests and to provide representation, as well as to monitor the activities of the insolvency practitioner. The committee shall represent the founding creditors in court and during consultations with the insolvency practitioner.

3.3. Preparing the undertaking

If the main proceeding was opened in Hungary, only the insolvency practitioner in the *felszámolási eljárás* has the right to give an undertaking in another Member State. In a *csődeljárás,* an undertaking is not possible.

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tár a csődeljárásról és a felszámolási eljárásról szóló 1991. évi XLIX. törvényhez [Comprehensive Commentary on the Insolvency Act], (Wolters Kluwer 2019). See also: János Bóka, Katalin Gombos, Tekla Papp, András József Pomeisl, *Commercial and Economic Law in Hungary* (Wolters Kluwer 2019), Chapter 6. János Tóth and Bálint Tóásó, 'Hungary' in Christian Hoenig and Christian Hammerl (eds.): *Insolvency and Restructuring Law in Central & Eastern Europe* (Linde 2014) 241-287

3.4. When a main proceeding was opened in Hungary

Statements of undertaking issued to creditors established in other Member States shall only be considered valid if approved in advance by the Hungarian court.

In a request submitted to the court, the insolvency practitioner shall present the assets situated in the other Member State of the undertaking, supported by financial statements and documents, their value, plans for the sale of such assets, and the objectives to be achieved by the undertaking on behalf of the creditors as a whole, as well as the disadvantages that the lack of an undertaking is likely to cause. The information thus provided will include a list of claims of known foreign creditors in the other Member State, also summarising the rules set out in the HIA for the payment of such claims, and how they should be classified in the priority order provided by HIA.

If the creditors in the other Member State affected do not approve the statement of undertaking that was approved by the court in advance, the insolvency practitioner shall inform them in writing, without delay, of the possibility of joining the main insolvency proceedings opened in Hungary, including the ensuing obligation to pay a registration fee, with the proviso that the time limit for the submission of notices for claims shall commence on the day of voting on the statement of undertaking.

Traditionally, Hungarian creditors and creditors' committees are not very active in controlling insolvency proceedings, so this is why the legislator transferred the task of checking the undertaking in the main proceedings to the court. The court must inform the creditors and order them to make a written statement about the undertaking, but it is not binding on the court. In such a situation – when the main proceedings were opened in Hungary – any insolvency court is entitled to approve a proposal to give an undertaking; there is no court with exclusive jurisdiction.

In the event of any unlawful action or negligence – including failure to fulfil the undertaking –foreign creditors may file an objection against the insolvency practitioner within 15 days. This is a legal remedy, wherein the creditors can ask the court to compel the insolvency practitioner to fulfil the undertaking.

3.5. When the main proceeding is opened in another Member State, and the main insolvency practitioner wants to give an undertaking in Hungary

The Fővárosi Törvényszék (Budapest-Capital Regional Court) shall have exclusive competence and exclusive jurisdiction for opening and determining proceedings opened in the form of territorial insolvency proceedings and for controlling the undertaking proceedings.

There several other formal conditions of the undertaking given by the main insolvency practitioner to the local creditors according to the rules of your insolvency law than those written in Art. 36.

The statement of undertaking by a foreign insolvency practitioner to Hungarian local creditors must also contain a legal statement declaring that the undertaking is following the validity requirements according to the national law of the Member State of the main proceedings.

The foreign insolvency practitioner must inform the Hungarian local creditors of the assets that are situated in Hungary and affected by the undertaking, including their value and plans for the sale of such assets written in Hungarian, and shall declare that the information is complete. All known Hungarian local creditors and their claims must be enumerated in the statement of undertaking.

The foreign insolvency practitioner needs to inform Hungarian local creditors of the voting process for his undertaking to be approved. Voting must be conducted in the presence of a public notary.

In the process of the approval of the undertaking, the creditors will be grouped into secured and unsecured creditors. Creditors have votes according to their accepted claims against the debtor; each 50,000 HUF claim represents one vote. If the plan is approved by the majority of votes in both categories, the undertaking is approved. However, there are many problems with those rules in practice**.** In reality the most serious difficulty is rooted in national law. The HIA could not solve the problem of creditors' disputed claims. A claim that has been rejected or disputed by the insolvency practitioner does not entitle the claimant to vote. Claims that have been disputed by the debtor, such as conditional claims, will only be taken into account by the undertaking if the holder of the disputed claim provides proof of enforcing his claim against the debtor by means of judicial or administrative procedures, and that he has opened or initiated such action.

The rules for *felszámolási eljárás* do not allow long-distance voting, so it is not allowed in undertaking proceeding, too. Our opinion is that the law has to be changed to follow the digitisation of the real world.

4. Conclusions

It is entirely clear from the above that, although we are close neighbours, and there are companies with a seat in one country and an establishment in the other, our insolvency rules are totally different. The Hungarian one is old, rooted in an Act adopted at the end of 20th century; meanwhile the Romanian is a new one and very similar to the French insolvency law.

The Hungarian legislator – from a cross-border point of view – tried to keep up with the new European rules of the EIR-R; the Romanian one did not wake up yet, while the courts will have to deal with the problems. The only solution is to use the rules in a creative manner to make the undertaking mechanism work in practice.

From the creditors' point of view, bad or inadequate rules are much better, than the situation of no rules. Lack of rules leads to legal uncertainty in cross-border situations,

as the resolution of problems depends on the preparedness of the participants in the proceedings.

It is very interesting to see the diverse solutions of these countries relating to the undertaking, which have come from the different systems of national insolvency rules. In Hungary, the HIA gives a major task and responsibility to the judge, while Romanian rules are based on creditors' activities, giving them the possibility to deal with their interests.

Our goal was to show how serious the challenges may become for an insolvency practitioner, a judge or creditors when they are facing a possible undertaking. We are encountering common problems. The "trailblazers" – those who have to deal with the undertaking in practice for the first time – will show us the direction to resolve the situation. This reality requires some flexibility and a positive attitude on the part of all parties involved debtors, creditors and national authorities with competence in the field in order to produce positive effects and develop the undertaking as an effective mechanism for international cooperation.