

Jurisprudential aspects regarding the action in annulment of the debtor's patrimonial transfers, the debtor being in insolvency procedure

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Abstract

The study aims to present relevant aspects from the jurisprudential solutions of the High Court of Cassation and Justice in matters of the action in annulment of the patrimonial transfers of the debtor in insolvency procedure and of other judicial actions introduced by the procedure bodies or, by case, the participants to the procedure who are enabled to use the measures prescribed by the law for the purpose of restoring the debtor's patrimony. The jurisprudential solutions adopted under the incidence of the former Law no.85/2006 on the insolvency procedure represent, in present, under diverse aspects, elements of continuity with the principles and rules established by the new law in this matter. Law no.85/2014 on the prevention insolvency procedures and of insolvency establishes the legal frame for the exertion of the measures having as purpose the restoration, in the debtor's patrimony, of certain assets, transferred by the debtor to the fraud of the creditors' interests, or of their value, in the scope of covering the passive part to satisfy the creditors' interests. The new law continues the tradition of the former regulations in this matter but, also, brings some novelty elements such as the decrease or, in some cases, the increase of the duration of certain terms that the exertion of the mentioned judicial actions or their object refer to or the completion of the category of the persons entitled to introduce the mentioned judicial actions with the creditor who holds more than 50% of the value of the claims enlisted in the amount of claims.

Keywords: *insolvency, debtor, creditor, bankruptcy, judicial reorganisation, general procedure, simplified procedure, judicial action, action in annulment, judicial administrator, judicial liquidator.*

JEL Classification: K11, K22

1. Introductory considerations

The insolvency procedures within the two forms – the judicial reorganisation and bankruptcy – in both regimes, general and simplified, design the juridical – institutional frame in which the specific operations and activities are performed in the scope of the procedure, as mentioned by the law: instituting a collective procedure for covering the passive of the debtor's patrimony by granting to him, when it is possible, the chance of recovery of business.²

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² Art.2 of Law no.85/2014 having correspondent in the former art.2 of Law no.85/2006, repealed in present.

The application sphere of the insolvency procedures legislated by Law no. 85/2014 on the prevention of the insolvency procedures and of insolvency³ includes *the professionals*, as these are defined by art. 3 par. 2 of the Civil Code, republished in 2011,⁴ including the autonomous state-owned companies, *exception* being the free-lancers,⁵ as well as those under the incidence of *special provisions* for the case of the insolvency regime.

In any of the methods or the regimes of the insolvency procedures, the subject is designated with the name "debtor", and may be a physical person or a legal person, following the distinctions made by the law.

The law makes a distinction between the *debtors in insolvency* who are under the incidence of the insolvency procedures (judicial reorganisation or bankruptcy, the general procedure or the simplified procedure), on one hand, and the *debtors in state of financial difficulty* who are under the incidence of the insolvency prevention procedures (the ad-hoc mandate, the preventive concordat), on the other hand.

The insolvency, as it is mentioned by art. 5 par. 29 of the law, designates "that state of the debtor's patrimony characterised by the insufficient available funds for the payment of the valid, liquid and enforceable debts, as follows: a) the debtor's insolvency is presumed when, after 60 days from the due date, did not pay the debt to the creditor; the presumption is relative; b) the insolvency is imminent when it is proved that the debtor will not be able to pay at the due date the acknowledged exigible debts, with the available sums of money at the due date".

Thus, the debtors in a state of presumed insolvency or a state of imminent insolvency, by case, will be submitted to the judicial reorganization (the debtors legal person) or the bankruptcy, respectively, to the general regime or the simplified regime.

As a consequence of the opening the insolvency procedure against the debtor, the capitalization of the claims against him may be done only within the common and concurrent procedure regulated by the law on the insolvency procedure, as it was stated, for instance, in the **decision no.2939 of 17 October 2008** given by the commercial division of the High Court of Cassation and Justice: "as a consequence of the opening of the insolvency procedure against the debtor SC S. SA joint stock company, the capitalization of the claims against the debtor may be done only within this concurrent and common procedure, ...".⁶

³ Law no.85/2014 was published in the Official Gazette of Romania, Part I, no.466/25.06.2014.

⁴ The new Civil Code was republished [1] in the Official Gazette of Romania, Part I, no. 505/15.07.2011.

⁵ In the sense of the law of the insolvency procedure, *the liberal profession* is defined, by art. 5 par.52, as the profession performed as a result of a professional qualification, with a professional title, on personal liability and independently, implicating intellectual activities on behalf of the client and serving the public interest. These professions are characterized by the existence of an ethical code, the continuous professional formation and confidentiality of the relation with the client.

⁶ The High Court of Cassation and Justice, commercial division, decision no.2939/17.10.2008, www.scj.ro, last access on May 1, 2015.

In addition, in conformity with the *law principle according to which the special law in a certain matter is applicable with prevalence in relation with the common law*, reflected in the jurisprudence of the High Court of Cassation and Justice, which stated upon *the prevalence of the insolvency procedure upon the voluntary liquidation in the conditions of the Company Law no.31/1990*, republished, but also in relation with the common law forced execution, if the debtor is in an insolvency state. For example, the **decision no.111 of 22 January 2008** ordered by the commercial division of the High Court of Cassation and Justice retained that "... this procedure is a concurrent one, collective and equalitarian and of special character in relation with the liquidation that would have been made in conformity with Law no.31/1990 republished, but also towards the forced execution regulated by EGO no.51/1998". In the case, even if the voluntary dissolution of the company was legally decided and the liquidator appointed, the voluntary liquidation did not take place because, against the company, the insolvency procedure was imposed and it has a special character in relation with the liquidation which would have been made according to the company Law no.31/1990, republished.⁷

The fulfilment of the procedure's scope requires the convergent action of the procedure's bodies and participants for the capitalization of the claims against the debtor, the recovery of some assets and patrimonial transfers made by the debtor to the fraud of the creditor's interests, the liquidation of the assets of the debtor's patrimony, by applying the principles of the procedure, mentioned in art. 4 of the law, as follows: maximizing the degree of capitalization of the assets and recovery of the liabilities, providing an efficient procedure, including the communication methods and mechanism for the developing of the procedure in due and reasonable time, in an objective and impartial manner, with minimum expenditure, providing an equal treatment of the debtors of the same rank, providing a high degree of transparency in the procedure, or the capitalization of the assets in due time and in a very efficient manner, the administration of the insolvency prevention procedures and the insolvency by the practitioners in insolvency, as well as the development under the control of justice.

The procedure's bodies – the judicial administrator or the judicial liquidator are entitled to exert the specific competences that lead to an increased degree of capitalization of the assets in the debtor's patrimony, and *the syndic-judge* is abilited to judge the actions in annulment of fraudulent acts and operations of the debtor and the actions in nullity of the payment and unlawfully operations made by the debtor, after the opening of the procedure, the judgement of the legal appeals or objections of the debtor, of the creditor's committee or of other interested persons against the measures taken by the judicial administrator or liquidator, the confirmation of the reorganization plan (after its voting by the creditors), solving the action in annulment against the decision of the creditors assembly, etc.

⁷ The High Court of Cassation and Justice, commercial division, decision no.111/22.01.2008, www.scj.ro, last access on May 1, 2015.

By means of the actions given to the liquidator, the patrimony of the debtor is restored, with the consequence of fulfilling to the maximum possible of the creditors, as it was mentioned in the **decision no. 1078 of 29 February 2012** given by the second civil division of the High Court of Cassation and Justice.⁸

The creditor's assembly and/or the creditor's committee, as participants to the procedure, are abilited to exert *the actions in annulment against fraudulent acts and operations made by the debtor against the interests of the creditors if such judicial actions were not exerted by the judicial administrator or the judicial liquidator.*

In order to sanction the fraudulent actions of the debtor in insolvency against the interests of the creditors, the regulations enacted, over the time, in matters of the bankruptcy procedure, consecrated the ***principle of inefficiency of the prejudicial acts against the creditors' mass***,⁹ the acts or operations made by the debtor, within the defined period of time given by the law, having as a consequence the decrease of the debtor's patrimony and being presumed in the fraud of its creditors and, as a result, affected by the nullity.

In the context of the insolvency procedures legislated by Law no. 85/2006 (abrogated), and, respectively, by Law no. 85/2014, the fraudulent acts and operations concluded by the debtor against the creditor's interests may be annulled by means of judicial actions according to the law with the purpose of *the restoration of the debtor's patrimony to maximize the degree of the capitalization of the assets.*

2. The action in annulment of the patrimonial transfer operations of the debtor – procedural means for the recovery of the debtor's patrimony under insolvency procedure

2.1 The object and legal grounds of the action in annulment exerted within the unitary and concurrent insolvency procedure

According to article 117 of Law no. 85/2014 on the prevention insolvency procedures and insolvency, *the judicial administrator, respectively the judicial liquidator, may introduce to the syndic-judge actions in annulment of the fraudulent acts and operations concluded by the debtor to the prejudice of the rights of the creditors, over the 2 years prior to the opening of the procedure.* A similar provision was contained in the former law on the insolvency procedure, in the former article 79, which stated upon the legal ability of the judicial administrator or, as the case may be, the liquidator, to introduce to the syndic-judge actions for the cancellation of the fraudulent acts concluded by the debtor to the prejudice of the rights of the creditors, over the 3 years prior to the opening of the

⁸ The High Court of Cassation and Justice, second civil division, decision no.1078/29.02.2012, www.scj.ro, last access on May 1, 2015.

⁹ Mircea N. Costin, Angela Miff, *Bankruptcy. Evolution and actuality (Falimentul. Evoluție și actualitate)*, Lumina Lex Publishing House, Bucharest, 2000, pp. 259-260.

procedure. So, the new law states upon *the same procedural means – the action in annulment*, but restricts the duration of the suspect period from 3 years to 2 years prior to the opening of the procedure.

Being distinct from the former Law no.85/2006, the actual regulation brings as a novelty element in this matter the consecration "in terminis" of the ***exclusive character*** of the action in annulment which, according to article 122 par.7 of Law no.85/2014, represents the "exclusive" means for the cancellation of certain acts concluded by the debtor within the period of 2 years prior to the opening of the procedure: "(7) From the date of the opening of the insolvency procedure, the cancellation of certain acts concluded by the debtor within the 2 years prior to the opening of the procedure, for the grounds of fraud to the prejudice of the creditors, may be done exclusively by means of the actions mentioned by art.117".

Art. 117 of the law, clearly speaks *about the action in annulment in two hypothesis*, namely the *action in annulment* of the fraudulent acts and operations of the debtor concluded within the 2 years prior to the opening of the procedure and the recovery of the transferred assets by acts of the debtor made to the prejudice of the creditors or the recovery of the value for other provided services, as well as the *action in annulment* of some acts and operations concluded, within 2 years prior to the opening of the procedure, with the persons who are in special juridical relations with the debtor, for the recovery of the services provided.

The action in annulment, as a procedural means to the disposal of the procedure bodies – *the judicial administrator/the liquidator*, and the participants to the procedure – *the creditor' committee as well as the creditor who owns more than 50% of the value of the claims registered to the amount of claims*, may be exerted for the recovery of the transferred assets or of the value of other services provided by the debtor within the suspect period (having the duration of 2 years prior to the opening of the procedure, respectively, in the cases mentioned by the legal norm, the 6 months prior to the opening of the procedure) *in the detriment of creditor's rights, concerning the acts and operations mentioned by art. 117 par. 2 letter a) – g)*.¹⁰

The action in annulment may concern, as well, *acts and operations concluded* by the debtor, within the 2 years preceding the opening of the procedure, *with persons having special legal relations with the debtor*, nominated in art. 117 par.4 letter a) – g), and for the recovery of the provided services, if they prejudice

¹⁰ Art.117 par.2 of Law no.85/2014 states upon the category of acts and operations that may be object of the action in annulment for the recovery of the transferred assets or of the value of other services made by the debtor to the prejudice of its creditors, such as, for instance, the gratuitous transfer acts, concluded during the 2 years prior to the opening of the procedure, except the humanitarian sponsorships (a), operations in which the debtor's payment clearly exceeds the services of the other party, made during the 6 months prior to the opening of the procedure (b), etc.

the creditors.¹¹ If the recovery in kind of the services it is not possible, by legal action, the person entitled will request the restitution to the debtor's estate of the value at the date of the service provided established by the expertise.

It is to be noted that concerning the object of the action in annulment, the cancellation of an act for constituting or for a patrimonial transfer concluded or made by the debtor *in the course of its normal or current activity may not be requested*, as art.119 of Law no.85/2014 disposes. In our opinion, this is not a *motive for not receiving* the debtor's petition, which if it is made with this purpose shall be solved with the admission or, as the case may be, the rejection of the petition, by taking into account *the current, respectively, the normal character* or not of the deeds and operations made by the debtor. A similar legislative solution was stated in the former art.82 of Law no.85/2006 on the insolvency procedure.¹² According to the law, the current activities represent the activities of production, commerce or services and financial operations carried out by the debtor during the observation period and the reorganisation period within the normal course of his activity, such as: continuity of activities initiated and the conclusion of new contracts, according to business activity; performance of cash and payment operations relating to these activities; providing for the financing of the working capital within current limits.

Regarding the object of the action in annulment exerted within the insolvency procedure, the High Court of Cassation and Justice, second civil division, through the **decision no.2908 of 27 September 2013** stated that the contract of cession, concluded by a company in judicial reorganisation, through the special administrator and under the supervision of the judicial administrator, but without the authorization of the syndic-judge, with the infringement of the provisions of art.46 of Law no.85/2006 which "requested – as a validity condition of the juridical operation – the authorization of the syndic-judge", is declared null. The High Court stated that, in the case of the takeover of some claims by the company in the judicial reorganisation, through the special administrator and under the supervision of the judicial administrator, the action *does not fit the category of*

¹¹ Art.117 par.4 states upon the category of the persons having special legal relations with the debtor, as follows: "a) with an active partner or a partner holding at least 20% of the company's capital or, as the case may be, of the voting rights in the general assembly of the associates, when the debtor is that limited partnership company, respectively, an agricultural company, a general partnership company or a limited liability company; b) with a member or an administrator, when the debtor is a group of economic interest; c) with a shareholder holding at least 20% of the debtor's shares or, as the case may be, of the voting rights in the general assembly of the shareholders, when the debtor is that joint-stock company; d) with an administrator, manager or member of the supervisory bodies of the debtor, who is a cooperative company, a joint-stock company, a limited liability company or, as the case may be, an agricultural company; e) with any other physical or legal person having a dominant position over the debtor or over its activity; f) with a co-owner over a common asset; g) with the spouse, relatives or affines up to the fourth grade inclusive, of the physical persons mentioned at letter a) – f)".

¹² Art. 82 of Law no.85/2006, abrogated, disposed: „The annulment of a patrimonial transfer carried out by the debtor in the course of the normal performance of its current activity may not be requested”.

the "current activity" in the spirit of the provisions of art. 49 parg. 1 letter a) of Law no. 85/2006, this juridical operation being not mentioned within the hypothesis of art. 49 of law and, by consequence, is under the nullity sanction even more if it is not meant to provide material benefit for the debtor or a gain for the insolvency procedure in any of its modalities – judicial reorganisation or bankruptcy. Thus, the contract of cession is under the nullity for the infringement of art.46 of Law no. 85/2006 which imposed as a validity condition for such a juridical operation the authorization of the syndic-judge. So, the High Court's decision concludes that "... the takeover of certain claims through a contract of cession does not enter the category of the "current activity", this operation not being usually used, even if it is made with a speculative purpose. As a consequence, being a juridical operation that exceeds the sphere of the current activity of the appealee, the fact that the juridical act was concluded through the special administrator and under the supervision of the judicial administrator is not relevant, for the validity of this operation the authorization of the syndic-judge being extremely necessary. The High Court considers that the authorization of the operation by the syndic-judge is even more necessary because the contract was considered to be under the nullity because of the lack of the cause, respectively, for the lack of the practical use for the debtor, signing such a contract not having any benefits either in the reorganisation or in the bankruptcy procedure because of its uncertainty to the amount of claims. Without the authorization of the syndic-judge for the procedure, consequently the nullity motive of the cession contract was declared, on the grounds of art. 46 of Law no. 85/2006".¹³

The above mentioned solution was taken in conformity with the provisions in force at the date of the procedure (in application of the rule "*tempus regit actum*"), but it is also valid for the actual legal context. The cession contract as a juridical operation can not be included in the *category of the acts and operations concluded or performed currently* by the debtor in insolvency condition during the insolvency procedure.¹⁴

Under the same regulations, through the High Court of Cassation and Justice, second civil division, **decision no.467 of 7 February 2012** it was stated that the operation of cession which was not authorized by the judicial administrator, nor by the syndic-judge is declared null, the company being not in the observation period.¹⁵

¹³ The High Court of Cassation and Justice, second civil division, decision no. 2908/27.09.2013, www.scj.ro, last access on May 1, 2015.

¹⁴ The insolvency procedure in the new Law no.. 85/2014 continues the regulation method initiated by Law no.85/2006 by instituting the two modalities, namely the judicial reorganisation and the bankruptcy, within the two regimes that are consecrated: the general regime and the simplified regime, the particularities that differentiate them being maintained, but updated the present regulation, on background and terminological aspects, to the actual legislative context following the entering into force, after 2011, of the new codes of the private and public law.

¹⁵ The High Court of Cassation and Justice, second civil division, decision no. 467/7.02.2012, www.scj.ro, last access on May 1, 2015.

However, the opening of the insolvency procedure does not affect *the right of a creditor to invoke the compensation of the claim owned with the claim of the debtor towards him*, when the requirements of the law are fulfilled in matters of compensation at the date of the opening procedure, as it was emphasized by the **decision no. 1604 of 13 May 2008** given by the commercial division of the High Court of Cassation and Justice. Consequently, the High Court stated, within the judgement of second appeal, that "the court of appeal wrongly stated that the respondent does not have the quality of creditor because was not enlisted at the amount of claims, and wrongly disposed the suspension of the petition on the grounds of art.36 of the law". The court's judgement emphasises the legal regime of the legal compensation as a means of cessation of the juridical obligation that may be invoked through the common law norms, this "being an exception from the rule mentioned by art.36 regarding the lawful suspension of all the judicial and extrajudicial actions for covering the claims upon the debtor or its assets".¹⁶

2.2 Other judicial actions – the revocatory action and indirect action

Within the jurisprudence concerning the insolvency procedure a topic arised related to the question whether following the opening of the insolvency procedure against the debtor, within the procedure or even after its closing, but in relation with it, for the same purpose and the same effect, besides the action in annulment of the fraudulent acts and operations of the debtor, *other judicial means such as the revocatory action and the indirect action* may be exercised, *actions that are not mentioned directly by the insolvency law*.

The revocatory action" represents a legal means, through which the creditor may strike the juridical acts concluded by the debtor for the fraud of his general pledge, and the main condition for exercising the revocatory action is the quality of creditor of the plaintiff".¹⁷

In the context of the application of the former Law no. 85/2006 on the insolvency procedure, the High Court of Cassation and Justice, second civil division, by **decision no.4126 of 24 October 2012** stated that "The inadmissibility of the action in revocation ... can not be accepted because within the frame of the insolvency procedure, the obligation of the liquidator resides not only in the liquidation of the company's assets, but also in the collection of the claims that the debtor is entitled to receive, sums that are distributed according to the preference sequency imposed by art. 123 of Law no. 85/2006 and only after the satisfaction of the creditors, the eventual residual sums corresponding to the latest distribution will be deposited in an account at the disposal of the associates. Following these legal norms, nothing obstructs the creditor associate, in the hypothesis that all the creditors enrolled in the final consolidated table were satisfied and still not all the

¹⁶ The High Court of Cassation and Justice, second civil division, decision no. 1604/13.05.2008, www.scj.ro, last access on May 1, 2015.

¹⁷ The High Court of Cassation and Justice, second civil division, decision no. 4126/24.10.2012, www.scj.ro, last access on May 1, 2015.

claims of the debtor company have been recovered through irrevocable decisions, to initiate the procedure for the recovery of those legal claims; in this situation, the court states that the plaintiff as an associate of the debtor company removed from the trade register justifies the active capacity to stand in court and the interest to bring the revocatory action before the court, motivated by the quality of creditor of the debtor company ...”¹⁸

In the mentioned case, the issue that has been discussed concerned the non-observance of the principle *specialia generalibus derogant*, in court, by taking into account the fact that the revocatory action is not mentioned by Law no. 85/2006, as a special law in the insolvency procedures field. The High Court stated that ”... the principle *specialia generalibus derogant* was not infringed, but the provisions of Law no.85/2006, that neither regulates the revocatory action nor excludes it, were completed with the common law norms, if the mentioned action serves the purpose of the insolvency procedure”¹⁹.

The court’s solution applies *the principle of interpretation of law according to which the common law norm completes the special law, if it is compatible with this one or in the cases when the special law does not comprise specific regulations*. The legal grounds is, presently, art. 342 of Law no. 85/2014 on the prevention of the insolvency procedures and insolvency, having correspondent in the former art. 149 of Law no. 85/2006, repealed, according to which *the legal frame of the insolvency procedures is completed, if it is compatible, with the provisions of the Civil Procedure Code and the Civil Code*.

As it was stated in the **decision no. 95 of 22 January 2008** ordered by the commercial division of the High Court of Cassation and Justice, *the revocatory action* defined by art. 975 of the former Civil Code (1864), as an ”action for the non-opposability of the juridical act concluded by the debtor in the fraud of the creditor, concerns a field determined by the condition of the debtor’s insolvent state or its increase but also the prejudice to the creditor. The existence of a valid, liquid and enforceable claim is not sufficient for the revocation of an act for valuable consideration, the existence of the insolvent state being necessary” thus ”... the relative effect of the revocatory action leads to the cancellation of the act in the measure of the prejudice suffered by the creditor”²⁰.

In other cases, such as the one ordered by the High Court of Cassation and Justice, second civil division, **decision no. 1698 of 18 April 2013** through which was stated upon the moment from which starts the prescription term of the material right in case of the revocatory action, as a patrimonial action through which the creditor may ask for the cancellation, in court, of the juridical acts concluded by the debtor with prejudice to the creditors, emphasising in the grounds of the judgement that ” the existence of the fraud, the fraudulent misrepresentation and

¹⁸ *Idem*.

¹⁹ *Ibidem*.

²⁰ The High Court of Cassation and Justice, commercial division, decision no.95/22.01.2008, www.scj.ro, last access on May 1, 2015.

misleading are the essence of the revocatory action”.²¹ In that matter, through **decision no. 4073 of 13 December 2011** ordered by the second civil division of the High Court of Cassation and Justice, it was stated that ”according to art. 975 C. civ., creditors may take legal actions against the misleading acts concluded by the debtor in prejudice to their rights, but apart from the proof of a valid, liquid and enforceable debt and the prejudice suffered by the creditor, by generating or increasing the insolvent state, they also have to prove the fraud made by the debtor and the complicity to fraud of the third party with whom the debtor concluded the fraudulent act”, or, in the case, the cumulative requirements mentioned by the law were not present for the admission of the revocatory action considering that there was not enough evidence to lead to the conclusion of the complicity to fraud of the third party”.²²

With respect to the issue if the indirect action may or not be used within the insolvency procedure, the High Court of Cassation and Justice, commercial division, by **decision no. 549 of 8 February 2011** ordered that the indirect action is compatible with the insolvency procedure ”because it practically prepares the forced execution of the debtor’s patrimony. By registering his claim in the table of creditors, the plaintiff protected its own right, while by exercising the indirect action, the plaintiff exerted a debtor’s right that returns in the debtor’s patrimony, for the benefit of all creditors”. Thus, *the creditor* who registered the claim in the final table of creditors, pursuing to protect its own right, *does not lose the active capacity to stand in court in other judicial procedures that regard the patrimony of the same debtor*.²³

As the jurisprudence stated, the indirect action represents a legal instrument that the creditors, as participants to the insolvency procedure, are entitled to use even if it was not explicitly mentioned by the law on the insolvency procedures within the category of the judicial means that they may exercise within the frame of procedure. By exercising the indirect action, the creditor exerts a debtor’s right that returns in the debtor’s patrimony, for the benefit of all creditors, the judgement for the admission of such action being opposable to the other creditors, meaning that this action is compatible with the insolvency procedure.

According to the former art. 974 of the Civil Code (1864) – abrogated, the creditors of a debtor may exercise all the rights and judicial actions recognized to the latter, except for those that are exclusively personal, *the indirect action being a means of protection of the creditor’s rights* in the case when the debtor becomes insolvent or makes his insolvent condition worse.

²¹ The High Court of Cassation and Justice, second civil division, decision no. 1698/18.04.2013, www.scj.ro, last access on May 1, 2015.

²² The High Court of Cassation and Justice, second civil division, decision no. 4073/13.12.2011, www.scj.ro, last access on May 1, 2015.

²³ The High Court of Cassation and Justice, commercial division, decision no. 549/8.02.2011, www.scj.ro, last access on May 1, 2015.

The new Civil Code, republished in 2011, legislates in different sections these two civil actions – the indirect action²⁴ and the revocatory action²⁵ – as means of protection of the creditor's rights.

Ex eadem ratio, the above mentioned solution of the court it should be also valid in the new legislative frame designed by common law legal norm and the new law of the insolvency procedures.

However, there has to be outlined that the present Law no. 85/2014 explicitly states that the annulment of some fraudulent acts of the debtor concluded to the prejudice of the creditors over the 2 years prior to the opening of the procedure, can be done exclusively, from the date of opening the procedure, through the actions mentioned in art. 117 of the law, that is by means of the action in annulment.²⁶

2.3 The competence to solve the action in annulment and other judicial actions within the procedure

The competence to solve the action in annulment *is incumbent to the syndic-judge*, according to the provisions of art. 117 par.1 of Law no. 85/2014. A similar provision was contained in the former art. 11 letter h) of Law no. 85/2006 on the insolvency procedure according to which the syndic-judge's prerogatives included judging the actions for the annulment of certain fraudulent acts or operations concluded by the debtor in the prejudice of the creditors, as well as other petitions and law suits related to the procedure.

The jurisdictional competence of the syndic-judge also concerns judging the action in annulment of the decision of the assembly of creditors, as art. 45 par.1 letter n) of Law no. 85/2014 states. The element that emphasises the continuity of the regulation in this matter results from the similar legal norm of the former art.11 letter m) of Law no. 85/2006.

It is to be noted the enuntiative contents of art. 45 of the law, mentioned above, which outlines the main prerogatives of the syndic-judge, but these are "limited" attributes, in the sense of the legal norm, to the judicial control over the judicial administrator's and/or judicial liquidator's activity as well as to the law suits and judicial petitions related to the insolvency procedure.

²⁴ The *indirect action* represents, according to art.1560 of the new Civil Code, republished in 2011, the legal means through which the creditor, having a valid and enforceable claim, may exercise the rights and legal actions of the debtor, except those that are exclusive personal, when the latter refuses or neglects to exercise them to the prejudice of its creditor. As to the effects, the indirect action benefits to all the creditors.

²⁵ The *revocatory action* is, according to art.1562 of the new Civil Code, republished in 2011, the legal means through which the creditor may ask, in court, for the inefficiency of the juridical acts concluded by the debtor to the fraud of the creditors, if by this the debtor constitutes or increases its insolvent condition and a prejudice is proved.

²⁶ Art.122 par.7 of Law no. 85/2014.

The law makes a justified distinction, in this matter of the exertion of the prerogatives of the procedure's bodies, between *the jurisdictional prerogatives* of the procedure's bodies and *the management prerogatives*.

The *management prerogatives* belong to the judicial administrator, respectively, to the judicial liquidator, or, by case, under exceptional circumstances, to the debtor if the latter's right to administrate its estate has not been withdrawn; the management decisions may be controlled, in terms of their opportunity, by the creditors through their bodies, respectively, the creditor's committee.²⁷

The distinction within the prerogatives of the procedure's bodies between *the jurisdictional prerogatives and management prerogatives*, the latter belonging to the judicial administrator or the judicial liquidator and, under exceptional circumstances, to the debtor if the debtor's right to administrate its estate has not been withdrawn, represents not only an aspect necessary for the clarification but also a continuity element with the precedent regulation.²⁸

For the interpretation and application of the legal norm that distinguishes between the prerogatives "limited" to the judicial control of the syndic-judge, on one hand, and the management prerogatives of the judicial administrator/judicial liquidator, or exceptionally, of the debtor who kept his right to administrate his estate, on the other hand, the High Court of Cassation and Justice, second civil division, by **decision no. 437 of 6 February 2014** stated, in the conditions of the former Law no.85/2006, when judging a second appeal, that the syntagm "the main prerogatives of the syndic-judge *does not exclude the latter's competence for other petitions and law suits in which the debtor of the procedure is part*, but "on the contrary, an effective and good administration of the procedure requires an extensive interpretation of the provisions of art. 11 par. 2 of Law no. 85/2006". Thus, the judicial action introduced by the liquidator for the absolute nullity of a fraudulent act concluded by the debtor prior to the opening of the insolvency procedure, on the grounds of the former art. 948 of the Civil Code (1864), in force up to the 1st October 2011, was judiciously considered to belong to the competence of the syndic-judge.²⁹

The solution of the High Court is also fully applicable in the context of Law no. 85/2014, the "limitation" of the syndic-judge's prerogatives, through the legal norm, to the jurisdictional ones having only *the purpose of determining more precisely the sphere of jurisdictional prerogatives that design this competence*.

²⁷ The creditors' committee prerogatives are stated in art.51 of the present law, and among them is mentioned in letter f) - to lodge actions for the annulment of certain fraudulent acts and operations made by the debtor to the prejudice of its creditors, according to art. 117 par. 1 when such actions have not been lodged by the judicial administrator or the judicial liquidator.

²⁸ Angela Miff, *The new insolvency procedure – actuality, tradition and perspectives (Noua procedură a insolvenței – actualitate, tradiție și perspective)*, in Romanian Business Law Review no.1/2007, Wolters Kluwer Publishing House, Bucharest, 2007, p. 62.

²⁹ The High Court of Cassation and Justice, second civil division, decision no. 437/6.02.2014, www.scj.ro

More precisely, in the above mentioned decision, the High Court considered that the prerogatives of the syndic-judge *are not limited to the judicial control of the activity of the judicial administrator and/or the judicial liquidator and to the law suits and judicial petitions related to the insolvency procedure*, according to art. 11 parag. 2 of Law no. 85/2006, not in the sense that the enumeration should be considered exhaustive, as incorrectly the appellee stated in the second appeal, but it is proper and conform with *"a good and effective administration of the procedure"* **the extensive interpretation of the incident provisions**. The High Court stated that "It is wrong to sustain as the appellee in the second appeal did, that "the prerogatives of the syndic-judge are limited to the judicial control of the judicial administrator and/or liquidator's activity and to the law suits and judicial petitions related to the insolvency procedure", according to art.11 parag. 2 of Law no. 85/2006. The syntagm "the main prerogatives of the syndic-judge" not only that does not exclude its competence for other petitions and law suits in which the debtor of the procedure is subject to, but also a good and effective administration of the procedure requires an extensive interpretation of the provisions of art.11 parag.2 of law no. 85/2006".³⁰

We consider that the above mentioned allegation on the topic of the competence sphere of the syndic-judge concerning the judgement of the judicial actions with whom the syndic-judge is abilited for the scope of the procedure, regarding the extensive interpretation of the provisions stating upon its prerogatives,³¹ is presently still *proper and in conformity with the purpose and the principles of the procedure according to Law no. 85/2014*, even if art. 45 parag.2 of the law stipulates the limitation of the syndic-judge's prerogatives to "the judicial control of the activity of the judicial administrator and/or the judicial liquidator and to the law suits and judicial petitions related to the insolvency procedure".

The syntagm **"the law suits and judicial petitions related to the insolvency procedure"** may include not only the actions for the annulment of the fraudulent acts and operations of the debtor concluded to the prejudice of his creditors but also, *other judicial petitions and judicial actions*, such as the revocatory action or the indiect action, which come from the common law, and that are not explicitly mentioned by the special law for the insolvency procedure, if they serve to the purpose of the good and effective administration of the procedure, being in conformity with the *collective character of the procedure* which aims to its development within **a concurrent, unitary and equal frame**.

Distinct from the correspondent provision of the former law, art. 45 of Law no. 85/2014 mentions *"in terminis"* that the judgement of *"the actions in nullity of the payments or operations made by the debtor, without being entitled, after the*

³⁰ *Ibidem*.

³¹ Art.45 of Law no.85/2014 includes in the category of the main prerogatives of the syndic-judge „judging the actions initiated by the judicial administrator or the judicial liquidator for the annulment of certain fraudulent acts and deeds, according to art.117 – art.122 and of the actions in nullity of the payments and deeds made by the debtor, unlawfully, after the opening of the procedure" (letter i).

opening of the procedure” belongs to the syndic-judge’s prerogatives, which opens the sphere of his competence towards the judgement of other judicial petitions and actions than those concerning the annulment of fraudulent acts or patrimonial transfers prior to the opening of the procedure, namely *the actions for the recovery to the debtor’s patrimony of some assets, values or claims exerted by the other participants to the procedure*.

Taking into consideration that the competence of the syndic-judge includes also *the judgement of the judicial actions related to the insolvency procedure*, the High Court of Cassation and Justice, the commercial division, by **decision no. 3356 of 11 December 2009** stated that the syndic-judge is also abilited to judge the actions concerning *the recovery of the claims born during the procedure* of the judicial reorganisation of the debtor because: ”by the interpretation of the provisions of art. 11 par. 1 of the law, in whose contents at the letters a – n „the main prerogatives of the syndic-judge” are mentioned, one may deduce that these have an exemplified character, and not a limitative one. The judicial statement of the plaintiff, being under the conditions of the second paragraph of the same article, in the sense that it has the nature of a judicial petition related to the insolvency procedure by which the judicial control is required, on the grounds of the mentioned provisions, it is obvious that the syndic-judge is the one who is entitled to exert the judicial control upon the mentioned action. On the other hand, the contract of the service-provider for gas, necessary to continue the debtor’s activity during the period of reorganisation was concluded with respect to the reorganisation plan, by clearly mentioning the payment terms for the gas provided, and being a claim born during the procedure. As it results that during the procedure the judicial administrator refused the payment of due sums, it is natural and in accordance with the insolvency law’s provisions that the syndic-judge should solve the creditor’s request”.³²

Because *the purpose of the insolvency law is to set out a collective procedure for covering liabilities of the debtor* in insolvency ”the creditor’s preoccupation to realize the claims is legitimate, not having a speculative character”. Therefore, the High Court of Cassation and Justice, commercial division, by **decision no. 2169 of 29 September 2009** stated that ”the execution acts performed by the judicial administrator may not be contested separately, after the closing of the procedure, even if absolute nullity grounds are invoked, their validity being verified implicitly by the exertion of the prerogative of the syndic-judge concerning the control over the administrator’s activity”. From the opening date of the procedure ”the entire estate is allocated to the purpose of the procedure – the selling of assets that may be object of the forced execution – at the highest price to cover the liabilities, ...”.³³

³² In the mentioned case, the claims having as object the price of the gas provided by the debtor in the condition of the judicial reorganisation. The High Court of Cassation and Justice, commercial division, decision no. 3356/11.12.2009, www.scj.ro, last access on May 1, 2015.

³³ The High Court of Cassation and Justice, commercial division, decision no. 2169/29.09.2009, www.scj.ro, last access on May 1, 2015.

3. The person entitled to perform the action in annulment of the patrimonial transfers of the debtor in the insolvency procedure

Law no. 85/2014 states, in art. 117 par. 1, that "The judicial administrator/the judicial liquidator may bring before the syndic-judge actions for the annulment of the fraudulent acts and operations of the debtor to the prejudice of the rights of the creditors, over the 2 years prior to the opening of the procedure", and in art. 118 par.2 and, respectively, in par.3 disposes: "(2) The creditors' committee may lay such an action to the syndic-judge, if the judicial administrator/judicial liquidator does not lay it. (3) Such an action may be introduced, in the same conditions, by the creditor who owns more than 50% of the value of the claims enlisted in the amount of claims".

As it results, *the active capacity to stand in court* for the actions in annulment of the fraudulent acts and operations of the debtor in prejudice to the creditors, over the 2 years prior to the opening of the procedure, belongs to the judicial administrator and, respectively, to the judicial liquidator, with prevalence. But, if the mentioned persons do not use, because of various motives, the legal means provided to comply with their legal prerogatives, *the creditors' committee* is entitled to lay such an action to the syndic-judge. This possibility was also recognized to the creditors' committee under the former regulation, by the former art. 81 par. 2 combined with art. 85 par.5.

Art. 122 par. 5 of Law no. 85/2014 clarifies the topic of *the active capacity to stand in court* by reporting to the distinction made by the legal norms mentioned above, that is: "(5) The active capacity to stand in court in the action of annulment regulated by art. 117 belongs to the judicial administrator/judicial liquidator, in the case mentioned by art. 118 par. (2), the creditors' committee, and in the case regulated by art. 118 par. (3), the creditor having more than 50% of the value of the claims declared to the amount of claims".

The new law on insolvency consequently recognizes the active capacity to stand in court of *the creditor having more than 50% of the value of the claims declared to the amount of claims*, this mention and solution of the law being *a novelty element* in comparison with the former regulation. By doing so, the new law enforces the category of the persons who, having prerogatives or interests in relation with the procedure, in conditions that are proper to insure *the maximum increase of the value of the debtor's estate*, by *increasing the degree and the recovery of the claims*, have the legal ability to act for the mentioned purpose.³⁴

In the context of the former regulation of Law no. 64/1995 on the judicial reorganisation procedure and on bankruptcy, abrogated by the effect of entering into force of Law no. 85/2006, the juridical acts mentioned by the former art. 45 could be annulled before the court, at the request of the administrator or liquidator,

³⁴ The scope of the insolvency procedures stated in art.2 of Law no.85/2014 regards the covering of the debtor's passive, by granting him, when it is possible, the chance to redress his activity; according to art. 4, the category of the principles that govern the procedure include, also, maximizing the degree of capitalization of the assets and recovery of the liabilities.

but if such an action in annulment lacked the active capacity to stand in court was recognized to the creditors' committee authorized for this purpose by the syndic-judge.³⁵ The law stated upon a one year term from the opening date of the procedure for introducing the request for the action in annulment. If the action in annulment concerned the transfer of an imovable asset, the syndic-judge was abilited to decide the notification of the registration of the request in the register for real-estate publicity. By means of the same action – the action in annulment exerted by the administrator, liquidator or the creditors' committee – the asset could be also recovered from a sub-acquirer if the sub-acquirer did not pay the value corresponding to the asset and it was aware or had to be aware of the fact that the initial transfer was likely to be annuled.

The active capacity to stand in court of the judicial liquidator in other actions than those for the annulment of the fraudulent acts of the debtor in insolvency, and his legal capacity to lay an action for the evacuation of the tennant, from the building used on the grounds of a silent partnership contract that ended, was recognised, for instance, through **decision no. 2763 of 5 November 2009** given by the commercial division of the High Court of Cassation and Justice. In the case, a silent partnership contract was concluded on a non-determined duration which was denounced by the judicial liquidator in representation of the appeallee, being in the insolvency procedure, requesting to evacuate the location. The High Court stated that "... taking into account the right of the judicial liquidator to denounce any contract on long term, concluded by the company in the insolvency procedure, the court of appeal retained on ground reasons that the plaintiff would not have active capacity to stand in court and to lay an action for evacuation of the respondent from the building used on the basis of a silent partnership contract that ended".³⁶

Through **decision no. 549 of 8 February 2011** given by the commercial division of the High Court of Cassation and Justice it was stated that, in the context of the insolvency procedure, the creditor who declared his claim in the final table of creditors, pursuing the protection of a personal right, *does not lose the active legitimacy in court in other judicial procedures that are related to the same debtor's patrimony*.³⁷

Regarding *the passive capacity to stand in court*, by exerting the action in annulment within the insolvency procedure, *the constancy and continuity of the topic in time* may be noted. The passive capacity to stand in court in actions of annulment mentioned by art. 117 of Law no. 85/2014 belongs to *the debtor* and, by case, to his *co-contractor or the sub-acquirer*. The debtor shall be summoned as defendant through the special administrator or the special trustee. The special

³⁵ Stanciu D. Cărpenaru, *Romanian commercial law (Drept comercial român)*, fourth edition revised and completed, All Beck Publishing House, Bucharest, 2002, p. 621.

³⁶ The High Court of Cassation and Justice, commercial division, decision no. 2763/5.11.2009, www.scj.ro, last access on May 1, 2015.

³⁷ The High Court of Cassation and Justice, commercial division, decision no. 549/8.02.2011, www.scj.ro, last access on May 1, 2015.

trustee intervenes in this quality if a special administrator was not appointed by the general assembly of the associates/ shareholders/members of the debtor, under the provisions of art.52 and art.53 par.1 of the law. The special trustee is appointed by the syndic-judge and, if later, the general assembly of associates/shareholders/members of the debtor does not designate a special administrator, the special trustee will take over the procedure as it was in the moment of his designation.

4. The legal term for the exertion of the action in annulment in the insolvency procedure

The action in annulment of the fraudulent acts concluded by the debtor in the prejudice of the creditors may be introduced, according to art. 118 par. 1 of Law no. 85/2014, by the judicial administrator, respectively, the judicial liquidator, within *one year* from the expiry of the deadline established for the preparation of the report on the causes and circumstances that led to the insolvency condition of the debtor, *but not later than 16 months from the date of opening the procedure*. The legal due date for drawing up, by the judicial administrator, respectively, the judicial liquidator, of the report on the causes and circumstances that led to insolvency state of the debtor is up to 40 days from the date when the judicial administrator/judicial liquidator was appointed, and, at the motivated request, the due date may be extended by the syndic-judge with 40 days maximum.³⁸

In the situation when the judicial administrator/judicial liquidator does not exert the action, the law states that such prerogative shall be exerted by the *creditors' committee*, and, as the case may be, by *the creditor who owns more than 50% of the value declared to the amount of claims*. Even if the law does not explicitly state a specific due date for such a case, art. 118 par. 3 states that the action in annulment shall be exerted *"in the same conditions"*.

We consider that the due date for the performance of the mentioned action within the insolvency procedure is connected to the action, being a *procedural term*, and not to the person entitled to exert it, argument for which, in our opinion, the term is a decay term,³⁹ and not a prescription term.⁴⁰

The consequence for the above mentioned qualification resides, from the perspective of the material law norm, in the fact that if the subjective right was not exerted within the due term, the fulfilment of the decay term generates the lose of the right or the obstruction of the fulfilment of the unilateral juridical act, in the conditions of the law, but if the term used is a *prescription term*, the material right to action of the person who did not exerted it within the legal term, provided by the law, is ceased (extinguished). However, the substantive legal norm of art. 2547 of the Civil Code, republished in 2011, states that if the nature of the term does not

³⁸ Art. 97 of Law no. 85/2014.

³⁹ The legal regime of the decay terms is established by Title II of Book VI in the Civil Code, republished in 2011.

⁴⁰ The legal regime of the prescription terms is regulated by Title I of Book VI in the Civil Code, republished in 2011.

clearly result from the law or from the parties agreement "the prescription rules are applicable".

The qualification of the term provided for the exertion of the action in annulment also conditions the modality of invoking the term, because if the term is a decay term "the jurisdictional body is obligated to invoke and apply *ex officio* the decay term, no matter if the interested party will discuss it or not, except for the case when it concerns a right upon which the parties may freely negotiate".⁴¹

Finally, the qualification of the term as being *a material or a procedural term*, is important because if the term is *a procedural one*,⁴² the infringement of the term generates the decay from the ability to exert the right to action, except for the cases when the law provides otherwise, according to art. 185 of the Civil Procedure Code, republished in 2012, that states: "(1) When a procedural right has to be exerted within a certain term, its non-observance generates the decay from the possibility of its performance, except the case when the law states otherwise. The procedural act made after the term is under nullity".

The qualification of the term concerning the exertion of the action in annulment as being a procedural term, whose infringement generates the sanction of decay, matches both the finality of the compulsory legal terms in the civil lawsuit to ensure its celerity and the principles that govern the insolvency procedure *by providing an efficient procedure that takes place within a due and reasonable time, with minimum of costs, by ensuring the transparency and predictability within the procedure, an equal treatment of the creditors of the same rank and the efficient liquidation of the assets*.

In the context of Law no.85/2014, the term for the exertion of the action in annulment provided by art.118 par.1 is equally applicable to the judicial administrator, respectively, to the judicial liquidator, and to the creditors' committee and, by case, to the creditor who owns more than 50% of the value of the declared claims in the amount of claims.

5. The effects of the annulment of the juridical acts concerning the constitution or the transfer of some patrimonial rights within the insolvency procedure

The main effect of the performance of the action in annulment within the insolvency procedure resides in *the recovery to the debtor's estate of the transferred asset or of its value at the date of the transfer*, established by expertise, if the asset does no longer exist or there are impediments of any kind for its recovery by the debtor.

In the case of an annulled patrimonial transfer, in terms of art. 117 of Law no.85/2014, the obligation to return the asset or its value at the date of the transfer

⁴¹ Art. 2550 par. 2 of Civil Code, republished in 2011.

⁴² The *procedure terms* are established by the law or by the court and represent the duration over which a procedure act may be accomplished or not, according to art.180 of the Civil Procedure Code, republished in 2012.

is incumbent to the third party acquirer, with the consequence of repositioning the parties to the previous situation, in case of restitution. Other possible duties corresponding to the asset at the date of the transfer shall be registered again in the real-estate public register, as it is mentioned by art.120 par.1 of Law no. 85/2014.

The law in force continues the tradition formed under the previous regulations but brings necessary clarifications for the coherence and transparency of the legal frame and, as a novelty element, the distinct mention in unequivocal terms of the consequence of re-enlisting of the existent duties on the asset at the date of the transfer following the repositioning of the parties in the previous situation.

Thus, the third party acquirer *in good-faith* who returned to the debtor's estate the asset or the value of the asset which had been transferred to him by the debtor, has a *claim* of the same value over the debtor's estate, equal with the price paid, to which the increase of the value of the asset may be added, and will be registered in the table of claims for the participation to the distribution of sums.

The third party acquirer *in bad-faith* is entitled to receive only the price paid and to participate to the distribution of the sums. The bad-faith of the third party has to be proved because it is not presumed. The third party acquirer *in bad-faith* is obligated to return the entire value, as well as the results gathered.

Law no. 85/2006 stated, in the former art.83, upon the obligation of the third party acquirer, in case of annulment of a patrimonial transfer, to return to the debtor's estate the transferred asset or its value at the date of the transfer carried out by the debtor, established by expertise, if the asset does no longer exist.⁴³ The third party who returned to the debtor's estate the asset or its value had over the debtor's estate a claim of the same value if the third party was in good-faith, or if not, the third party in bad-faith would lose the claim or the asset, which was restituted to the debtor's estate.

Within the legal frame of the former Law no. 64/1995 on the judicial reorganisation and bankruptcy, the consequence of the annulment of the fraudulent legal acts of the debtor resided in the return of the assets or services to the debtor's patrimony; more precisely, the third party who acquired from the debtor an asset that, afterwards, was annulled, according to the law, had the obligation to return the asset or, by case, the value of the asset at the date of the transfer if the asset did no longer exist or was missing. As a consequence, the third party would have had a claim of the same value if it was in good-faith when acquired the asset and without intention of blocking, delaying or deceiving the debtor's creditors. The asset could have been recovered also from a sub-acquirer if the sub-acquirer did not pay the corresponding value of the asset and knew that the initial transfer could be cancelled.⁴⁴

⁴³ The obligation to return the transferred assets "... is a legally alternative obligation with the obligation to return to the debtor's estate of those assets' value, if the assets do no longer exist", as was stated through the decision no. 3045/11.10.2011 ordered by the second civil division of the High Court of Cassation and Justice, www.scj.ro, last access on May 1, 2015.

⁴⁴ Stanciu D. Cărpănu, *Romanian commercial law (Drept comercial român)*, op. cit., 2002, p. 621.

The effects of the annulment of legal acts of the debtor concerning the constitution or transfer of some patrimonial rights concluded within the 2 years prior to the opening date of the insolvency procedure, according to Law no.85/2014, require observation regarding *the situation of the third party acquirer*, as it is in good-faith or bad-faith, with a valuable consideration or gratuitous, as well as *the legal status of the sub-acquirer*.

Therefore, by **decision no. 3045 of 11 October 2011**, ordered by the second civil division of the High Court of Cassation and Justice, it was stated that the annulment of the sub-acquirer's title "may not be ordered but on the grounds of a legal action filed by the administrator, liquidator or creditor's committee, as opposed to/in contradiction with the sub-acquirer, in order to grant him the possibility to invoke legal arguments for his procedural position in respect with the fulfilment of the requirements for the admission of such an action. Thus, it may not be considered that the title of the sub-acquirer was annulled by the disposition – „the annulment of all the subsequent acts" – included in an interim judgement for the correction of a material error of a judgement ordered in a litigation in which the sub-acquirer was not a litigant party, its title not being judicially examined nor identified in the dispositive part of that judgement". In conformity with the former art. 84 of Law no. 85/2006, which transposed the contents of the former art. 65 of Law no. 64/1995 in force at the date of the conclusion of the selling-buying contract, the administrator, judicial liquidator or the creditor's committee, could file an action for the recovery from the sub-acquirer of the asset or the value of the transferred asset by the debtor only if the sub-acquirer did not pay the correspondent of the asset and knew or should have known the fact that the initial transfer could be cancelled. From the cited legal norm results that a possible annulment of the title of the sub-acquirer could not be ordered but as a consequence of an action filed by the administrator, respectively, the judicial liquidator or the creditor's committee, in contradiction with the sub-acquirer so that the latter could have the opportunity to defend himself by expressing his position in court concerning the fulfilment of the requirements for the admission or rejection of the action.⁴⁵

6. The exemption from the stamp fee for the file of the action in annulment and the gratuitous character of the publicity formalities of the procedure acts within the procedural frame of the insolvency

Law no. 85/2014 states, in art. 115 parg. 1, upon *the exemption from the stamp fee* of all actions brought to court by the judicial administrator, respectively, the judicial liquidator, including those for the recovery of the claims.

Under the former regulation of Law no. 85/2006, concerning the category of the actions to which the exemption from the stamp fee is applied, the High Court

⁴⁵ The High Court of Cassation and Justice, second civil division, decision no. 3045/11.10.2011, www.scj.ro, last access on May 1, 2015.

of Cassation and Justice, commercial division, by **decision no. 147 of 22 January 2013**, ordered upon judging the second appeal, by stating as a principle that in matters of the exempt from the stamp fees in case of the judicial actions initiated by the judicial administrator or the judicial liquidator, for the purpose of the insolvency procedure opened against debtor, "the limitation of the application of the stamp fee, exclusively to the category of actions introduced by the judicial administrator or liquidator, as the provisions of art. 77 par. (1) of Law no. 85/2006 state, without the category of the actions acknowledged by the latter, giving to the legal norm a strictly *ad litteram* interpretation, would signify the limitation of the legislator's intention, that is the protection of the company's interests against whom the insolvency procedure was opened after the initiation of some actions that had that purpose, to the prejudice of the company instead of facilitating it". The High Court considered that, in view of art. 11 par.1 of Law no. 85/2006, the appeal initiated by the respondent company, before the court of the first appeal, and later acknowledged by the judicial liquidator" leading to the reformation of the judgment by which the company was obligated to pay a sum of money, pursuing the protection of the company's patrimony, is exempt from the stamp fee". Therefore, the High Court stated that" According to art. 77 par. 1 of Law no. 85/2006, all the actions filed by the judicial administrator or the liquidator for the application of the invoked provisions of the normative act, including those for the recovery of the claims, are exempt from the payment of the stamp fees. Through the provisions of art. 77 of Law no. 85/2006 it was extended the sphere of exemption from the payment of the stamp fees to all the actions initiated by the judicial administrator or the liquidator for the application of the law on insolvency procedure, including those for the recovery of the claims. From the analysis of the legal text of art. 77 par.1 of Law no. 85/2006, it results that the exemption from the payment of the stamp fees has a general character, in the sense that regards all the actions initiated by the judicial administrator or the liquidator, irrespective of whom these are formulated against and irrespective of the type and nature of the petition, so that none on these actions may be annuled as unstamped. Thus, interpreting the above mentioned legal norm, not in its *ad litteram* sense, but in its spirit, by reporting to the legislator's intention when the norm was enacted, it results that it had as a purpose the protection of the debtor's patrimony and, as a consequence, of its creditors". As a consequence, because through the pre-cited legal norm was instituted the exemption from the payment of the stamp fees of all the actions initiated by the administrator or the judicial liquidator, the actions and means of appeal initiated or accepted by one of the mentioned representatives of the company in insolvency should have the same benefits, as a consequence of the presumption of protection of the company's interests whose right to administrate its estate had been withdrawn".⁴⁶

Through judgments previously ordered, the High Court of Cassation and Justice stated upon the general character of the exemption from the payment of the

⁴⁶ The High Court of Cassation and Justice, commercial division, decision no. 147/22.01.2013, www.scj.ro, last access on May 1, 2015.

stamp fees regarding the actions initiated by judicial administrator or the judicial liquidator such as, for example, **decision no. 683 of 21 February 2008**, ordered by the commercial division of the court, which clarifies and states upon the general character of this exemption in the meaning that it concerns all the actions initiated by the judicial administrator or the liquidator "irrespective of whom they are formulated against and irrespective of the type and nature of the petitions so that none of these actions may be annulled as unstamped". Through the systematic interpretation of the provisions of the former art. 77 of Law no. 85/2006, the court stated that "as distinct of the provisions of art. 58 of Law no. 64/1995 which regulated the exemption of the judicial administrator from the payment of the stamp fees only in case of initiating the actions for the annulment of the fraudulent acts concluded by the debtor and the exemption of the judicial liquidator for all the actions and petitions formulated, by art. 77 of Law no. 85/2006, the sphere of the exemption from the payment of the stamp fees was extended to all the actions initiated by the judicial administrator or liquidator in application of the provisions of the insolvency procedures' law, including the one for the recovery of the claims".⁴⁷

We consider that the solution and argument of the High Court establishes *a uniform and a principle interpretation of the legal norms* mentioned above, being able to guide the courts and the practitioners for a better and adequate application of the law not only by its literal meaning but also in its spirit.

A similar issue preoccupied the theory and practice under the incidence of the former Law no. 64/1995 on the reorganization procedure and the judicial liquidation, republished, the regime of exercising the action in annulment also stating, in that period, the exemption from the payment of the stamp fees, of the actions in annulment initiated by the administrator or the liquidator designated to perform the specific prerogatives received within the procedure. Even if the legal norm did not mention it explicitly, we considered that the exemption from the payment of the stamp fee should also have regarded the hypothesis in which the action in annulment would have been filed by the creditors' committee, as an exception, on the grounds of the authorization given by the syndic-judge, as a consequence of the passive conduct of the administrator or the liquidator.⁴⁸

Similarly, art. 115 of Law no. 85/2014 regulates explicitly *the exemption from the payment of stamp fees of all the actions filed by the judicial administrator/judicial liquidator*, including the one for the recovery of the claims, but, not even in the present, the law clarifies or clearly mentions the solution for the hypothesis when the creditors' committee exercises such an action if the judicial administrator, respectively the judicial liquidator, does not fulfil its prerogatives, while in such a case, art. 118 par.2 of the law enables the creditors' committee to file the action before the syndic-judge.

⁴⁷ The High Court of Cassation and Justice, commercial division, decision no. 683/21.02.2008, www.scj.ro, last access on May 1, 2015.

⁴⁸ Mircea N. Costin, Angela Miff, *Bankruptcy. Evolution and actuality (Falimentul. Evoluție și actualitate)*, op. cit., 2000, pp. 274-275.

We consider that motivated by the *purpose of the procedure* – focused on covering the liabilities of the debtor, or, by case, on the reorganisation of the debtor's activity, objective to which all the actions and judicial measures of the judicial administrator, or the judicial liquidator, are submitted, materialized in the legal measures used for the recovery of the debtor's patrimony - *ex eadem ratio*, the facility of the exemption from the payment of stamp fees in the case when such legal and judicial means are filed by the creditors' committee is also to be noted.

Among the *facilities* regulated by the law for the protection of the debtor's patrimony and an efficient administration of the insolvency procedure should be mentioned ***the gratuitous character of the publicity formalities of the procedure acts*** issued by the judicial administrator/judicial liquidator, which are under publicity not only in Insolvency Procedure Bulletin (BPI) but also in the trade register, as well as in the case of the publicity in BPI of the procedure acts issued by the courts during the insolvency procedure.

7. Conclusions

The provisions of the fifth section "Situation of some legal acts of the debtor" (art. 115 – art. 131) of Title II of Law no. 85/2014 on the prevention of the insolvency procedures and the insolvency, and the measures provided by these, are *generally applicable* both in the judicial reorganisation and in the cases of bankruptcy, under the general and simplified procedure.

The action in annulment, as procedural means provided at the disposal of the judicial administrator/judicial liquidator, creditors' committee and the creditor who holds more than 50% of the value of the claims declared to the amount of claims, is of utmost importance within the category of these judicial means being configured, within Law no.85/2014, through legal norms that, not being essentially different from those provided by the former law, reflect the regulation tradition in this matter. The law in force designates this action as the "exclusive" means, from the opening date of the procedure, for the annulment of the fraudulent acts concluded by the debtor to the prejudice of its creditors. The action in annulment is still reserved to the competence of judgement of the syndic-judge, according to art. 117 parg. 1 of Law no. 85/2014.

In general terms, the object of the mentioned action, within the frame described by Law no. 85/2014, refers to the same category of fraudulent acts and operations concluded by the debtor in the detriment of the creditors, prior to the opening date of the procedure, but the duration of the suspect period diminished from the 3 years term prior to the opening of the procedure provided by the former regulation, to the duration of 2 years prior to the opening date of the procedure, according to the present law. However, the duration of 120 days prior to the opening date of the procedure during which the debtor concluded presumed fraudulent acts or operations to the prejudice of its creditors is increased, in the terms of Law no. 85/2014 that provides the possibility to introduce the action in annulment of certain presumed fraudulent acts and operations made by the debtor

within the 6 months prior to the opening date of the procedure, in the cases mentioned by art. 117 par. 2 letters b), d), e) - f).

The persons entitled to introduce the action, within the legal frame of Law no. 85/2014, are those also designated by the former regulation, but, as a *novelty element*, the present law in force recognizes the active capacity to stand in court to *the creditor who owns more than 50% of the value of the claims declared to the amount of claims*. In addition, the one year term for the exertion of the action in annulment of the fraudulent acts but not more than 16 months,⁴⁹ from the opening date of the procedure, while the action in annulment may be introduced, is maintained as before and it represents the constancy of the regulation in this field.

Law no. 85/2014 maintains the facilities, also granted by the former regulation, regarding the exempt from the payment of the stamp fees of all the actions brought to court by the judicial administrator/judicial liquidator during the enforcement of this law's provision, the gratuitous publicity – in the Insolvency Procedures Bulletin (BPI) and in the trade register – of the procedure acts, issued by the courts, the judicial administrator/judicial liquidator, after opening the procedure, that are under these forms of publicity.

The jurisprudence of the High Court of Cassation and Justice has brought clarifying notes and a highly professional interpretation for the correct and adequate application of the provisions of insolvency law, the jurisprudential solutions for a *unitary interpretation and application of law* having a notable impact and being reference points in the actual legal frame of the new law for the insolvency procedures.

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