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Insolvency and exequatur under Romanian and EU law

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1. Insolvency and exequatur under Romanian and EU law

1.1. How do you successfully promote an exequatur in Romania against a foreign debtor who is in insolvency in a foreign country?

Insolvency is one of the forms regulated by Law no. 85/2014 for the prevention of insolvency. According to Annex A of EU Regulation 848/2015, insolvency is one of the procedures that fall under the scope of EU Regulation 2015/48.

A very challenging problem encountered in practice is the situation in which the debtor-defendant in the exequatur process enters insolvency after the start of the exequatur. In this case, the judge of the exequatur could suspend the process until the end of the insolvency proceedings, because the rule under Romanian Law no. 85/2014 is that insolvency blocks all judicial actions against the debtor. Thus, the debtor could plead for the creditor to enter the table of creditors in the insolvency procedure in the debtor's state.

This would mean that the creditor-plaintiff would not be able to obtain the enforcement of the arbitral award and the satisfaction of the rights established in his favour.

Payment of claims is governed by art. 12 (1)(b) Rome I Regulation 593/2008 on the law applicable to contractual obligations.

According to Art. 16 EU Regulation 848/2015 (*"Detrimental acts"*) the payment of claims cannot be challenged by the insolvency creditors and enforcement on the Romanian territory is not affected/suspended:

- **Art. 12 (1)(b) EU Regulation 2008/593 (Rome I):**

"The law applicable to a contract by virtue of this Regulation shall govern in particular:

(a) interpretation;

(b) performance;

(c) within the limits of the powers conferred on the court by its procedural law, the consequences of a total or partial breach of obligations, including the assessment of damages in so far as it is governed by rules of law;

(d) the various ways of extinguishing obligations, and prescription and limitation of actions;

(e) the consequences of nullity of the contract."

- **Art. 7 (2)(m) EU Regulation 2015/848:**

"2. The law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure. In particular, it shall determine the following:

(m) the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to the general body of creditors."

- **Art. 16 (*"Detrimental acts"*) EU Regulation 2015/848:**

*"**Point (m) of Article 7(2) shall not apply** where the person who benefited from an act detrimental to all the creditors provides proof that:*

(a) the act is subject to the law of a Member State other than that of the State of the opening of proceedings; and

(b) the law of that Member State does not allow any means of challenging that act in the relevant case."

For the creditor-plaintiff to be able to invoke Art. 16 EU Regulation 848/2015, he must prove that the arbitral award given in a foreign state *("other than that of the State of the opening of proceedings")* meets the conditions imposed by Art. 16:

- The award is subject to the law of a Member State other than that of the State of the opening of insolvency proceedings: the creditor-plaintiff must indicate that the arbitral award was given in another state than the state of the opening of insolvency against the debtor-defendant;
- The award does not allow any means of challenging that act in the relevant case – the creditor-plaintiff must show that the arbitral award is final and binding and there are no legal ways of challenging it, according to the procedural rules that governed the arbitral process in that case.

Therefore, if an act, pursuant to Article 16 EU Regulation 848/2015, is considered to be a detrimental act, then the payments made on the basis of this act do not enter the table of creditors, are not subject to the protection of the creditors in the foreign country, but are exclusively subject to the legal order of Romania.

In such a case, even if the arbitral award was a detrimental act under Art. 16 EU Regulation 848/2015, this would not preclude the judge to admit the exequatur and it would not give the debtor the right to block / suspend the forced execution of the right established in the detrimental act (the arbitral award).

In our opinion this solution is sensible and equitable: the creditor-plaintiff in the exequatur procedure has a final and binding arbitral award that grants him certain rights against the debtor-defendant. In order to obtain that final and binding arbitral award, the creditor-plaintiff most likely followed a long and costly international arbitration procedure, for a number of years. When the creditor finally sees his rights granted, the debtor-plaintiff invokes its own insolvency opened in a different state.

It would be extremely unjust for an insolvency proceeding opened after the arbitration and after the start of the exequatur process to block the enforcement of the creditor's rights in Romania. For this reason, Art. 16 EU Regulation 848/2015 allows the creditor who has a final and binding arbitral award against the debtor to satisfy its receivable directly through exequatur and not follow the insolvency procedure opened in the debtor's state.

1.2. CJEU's official interpretation of the `detrimental acts` (Art. 16 EU Regulation 848/2015) in relation to an insolvency procedure started in the debtor's state (Art. 12 (1)(b) EU Regulation 593/2008)

On the subject of enforcing rights against a debtor in insolvency in a different country, a very innovative application of Art. 16 EU Regulation 848/2015 and Art. 12 (1)(b) EU Regulation 593/2008 was made by the Court of Justice of the European Union in its Judgment in Case C-73/20 from 22.04.2021.

The problem put forward in C-73/20 was the following: 2 German companies (A and B) were part of the same group.

B and C (a Dutch company) concluded a contract relating to a waterway vessel under which B had to pay C a sum as remuneration. The remuneration was paid by the first German company, A, in performance of the contract between B and C.

Afterwards, insolvency proceedings were opened against A in Germany. During the insolvency proceedings, the liquidator called for the voidance of the payment made by A to C in the performance of the contract between B and C.

The problem put forward to the CJEU was whether Article 13 of Regulation No 1346/2000[1] and Article 12(1)(b) of Regulation No 593/2008 must be interpreted as meaning that the law applicable to the contract under the latter regulation (the contract between B and C) also governs the payment made by a third party (A) in performance of a contracting party's contractual payment obligation where, in insolvency proceedings (of A), that payment is challenged as an act detrimental to all the creditors.

The CJEU ruled:

"35 Moreover, the interpretation that, for the purposes of applying Article 13 of Regulation No 1346/2000, the law applicable to the performance, by a contracting partner or a third party, of a contractual obligation is the law governing the contract from which that obligation arises is supported by the wording of Article 12(1)(b) of Regulation No 593/2008.

36 That provision states that the law applicable to the contract under the latter regulation is to govern, in particular, the performance of the obligations arising from the contract.

37 ***It therefore follows from the wording of that provision that the performance of a contractual payment obligation is governed by the law applicable to the contract constituting the legal basis of that obligation.***

38 Moreover, as stated in recital 16 of Regulation No 593/2008, the conflict-of-law rules laid down in that regulation should be highly foreseeable in order to contribute to the achievement of the general objective of that regulation, namely legal certainty in the European judicial area.

39 It must be stated that an interpretation of Article 13 of Regulation No 1346/2000 to the effect that the law applicable to a contract also governs the performance, by a contracting partner or by a third party, of an obligation arising from that contract is consistent with that objective of legal certainty, since it ensures that, even after insolvency proceedings have been opened, that obligation will continue to be governed by that law.

40 In the light of all the foregoing considerations, the answer to the question referred is that ***Article 13 of Regulation No 1346/2000 and Article 12(1)(b) of Regulation No***

[1] The then-equivalent of Art. 16 EU Regulation 848/2015.

593/2008 must be interpreted as meaning that the law applicable to the contract under the latter regulation also governs the payment made by a third party in performance of a contracting party's contractual payment obligation where, in insolvency proceedings, that payment is challenged as an act detrimental to all the creditors."

The ruling in Case C-73/20 is important because it not only establishes that the law applicable to the performance of a contract is applicable to a payment made by the debtor to the creditor before the start of the insolvency proceedings against the debtor, but also that the same law is applicable in case that a third-party makes the payment on behalf of the debtor.

In the context of an exequatur proceeding in Romania, this official CJEU interpretation can be invoked in front of the Romanian courts if, for example, the arbitral award that is the subject of the exequatur establishes that the payment of an amount is to be made to or by a third party.

Key takeaways:

- EU legislation (EU Regulation 2015/848) protects the creditor who has a receivable against a debtor in a foreign country when the debtor enters insolvency in its country.
- The opening of an insolvency procedure against the debtor in the debtor's state does not block the creditor to satisfy its receivable through the recognition and enforcement of a foreign arbitral award in Romania.

2. Exequatur and scheme of arrangement (concordat preventiv) under Romanian and EU law

2.1. How do you successfully promote an exequatur in Romania against a foreign debtor who is in a scheme of arrangement with creditors in a foreign country?

The scheme of arrangement or *concordat preventiv* is one of the forms regulated by Law no. 85/2014 for the prevention of insolvency. According to Annex A of EU Regulation 848/2015 the scheme of arrangement (*concordat preventiv*) is one of the procedures that fall under the scope of EU Regulation 848/2015.

Art. 18 of EU Regulation 848/2015 provides:

„The effects of insolvency proceedings on a pending lawsuit or pending arbitral proceedings concerning an asset or a right which forms part of a debtor's insolvency estate ***shall be***

governed solely by the law of the Member State in which that lawsuit is pending *or in which the arbitral tribunal has its seat."*

In the case of an exequatur pending in Romania against a debtor that entered a scheme of arrangement in a foreign country, the effects of the scheme of arrangement on the exequatur process shall be governed by Romanian law.

The Romanian law on insolvency is Law no. 85/2014, that regulates in Art. 16-37 the effects of a scheme of arrangement procedure. Romanian Law distinguishes between 2 possible scenarios: (i) If the scheme of arrangement is not approved by a bankruptcy court in the debtor's state or (ii) If the scheme of arrangement is approved by a bankruptcy court in the debtor's state.

(i) If the scheme of arrangement is not approved, the exequatur procedure cannot be suspended

In this scenario, Art. 25 Law no. 85/2014 establishes that the debtor **can** ask the bankruptcy court in its own state to suspend all enforcements against the debtor until the approval of the scheme of arrangement.

Therefore, the rule is that legal actions such as enforcements are **not** automatically suspended against the debtor during an unapproved scheme of arrangement, but the bankruptcy court can grant that suspension if it considers so.

Still, as long as the debtor-defendant in the exequatur proceedings does not prove that a bankruptcy court in its own state approved such a suspension request, the exequatur procedure in Romania is not affected by simply entering an unapproved scheme of arrangement in the foreign state.

Therefore, in a situation like this, the debtor-defendant in the exequatur has the burden to prove that a bankruptcy court in the debtor's state did suspend all legal actions against the debtor until the approval of the scheme of arrangement. If the debtor-defendant fails to make this proof, the suspension of the exequatur will not be allowed and the procedure will move forward

(ii) If the scheme of arrangement is approved, it does not have an effect on enforcements started by non-subscribing creditors

According to Art. 32 para. 1 Law no. 85/2014, regarding the situation of a scheme of arrangement agreed by the debtor with other creditors:

*"**Any creditor who obtains an enforceable title on the debtor during the procedure** may apply for membership of the scheme of arrangement **or can recover his receivable by any other means provided for by the law."***

Therefore, if the scheme of arrangement is approved, the law provides that the creditor has 2 options: (i) either subscribe to the scheme of arrangement or (ii) not subscribe to the scheme of arrangement and recover his receivable by any other means provided for by the law.

The literature is edifying in this regard:

*"It is very clear that, in case of an approved scheme of arrangement**, the creditors who did not agree with the scheme of arrangement (non-subscribing) can obtain an enforceable title after the approval and, if they do not agree with the scheme of arrangement, can enforce, in any way, their receivables.** Thus, the debtor, for avoiding to disregard the scheme of arrangement, must pay the amounts due to these creditors, in case of a final award[2]."*

If the creditor-plaintiff in an exequatur doesn't subscribe to the scheme of arrangement, the effects of the scheme of arrangement are non-binding for him and Romanian legislation regarding the scheme of arrangement does not interfere in any way with the creditor's right to enforce an arbitral award against his debtor through the exequatur procedure, as the doctrine concluded:

*"(...) **a scheme of arrangement thus approved is non-biding for the non-subscribing creditors and these creditors can recover their claims by any judicial path** if conditions are met[3]."*

So what happens if, during the exequatur procedure, the debtor-defendant requests a suspension of the procedure grounded on a an approved scheme of arrangement that the creditor-plaintiff has not subscribed to?

According to Art. 29 Law no. 85/2014:

*"From the date of communication of the award for approval of the scheme of arrangement, the individual enforcements started by **subscribing creditors** against the debtor are suspended by law (...)"*

The provision above refers to the situation of **subscribing creditors** and only in this situation the enforcements started by them are suspended by law. *Per a contrario,* the enforcement started by a non-subscribing creditor will not be affected by the approval of the scheme of arrangement.

Therefore, for the exequatur to not be suspended, it is enough for the creditor-plaintiff to indicate that he hasn't subscribed to the debtor's scheme of arrangement approved in

[2] R. Bufan (coord. şt.), *Tratat practic de insolvenţă,* Ed. Hamangiu, Bucureşti, 2014, p. 118.
[3] *Ibidem*, p. 115.

the debtor's country. In this situation, the enforcement by exequatur will continue, because the scheme of arrangement is not binding for the non-subscribing creditor.

Key takeaways:

- When the debtor is in a scheme of arrangement non-approved by a bankruptcy court in his country, the exequatur procedure will not be suspended automatically.
- When the debtor is in a scheme of arrangement approved by a bankruptcy court in his country, the creditor must show that he hasn't subscribed to the scheme of arrangement. In this case, the exequatur procedure will not be suspended and the enforcement will be possible regardless of the debtor's scheme of arrangement.