****

**EMERGENCY LEGAL KIT FOR BUSINESS SERIES**

**Year 5, Issue 20, November 2018**

**Insolvency: Supreme Court’s decision on the point of law regarding bugetary claims**

1. **Supreme Court’s Decision highlights**

In the above-mentioned legal framework, the Supreme Court rendered the Decision no. 53 rendered on June 18, 2018, recently published in the Official Gazette on November 5, 2018, on the point of law (the ”**Decision**”).

To put things in context, we mention that the Supreme Court renders a Decision on the point of law in order to avoid an inconsistent interpretation of a certain essential legal provision susceptible of multiple interpretation, as an *a priori* control.

In this case, Cluj Court of Appeal asked the Supreme Court to render a Decision on the point of law regarding the extent of the judicial administrators/liquidators’ prerogative to analyse the budgetary claims comprised within enforceable titles in order to establish its historical or current legal nature within the insolvency procedure.

Determining the historical or current nature of a certain receivable in an insolvency procedure has serios long term implication given the fact that, according to the Insolvency Law:

1. on one hand, the historical claims must be registered within the debtor’s table of creditors and its recovery shall be made in accordance to the payment schedule comprised within the reorganization plan in three to four years’ timeframe;
2. on the other hand, the current claims are not registered within the debtor’s table of creditors; the current claims are paid during the insolvency procedure on the maturity date.

As a rule, the judicial administrator analyses all claims both formally (full or partial payment, statute of limitation etc.) as well as on the merits except two categories of claims, when the analysis is limited to the formal aspects, as follows:

1. the claims arising of enforceable titles, namely enforceable court’s decisions or enforceable arbitral awards; and
2. the budgetary claims arising from enforceable titles challenged or unchallenged before the specialized courts.

The point of law subjected before the Supreme Court’s attention concerns the second exception, namely the extend of the formal analysis of the budgetary claims arising out of enforceable titles in order to establish its historical/current nature.

In this regard, establishing the historical/current nature of a certain claim, budgetary or otherwise, implies setting the date on which such claim was actually born, namely before/after the date on the insolvency commenced.

Or, such analysis concerning the day a claim was born is at the border between the formal verification, namely on extrinsic aspects, and the merits of the claim, namely on the intrinsic aspects. In other words, such analysis may be considered to interfere with the merits of the budgetary claim.

Nevertheless, the Supreme Court decided that even if the judicial administrator cannot perform an analysis on the merits of the budgetary claims, arising from enforceable titles, challenged or unchallenged, the judicial administrator is entitled to verify the date on which such budgetary claims were born, namely before/after the date on the insolvency commenced, in order to establish its historical/current legal nature.

1. **New legislative context**

The primary legislation governing insolvency and restructuring proceedings in Romania is Law 85/2014 on preventing insolvency and insolvency proceedings (the ”**Insolvency Law**”).

Recently, namely on October 3, 2018, the Insolvency Law has been slightly modified by Emergency Ordinance no. 88/2018 amending and supplementing several normative acts in the field of insolvency (the ”**E.O. no. 88/2018**”).

According to the substantiation note of E.O. no. 88/2018, the tax authorities unilaterally concluded that lately, the insolvency procedure has become a method of defrauding the state budget so that the fiscal authorities should have more prerogatives.

In a nutshell, E.O. no. 88/2018 provides for a set of specific rights to the benefit of the budgetary creditors from the date of commencement of the procedure and further on until a reorganization plan is adopted.

In this regard, the most important amendments provided by E.O. no. 88/2018 are:

1. in case the debtor submits the request for the commencement of the insolvency proceedings, the fiscal receivables cannot exceed 50 percent of the total amount of the historical debts;
2. another consequence of the opening of the insolvency proceedings, aside from the fact that all judicial or extrajudicial legal actions and forced execution measures for recovery claims against the debtor or its goods will be stayed by virtue of law, is the trigger of the fiscal inspection of the debtor within 60 days after the date on which the insolvency has commenced;
3. the reorganization plan may provide the conversion of fiscal receivables into shares with the consent of the tax authorities as well as under the fulfilment of certain cumulative conditions, out of which the most important is for the reorganization plan to provide the continuance of the current activity;
4. the fiscal creditors may approve the reorganization plan providing the reduction of the unsecured fiscal receivable only under very strict cumulative conditions.

Given the above-mentioned amendments, E.O. no. 88/2018 seems to impact the collective and egalitarian character of the insolvency and bankruptcy procedures by favouring the fiscal creditors at the expense of the private creditors as well as the debtor.

1. **Supreme Court’s Decision**

In the above-mentioned legal framework, the Supreme Court rendered the Decision no. 53 on June 18, 2018, recently published in the Official Gazette on November 5, 2018, on the point of all (the ”**Decision**”).

To put things in context, we mention that the Supreme Court renders a Decision on the point of law in order to avoid an inconsistent interpretation of a certain essential legal provision susceptible of multiple interpretation, as an *a priori* control.

In this case, Cluj Court of Appeal asked the Supreme Court to render a Decision on the point of law regarding the extent of the judicial administrators/liquidators’ prerogative to analyse the budgetary claims comprised within enforceable titles in order to establish its historical or current legal nature within the insolvency procedure.

Determining the historical or current nature of a certain receivable in an insolvency procedure has serios long term implication given the fact that, according to the Insolvency Law:

1. on one hand, the historical claims must be registered within the debtor’s table of creditors and its recovery shall be made in accordance to the payment schedule comprised within the reorganization plan in three to four years’ timeframe;
2. on the other hand, the current claims are not registered within the debtor’s table of creditors; the current claims are paid during the insolvency procedure on the maturity date.

As a rule, the judicial administrator analyses all claims both formally (full or partial payment, statute of limitation etc.) as well as on the merits except two categories of claims, when the analysis is limited to the formal aspects, as follows:

1. the claims arising of enforceable titles, namely enforceable court’s decisions or enforceable arbitral awards; and
2. the budgetary claims arising from enforceable titles challenged or unchallenged before the specialized courts.

The point of law subjected before the Supreme Court’s attention concerns the second exception, namely the extend of the formal analysis of the budgetary claims arising out of enforceable titles in order to establish its historical/current nature.

In this regard, establishing the historical/current nature of a certain claim, budgetary or otherwise, implies setting the date on which such claim was actually born, namely before/after the date on the insolvency commenced.

Or, such analysis concerning the day a claim was born is at the border between the formal verification, namely on extrinsic aspects, and the merits of the claim, namely on the intrinsic aspects. In other words, such analysis may be considered to interfere with the merits of the budgetary claim.

Nevertheless, the Supreme Court decided that even if the judicial administrator cannot perform an analysis on the merits of the budgetary claims, arising from enforceable titles, challenged or unchallenged, the judicial administrator is entitled to verify the date on which such budgetary claims were born, namely before/after the date on the insolvency commenced, in order to establish its historical/current legal nature.

1. **Impact**

Considering the recent amendments made by E.O. no. 88/2018 on the Insolvency Law creating privileges exclusively for the budgetary creditors to the detriment of the other categories of creditors as well as the debtor, the Supreme Court grants the judicial administrator a small but important *in extenso* interpretation of its prerogative in analysing the budgetary claims.

Hence, given the recently amended regime of the budgetary claims within the economy of the insolvency procedures, establishing the historical nature as opposed to the current nature of such claims is crucial for determining the extent of the debts’ pool and subsequently, the chances to successfully implement the reorganization plan for the reinsertion of the debtor within the economic circuit.

\*\*\*

This publication contains general information only, and it should not be considered as legal, tax, accounting opinion or other professional advice or services. This publication is not a substitute for such professional ad vice or services, nor should it be used as a basis for any decision or action that may affect your finances or your business. Before making any decision or taking any action that may affect your finances or your business, you should consult a qualified professional adviser.

For additional information please contact:

**Dana Rădulescu Anca Băițan**

**Partner Associate**

dana.radulescu@maravela.ro anca.baitan@maravela.ro