

Hungary – Insolvency Law and Practice

by Andrea Csőke

The Hungarian Insolvency Act needs to be changed, my opinion is that the rules do not give the right answers to financial challenges – unfortunately, the last amendments, which went into force on 1st September 2009, does not deal with the real problems of the system.

The Hungarian Insolvency Act is a very special one in Europe, first of all because it deals only with companies and some other legal entities, meanwhile individuals, natural persons have not got a legal possibility to go bankrupt. There are some concepts to put them under the scope of the Insolvency Act or to create another new Act for them, but unfortunately these rules do not yet exist.

The other speciality is, that companies without money can be debtors in the proceedings, there is not a possibility to refuse a petition because the debtor does not have enough money to pay the costs and fees of the proceeding.

The Act contains only two types of proceedings: namely one for reorganization – csődeljárás ; and the other is for liquidation (winding up) – “felszámolási eljárás”.

Csődeljárás

The modification has completely changed the rules of the reorganization proceeding, because during the last 15 years this procedure did not exist, the debtors did not file petitions to open reorganization proceedings, because they found some other ways to solve their financial difficulties.

The proceeding can be filed by a formula only, and the moratorium on the debtor assets goes into force from the next day. The moratorium lasts 90 days which can be made longer with the consent of the majority of the creditors to 180 or 365 days. When the debtor and its creditors can not create a settlement, the court finishes the procedure and when this decision becomes absolute, the proceeding changes into liquidation, and the debtor has not got right to appeal against the opening of the liquidation proceeding.

I doubt the applicability of the proceeding because the rules are not clear, they are very difficult to understand, they do not deal with the financial part of the procedure and they are

ambiguos. My opinion is that the Act gives some relief to the debtors, but there is not a real system in the rules and when a proceeding starts the debtor and the creditors do not know what should they do to reach a successful outcome.

Felszámolási eljárás

In Hungary only liquidation proceedings have worked for the last 15 years. In the first years of the '90s they were tools for the privatization, but after these years the legislator has not changed the conception and the rules – meanwhile economy and circumstances have changed - and nowadays liquidation proceedings are mainly tools to escape from the responsibility.

The liquidation proceeding was - and is - "the insolvency proceeding" in Hungary, because more than 20 thousand requests arrive at the courts in a year out of which more than 10 thousand liquidations are opened.

The proceeding has two big parts. In the first part the court examines whether the debtor insolvent is or not. The examination is very formal, there are 5 situations when the creditors have the right to file for the commencement of liquidation. The court has no right to investigate whether the debtor's assets are enough to satisfy the creditors' claims, it can be examined only if the conditions written in the Act exist or not.

When the court's decision became absolute about the debtor's insolvency, the court publishes the opening of the insolvency case in the Official Gazette. This is the starting point of the second part where the liquidator takes out the power over the debtor's assets, arranges them and parallel he examines the creditors' claims and ranks them. The creditors' right to enforce their claims are stopped, however the litigations against the debtor filed by the creditors before the time of the opening of the liquidation (the publishing) are continued.

The creditors' claims have to be sent to the liquidator with 40 days after the publishing. To become a creditor one has to send his claim to the liquidator and has to pay a fee which depends on the amount of the claim. (It is 1 % of the claim, but there is a minimum fee, which is 5000 HUF (20 Euro) and the maximum is 200.000 HUF (800 Euro). When the liquidator and the creditor do not agree with the amount or on the ground of the claim, the liquidator has to send the documents to the judge and he/she has to decide whether the claim is enforceable or not.

The liquidator has to create a balance-sheet annually and he can pay the non-disputed claims according to the proposal for the distribution of assets.

The creditors have limited rights to make decisions about the financial problems of the proceedings. They have rights to file complaints against the liquidator's activity after the event

- but it is not so effective. Unfortunately, the rules of the creditors committee are not detailed very well, so the result of the proceeding depends on the strength and good faith of the liquidator and the capability of a creditor to enforce their interests against the liquidator or against the other group of creditors.

In the Hungarian system it is the liquidator – who is a company - that is the “strongest link”, the court only supervises its activity and the creditors do not have many rights over it. The new rules give some possibility to change the liquidator, but the lack of information makes it difficult.

In the proceedings it very rarely happens that the company can be sold as a going concern. It is possible only in those cases where there are no secured creditors or other facts press and help the liquidator to choose this solution.

I think that meanwhile the national procedural rules are not very clear, effective, and the statistics figures of the insolvency cases are horroistic, our cross-border practice is good and it has several good aspects.

On 1st May, 2004 the Hungarian Insolvency Act was modified due to the European Insolvency Regulation (1346/2000 EC Regulation on insolvency proceedings). The Hungarian legislator decided not to spread the cases which could arise in the future all over Hungary, the intention was to create experience on this part of law, so the Metropolitan Court, Budapest was appointed to deal with these cases. My opinion is that it was a good decision, because there are not many cases – especially not in a little country like Hungary – and a judge dealing only with one cross-border case can not create practice.

At the beginning there was a big debate among experts about the question: should the judge write into his decision the type of the proceedings in every case? Should he write into the decisions about „national” companies that it is a main proceeding? One part of the experts said that we should distinguish „national” and „international” cases and it is only in the second one when the judge should decide about the jurisdiction of the court and the liquidator. The other part of the judges, including myself, was on the opinion, that „national” cases do not exist, every case which is opened in a Member State is an „international” case, because the judge has to decide about the jurisdiction of the court, of the liquidator and in this decision he decides about the law applicable.

My opinion is that there can be several „international” lines in a case:

- 1) It might happen, that the debtor „has crossed” the borders – when its registered office and its CoMI (centre of main interests) or its establishments – are in different Member States.
- 2) It might happen, that the debtor has assets in an other Member State – so the debtor as an owner „has crossed” the borders. This is very important when we speak about the Art.2 g), because this rule defines the Member State in which assets are situated, and it can be, that the debtor’s properties, rights are in different countries to the Member State where the procedure was opened and the creditors’ rights depend on where the debtor’s CoMI is and in which country the properties, etc. are.
- 3) It might happen, that the creditors „have crossed” the borders – the rights of the creditors of the other Member States are written in the Regulation.
- 4) It might happen, that the debtor as a creditor „has crossed” the borders – and the rights of the third party are written in the Regulation.

When an insolvency case is opened generally it can not be foreseen what will happen. The judge must decide about his own jurisdiction to which the liquidator’s jurisdiction is connected.

The debate was heavy but after several months the first group gave in, they said that we were right, and since that time the Hungarian judges have decided about the type of proceedings and they have stated their reason in their decisions.

In my opinion it is very important to write the type of procedure also in a situation when the judge has to open proceeding against a company whose registered office is not in the country of the court, only its CoMI is there.

In our first cross-border case the situation was the same. There was a Hungarian company which owned a Slovakian company. The Hungarian company went bankrupt, the court opened the liquidation proceeding against the debtor. Its liquidator asked the Metropolitan Court, Budapest – which is the competent court in Hungary to deal with such cross-border cases – to open a liquidation proceeding against the Slovakian company, in which this Hungarian company under liquidation was the only owner. The liquidator stated that the main decisions about the Slovakian company were ordered from Hungary, so according to the „head office function” principle the Hungarian court had jurisdiction to open the liquidation procedure against the Slovakian company.

At that time – in 2004 – the „head office function” principle was the winner all over Europe, so the Hungarian court opened the liquidation.

This case was the ”vet’s horse” – you know, this is the animal which has every illness what a horse can have. The first biggest lesson that we learnt from this case was that the translation of the proceedings names can cheat anybody. Every country has a different insolvency system with different proceedings names, so they can not be translated from one language to an other one. (For example the director of the Slovakian company was an Italian man. The Hungarian liquidator ordered him to file a petition to the Metropolitan Court, Budapest to open a liquidation proceeding. He filed and he was shocked when the Hungarian liquidator appeared at the company to collect the debtor’s assets, because in the Slovakian law the „likvidacija” is not a winding up proceedings, but it is like a voluntary dissolution.)

The second lesson to learn was that it is a big problem to communicate and cooperate between courts. The Hungarian court sent some translated and not translated decisions to the Slovakian court but there was no answer and it is not known what happened to the company. Is it registered in the Slovakian register or not?

It was a bigger shock when we came to know that there were Hungarian companies „stolen” by the German and Austrian courts. The owners of the companies went home and asked their national courts to open the main proceedings against the Hungarian companies. These cases showed us the importancy of communication and cooperation between main and secondary liquidators - because of course Hungarian creditors filed for opening secondary proceedings against the debtor in Hungary. The secondary liquidators tried to work together with the German and Austrian liquidators, but our experience is that foreign liquidators do not care very much about these Hungarian cases. One of them tried to give orders to the secondary liquidator, the other one did not lodge the claims of the creditors of his procedure – and it caused damages to his creditors. So we can say that they did not bother with the Hungarian secondary cases.

The Metropolitan Court, Budapest is the competent court to publish the opening of the main or territorial proceeding according to Art. 21., and this court orders when a main liquidator asks to register into land-, trade- and other public registers the judgement opening the proceedings – according to Art. 22.

From these cases we got to know that not only insolvency systems are very different within Europe but also civil law. For example, there was a case in which the German liquidator

asked to write into the land register that a main insolvency proceeding against an inheritance was opened in Germany. The testator had debts in Germany and immoveable properties in Hungary, and the liquidator asked to write in the land registry the fact of the opening of the proceeding. It was a surprise in Hungary, because the Hungarian Civil Law says that the heir is responsible for the testator's debts only up to the inheritance. According to this case we got to know that in Germany the heir is responsible for the testator's debts with his own assets, except when he files for opening an insolvency procedure.

The other problem was again the translation problem: how can we translate the names of foreign proceedings, and how can we write into the landregister in a way that it does not cause any troubles in the future. Our final solution is that we write into our decision what the opening of the proceeding abroad means concerning the property.

There were big debates about opening the secondary proceedings – is it possible to open a secondary proceeding if the company previously owned an establishment in Hungary, but it does not any longer; what are the conditions of an establishment, etc. – because Hungary is mainly concerned with secondary proceedings.

There was another Hungarian company, whose main proceeding was opened in the United Kingdom together with the other companies of the group. The English judge wrote a Letter of Request to all concerned jurisdictions asking not to open secondary proceedings against the companies in the countries where the registered offices of the companies were, or if the judge has to open it, they shall inform the main liquidator about it. The Hungarian court should not decide about the question but it was an interesting situation – the court could not have refused a petition to open secondary proceedings according to the Regulation.

My opinion is, that without any communication and cooperation cross-border cases cause problems in concerned countries. I am not sure if this communication and cooperation should touch the core of the case or not, but to know about parallel proceedings is very important.