PENAL ACTION AND CIVIL ACTION IN BANKRUPTCY'S OFFENCE CASE

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Abstract:

Civil action may be exercised along with penal action, only with the purpose of bringing back the goods, the hidden values or the fraud values in a strange way to the failure table, due to some actions which enter in bankruptcy's underground content.

Creditors may have a civil part quality because they suffer the damages of the action, also like the insolvent debtors.

The penal action and the mercantile action of the judicial reconstruction or debtor bankruptcy's are independent, having a different current, the charges of the 19th article, the second paragraph, Code of criminal procedure being impracticable.

Only final injunctions of the penal instances have judge work authority. There is an exception: the solution of the penal pursuit instances, only if they aren't confirmed by the judgment instances.

The final injunction of the mercantile instance regarding the unsolved procedure has judged work authority in front of the penal and judicial instances (prosecution instances and judgment organization) that solve the penal action, human penal responsibility, which make the bankruptcy's offence to be the object in the mercantile insolvent existing state of the condition.

Key words: penal action, civil action, bankruptcy.

1. Civil action along with penal action forms a very controversial problem for the damaged creditors through the bankruptcy's offence. In an old opinion it sustained that the civil action is not allowable because, through it the creditor who would make the civil action would obtain, individually, damages which would break the leveling rule of the bankrupting contestable procedure[149].

In another opinion[150], creditors may form civil parts in penal process, in the action of requiring damages from the bankruptcy's offence (ex delictu).

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[149] M. Pascanu, *Romanian Bankruptcy's Right*, Cugetarea Publishing House, Bucharest, 1926, page 659.

[150] N. Buzea, *Note,* Pandectele Romane, 1930, II, pages 18-20.

Like other authors[151], we consider that the civil action may be exercised near the penal action, but only with the purpose of bringing back the goods, the hidden values or the fraud values in a strange way to the failure table, due to some actions which enter in bankruptcy's underground content.

Regarding the civil part quality in the penal process for the bankruptcy's offence, it was reflected the opinion that each of the damaged creditors don't have a same quality and only a local-judge has in his fortune's name which is administrated by him, and into whom he intends to bring the foreign good for the creditors well-being. Maintaining this opinion, there were evoked legal charges which provide the local-judge's right to make civil actions for bringing the foreign goods in debtor's fortune.

Far away to deny a same faculty of the local-judge we can't pass over the fact that the creditors are the damaged persons and no other persons or state instances. During the incriminatory norms, in the case of some bankruptcy's offence modalities, the lawgiver previewed in an express way that the material-element may be fulfilled only in the creditors' fraud. In conclusion, creditors may have the civil part quality because they suffer the prejudice caused by the committed act.

In the other hand, according the 24th article, the first and the second paragraph, Code of criminal procedure, the person who suffered a physical, moral or material damage through the penal act is named a civil part if he participates to the penal process.

In the same case, the 85/2006 Law gives creditors a lot of faculties in bankruptcy's matter: they can elicit the bankruptcy's opening procedure; they can participate to the bankruptcy's procedure etc. The bankruptcy's procedure represents the collective contest and the leveling contest of unsolved procedure which is applied to the debtor for his fortune's liquidation, for the quiescent coverage, being followed by the debtor's radiation from the register in which he is matriculated.

Regarding the local-judge, we have to mention that, according to the 11th article, the first paragraph, the „g" letter from the 85/2006 Law, he has like competences the involving demands' judgment of the board members' responsibilities who contributed to the debtor's reach in insolvency, according to 138th article the approach of the penal investigating organization linked with the previewed damages committed from the 143-147th article, from the same quota's act.

According with the second paragraph from the 11th article, from 85/2006 Law, the local-judge's responsibilities are limited to the judge's control of the judicial managers' activities, or, in exceptional way, to the debtor if nobody takes him the right of managing his fortune. Managerial decisions may be controlled by the creditors, under the opportunity's aspect, through their organization. From the

[151] V. Pasca, *Bankruptcy's fraud previewed in 64/1995 Law*, regarding the judicial and failure reorganization's procedure, *The Phoenix insolvency magazine nr.11/2005*, page 45.

same quota's act, the 12article, the first paragraph provides that the local judge decisions are finally and executor.

In conclusion, the local-judge can't have a civil part quality in the penal process, being a judicial authority who accomplishes only a judgment and a solved function of the insolvency procedure. Also, in the 5th article, from the 85/2006 Law, it provides that judgment's members (local-judge, judicial manager and the liquidator member) are the members who apply the procedure.

In the 20th article from the 85/2006 Law the judicial manager's actions are previewed: book debit's encashment, checking the book debit's encashment, referring to the goods from the debtor's fortune or to the amount of money transferred by the debtor before the procedure's opening; the actions' formulation and maintenance in demands for the debtor's book debit's encashment with the purpose of employing lawyers. In the case of the liquidator member we have the same competences (the 25th article, „g" letter from the 85/2006 Law). Also important is the fact of mentioning that after the insolvency's opening procedure, the general meeting of the debtor's investors/ co-partners will denote a commissioner, physical or judicial person, and a special manager, on their expense who has to represent their interests and the society's interests and to participate to the procedure, on the debtor's experience. After taking a managerial right, the debtor is represented by the judicial manager/ liquidator member who also manages his commercial activity and the special manager mandate will represent only the investors/ co-partners interests.

From these legal dispositions it is deduced that also the debtor may have a civil part quality in the penal process, being represented by the special manager, judicial manager or the liquidator member who appears in the insolvency procedure's stages: the special manager- in the moment of the insolvency's opening procedure; the judicial manager- in the moment of the insolvency's opening procedure; the provisional liquidator- in the moment of the simplified opening procedure; the liquidator- in the moment when it is disposed the pass to the bankruptcy. The creditors' committee is involved in bankruptcy's matter, like a creditors' commissary that may action only when the judicial manager and the liquidator remained inefficient and they didn't introduce actions for the debtor's book debit's recuperation.

All the recovery goods will enter in debtor's fortune and will be destined, in reorganization case, to the accomplishment of the necessary supply for the debtor's continuity actions and also for the passive coverage in the bankruptcy's case (140 article from the 85/2006 Law).

2. The penal action's independence toward mercantile action represents an old problem, since the Mercantile Code was adopted.

According the 138th article, the second paragraph from the 85/2006 Law, the application of the first article referring at the civil responsibility's booking of the person who caused the debtor's insolvency cause, doesn't discharge the penal law application for the acts which constitute frauds.

This norm consecrates the independence rule of the penal action along with mercantile action.

In this case, the bankruptcy's procedure may be sustained like a commercial venue which is independent from the penal procedure and they will expand independently one from another. The mercantile action of the debtor's reorganization or bankruptcy will follow it course even if the penal pursuit against persons who made simple or fraud bankruptcy was started. The 19 article dispositions, the second paragraph, Code of criminal procedure regarding the civil actions' reprieve, promoted in the front of the civil action until the penal action's solution, they don't have incidence in bankruptcy's fraud matter[152].

The most important argument which can be brought to support the 19th article inapplicable previews of the law, from the second paragraph, Code of criminal procedure is constituted by the fact that, usually, it doesn't exist an identity between the passive subjects of the two actions, because, in most of the cases, the penal action is used against a physical person, while the mercantile action is used against a judicial person.

However, it may be encountered situations when it is a passive subject's identity, like in the case of merchant-physical person or that person in which the penal responsibility of the judicial person may be employed.

Into the doctrine was also told the opinion according with no one from the existing opinion from the special literature can be accepted, respectively the two actions are independent[153] or the mercantile action has to be suspended due the basis of the phrase „the penal keeps place to the civil"[154], because the actions' source is different[155].

Pleading for his opinion, the author shows that the bankruptcy's fraud represents the penal action's source, while the procedure previewed in the 85/2006 Law has in basis the simple existence of the insolvency state. In this case, the legal solution is the 244th article dispositions' application, the first paragraph, second point, Code of civil procedure which previews that the instance may suspend the judgment „when the penal prosecution started for a damage which would have a decisive state over the following decision"[156].

To support his point of view, the author also evokes other two arguments, from the law regarding the insolvency procedure: the mercantile procedure may be unrolled in the same time with the penal procedure; even if the merchant is investigated for bankruptcy's fraud, the merchant may satisfy his creditors during

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[152] V. Pasca, *Bankruptcy's fraud*, Lumina Lex Publishing House, Bucharest, 2005, page 161; V. Berchesan, N. Grofu, *Criminalistic investigation of the fiscal fraud and bankruptcy's fraud,* Little Star Publishing House, Bucharest 2003, page 170.
[153] V.Pasca, *Bankruptcy's fraud*, the cited opera, page 36.
[154] G. Piperea, *The obligations and responsibilities of the mercantile managers' society. Elementary notions* , All Beck Publishing House, Bucharest, 1999, page 244.
[155] R. Slavoiu, *Some aspects regarding the bankruptcy's fraud*, Law no.3/2006, page 218.
[156] Ibidem, pages 218-219.

the procedure, this case being declared independent by the administration if, at that moment, the penal responsibility was established or not[157].

In other opinion it was sustained that, in all the situations in which the passive subject's identity exists, like for example, the case of the merchant-physical person, the 19th article, the second paragraph, Code of criminal procedure is applied and the mercantile situation previewed in 85/2006 Law will be suspended until the final conclusion of the penal action for the bankruptcy's fraud[158].

If the debtor's reaching in the insolvency state was induced of one of the acts which constitutes different modalities of the bankruptcy's fraud, it can say that it is the source (the basis, the cause) of the mercantile action and also of the penal action, because money's cessation is an existing condition of the bankruptcy's fraud. This thing means that insolvency state is the cause of the two actions and in bankruptcy's case, the insolvency conditions of the act's content. None of the two actions may be promoted without ceasing money's supply[159].

The fact that the instance may suspend the mercantile action, in the situation in which the solution from the penal process may influence the mercantile instance decision is a farther more argument that the penal action and the mercantile action mustn't be regarded in a different way, every time[160].

Regarding our opinion, we believe that the passive subject identity has no relevance in this subject matter. But, the 19th article application, the second paragraph, Code of criminal procedure can be referred only in the case in which the penal action and the civil action have the same source-committing an offence[161].

In our case, the penal action and the mercantile action don't have the same source – the commission of a fraud, only the insolvency state linked them which constitute a premise situation in the bankruptcy's fraud content and a condition for the bankrupting opening procedure.

The permitted situation resides in the preexisting of a same reality, fact state etc, on which the course act's performance has to be grafted, for being considered a fraud.

The premises may be defined like those elements, natural or judicial element, previous to the incriminated action and independent between them, which are asked for the fraud's existence, like, for example, the existence of the pregnancy in the case of the illegal abortion's provocation, the existence of a previous marriage in bigamy's case etc.

In the Italian doctrine, the fact premises (presupposti del fatto) were denoted by the phrase „the course's premises" (presupposti della condotta),

[157] A. Gabrielli, *Grande dizionario illustrato della lingua italiana (A-L)*, a cura di Grazia Gabrielli, Editore: CDE Sp A-Gruppo Mandadori, 1989, page 219.
[158] M. A. Hotca, *Bankruptcy's fraud*, C. H. Beck Publishing House, Bucharest 2008, page 59.
[159] Ibidem, page 59-60.
[160] Ibidem, page 60.
[161] I. Neagu, *Procesual penal right*, Treaties on, First volume, The general part, Global Lex Publishing House, Bucharest, 2006, page 254.

because them, even if there aren't independent in front of the active subject's behavior, they aren't strange for the act previewed by the law as a fraud[162].

In opposition with the constitutional elements of the incrimination which can only be concurrent or chronological, the fact premises are the preexisting conditions of the fact.

Accordingly, insolvency is a fact premise, before the acting of the material element of the bankruptcy's fraud and it mustn't be mistaken with the fraud itself.

We can't deny the fact that insolvency, like a fact premise, enters in the bankruptcy's fraud structure, but it can't present the sign of equally between the frauds itself and one of its element.

In sustaining our opinion, we can evoke the 137th article dispositions, the first paragraph from the 85/2006 Law, according with, by bankruptcy's final procedure the debtor-physical person won't have the responsibilities that he had before the bankruptcy's opening, but under their thought of „not guilty" in the bankruptcy's fraud case, payments or fraud transfer; in there situations he won't have responsibilities, only if there were paid during the procedure, the 16th article case, the first paragraph, the third point being an exception. This article has two different procedures: the penal procedure through where the debtor was found guilty of bankruptcy's fraud and the mercantile procedure, where the debtor accomplished his responsibilities.

Consequently, the penal action and the mercantile action of the debtor's judicial reorganization of bankruptcy are independent and they will follow their own way, the 19th article dispositions, and the second paragraph, Code of criminal procedure being impracticable.

The 137 article, the first paragraph from the 85/2006 Law must be interpreted in the way that the penal process may be started after the insolvency's final procedure (The Appeal Court Cluj, mercantile section, 612/1999 decision).

Nowadays, there is no legal disposition to correspond with the 714th article's disposition in which „the bankruptcy's procedure before the mercantile venue and the directive or the penal procedure will follow one to another in a different way. Applying this legal disposition, the old Justice Court decided that the public action for the bankruptcy's crime is independent from the failure state of the mercantile action[163]. At one time opened, the public action will follow its course, without allowing of what was decided for the failure's state, no matter what the mercantile law court would decide (Cass, Sect. Unite 3/1911 number[164]).In this way, if the mercantile law court took over the bankruptcy's state, after a merchant declared the bankruptcy's state, the law court may send the merchant in front of the repressive instances to respond for his frauds, inasmuch as the law court decision

[162] F. Antolisei, *Manuale di diritto penale. Parte generale*, Dott. A. Giuffre Publishing House , Sp. A. Milano, 2000, page 215.

[163] V. Pasca, *Bankruptcy's fraud*, cited opera, pages 112-113.

[164] M.I.Papadopolu, *The adnotet penal code*, National Edition- S. Ciornei, Bucharest, 1930, page 358.

can't constitute a judged thing for the penal instance (Appeal Court IV Bucharest, 204/1929 number[165]).

3. The judicial decisions' authority for the penal matter and mercantile matter is another delicate problem.

According the 22nd article, Code of criminal procedure, the final decision of the penal instance has judged thing authority in front of the civil instance which judges the civil action regarding the existing fact, the person who committed it and her guilt.

Two hypotheses are possible. The first is that when the penal action is finally solved by the judicial decision, before the mercantile decision. In the doctrine it was presented the point of view that, excepting the case when judicial-material matter is unchangeable, from the time of the final result of the penal action to the time of the mercantile action's exertion, in all the cases, the final solving existence doesn't influence the mercantile action exercise in some way, because the payment cessation must be analyzed between the instance moment and that of the demand's solving, regarding the insolvent opening procedure, which means that the temporal existence or inexistence of the circumstances' causes are the same[166].

We believe that, from the moment when the insolvency constitutes a fraud content's element and its existence was finally canceled by the penal instance, the discussions in front of the civil instance has no result. The penal instance discovered the payment final state and no circumstance can change this fact situation.

Only final judicial decisions of the penal instance have judged thing authority. The solutions of the penal pursuit instances (of not starting the penal pursuit, of taking from the penal pursuit, of dismissal, of ending the penal pursuit) aren't necessary for the mercantile instance. However, this is an exception: the penal pursuit instances' solution, attested by a judicial instance, in the complaint matter against penal pursuit acts and measures. According the 278th article, the 11th paragraph, Code of criminal procedure, in the situation made provision in the 8th paragraph letter a) − when the judge denies the complaint made against procurator's resolutions or orderly of not sending in the justice, through the sentence, like unallowable sometimes, after the case, maintaining the resolution or orderly attacked − regarding the person for whom the judge decided through a final decision that isn't the case of the penal pursuit again started for the same act, only in the case in which some new facts or circumstances are unknown by the penal pursuit instance and none case made provision in the 10th article appeared, Code of criminal procedure.

The second hypothesis refers to the contrary situation, when the penal action is solved after the irreversible solution of the mercantile action, regarding the insolvency procedure. In this case, the irrevocable decision of the mercantile instance regarding the insolvency procedure has judged thing authority in front of

[165] Idem.

[166] M.A. Hotca, cited opera, pages 54-55.

the penal judicial instances (penal pursuit instances and judicial instances), who solve the penal action having like object the penal draw responsibility of the persons who made the bankruptcy's fraud, referring to the existing state condition of the mercantile insolvency[167]. In such a case, the insolvency case analysis constitutes a perquisite thing.

According the 44th article, the third paragraph, Code of criminal procedure, the final decision of the civil instance has judged thing authority in front of the penal instance, over a circumstance which represents a perquisite thing,

The perquisite thing is an extra-penal problem and its perquisite solution is linked with the penal cause conclusion[168].

We have to mention the fact that, according the 44th article, the first paragraph, Code of criminal procedure, the penal instance may judge any thing of which depends the cause solution even if, through its nature, that thing represents another instance capacity.

In the case in which the mercantile instance pronounced finally and irrevocably that the bankruptcy's act doesn't exist or it wasn't made by the guilty person or the culprit didn't action with fault, than the 22nd article dispositions, the second paragraph, Code of criminal procedure, are applied and the prosecutor can send at law the accused, and the penal judged instance may sentence him if the tests managed during the penal trial confirms this solution.

4. Another delicate problem represents the 36th article interpretation and application, from the 85/2006 Law in which „from the time of the procedure's opening, it is suspended by the right all the judicial actions or extra-judicial actions for the book debits creation over the debtor or over his goods." According the 32nd article dispositions, the first paragraph from the 85/2006 Law, the local-judge will pronounce a final opening of the attorney procedure or of the simplified procedure.

Through the phrase „all the judicial actions or extra-judicial for the book debit's creation over the debtor or his goods" we understand only those judicial actions (including the coerced execution) or extra-judicial, which has as purpose the book debit's satisfaction, regarding the debtor's person or his goods. In conclusion, the 36th article from 85/2006 Law doesn't refer at the penal action, too[169]. Moreover, the penal action hasn't like object some book debit's creation but penal draw responsibility of the persons who are guilty of a bankruptcy's act.

In conclusion, the penal action of the bankruptcy's fraud isn't suspended and it can't be suspended by the mercantile instance by the fact of the insolvency opening procedure[170].

However, like a rule, it isn't normal like a penal action take place in a place by the civil action (privacy). The penal action is regarded with some characteristics: in a

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[167] Ibidem, page 55

[168] I. Neagu, cited opera, pages 291-192; Gr. Theodoru, *The treaty of the procesual penal right*, Hamangiu Publishing House, Bucharest, 2007, pages 314-318; N. Voicu, *The treaty of penal procedure. The general part, vol.I*, Paidela Publishing House, Bucharest, 1998, pages 315-318.

[169] M. Hotca, cited opera, page 67.

[170] Ibidem, page 68.

public order, unavoidable, indivisible and not available. For this reason, it is hard to accept that the „penal keeps place to the civil" [the 19th article, the second paragraph, Code of criminal procedure].

This rule is necessary to solve the penal action first, because the solution giving in this situation, with a public order character, must be taken in consideration for the civil action solution[171].

[171] Gr. Theodoru, cited opera, page 233.