An analysis on the D8 principle from the World's Bank report (ROSC)

This presentation will explore the World Bank' report regarding the D8 Principle that refers to the role of the insolvency practitioner, the principles that should underpin its activities and its responsibilities.

While analyzing this chapter of ROSC two ideas caught my attention in particular:

1.the emphasis on the principles of integrity, independence and impartiality;
2.the assimilation of the insolvency practitioner with the management of the company, in terms of its responsibilities;

Traditionally, the role of the insolvency practitioner was seen more in the light of its judicial duties, the administrator or liquidator being seen as an extension of the court, out of the court.

We are now witnessing a change of view regarding the ways in which the cases of struggling companies should be tackled, with more emphasis on saving the companies through ad hoc procedures, arrangement and reorganization.

In such proceedings of reorganization, more focus is given to the role of the insolvency practitioner regarding its managerial responsibilities, for example:
- negotiation with creditors in the ad hoc mandate procedure (Art.13 draft law);
- advice to the debtor for the preparation and completion of the project along with the creditors, as well as the supervision aimed to ensure the fulfillment of the recovery plan (Art.19 draft law);
- supervising the company after commencing the insolvency procedures and during the reorganization period, in a clear definition (art. 5 , pct.65).

1) In ROSC, the World Bank wanted to attract attention in the Principle D8 on the competence and integrity of insolvency representatives.

Regarding the principle of integrity that must underpin the exercise of any judicial professions, there is nothing to comment. Integrity is fundamental, and if derailments occur to this principle, the sanctions must be exemplary.

Recent events have sparked serious debate in the National Leadership Council, and certainly in the next period solutions will be identified in order to strengthen

control in terms of the rules of professional ethics, integrity and accountability.

Regarding the principle of impartiality and independence, we must objectively recognize the permanent effort of ensuring these principles during the insolvency procedures.

Insolvency practitioner intervenes in a situation when the company's performance is low, in a crisis situation, being in the middle of various conflicting interests. Any expressed opinion on a punctual matter may be in conflict with the interests of either party.

Lately, there is a significant increase in the number of disciplinary complaints filed against insolvency practitioners, addressed either by creditors or by the debtor.

I have studied various decisions of the disciplinary courts and I have noticed the concern not to interfere with the duties of the syndic judge and not to adjudicate on matters which can only be drawn in a Court.

On the other hand, when the court has already ruled on issues in the insolvency proceedings, thus validating the views, actions or reports of the judicial administrator, the disciplinary court may not analyze whether they violated the requirements of objectivity, impartiality and independence.

There is a dividing line between the power of the syndic judge to apply sanctions in cases of professional misconduct committed during the insolvency proceedings and the duties of the disciplinary court to apply sanctions for breaking the rules of professional conduct.

2) In the D8 principle, the World Bank considers that '*In light of their responsabilities, the judicial administrator and the liquidator can be assimilated, in terms of their responsabilities, to company managers.'*

The draft of the new law states that the ad-hoc trustee may propose rescheduling or debt reduction , continuation or termination of contracts, staff reductions or other measures deemed necessary (art. 13.3).

The conciliator elaborates along with the debtor the scheme of arrangement and recovery plan, and then, after approval of the scheme monitors the fulfillment of the obligations assumed by the debtor (Article 19).

Article 5, Pct. 65 from the new law states that, during the surveillance activities, the judicial administrator approves preliminary steps involving the debtor's assets, approves operations regarding asset management, approves payments,

approves new contracts, defense strategy in case of litigation, transactions, financial statements, staff reductions, etc.

All this means that the judicial administrator will express its opinion ex ante, regarding almost all the aspects of the companies' operations so that, by law, he is forced to get involved in management.

The ex post control regarding the debtor's activities has moved ex ante. The judicial administrator is not just meant to report to the creditors and the syndic judge regarding the economic, financial and legal evolution of the debtor, the report being prepared ex post on the basis of the financial and other information provided by the debtor.

The law requires the judicial administrator to have their say on the business proposals formulated by the board of the debtor, and that means direct involvement in management.

I cannot ignore that, as written in Article 5.65, the judicial administrator is required to have specific skills and competencies regarding different activities of a company. If traditionally, the basic competencies stood in the financial - economic and legal areas, now the law requires the insolvency practitioner to have skills in human resources, in the commercial area, in the business strategy area so that it can predict all possible future effects of the decisions.

Therefore, the insolvency practitioner is required to have extended competencies regarding the management of a company, as if the insolvency practitioner could be an multi valent leader, as if his own organization could be structured on the corporatist model, with employees specialized in different areas and located in different departments

In light of these new changes in the law on insolvency practitioner's duties, it is imperative that the National Union of Insolvency Practitioners will organize training courses so that insolvency practitioners have the opportunity to acquire basic techniques and the skills in management processes.

It is necessary for the Union to take preventive action, to create the framework for acquiring these types of competences so that the insolvency practitioners can fulfill their duties effectively.

It is not enough that the law sanctions professional misconduct, as this is not the goal.

As insolvency practitioners will be obliged by law to have their say on almost all

aspects of the debtor's activities, being forced to engage in management and then be judged by the same professional standards as directors, it means that they will be judged by the business rule.

The insolvency practitioner will not be able to attract liability for a particular positive or negative say regarding an opinion, if the judgment was expressed on the basis of adequate information provided by the debtor himself or obtained on the need, opportunity and profitability of a managerial decision.

My assessment is that creditors in particular wanted to strengthen the role and responsibility of the insolvency practitioner, expanding his powers. This means trust in the profession.

On the other hand, it is paramount to find the right balance between expanding duties and responsibilities and the remuneration agreed by the creditors.

I should point out that there are two contradictory trends: on one hand, the creditors claim an extension of surveillance powers of the judicial administrator and on the other hand there is a tendency to reduce fees on the grounds that the debt recovery rate is affected by the expenses.

Between these two tendencies the right balance has to be found as otherwise, insolvency practitioners will be future candidates of insolvency proceedings, as they will not have sufficient resources to support their activities and to work effectively.

Finally, I wish to emphasize that most of the reflections and proposals formulated by the World Bank in ROSC can be found in the new law.

In terms of increasing accountability and control over obeying the principles of ethics and integrity, I assure you that the concern of the management bodies of UNPIR is extremely serious.

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