In these scenarios, creditors end up spending important amounts on favorable but inefficient court rulings due to the state of the debtor's estate. Below are a few essential points regarding measures that can be taken in Romania to prevent debtors from purposefully diminishing their estate with the aim of escaping enforcement.

Opportunity and Costs Assessment


Viorel Bran

In many cases, a correct assessment of the opportunity and costs of such measures is key to: (i) correctly deciding whether it would make sense financially to litigate or not and (ii) drawing up the litigation strategy.

The advisability of pursuing these measures should therefore be addressed during the early assessment stage of the dispute.

If a request for interim and conservatory measures has a small chance of being granted, depending on the state of the debtor, the creditors may lack any reasonable assurance that their prospective endeavors shall lead to a successful enforcement of a court's ruling on the merits. In that case, it may not be a wise decision to invest in litigation costs.

Scope of Interim and Conservatory Measures

Essentially, interim and conservatory measures are aimed at securing the recovery of receivables by either placing a ban on the transfer of the debtor's assets to third parties or placing the assets upon which the creditors claim property-related rights in the hands of a receiver.

The creditors are thereby assured that their efforts and expenses incurred during the trial can be followed by a successful enforcement through the selling of the assets banned from transfer or placed in receivership.

As a general rule, the Romanian courts are keen on granting applications for these types of measures, with the aim of protecting to the fullest degree the creditors' receivables.

To that same end, courts rule expediently on applications for interim and conservatory measures, on average not later than one month after application.

Types of Interim and Conservatory Measures

The procedural rules in force in Romania provide for three main types of such measures: (i) Conservatory seizure, (ii) Attachment, and (iii) Receivership.

Conservatory seizure consists of placing a transfer prohibition upon the assets owned by the debtors. An attachment is placed on the amounts of money and securities payable to debtors by third parties. As a result, these third parties are impeded from making their usual payments to the debtors, by redirecting the payments towards the enforcement officers.

The conservatory seizure and the attachment may be sought by creditors who demand payment of money from their debtors in court.

Sometimes, creditors claim ownership or other real rights over debtors' assets. Receivership consists of placing these assets in the custody of a third person (a receiver), whose duty is to preserve them and, eventually, to hand them over to the winning party at the end of the litigation.

Collateral Deposit

Depending on the facts of the case, creditors may have to provide cash collateral in order to obtain an interim conservatory measure. The cash collateral is aimed at securing the debtor for losses incurred due to the blocking of their assets on grounds of an ill-founded claim.

For instance, if the receivables claimed by the creditors are certain, overdue, and expressly specified in a written agreement, the court is to decide whether a collateral deposit is necessary. In this case the collateral may not exceed 20% of the claimant's receivables.

If the claimant's receivables are certain and overdue but not specified in a written agreement, the collateral deposit has a fixed mandatory value of 50% of the value of the receivables.

When receivership is applied for by creditors claiming ownership or other real rights over assets held by the debtors, the court may decide if cash collateral of up to 20% of the claims is necessary.

Conclusions

It is highly recommendable for creditors to assess the necessity of and where appropriate to apply for interim and conservatory measures from the outset of the trial.

The likelihood and potential amount of a collateral deposit in conjunction with the merits of the claim, as well as the financial status, reputation, and good faith of the debtor are key factors to be evaluated in this respect.

Ioan Roman, Partner, and Viorel Bran, Senior Associate, Maravela | Asociatii

Montenegro

When Arbitration Meets Insolvency in Montenegro – Can They Coexist?


Jelena Bezarevic Pajic

Even at first blush, it is apparent that arbitration and insolvency make strange bedfellows. The reason they make such an odd couple is the different underlying the policies, objectives, and purposes they stand for. The heart of arbitration lies at the privity of contract and the existence of party autonomy independent from the state. In contrast, insolvency reflects a centralized and to a certain extent state-managed procedure that holds all creditors equal, within a set system of ranking – a transparent and accountable process governed by mandatory substantive and procedural law provisions.

However, with insolvency on the rise, parties to arbitration agreements may find themselves increasingly often considering a claim against a counterparty who is insolvent or becomes insolvent during the dispute. This is no different in Montenegro.

When arbitration meets insolvency or insolvency meets arbitration in Montenegro, can they coexist? Does insolvency affect the arbitrability of claims in Montenegro? Is there exclusive jurisdiction of Montenegrin courts for all disputes against or with an insolvent party?

Montenegrin statutory law does not provide a clear answer.

It is undisputed that once initiated, an insolvency proceeding is carried out ex officio by the Montenegrin court competent within the territory where the insolvency debtor is seated or has its residence. It is equally unquestionable that creditors can settle their claims against an insolvent debtor exclusively within these insolvency proceedings. Montenegrin insolvency law also provides that disputes arising within or in relation to insolvency proceedings in Montenegro fall within the exclusive territorial jurisdiction of the court seated in the territory of the insolvency court. This rule intends to attract all insolvency-related litigations under the auspices of one court – the one conducting insolvency.

There are no further provisions explicitly conferring jurisdiction on Montenegrin courts in relation to insolvency.

Still, how broadly are these jurisdictional rules interpreted in practice?

Do they inevitably affect the validity of the arbitration agreement? Can they be stretched so far as to justify a court's refusal to (i) enforce a previous arbitration agreement relating to an insolvent debtor, or (ii) recognize and enforce an arbitral award against an insolvency debtor?

It seems that Montenegrin court practice is yet to be settled in this respect.

However, some recent court decisions indicate that Montenegrin courts may be quick to interpret exclusive territorial jurisdiction very broadly. Thus, one can find decisions where the court construed this rule of territorial jurisdiction to imply exclusive jurisdiction of Montenegrin courts. There are also instances in which courts have read the subject matter scope of this territorial jurisdiction rule expansively. With no attempt to explain, in those cases courts understood the wording "disputes arising within or in relation to insolvency proceedings administered in Montenegro" to encompass, in principle, all disputes commenced by or against an insolvency debtor after the initiation of the insolvency proceeding in Montenegro. Some courts have recognized a far-reaching jurisdiction of the Montenegrin insolvency court, even if only from such court's exclusive jurisdiction for insolvency.

Obviously, this reasoning would impede the use of an arbitration agreement against the insolvency debtor, i.e,. an insolvency administrator. It could equally affect the enforcement of an arbitration award rendered against a Montenegrin insolvency debtor after initiation of the insolvency proceeding.

Vanja Tica

Jurisprudence, on the other hand, appears to offer a more elaborated and analytical approach. It has been underlined that the law itself provides no justification for converting the exclusive territorial jurisdiction into exclusive jurisdiction of Montenegrin courts. For that reason, insolvency should not be an absolute bar to arbitration with or against an insolvency debtor. In terms of monetary claims, it is unquestionable that any such claim needs to be registered and settled within the insolvency procedure. This is mandatory even where arbitration is pending for such claims. If the registered claim remains undisputed in insolvency, there is no need for arbitration. But if the insolvency administrator disputes the existence and/or amount of the claim, many argue that these issues should be decided in arbitration if the insolvency debtor had previously so agreed.

The above evidently shows that the meeting of arbitration and insolvency in Montenegro is rather a difficult matter. In that clash, projections for arbitration are currently still uncertain. Given the severity of possible implications, the parties are strongly advised to take this issue into account and monitor further developments of court practice and legal doctrine in this respect.

Jelena Bezarevic Pajic, Partner, and Vanja Tica, Associate, Moravcevic Vojnovic and Partners in cooperation with Schoenherr

Slovakia

Major Reforms to Enter into Force in 2017

Andrej Leontiev

Since former Of Counsel of Taylor Wessing Bratislava Lucia Zitnanska was appointed Slovak Minister of Justice in April 2016, the legislative changes prepared by her department have primarily been driven by the practical need to improve the enforceability of law and increase the importance of e-communication tools. To those ends, two major reforms concerning debt enforcement will enter into force in the first half of 2017.

Introduction of a New Alternative to Proceedings for a Payment Order

The ratio of issued payment orders to the total number of initiated payment order proceedings has been steadily decreasing over the last decade. Rather than reforming the existing payment order procedure, the legislature opted to create an alternative to it. The so-called collection procedure is expected to be simpler, swifter, cheaper.