AD-HOC MANDATE

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Abstract: *The procedure of the ad-hoc mandate is triggered, like the procedure of the preventive agreement, at the request of the debtor, by formulating a request addressed to the president of the court. The ad-hoc mandate is a confidential procedure, to prevent insolvency, to amicably resolve the financial difficulties of the debtor, before the debtor reaches the end of payments.*
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Definition

The ad-hoc mandate is a pretorian creation of the Paris Commercial Court, not long introduced in French law.[1], defined in art. 5 point 36 of Law no. 85/2006. It is a confidential procedure[2], triggered at the request of the debtor in financial difficulty [3], whereby an ad hoc trustee, appointed by the court, negotiates with the creditors for the purpose of reaching an agreement. It is not a collective procedure, it is very rarely used, it is characterized by confidentiality,[4] and it aims to prevent insolvency, to amicably resolve the financial difficulties of the debtor's company, before the debtor reaches the termination of payments. The procedure of the ad-hoc mandate can be initiated only at the request of the debtor, as opposed to the insolvency proceedings, by making a request to this effect, addressed to the president of the court and not to the syndic judge, and submitted to the cabinet of the president of the court. It shall be recorded in a special register.

The characters of the ad-hoc mandate

The ad-hoc management
a) is a legal procedure, confidential
b) it is optional, the debtor's creditors may refuse the proposed negotiation
c) is performed by a judicial representative

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[1] A. O. Stănescu, S.M. Miloş, Şt. Dumitru, O.D. Miu, *op. cit.* p.14
[2] See Law No. 2005-845 of July 26, 2005 on Business Backup (JORF No. 173 of July 27, 2005, p. 12187).
[3] Art.5 pt. 27 of the Insolvency Code
[4] Art.5 pt. 36, Insolvency Code

d) it counts in a procedure by which, the judicial agent negotiates with the creditors of a debtor in order to reach an agreement between the creditors and the debtor, in order to overcome the financial difficulty in which the debtor is.

Regarding the confidentiality of the procedure, during all the time, it is required that the Regulation of internal organization of the courts provide that the special register of records of the warrant applications and the files be kept in confidential conditions, with the activation of the function "not public "In ECRIS. Confidentiality is the principle that governs the ad-hoc mandate procedure and is imposed on the persons participating in the procedure, but also on the institutions involved, and on the invested courts. The request of the debtor to appoint an ad hoc trustee, among insolvency practitioners, authorized according to the law, is submitted not to the court registry, but to the office of the president of the court, where it is registered in a special, non-public register. The procedure is carried out in the council chamber and is kept confidential throughout its duration, confidentiality being mandatory for all persons and institutions participating or involved in it. The dissemination of information related to the financial difficulties of a professional could create uncertainty among his business partners, business partners, and could cause cessation of payments, due to the unexpected interruption of business relationships.

Regarding the optional character of the ad-hoc mandate, we can say that those who are the creditors of the distressed debit can refuse the negotiation proposed by the a-hoc manager, the main representative of the debtor in this procedure.

Content of the ad-hoc mandate

The object of the ad-hoc mandate is represented by reaching an agreement between the debtor and one or more of its creditors, in order to overcome the financial difficulty, to safeguard it, to keep the jobs and to cover the debts on the debtor.

From the text of the law we deduce that the purpose of the ad-hoc mandate is to cover the debt of the debtor in financial difficulty, to prevent the insolvency, to give an opportunity for an efficient and effective recovery of the debtor's business, an amicable negotiation of the debts, an efficient procedure, with minimum costs, an administrative procedure of insolvency practitioners under the control of the court. It is recommended that the first contacted be the creditors with whom the debtor has had good commercial relations for a longer period, with a stronger feeling of mutual trust, being possible for the smaller creditors to pay them as the court proceedings are lost or individual forced prosecutions are initiated, using for this purpose the financing provided by the relevant creditors.

Although the insolvency practitioner named ad-hoc trustee is independent, his mandate is not similar to that of a mediator [5], having the role of a good negotiator, being able to draw up a business restructuring plan, similar, but more briefly, to the judicial reorganization plan which includes the forecast of the cash flow, the payments to creditors for the next period, the sources of working capital financing. and the operational improvements of the enterprise, and the extent to which creditors' rights are expected to change.[6]

And creditors must grant the debtor a moratorium on past due debts, payment deadlines, while freezing the nominal value of the debts held, and perhaps a reduction of the amounts owed or even the deletion of debts.

The ad-hoc mandate procedure presents the risk of unequal treatment of creditors, favoring some creditors.[7]

Ad-hoc agent's fee it is fixed, represented by a lump sum for the entire activity performed, regardless of duration, or monthly, payable for each month of activity performed in the fulfillment of the mandate, and is established, according to art.14 of the law by the president of the court, at the proposal of the debtor and with the agreement of the trustee, which may be modified at the request of the trustee, with the agreement of the debtor. The fee set by the president is provisional, and can be modified at the request of the trustee with the agreement of the debtor. If the debtor is against it, the question arises whether the president of the court will be able to increase the ad hoc attorney's fee, after listening to the debtor.

The manner of establishing and paying, the criteria for evaluating the ad-hoc administrator's fee depends on the administrator's involvement and the complexity of the activities carried out during the mandate procedure. The president of the court vested with the request, cannot ex officio rule on the subsequent modification of the agent's fee. Although the law gives the debtor the copiousness of changing the fee, this issue can also be raised by the creditors, given that they are the main targets in terms of capitalizing on the debtor's assets in order to satisfy the debts. The administrator's fee is directly related to him, because the amounts paid from the debtor's assets have an impact on the rights of the creditors, diminishing their financial resources for debt recovery.

Procedure for appointing the ad hoc trustee

The debtor who is in financial difficulty may submit to the president of the court a request for appointment of an ad hoc trustee, with a detailed explanation of the reasons underlying this request. The trustee is proposed by the debtor among the insolvency practitioners, authorized.

[5] Law no. 192/2006 regarding the mediation and organization of the profession of mediator, published in M.Of. no. 441 of May 22

[6] cancellations, debt reductions, debt repayments

[7] Law no.85 / 2014 art. 117 et seq., And art. 117, paragraph (3)

The application must include a detailed description of the reasons that make it necessary to appoint an ad hoc trustee. If the application is not properly motivated, there is a danger that it will be rejected, although the law does not list as in the case of insolvency[8] what documents must accompany the request of the debtor, being of course to be accompanied by supporting documents such as contracts, financial statements, extrajudicial expertise.

Although the law assigns the jurisdiction to resolve the debtor's request and, subsequently, the ad hoc mandate procedure to the president of the court, for well-founded reasons, he may appoint another judge or even a syndic judge with these prerogatives.

According to the law, the president can delegate certain tasks with which he is in charge, and the legislator does not sanction with nullity the decision given by another judge than the president.

Citation of the proposed debtor and ad-hoc manager

Within five days, the president of the court shall order, in the council chamber, the summoning, through the procedural agent, of the debtor and the proposed ad-hoc agent.

Appointment of ad-hoc manager it is achieved by the president of the court, through interlocutory conclusion, if his financial difficulties are real, and if the person proposed as agent meets the conditions required by law. The conclusion is subject only to the appeal to the court of appeal, the file being randomly assigned to a complete appeal, at this stage, not being foreseen the competence of the president of the court of appeal, due to the collegial composition of the complete in the appeal.

In order to achieve the mandate objective, the ad-hoc trustee will be able to make proposals, remits, reschedules or partial debt reductions, continuation or termination of ongoing contracts, staff reductions, and any other measures that need to be taken.

The debtor in order to convince the president of the court to order the mandate to be triggered, will have to submit evidence that shows the financial difficulty. The degree of short-term liquidity and / or a high degree of long-term debt, which may affect the fulfillment of the contractual obligations in relation to the resources generated from the operational activity or to the resources attracted through the financial activity. The debtor needs financial protection both for the success of the request to open the mandate procedure and for the negotiation with the creditors.

After receiving the request, the president of the court orders the appointment by both the debtor and the agent through procedural agent, which means that the latter is also present when debating the mandate application. However, the law does not require the listener and the ad hoc trustee proposed by the debtor. Being

[8] Art.67 from the Insolvency Code

present when analyzing the mandate application, nothing prevents the president from also listening to the trustee regarding the necessity of the appointment and the duties of the ad-hoc trustee, the necessity of the appointment and the duties of the ad-hoc trustee, as well as the regarding the patrimonial status of the debtor, considering that in art. 14 refers to the agreement of the trustee regarding the establishment of the provisional fee by the president of the court. The ad hoc trustee will perfect the agreement with the third parties on behalf and on behalf of the debtor, so we are in the presence of a representative mandate. The details of the legal relationship of mandate will be governed by the rules of the Civil Code, applicable in the matter of representation mandate. In order to achieve the mandate objective, the ad-hoc trustee may propose deletions, reschedulings, partial debt reductions, continuation or termination of ongoing contracts, staff reductions, or any other necessary measures required. The measures proposed by the ad hoc trustee must not be approved by the president of the court, they may be valid and will be applied insofar as they will be negotiated with the creditors and recorded in the agreement that materializes their agreement with the debtor.

Unlike insolvency, which seeks to satisfy the creditors' claims, the insolvency procedure consists in instituting a collective procedure to cover the debtor's liabilities.

Termination of the ad-hoc mandate occurs through the conclusion of the agreement between the debtor and the creditors, if within 90 days of the appointment, the ad-hoc trustee has failed to mediate the conclusion of the agreement.[9]

Thus, the ad-hoc mandate [10], although it is a mandate with representation, even if it is ad hoc and judicial [11], is subject to the rules of the mandate [12]. In addition to the general clauses for termination of contracts, the mandate ceases by its revocation by the principal, the resignation of the agent or the death, the incapacity or bankruptcy of the principal or the agent.

In order to respect the principle of legal symmetry, we could say that the right to unilaterally denounce the ad-hoc mandate should have been the responsibility of the president of the court, because he has the capacity to mandate, but because the president of the court is an body that applies the ad-hoc mandate procedure[13], all the legal consequences resulting from the conduct of the negotiations, the regulation of the right of unilateral termination of the mandate by the debtor is justified, however the revoked insolvency practitioner will not be able to request the reinstatement, but only compensation from the debtor who revoked it, if he can

[9] Art.15 of Law no.85 /2014
[10] Fl. Moțiu, Special contracts. University course, ed. 5th, revised and added, Juridical Universe Ed., Bucharest, 2014, p.223 et seq.
[11] St. D. Cărpenaru, M. A. Hotca, V. Nemeş, *op. cit.*, p.54
[12] Art. 2.009 and follow. Civil Code
[13] Nasz Csaba Bela, *Insolvency proceedings. Commented case law*, The legal universe, Bucharest, 2017

prove the cause of a prejudice as a result of the unilateral denunciation of the principal. The Civil Code provides that the principal may at any time revoke the mandate, expressly or tacitly, regardless of its form, and even if it has been declared irrevocable, when the parties have declared the mandate irrevocable. The revocation is considered to be unjustified if it is not determined by the agent's fault or by a fortuitous case or force majeure.[14] Paragraph (1) of art.342 of the Insolvency Code states that the provisions of this law are supplemented, if not contravene, with those of the Code of civil procedure and of the Civil Code, the practitioner being revoked without cause by the debtor, if the reason for revocation is not from the agent's couple, the fortuitous case or force majeure, cases in which the presumption of unjustified character does not operate.

By achieving the objective envisaged by the legislator, the conclusion of the agreement, the agent's objective is to achieve, an agreement between debtors and creditors. If the agent has failed to mediate the agreement, the contract also ends due to a force majeure event, accidental event or other event that makes the contract impossible to execute. It is possible that during the existence of an obligatory report, a valid born obligation will become impossible to execute, for objective reasons that exclude the couple of the debtor and the creditor and which lead to the extinction of the obligation for the future. The supervision exercised by the judicial administrator, under the conditions in which the debtor's right of administration has not been lifted, consists in the permanent analysis of his activity and the prior approval of both the measures that involve the debtor's assets, the approval is made on the basis of a report prepared by the special administrator, which states that the conditions regarding the reality and the opportunity of the legal operations subject to approval have been verified and fulfilled. The supervision of the operations of management of the debtor's patrimony is done by the prior notice given on the payments, the conclusion of contracts, the legal operations, the approval of the proposed measures, the financial statements and the activity report, the restructuring measures or the modifications of the collective contract, the mandates for the creditors' meetings and committees, the alienation of real estate assets.

The termination of the mandate is stated by the president of the court by final conclusion, not being appealable, but only with an appeal in the annulment [15] and review [16].

Regarding the closure of the ad-hoc mandate procedure, the legislator omitted the situation in which neither the debtor nor the agent makes a request to find the termination of this procedure, being only the hypothesis in which the president of the court is notified either by the debtor in difficulty or by the insolvency practitioner.[17]

[14] Art 2.032 para. (2)
[15] Art. 503 Civil Procedure Code
[16] Art.509 para.(2) Civil Procedure Code
[17] Para. (2) para. 15 of Law no / 85/2014

According to the current regulation, the court cannot ascertain ex officio the termination of the ad-hoc mandate for any of the cases provided by the Insolvency Code, an ad-hoc mandate procedure for which no application was made lasting infinitely, it would be necessary to modify the art. 15 of Law no. 85/2014, in the sense that, if at the expiry of the 90-day term provided by art. 13 paragraph (2) neither the debtor nor the ad hoc trustee has made a request to establish the termination of this preventive procedure, the court, ex officio, may close the procedure, will cite the parties to set out their point of view, similar to the procedure finding the expiry of a request, in which the exception of the expiration must be submitted to the parties' contradictory debate, the judge being in the presence of a procedural incident that must be resolved according to the rules of the litigation procedure.[18]

Finding the termination of the ad-hoc mandate it is done, at the request of the debtor or the ad-hoc manager, by the president of the court, by the final conclusion.

Although the Law provides that the debtor and the ad hoc trustee will be cited, the situation is not excluded that, upon receiving the request, the president of the court will set the time limit for judgment and, at the same time, communicate it to the person filing the application, especially in the situations in which the application the mandate can be submitted by the ad-hoc administrator himself, being empowered to take the deadline and to communicate the procedural documents. In the absence of an express sanction, we consider that the 5-day term is a recommendation term.[19] Due to the fact that the procedure is confidential, shouting the file in public hearing is excluded. In the absence of a sanction, the breach of confidentiality can only entail damages for the person who fails to comply with this obligation.[20]

The legal norm recognizes the right of dismissal of the agent by the debtor and the right of resignation of the mandate from the ad-hoc agent. The legislator has combined the two possibilities in the institution of unilateral termination of the mandate, thus, the ad-hoc revoked trustee can not request restitution in rights but only compensation from the debtor who revoked it.

Due to the fact that the law does not provide for any notice period, nor the motivation, both the renunciation of the mandate and the revocation of the mandate produce effects as soon as they have occurred. The simple resignation of the trustee entails termination of the procedure. We consider that the sanction is too drastic, being more suitable for the possibility of choosing a new trustee, by granting a reasonable term.

[18] Art. 22 para.(2) and art.245 and seq. Civil Procedure Code
[19] Susanu Claudia Antoanela, Nicoleta Țăndăreanu, Florin Moțiu, *Insolvency proceedings. The general part. Judicial practice,* Legal universe, Bucharest, 2019
[20] Țăndăreanu Nicoleta, *The annotated insolvency cod*e, The legal universe, Bucharest, 2014

The legal norm says that the ad-hoc trustee is not bound or obliged to apply the measures he proposes, and the ad-hoc trustee does not apply and does not supervise the fulfillment of the clauses of the agreement concluded by the debtor with his creditors. Once this agreement is perfected, the term of office ceases, and the president of the tribunal is not involved in the implementation of the measures agreed by the agreement between the debtor and the creditors who sign the agreement.

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