TENANT'S INSOLVENCY IN LEASE AGREEMENTS

Lecturer **Simona CHIRICĂ**[1]

Abstract

Constantly increasing interest rates along with the recent economic downturn represent real challenges not only for the tenants but also for the landlords. Usually, the economical blockage is reflected on the business performance of the landlord of commercial premises whose tenants, succumbing to the pressure of creditors and the repercussions of excessive pecuniary obligations intend to file for a reorganization plan.

Keywords: *insolvency, lease agreements, the principle of maximization debtor, the insolvent tenant*

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1. Preliminary

This article analyzes the issue of a legal entity acting as a tenant, which enters into insolvency proceedings.

From an economic perspective, the contractual freedom, especially in the current business environment, is considered the most appropriate legal method in order to satisfy the legitimate interests of the individuals and for ensuring the general benefit, respectively to ensure the social progress. It is one of the basic premises in order to ensure a competitive free market between the economic operators[2].

In any activity, the business is a profit seeker, but its accomplishment depends on a series of determinants elements, as well as a certain number of risks which should be assumed by any professional when implementing its business objectives. This risks assumed by the professionals are, from a practical perspective, subordinated to an imperative profit[3]. However, the commercial risks should also refer to an objective reality of the current activity performed by the professional in order to avoid significant economic difficulties caused by the sole purpose of maximizing the profit when engaging a series of contractual relationships.

Considering that contractual relationships have their foundation on contractual reliance, the parties expect that regardless of the performances their counterparties will or will not achieve in their activities, the obligations they assumed shall be in due time and fully fulfilled[4].

In a preliminary stage, this aspect is reflected by the necessity of the professionals to establish a headquarters for their businesses or to expand their activities in specific locations, premises which often are rented from other professionals acting as owners of commercial, industrial premises or office buildings or other similar premises.

Therefore, these assumed individual risks, supported by the recent economic recession, are real challenges not only for tenants but also for the landlords. Usually, the economical blockage is reflected on the business performance of the landlord of commercial premises whose tenants, succumbing to the pressure of creditors and the repercussions of excessive pecuniary obligations intend to file for a reorganization plan.

In such a situation, it should be assessed the necessity/ requirement to file for the opening of the insolvency proceedings. Insolvency is the legal instrument designed to counteract the effects that a business failure incurred by a professional might have on the business activity of other professionals acting as its counterparties. In the retail industry for example, the effects that such failure might have on an entire sector of activity, if it would not be coordinated, would be significant regarding the

[1] Simona Chirică – Law Department, Bucharest University of Economic Studies, s.chirica@schoenherr.eu

[2] L. Dumitrescu, *Aspecte privind libertatea contractuală*, available online at www.uab.ro/reviste, consulted on November 1, 2016.

[3] I. Schiau, *Regimul juridic al insolvenţei comerciale*, Ed. All Beck, Bucharest, 2001, p. V.

[4] R. Bufan, *Tratat practic de insolvenţă*, Ed. Hamangiu, Bucharest, 2014, p. 34.

business activity of landlords which have contractual relationships with the same retailer on several premises within the same commercial center or otherwise.

Consequently, an analysis should be developed regarding the legal issues in progress by the time the insolvency proceedings are declared opened, "situation which is also governed by specific aspects, such as maximizing the value of the debtor's assets or profitability criteria instituted for the debtor"[5].

As vigorously underlined by the legal doctrine[6], in order to maintain the legal safe-keeping, it must be found a transitory bridge to govern in detail a certain balance which must coexist between every law area governing the agreements concluded by the insolvent tenant and the insolvency procedure. In this respect, both the legal practice and doctrine, rallied on fact that the consistency of the private law have gradually grant in favor of the expansionism characterizing the insolvency legislation[7].

Thus, the futurity of the lease agreements concluded between the insolvent tenant and the owner shall be decided by the judicial administrator/ liquidator appointed for the supervision or the administration of the debtor's activity, in this way the contractual freedom granted for the parties under the provisions of the private law governing contractual relations being defeated.

2. Agreements "on going" by the time the insolvency proceedings are opened

By the time the insolvency proceedings are declared open, the tenant is usually engaged in a series of contractual relationships with other subjects of law, legal commitments which aim to achieve its business objectives[8], for example agreements with suppliers, with owners of commercial premises etc. The commencement of the insolvency proceedings involves the establishment of the legal status of the agreements which are still ongoing. Certain agreements are for the benefit of the insolvent tenant, but, on the contrary, other agreements may be detrimental for the current financial situation of the tenant or it cannot be honored by the debtor without a sustained financial effort which would indirectly compromise the creditors and also the chances of a successful reorganization plan for the debtor.

In all cases, it should be achieved a balance between the divergent interests of the debtor's counterparties and its creditors. The contractual partners usually aim for the continuance of the agreement, while the latter aim for a rapidly termination of any contractual relationship and the fast attainment of large amounts of assets for the general body of creditors[9].

According to the provision of article 123 paragraph (1) of Law 85/2014 on procedures to prevent insolvency and insolvency, as amended and supplemented ("**Insolvency Law**") "ongoing contracts are considered maintained at the opening date of the proceedings, the provisions of article 1417 of the Civil Code[10] not being applicable. Any contractual clause regarding the termination of an ongoing contract, the revocation of the benefit period or declaring the anticipated maturity date of the agreements on the ground of opening of the insolvency proceedings shall be considered null and void". Therefore, through this legal provisions, the tenant undergoing financial difficulty, will be enable the continuance of its activity, consequently the fulfilment of the objectives of the reorganization plan, conditioned both by the maintenance of the benefit of the creditors enrolled at

[5] C.A. Obancia, *Procedura insolvenţei. Efectele juridice asupra contractelor debitorului*, Ed. Hamangiu, Bucharest, 2014, p. 4.
[6] I. Turcu, A. Szombati, *Dreptul insolvenţei, fiica rebelă a dreptului civil*, published in "Uniunii Naţionale a Practicienilor în Insolvenţă din România Phoenix" Magazine, no. 40-41/2012, 42/2012 şi 43/2013, p. 1.
[7] I. Turcu, cit. op., p. 2.
[8] I. Schiau, cit. op., p. 171
[9] S. Carpenaru, D.Stanciu, Hotca Mihai-Adrian, *Codul insolventei comentat* dated 01-oct-2014, Universul Juridic, available online at http://idrept.ro, consulted on November 1, 2016.
[10] Art. 1417 paragraph (1) of the Civil Code : The debtor shall lose the benefit of the term if it is found insolvent or, where appropriate, insolvency declared under the provisions of the law, and where, intentionally or in a grossly negligence, diminishes by its act the guarantees constituted in favor of the creditor or does not constitute the promised guarantees.

the general by of creditors (by increasing the debtor's assets) and the debtor's contractual partners which shall benefit by the fully and in due time performance of the obligations assumed by the latter.

Following the economic and financial analysis, subordinated to the idea of obtaining or maintaining a significant value[11] of the debtor's assets, the insolvency practitioner has at its disposal the legal mechanism by which it shall be able to determine the continuance or termination of the contractual commitments of the tenant, irrespective of the consistent intention of the parties.

With major impact on a debtor's activity may be both the lease agreements for the spaces in which it operates or the utility supply contracts, the contracts for certain service performance and also the contracts which were concluded with its suppliers. The analysis regarding the opportunity of such contractual commitments for the activity of the tenant, considering the new financial environment, shall be the responsibility of the judicial administrator/ liquidator which shall incur responsibility for the decision to maintain/ terminate the contracts strictly related to the impact that such a decision would have on increasing the debtor's asset values, without taking into consideration the social or economic pressures exerted by the contractual partners of the debtor[12].

As a difference from the repealed legislation, art. 123 of the Insolvency Law expressly regulates, under the provisions of paragraph (4), the possibility of the insolvency practitioner to unilateral terminate "*any contract, unexpired leases and other long-term contracts, as long as these contracts have not been entirely or substantially executed by the parties involved*". Such a decision must be substantiated in order to maximize the debtor's profit, namely the insolvency practitioner shall analyze the opportunity to maintain / terminate a contract strictly in respect with the tenant's possibility for a financial recovery, within 3 months from the opening date of insolvency proceedings. The three months period has emerged as a convenient amendment of the legislation in order to ensure the predictability and transparency in a such a procedure which affects not a subject of law solely (the insolvent tenant), but also its contractual partners. Consequently, as effectively underlined by the doctrine[13], "*the decision to maintain the contracts should be a cautious and responsible decision of the insolvency practitioner, decision which must confer the contracting partner a certainty for the revenues which must be received in relations with the contractual performances*".

After analyzing the financial situation of the debtor, the insolvency practitioner is obliged to immediately, but not later than 3 months perform an examination of the ongoing contracts and to decide their maintenance or termination[14].

The maintenance of the agreement entails the sustention of the effects envisaged by the tenant and the landlord when the agreement was concluded, unless the landlord requires the termination of the agreement on the grounds of lack/ wrongful performance, before the opening date of insolvency proceedings, of the obligations undertaken by the insolvent tenant.

The termination of the contract under the foregoing provisions of Insolvency Law may be achieved even in the absence of a clause for unilateral termination considering that the termination of a contract under the provisions of the Insolvency Law is considered cause of termination arising *ex legem*. Therefore, the termination of a lease agreement is possible even if the landlord would be in opposition regarding the termination. The kind of decision is the sole responsibility of the judicial administrator. Moreover, if prior to the termination date of the contract, the tenant has not duly executed its obligation regarding the payment of rent, this issue may not be used by the landlord as a qualified cause in order to terminate the lease agreement. Consequently only a breach occurred after the decision of the insolvency practitioner to maintain the contract may represent a valid cause for termination.

Therefore, as established in the legal doctrine[15], the maintenance or termination of the ongoing agreements is placed under the full competence of the insolvency practitioner irrespective the fact

[11] S. Carpenaru, D.Stanciu, Hotca Mihai-Adrian, *op.cit.*
[12] I. Schiau, op. cit., p. 165.
[13] S.-M. Miloş, A. Deli-Diaconescu, *Tratat practic de insolvenţă*, Ed. Hamangiu, Bucharest, 2014, p. 74.
[14] A. Avram, *Procedura insolvenţei. Partea generală*, Ed. Hamangiu, Bucharest, 2009, p. 252.
[15] Ibidem, p. 246.

that the administration right was/ was not expelled, including the situation where the administration right over the debtor's activity has not been assigned to the judicial administrator/ liquidator.

According to provisions of article 87 corroborated with the provisions of article 123 of the Insolvency Law, within the observation period the debtor may solely continue its current activity. Therefore, it is essential for the tenant to maintain the premises in which it currently operates. The insolvency practitioner should also consider this fact when deciding whether to maintain or to terminate a lease agreement. In this perspective, the doctrine[16] underlined the fact that in practice, most often, such a decision is taken by the judicial administrator / liquidator after consulting with the debtor. We believe that such a solution has a practical foundation considering the short time in which the insolvency practitioner should take a decision, considering that the debtor is the able to determine the economic relevance for each location where it currently operates. This decision to maintain a lease agreement is also pursued by the debtor who intends to fulfill its reorganization plan or, to terminate such an agreement in order to finalize properly the financial recovery plan[17].

If the tenant and the judicial administrator/ liquidator show a passive attitude, the Insolvency Law gives the landlord the possibility to react regarding a lease agreement, not by granting the landlord the possibility of unilateral termination but to request the insolvency practitioner to decide for maintaining / termination of contract[18]. More specifically, as underlined by the doctrine[19], the law allows the landlord to ask for a reaction of the judicial administrator/ liquidator, more exactly to notify their intention to continue or terminate the contract. The notification shall be made within a period of 3 months calculated from the opening date of the insolvency proceeding, this term applies similarly for the insolvency practitioner as it was shown above.

The insolvency practitioner who has received a notice from the landlord is obliged to issue a response regarding its decision to maintain or not the lease agreement within 30 days since the notice was received. Otherwise, to the passivity of the judicial administrator / liquidator shall be applied the principle *qui tacet consentuire videtur/ debetur*, its passivity being considered a tacit acceptance of the proposal submitted by the landlord within the notification. Specifically, in the absence of such a response, the insolvency practitioner shall no longer be able to request the execution of the contract which shall be considered to be terminated "*de jure*"[20]. Moreover, if the insolvency practitioner chooses to maintain the contract but, subsequent to the opening date of insolvency proceedings, the tenant no longer is able to perform its contractual obligations due to its personal fault, the landlord may file a request to the bankruptcy judge for the termination of the lease agreement.

However, the judicial administrator / liquidator may only decide on the entirety maintenance / termination of the lease agreement. It is therefore excluded the possibility to terminate only certain clauses from the lease agreements which may not be interpreted in favor of the debtor[21] or to unilaterally modify the amount of the rent owed by the tenant only in order to create a more profitable situation for the latter. The duties of the insolvency practitioner are therefore subject to limitation, considering that it is neither a party of the agreement, nor a authority in order to intervene in the agreement of the parties and to amend the clauses in order to maximize the debtor's assets. The possibility to renegotiate certain contractual clauses in the debtor's name is not excluded.

According to the provision of article 123 paragraph (2) of the Insolvency Law, provision introduced for the first time by the Insolvency Law "*if the judicial administrator/ the liquidator decides to maintain the contract, it shall be obliged to specify, quarterly, in the activity reports if the debtor has the funds necessary in order to pay the value of the goods or services provided by the contractor* ".

[16] Gh. Piperea, *Insolvenţa. Legile, Regulile, Realitatea*, Ed. Wolters Kluwer, Bucharest, p. 607.
[17] Ibidem, p. 608.
[18] I. Schiau, op. cit., p. 166.
[19] Gh. Piperea, op. cit., p. 608.
[20] I. Schiau, op. cit., p. 166.
[21] Gh. Piperea, op. cit., p. 610.

These provisions are aimed, on the one hand, to empower the insolvency practitioner and, secondly, to make available for the bankruptcy judge a concrete tool regarding the financial condition of the debtor[22].

Termination of lease agreements under the insolvency law is partly governed by a different legal regime, meaning that a lease may be terminated under art. 123 par. (7), more exactly by observing the legal terms of notice. Thus, even if the insolvency practitioner decides the termination of the tenancy, this termination cannot be finalized without observing the notice period set by the parties or, failing such a term within the contract provisions, a reasonable period of notice.

However, as it was mentioned above, in a contract which provides periodic payments due for the debtor, the decision to maintain the contract will not compel the insolvency practitioner to execute the residual payments. For these payments, the Insolvency Law provides that the landlord may file a claim against the debtor. The landlord of commercial premises subject to a lease agreement with the insolvent tenant shall be placed on the list of creditors for the execution of the residual payments. However, its debt will be unsecured.

3. The principle of maximization debtor

The professional literature[23] underlines when referring to the binding force of contracts that "*symmetry exists between the completion of a contract and its termination : the contract is the result of a mutuus consenssus, and therefore its termination must be the result of a mutuus dissensus*".

However, in the insolvency field, the principle of *mutuus consenssus, mutuus dissensus* is subsequent to the legislative decision to prioritize the principles of morality, fairness and social utility[24].

As already stated above, insolvency law departs from the common law principle of "*pacta sunt servanda*" in order to give priority to a different principle of law that prevails in the insolvency procedure - the principle of maximizing the debtor's assets.

Therefore, any decision / action of the judicial administrator/ liquidator must reflect the abovementioned fundamental principle of this area of law.

The finality which must be taken into account by the insolvency practitioner is solely to maximize the debtor's asset value. The Insolvency Law expressly established this principle for the first time, in the previous legislation this principle existed only at jurisprudential and doctrinal level. As shown above, in order to increase the maximum value of the debtor's assets, the judicial administrator or liquidator, as the case may apply for the maintenance or termination of any contract, unexpired tenancies, or other long-term contracts, as long as these have not been entirely or substantially executed by all parties involved.

According to the provisions of article 123 paragraph (1) of the Insolvency Law, in order to increase the maximum value of the debtor's assets, within a limited period of 3 months from the opening date of the insolvency procedure, the administrator / liquidator may terminate all contracts, unexpired tenancies, or other long-term contracts, as long as these have not been entirely or substantially executed by all parties involved.

The provisions of article 123 paragraph (10) of the Insolvency Law are governing the situation where "in order to maximize the debtor's assets or if the contract cannot be executed, the judicial administrator may assign ongoing contracts to third parties, provided that those contracts have not been concluded *intuitu personae* , according to the provisions of the Civil Code". In this regard, considering that most times a tenancy is not a contract concluded based on the qualities of the debtor (in this case - the insolvent tenant), the insolvency practitioner may be able to find third parties willing to take over the lease agreement in question. But it must be taken into account that the judicial administrator/ liquidator has only the possibility and not the obligation to assign those contracts. Moreover, we emphasize that the principle on which the insolvency practitioner's action are based is

[22] S. Carpenaru, D.Stanciu, Hotca Mihai-Adrian, op. cit.
[23] C. Stătescu, C. Bârsan, *Drept civil. Teoria generală a obligaţiilor*, Ed. All, Bucharest, 1995, p. 59.
[24] C. Zamşa, *Efectele obligaţiilor civile*, Ed. Hamangiu, Bucharest, 2013, p. 26.

to maximize the value of debtor's assets, thus being more likely to terminate a disadvantageous tenancy.

Since maximizing the debtor's assets represents the scope and a principle of the insolvency proceedings, the obligation to comply with this principle applies for all the actions of the insolvency practitioner including the alternative between the two possibilities of maintaining or termination the contract (*tertium non datur*)[25]. If the insolvency practitioner, when exercising this option in respect with a contract would ignore the principle of maximization of the value of debtor's assets, the creditors would have opened a personal action according to art. 58 of the Insolvency Law against the insolvency practitioner, filed with the bankruptcy judge. In the first scenario, when the insolvency practitioner has decided to maintain the lease, it has the right to renegotiate the terms and conditions of the lease agreement in order to obtain the best reflection of debtor's interests –the maximization of the assets' value.

4. Defense mechanisms against the insolvent tenant

Although, at a preliminary analysis regarding the provisions of the Insolvency Law it might appear inequitable the fact that an economic risk that the debtor deliberately assumed and which finally placed the debtor in financial difficulty, to be incurred by other legal entities acting in a business environment related to the practice area of the debtor, we believe that in such a circumstance the intention of the legislator was to grant priority for the general interest, which might have impact on certain business areas, in the detrimental of an individual interest.

However, the legislator has developed specific remedies for the counterparties of the debtor, which may be applied in case the insolvency practitioner decides to terminate the agreement based on opportunity reasons.

In default of lack of regulation regarding specific criteria for the insolvency practitioner in order to maintain or terminate the contracts concluded by the insolvent tenant, the specialist authors[26] underline the fact that the insolvency practitioner, when analyzing the maintenance or termination of a contract, shall consider "*the real utility or necessity of these contracts related to the debtor's activity, respectively in the liquidation proceedings of its property. Although the legal text does not expressly provide, the creditors, the special administrator and any other participant in the insolvency proceedings, including the contractual partners of the debtor may challenge the insolvency practitioner's decision regarding the maintenance or termination of a certain contracts when this decision was issued without taking into consideration the interests of the body of creditors*".

In the event the insolvency practitioner decides the termination of the contract, related to a lease agreement, the landlord may file an action for damages against the insolvent tenant, action which shall be settled by the bankruptcy judge, according to the provisions of paragraph (4) article 123 of the Insolvency Law. The same paragraph also provides that when the right established in favor of the counterparty to file an action for damages is exercised and finalize with a bounding decision in favor of the landlord, the damages shall be paid according to the provisions of article 161 point 4, based on the judgment under which they have been recognized as *res judicata*". Therefore, related to lease agreements, in the first step the landlord is entitled to be notified, and consequently, in the event the decision of the insolvency practitioner shall cause damages, the landlord may file an action in order to determine the amount of damages to which it is entitled to. However, it must be stated that the amounts granted as compensation shall be considered unsecured claims and shall follow the character of this sort of debt when the assets comprised in the body of creditors shall be divided. By way of example, such damages could be claimed as a lost profit or the expenses incurred by the landlord in order to identify other potential tenants, residual rent, etc.

However, since the risk of insolvency of its counterparty is, theoretically, predictable, the landlord is allowed to request at the date of conclusion of the lease agreement for independent and executables guarantees, such as letters bank guarantee, security deposits, etc. Such guarantees have

[25] S. Carpenaru, D.Stanciu, Hotca Mihai-Adrian, op. cit.
[26] *Ibidem*.

the power to "resist" the insolvency proceedings and may be used according to the purpose for which they were issued for by the tenant. Thus, a letter of guarantee issued in favor of the landlord may be performed regardless of the insolvency state of the tenant, but is shall be subject to the conditions agreed upon or applicable. Therefore, based on these issues, a prudent and diligent landlord is entitled to require certain legal instruments in order to ensure a certain level of protection against the effects of severe economic difficulties in which the tenant may find itself at a certain moment in time (i.e. for the reaming residual rents before the opening of insolvency proceedings).

Regarding the functional competence of the courts to settle the potential actions for damages arising from a wrongful performance of the tenant during the insolvency procedure, the Insolvency Law has supplemented a legal vacuum which existed in the earlier legislation establishing that the bankruptcy judge will have jurisdiction to rule on such damages. Prior to the entry into force of the Insolvency Law, the doctrine and jurisprudence had an differential practice in the sense that on one hand[27] it was argued that such an action shall be settled under the provisions of the common law considering that such claims are resulting from the violations of contractual obligations due the debtor - practically without taking into account the special character of the insolvency proceedings due to the fact that the law was "silent" when related to the regulation of such an action for damages. On the other hand[28], it was supported the idea that once the debtor entered into the insolvency proceedings, all the common law actions against the debtor regarding debts recovery shall be suspended or terminated, therefore such an action for damages may be resolved only by the bankruptcy judge within the insolvency proceedings.

The current legislation has settled this divergence of opinions and uneven practice, establishing that such an action for damages shall be determined by the bankruptcy judge under the provisions of art. 123 paragraph (4) of the Insolvency Law.

Therefore, this action for damages in favor of the landlord shall not be suspended by virtue of art. 75 of the Insolvency Law considering that the Insolvency Law derogates from the *ope legis* suspension of the judicial and extrajudicial actions against the debtor or its assets. The compensation obtained after the admission of such claims may be added to the body of creditors and it cannot be considered a belated[29] claim considering that such claims are no subject to the limitations provided by the Insolvency Law.

The practice remains ambiguous regarding the stamp duty applicable to such claims for damages, the legal doctrine[30] supporting the idea that such actions may be subject to the stamp duty provisions, in a fixed amount, expressly stipulated by the Insolvency Law.

Regarding the amount which may be awarded as a compensation for such damages, as it was already noted, the insolvency procedure derogates from common law principles, as the sovereign principle of this procedure is the maximization of the debtor's assets. Therefore, the insolvency practitioner should take this aspect into consideration when deciding the termination of a lease agreement.

In this regard there is also an unconsolidated practice in the courts of law which have ruled on such actions for damages. Neither the previously nor the current statutory provisions of the Insolvency Law define the criteria under which may be made an assessment of such damages. Therefore, the bankruptcy judge, based on its own persuasion, is left to decide in respect with the amounts due as compensations, taking into consideration the principle of equity by which it may be sustained both the damages incurred and substantiated by the counterparty of the debtor and the sovereign principle in the field of insolvency, namely the principle of maximization debtor's assets.

In conclusion, it may be sustained that although the special and competitive character of the insolvency proceedings has created various "abnormal" scenarios in the legal order by establishing a new principle - *maximizing the debtor's assets* – in the detrimental position of other law principles

[27] S. Tîrnoveanu, L. Retegan, *Denunţarea contractelor în cadrul procedurii - ipoteze şi efecte, avantaje şi dezavantaje în apelarea la instituţia denunţării contractelor*, in Phoenix no. 30/2009, p. 14.
[28] Gh. Piperea, op.cit., p. 608.
[29] I. Schiau, op. cit., p. 170.
[30] S. Carpenaru., D.Stanciu, Hotca Mihai-Adrian, op. cit.

which usually govern the contractual relations - *pacta sunt servanda* - the legislature sought to reconcile and correct the unconsolidated practice regarding the application of the special provisions of the Insolvency Law.

In terms of lease agreements, it may be assumed that although a certain level of inequity may be highlighted by the landlord when the insolvency practitioner decides that the optimal solution to enhance the value of the debtor's assets is the termination of the tenancy, the owner is entitled to resort to certain legal instruments able to reduce the impact that such a termination would have on his business.

In a first phase, it can be argued that, unlike other contractual agreements, a lease agreement shall be carefully analyzed by the insolvency practitioner considering the insolvent tenant's necessity to maintain the premises in which its business is operated in order to properly implement the reorganization plan. Therefore, if the insolvency practitioner decides to maintain the lease agreement, it shall be bound by the obligations of the tenant undertaken under the initial contract. Otherwise, the landlord shall be entitled to request the bankruptcy judge for the immediate termination of the contract.

If the insolvency practitioner's decision shall be to terminate the lease agreement, first of all the landlord shall be entitled to the right of notice. To the extent that the landlord shall substantiate a prejudice incurred by means of the unilateral termination of the contract, it may be filed an action for damages to the bankruptcy judge. For *lex ferenda*, it should be considered a series of criteria by which it may objectively be determined the amount of such compensation considering the principles of common law as well as the principle of maximization of debtor's assets, or regulations establishing the nature of such compensation. This sort of provisions would prove to be useful for both the courts of law and the insolvency practitioner who could assess more precisely the impact that either the termination or the maintenance of the lease agreement contract would have on debtor's assets. Such criteria would, for example, be considered the costs incurred by the landlord to restore the area to its original state, the undeceived rent until the subsequent occupation of the premises, costs incurred for mandating a real estate agency in order to identify another potential tenants, etc.

In any case, it was already established that after granting such compensation through a final and bounding decision, the landlord may join the body of creditors as an unsecured creditor in order to satisfy its debt. However, the law does not prevent a prudent and diligent landlord to include at the time of concluding such a tenancy clauses giving the position of a secured creditor in the proceedings.

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