REPLACING THE CULPABLE INSOLVENCY PRACTITIONER ACCORDING TO LAW NO. 85/2014 (ROMANIAN CODE OF INSOLVENCY)

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REPLACING THE CULPABLE INSOLVENCY PRACTITIONER ACCORDING TO LAW NO. 85/2014 (ROMANIAN CODE OF INSOLVENCY)

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Abstract
By adopting in June 2014 Law no.85 /2014 on procedures destined to prevent insolvency and of insolvency (“Insolvency Code”) they tried to remedy the shortcomings of the old regulations - Law no.85 / 2006 on insolvency. One of the controversial issues in doctrine but especially in the practice of courts targeted the replacement of the judicial administrator or of the liquidator. In this study we shall try to find out to what extent the desire pursued by the legislature was reached, indicating that our approach will address only the situation of replacement of the just insolvency practitioner due to his/her fault.

Keywords:
insolvency, replacement of judicial administrator / liquidator / insolvency practitioner, syndic judge

JEL Classification K 30, K 22

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1. LIMITS OF APPROACH

Recently Law no. 85/2006 on insolvency\(^3\) was replaced\(^4\) by Law no. 85/2014 on procedures to prevent insolvency and of insolvency\(^5\), a law that most practitioners and doctrinaire call the Insolvency Code.

The new regulation, like the old one, enshrines the possibility of replacing the insolvency practitioner in many situations, both due to culpable reasons and non-culpable reasons.

We will not analyze the situation where the syndic judge rules the replacement of the insolvency practitioner at his/her request due to well reasonable grounds, under Article 57 paragraph 5 of the Code of insolvency\(^6\).

This legal approach will be limited to analyzing the case of culpable replacement of the insolvency practitioner by the syndic judge, for good reasons. We will address the issue according to the current insolvency law, for which we will use the denomination “Insolvency Code” for a facile expression. Naturally, we will make references to the old regulation and especially to jurisprudence built under its aegis. Actually, it is the only judicial practice in the field because due to the very short time after the entry into force of the Insolvency Code and of the fact that to the proceedings commenced under the rule of Law no.85 / 2006 on insolvency the old law applies, the courts have not ruled solutions in our sphere of interest.

\(^3\) Law no.85 / 2006 on insolvency published in the Official Gazette of Romania, Part I, 359 of April 21, 2006 repealed on June 28, 2014 with the entry into force of Law no. 85/2014 on the procedures of insolvency prevention and insolvency.
\(^4\) In October 2013, between 25/10/2013 and 31/10/2013 for five days it was in force Ordinance no. 91/2013 on insolvency prevention procedures and of insolvency, which repeals Law no. 85/2006 on insolvency. Emergency Ordinance no.91 / 2013 has been declared entirely unconstitutional by the Constitutional Court by Decision no. 447/2013 for admission of the exception of unconstitutionality of the provisions of the Government Emergency Ordinance no. 91/2013 on insolvency prevention proceedings and of insolvency which from 01/11/2013 reinstated Law no.85 / 2006 on insolvency.
\(^5\) Law no. 85/2014 on insolvency prevention proceedings and of insolvency published in the Official Gazette no.466 of June 25, 2014 law called in this paper “Insolvency Code”
\(^6\) The possibility of the non-culpable replacement of the insolvency practitioner was enshrined in Law no. 85/2006 on the insolvency by the provisions of Article 22, paragraph 2, replacement which was achieved under the provisions of Article 19, paragraph 2 when the judicial administrator refuses to assume the position for reasonable grounds, after the communication of designation decision, sending its refusal and the reasons within 5 days of receipt of the decision pursuant to Article 22, paragraph 1 or when the practitioner does not qualify for professional practice (after designation, the administration has begun to provide a salaried employment in other professions, etc.)
2. GOVERNING RULES

In Law no. 85/2006 on insolvency the law that regulated the replacement of the insolvency practitioner for justified culpable reasons – Article 22 paragraph 2 - reads as follows: "At any stage of the proceedings, the syndic judge, ex officio or at the request of the committee of creditors, can replace the judicial administrator, by means of a reasoned ruling, for reasonable grounds. The replacement authentication is pronounced in the council chamber urgently by summoning the judicial administrator and the creditors' committee."

The Insolvency Code resumes it almost identically in the content of Article 57 paragraph 4: "In any moment of the proceedings, the syndic judge, ex officio or following the adoption of a meeting of creditors' decision in this regard, with the vote of more than 50% of all voting receivables, may replace the judicial administrator / liquidator, for reasonable grounds. The replacement is judged in the council chamber, urgently, summoning the judicial administrator and the creditors' committee. Against this authentication an appeal may be formulated in 5 days from notification."

To justify the admission of the request for replacement of the insolvency practitioner appointed there have to be justified culpable grounds that impose the replacement. It is qualified as a penalty, a form of professional liability justified by the serious misconduct or its fraud. 

3. THE PURSUIT OF THE PROCEEDINGS

Regarding the manner of investing the court the legislature has kept intact the prerogative of self-notification and self-investiture of the syndic judge with such a request. 

In its original form, during the discussions for the development of the Insolvency Code "ex officio" it has been removed being considered that the replacement of the insolvency practitioner, for reasonable grounds must not be disposers at his/her referral, ex officio. This happened, despite the fact that the prerogative of the judicial control of the proceedings belonged indisputably to the syndic judge. Subsequently, after discussions, they went back and the syndic judge was granted his/her old prerogative, now having the possibility ex officio to replace the insolvency practitioner for reasonable grounds. 

7 Civil Decision no. 490/2008 of Cluj Court of Appeal cited in M. Sărăcuț, Appointment, confirmation and replacement of the Syndic judge in “Phoenix” magazine no. 47, March 2014, p.14

Article 57 paragraph 4 of the Insolvency Code amends the scope of the ones pursing the proceedings of seeking the replacement of the judicial administrator/liquidator. According to Article 22 paragraph 2 of Law no.85/2006 on insolvency only the creditors' committee\(^8\) was the only one who could notify the syndic judge with a request to replace the insolvency practitioner. The current regulation states that the decision to formulate the request for replacement of the insolvency practitioner for reasonable grounds belongs to the creditors. The text of law establishes the necessary vote for adoption of such a decision: more than 50% of the total voting claims.

It should be noted that the creditors' meeting does not decide the replacement of the liquidator. This is the exclusive prerogative of the syndic judge. Creditors' meeting decides only the notification of the court with such a request for replacement, its admission or rejection depending on the rules of evidence intended to convince the court of the existence of justified grounds regarding the replacement of the insolvency practitioner.

The conclusion by means of which the syndic judge shall decide on the replacement of the insolvency practitioner is subject to an appeal within 5 days of notification. As shown, in this case the term of appeal is different from the term common law regarding the decisions of the syndic judge, which is of 7 days, a term which we believe had to be preserved in the analyzed situation.

4. THE CONCEPT OF “REASONABLE GROUNDS”

In the former regulation there were difficulties in shaping the concept of “reasonable grounds” and in the establishment of criteria to determine its area of coverage. However, legislature does not currently indicate elements that help courts in determining "reasonable grounds".

Moreover, when it establishes by the provisions of Article 57 paragraph 5 of the Insolvency Code, as a novelty, the possibility to replace at any time of the proceedings the insolvency practitioner at his/her request, the legislature uses the term, “well reasonable grounds” but without indicating the items which help shape such situations.

\(^8\) Research literature shows that in the absence of this committee, any creditor regardless of the weighting of the claim value in the statement of affairs could exercise the creditors' committee powers and could request the syndic judge the replacement of the practitioner.
As a consequence the jurisprudence has the role to determine the assumptions which fall within the expression “reasonable grounds”, a task that will remain with them.

One of the solid grounds outlined by the legal practice would be the failure to appropriately fulfill the duties provided by law or determined by the syndic judge, when they seriously prejudice or endanger the interests of creditors or that of the debtor.

To determine when the conduct of the judicial administrator is culpable we will take into consideration the provisions of Article 58, namely of Article 64 of the Insolvency Code which set the main responsibilities of the insolvency practitioner. Starting from the content of these texts in practice it was appreciated that it may be considered a reasonable ground to justify the replacement the behaviour of the judicial administrator of not meeting any of the deadlines established for submitting the final report, the final table of claims and the full report on the economic situation of the debtor. The unjustified refusal of the insolvency practitioner to take over the position in question may attract its replacement. The situation is similar in the case the insolvency practitioner diminishes directly or indirectly the value of the amount insured by the insurance contract, conduct that both Law no.85 / 2006 on insolvency and the Insolvency Code expressly prohibit.

Can the failure of the personal practitioner to complete his/her duties otherwise but by means a trustee can be considered a non-fulfilment or improper fulfilment of duties and thus a reasonable ground for his/her replacement? It was considered that the mere activity of the termination of the contract of mandate and delegation of powers to another insolvency practitioner which was not completed is not a reasonable, culpable ground to justify the replacement. It is true that the appointment of the judicial administrator is made in consideration of his/her professional qualities and its responsibilities within the insolvency procedure must be performed

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9 Such a conduct of the insolvency practitioner may attract his/her sanction by a legal fine amounting to 1,000 lei -5000 lei when the deed is committed due to his/her fault or in bad faith, according to Article 60 paragraph 2 of the Insolvency Code, Article 60 paragraph 3 enshrining the possibility of the judicial administrator to be liable to pay the prejudiced caused by this conduct.

10 Article 19 paragraph 8 and paragraph 9 of Law no. 85/2006 on insolvency state that:,, (8) Before his/her appointment, the judicial administrator must prove that it is insured for professional liability through subscription of a valid insurance policy that cover any damage caused in carrying out his/her duties. The insured risk must be the consequence of the insolvency administrator's activity during performance of his/her quality. (9) The insolvency administrator is forbidden, under penalty of dismissal from office and repair of any damage caused, to reduce, directly or indirectly, the amount assured by the insurance contract.”
exactly, but the conclusion of a contract of mandate and delegation of powers, not followed by implementation cannot be assessed as good reason to justify the replacement\(^{11}\).

The courts have established that the replacement under the provisions of Article 57 paragraph 4 of the Insolvency Code (corresponding to Article 22 paragraph 2 of Law no. 85/2006 on insolvency), for example, cannot be justified by the work carried out according to the confirmed plan of a sale of assets without seeking confirmation of conclusion of the transactions; failure to pay the debt to the creditor who made the request for substitution of the proceeds in the proceedings of bankruptcy, as long as this competition, collective and egalitarian procedure aims mainly to cover the entire liability, without preference\(^{12}\).

What happens if the judicial administrator is in a state of conflict of interests or in one of the situations described in Article 42 of the new Code of Civil Procedure\(^{13}\), namely Article 27 of the Old Code of Civil Procedure\(^{14}\).

\(^{11}\) M. Sărăcuț, op.cit., p.15.


\(^{13}\) Article 42 of the new Code of Civil Procedure, with the marginal title “other cases of absolute incompatibility states: “The judge is also incompatible to judge in the following situations: 1. Where he/she previously expressed his/her opinion on the solution of the case he was assigned to a judge. The discussion by the parties, ex officio of matters of fact or law, according to Article 14 paragraph (4) and (5) does not make the judge incompatible; 2. when there are circumstances that justify the fear that he, his/her spouse, ascendants or descendants or their in-laws, if necessary, have an interest in the cause that is judged; 3. When he/she is a spouse, relative or in-law up to the fourth degree including with the attorney or representative of a party or if married with the brother or sister of a spouse of one of these people; 4. when the spouse or ex-spouse is a relative or in-law up to the fourth degree with any of the parties; 5. if the spouse or relatives to the fourth degree or in-laws, as appropriate, are parties in a trial that is judged at the court where one party is a judge; 6. If between himself/herself, his/her spouse or relatives to the fourth degree or in-laws, as appropriate, and one party there was a criminal trial with more than 5 years before being appointed to judge the case. In case of criminal complaints submitted by the parties during the trial, the judge becomes incompatible only if a criminal action is instituted against him/her;

7. If it is guardian or custodian of a party; 8. If he/she, the spouse, his/her ascendants or descendants received gifts or promises of gifts or other benefits from one of the parties; 9. if he/she, the spouse or one of their relatives up to the fourth degree or in-laws, as appropriate, is in enmity relations with one of the parties, the spouse or his/her relatives to the fourth degree; 10. If when vested with solving an appeal, the spouse, or his/her relative up to the fourth degree participated as a judge or public prosecutor, in the judgment of the same case before another court; 11. if he/she is spouse or relative up to the fourth degree or in-laws, as appropriate with another member of the panel; 12. if the spouse, a relative or an in-law or up to the fourth degree represented or assisted the party in the same case before
namely in the situations in which the insolvency practitioner has the obligation to abstain. Or when the insolvency practitioner breaches the prohibitions or incompatibilities that the law (Article 27, Article 28 of the Government Emergency Ordinance no. 86/2006) establishes in relation to him/her.

A closer look is needed where between the insolvency practitioner, on the one hand and the bankrupt debtor – by means of the special administrator, and / or former statutory or fact administrators and / or special administrator, on the other hand, there are relationships that can be characterized as hostile or as showing elements that rightly give birth to doubts about the impartiality of the insolvency practitioner. Such a situation can be generated by the formulation of certain criminal complaints by the special administrator (former statutory / fact administrator) against the insolvency practitioner for committing corruption offenses in that procedure. Are there "reasonable grounds" within the meaning of Article 57 another court; 13.when there are other elements that rightly give birth to doubts about its impartiality.

14 Article 42 of the new Code of Civil Procedure, with the marginal title “other cases of absolute incompatibility” states: “The judge is also incompatible to judge in the following situations: 1. Where he/she previously expressed the opinion on the solution on the case for which he/she was assigned to judge it. The challenging of the parties, ex officio of matters of fact or law, according to Article 14 paragraphs (4) and (5) does not make the judge incompatible; 2. when there are circumstances that justify the fear that he/she, his spouse, his/her ascendants or descendants or in-laws, if necessary, have an interest in the cause that is judged; 3. when he/she is a spouse, relative or in-law up to the fourth degree including with the attorney or representative of a party or if he/she is married to the brother or sister of the spouse of one of these people; 4. When the spouse or ex-spouse is a relative or in-law up to the fourth degree with any of the parties; 5. If the spouse or their relatives to the fourth degree including in-laws, as appropriate, are parties in a trial which is judged by the court where one of the parties is a judge; 6. If between him/her, the spouse or relatives to the fourth degree or in-laws, as appropriate, and one of the parties no later than criminal proceedings five years before being appointed judge in question. In case of the criminal complaints submitted by the parties during the trial, the judge becomes incompatible only if a criminal trial is made against him/her; 7. If he/she is guardian or custodian of one of the Parties; 8. if he/she, the spouse, his/her ascendants or descendants received gifts or promises of gifts or other benefits from one of the parties; 9. If he/she, the spouse or one of his/her relatives to the fourth degree or in-laws, as appropriate, is in enmity relations with one of the parties, his/her spouse or his/her relatives to the fourth degree; 10. If, when vested with the solving of an appeal the spouse or his/her relative up to the fourth degree participated as a judge or public prosecutor, in the same case before another court; 11. if the spouse or a relative up to the fourth degree or in-laws, where appropriate, another member of the panel of judges; 12. If a spouse, a relative or a in-laws up to the fourth degree represented or assisted the party in the same case before another court; 13. when there are other elements that rightly give birth to doubts about his/her impartiality.
paragraph 4 of the Insolvency Code (former Article 22 paragraph 2 of Law no. 85/2006) justifying the replacement?

The obligation of abstention is provided by Article 29 of GEO no. 86/2006 on the organization of the insolvency practitioners according to which, "... the practitioner is obliged to abstain, under penalty of suspension from the profession if: a) ... is in conflict of interest, as defined in the Statute and in the Code of professional ethics; or b) is in one of the cases provided for in Article 27 of the Civil Procedure Code, except that provided for in Article 27 section 7”.

In our opinion the breach of the obligation to abstain, of the mandatory legal texts establishing incompatibilities and interdictions are reasons for which the syndic judge should rule the replacement of the insolvency practitioner. We consider it is one of the situations in which the syndic judge ex officio should proceed to the replacement of the insolvency practitioner. He/she can do this either if he/she perceived directly the infringements of the file works or from memory (petitions) and supporting documents filed in the case file by the participants or persons concerned in the proceedings or by the parties or people interested in the files associated with the procedure file. Memoirs (petitions) are not acts of intimation but only of notification of the syndic judge on the existence of the conflict of interest or of any of the situations stipulated by Article 42 of the Civil Procedure Code or on the violation of the mandatory provisions concerning prohibitions and incompatibilities by the insolvency practitioner.

5. THE PASSIVITY OF THE SYNDIC JUDGE

We raise the question of knowing what is happening and what would be the way of procedure to be followed in those cases when the syndic judge shows passivity and does not self-invests him/herself to order the

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16 The conflict of interest is defined in Article 11 of the Code of professional ethics and discipline of the National Union of Insolvency Practitioners of Romania (UNPIR), legal text which reads: “The conflict of interest is the state of the member of the Union which has a personal interest, of patrimonial or non-patrimonial nature which could influence the impartiality and objectivity of its work in the assessment, implementation and reporting of his/her duties.”
replacement of the insolvency wrongful practitioner (and neither the creditors who meet the conditions of majority stipulated by law do not request it, a situation encountered especially if the practitioner has been appointed by creditors).

The question is legitimized by the fact that currently there are no legal provisions allowing the recusal of the insolvency practitioner. Pending the entry into force of Government Emergency Ordinance no. 86/2006, paragraph 6 and paragraph 7 of Article 19 of Law no.85 / 2006 on insolvency provided the possibility of recusal of the insolvency practitioners when they breached the duty of abstention\(^\text{17}\). But the texts repealed were not replaced with similar ones.

One of the possibilities is for the person concerned to notify the court of discipline by means of a disciplinary action for disciplinary liability of the insolvency practitioner and the application of the appropriate sanction, namely of the suspension from the profession.

But in practice, often the disciplinary courts of liberal professions delay or avoids the penalizing of a colleague for wrongful acts by applying extreme disciplinary measures such as suspension from the profession.

On the other hand, frequently, the person concerned does not intend for the insolvency practitioner to exercise his/her profession for a while, to be excluded from all the procedures he/she manages. His/her desideratum is the removal of the culpable practitioner only from the proceedings in which his/her interests are harmed, leaving the disciplinary body to order disciplinary sanctions in relation to the activities of that practitioner, if he/she sees it fit. Suspension from the profession of the insolvency practitioner that occurs after closing (or performing mostly) of the procedure in which the abstention obligation was violated does not show any interest to those prejudiced by such violations.

And yet, how can the insolvency practitioner, under the assumptions set out in Article 27 - 29 of Government Emergency Ordinance no.86 / 2006 in case of the syndic judge passivity, be replaced timely?

\(^{17}\) Article 19 of Law no. 85/2006 on insolvency provided before the modification by Government Emergency Ordinance no.86 / 2006 that: “...(6) the following categories of people are incompatible with the status of liquidator (expert in insolvency): ... c) natural or legal persons having the quality of liquidator (expert in insolvency) to whom the provisions of Article 27 sections 1-9 of the Code of Civil Procedure are applied. (7) In the cases provided for in Article 149 of Law no. 31/1990, republished, as amended and supplemented, the judicial administrator / liquidator is obliged to abstain. In case of noncompliance, the person concerned may initiate the procedure for objection, in accordance with the Code of Civil Procedure, which shall apply accordingly.”
As the Constitution guarantees, interested persons should be able to appeal to the courts when their legitimate rights and interests are violated and to request the termination of the infringement and removal of its consequences. As a result, we consider that in the event of failure to fulfil the abstention obligation and of failure to comply with the prohibitions and incompatibilities regime provided for by Article 27- Article 29 of Government Emergency Ordinance no.86 / 2006 it can be replaced following a request addressed to the syndic judge, by virtue of the powers conferred upon him/her by Article 45 paragraph 1 section f of Insolvency Code (formerly Article 11 paragraph 1 section e of Law no. 85/2006).

In situations where the practitioner does not abstain, the one that can to "draw" him from the cause where he/she would have an obligation to abstain, the syndic judge, in virtue of the powers conferred to him/her by the provisions of Article 45 paragraph 1 section f) of the Insolvency Code, the breach of the obligation to refrain constituting a reasonable ground for the replacement of the insolvency practitioner.

If we consider the idea that the syndic judge could only replace the liquidator ex officio, as there is no way to sanction his/her passivity we would reach the absurd situation in which the magistrates, when they do not abstain, may be replaced at the request of the parties while the insolvency practitioner may be unwavering for the same reason. In this regard, the position of the insolvency practitioner is privileged as compared to the judge called to verify the legality of legal acts and operations committed by the former.

In this situation, the syndic judge may, on request, replace the practitioner for the infringement of the abstention obligation.

The possibility to formulate such request is the more reasoned (in other words the existence of a judicial procedure for the replacement upon request of the culpable practitioner is all the more necessary) where the insolvency practitioner who breaches the abstention obligation was sanctioned within the same insolvency procedure by the disciplinary court with another sanction (written warning) for the non-fulfilment of their duties. In this context, if the syndic judge remains passive without referring him/herself and maintaining the practitioner in insolvency we believe that the person concerned (for example the bankrupt debtor by the special

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18 In the same vein, M. Sărăcut, op.cit., p. 15.

administrator, the defendant in the associated file aiming at holding liable, the statutory administrator) can request the replacement\textsuperscript{19}.

One could raise the question what would be the usefulness of the recognition of such an alternative since him/her, the syndic judge, decides whether he/she replaces or not the practitioner even if the investing is ex officio or on demand. One could say that the syndic judge may reject the replacement request of the insolvency practitioner not because the application was filed by a person without legal standing but in substance, because he/she appreciates subjectively that there are no reasonable grounds for replacement.

The discussion deserves to take place as the passivity of the syndic judge, the refusal to act ex officio cannot be sanctioned by exercising an appeal, while the rejection of an application for summons by means of which he/she is asked to perform his/her duties in the present case described in Article 45 letter f of the Insolvency Code may be subject to the judicial review of the Court of Appeal, by way of appeal.

Otherwise there would be no procedure of replacement of the insolvency practitioner who violates the mandatory provisions concerning prohibitions, incompatibilities and the obligation to abstain when the syndic judge is passive.

6. JURISPRUDENCE.

The practice of courts regarding the replacement of the insolvency practitioner for breach of obligation of abstention, as regulated by Article 29 of Government Emergency Ordinance no. 86/2006 on the organization of the insolvency practitioner profession is different.

Thus, civil decision no. 40/2013 of Oradea Court of Appeal is in the sense of those sustained by us. The court noted that according to Article 11, section e) of Law no. 85/2006 on insolvency (in effect on the date of the case settlement) among the attributes imposed on the judge, is that of the replacement for reasonable grounds, of the judicial administrator, replacement that can be imposed under Article 22 paragraph 2 of the same law at any stage of the proceedings, ex officio or at the request of the creditors' committee. To those shown, and considering the provisions of Article129 paragraph 5 of the old Code of Civil Procedure the syndic judge,\textsuperscript{19}

\textsuperscript{19} No less important is the fact that there are suspicions that the same insolvency practitioner has committed offense in other proceedings, criminal complaints being made against him/her for corruption offenses by other people and in other procedures.
in so far as he/she considers, in relation to the evidence submitted, that the insolvency practitioner is in a state of incompatibility, he/she is obliged ex officio to refer in order to replace the judicial administrator. As the syndic judge did not act in this manner the Court of Appeal allowed the appeal, quashed the sentence imposed by the syndic judge (by means of which the request for recusal formulated by the debtor on the grounds of incompatibility had been rejected), while the cause would be remitted to the syndic judge who will take account of those shown.

In the same vein it is the decision of the Court of Appeal Pitesti 1439/2011, which maintains the decision by means of which the syndic judge ordered the replacement of the judicial administrator for breach of the obligation of abstention incumbent upon him/her when in a state of incompatibility. In the application it filed, the the bankrupt debtor raised the plea of incompatibility of the insolvency practitioner, representative of the judicial administrator, who is in the case of Article 27 paragraph 1 section 2 of the Code of Civil Procedure

Instead, Suceava Court of Appeal by decision 7372/2014, upheld judgment 567 of July 3, 2014 of Botosani Court rejecting the request for replacement of the liquidator as formulated by persons without locus standi. The application was lodged by the special administrator (former administrator of the bankrupt debtor) and by the former statutory manager. The two were plaintiffs in the associated files with the object of designating the special administrator, appeal at the final table consolidated, appeal to the consolidated final table “rectified”, appeal to the activity report and the quality of defendants in the associated file on assuming personal liability, and etc.).

By means of the application addressed to the syndic judge the replacement of the judicial liquidator for failure to fulfil or improper fulfilment of duties by the insolvency practitioner is requested and demonstrates the breach of the duty of abstention because the conditions provided for by Article 42 point 9 and point 13 of the Code of Civil Procedure (formerly Article 27 of the old Code of Civil Procedure) were met – the existence of some criminal complaints formulated by the authors of the replacement request against the insolvency practitioner for committing corruption offenses, a file still being investigated in 2012 by DNA (National Anticorruption Directorate) Suceava.

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20 Published in Revista Română de Jurisprudență (Romanian Jurisprudence Magazine) no. 6/2012.
The syndic judge rejected the application for replacement as made by a person with no locus standi and took no action to replace the insolvency practitioner, a solution maintained by Suceava Court of Appeal. This happened despite the fact that Suceava local discipline court found that the insolvency practitioner committed disciplinary offenses in the same insolvency proceedings, sanctioning the insolvency practitioner by written warning. Regarding the breach of the obligation of abstention, the local discipline court adjourned the settlement of the disciplinary action “until settlement by the criminal prosecutor’s office of the criminal complaints formulated by the authors of referral (the same as the ones who have addressed the syndic judge).

CONCLUSIONS

By means of the express repeal of Article 19 paragraphs 6 and 7 of Law no. 85/2006 on insolvency, under Article 81 paragraph 3 of GEO no. 86/2006 it is no longer possible to challenge the insolvency practitioner according to the Code of Civil Procedure, the provisions of Article 29 of GEO no. 86/2006, which establish the obligation of the practitioner to abstain under penalty of suspension in cases referred to in subparagraph a and b of Article 29 becoming applicable: If he/she in a state of professional incompatibility or conflict of interest as defined in the Statute and Code of Professional Ethics, if in one of the cases provided for in Article 42 of the Civil Code.

We believe that in the situations where the insolvency practitioner breaches the obligation of abstention provided by Article 29 of GEO no. 86/2006 he/she may be replaced following a request addressed to the syndic judge, by virtue of the powers conferred upon it by Article 45 paragraph 1 section f of the Insolvency Code (Law no. 85/2014) the breach of the obligation to refrain constitutes a valid reason for its replacement.

The passive attitude of the syndic judge embodied in the refusal to refer and to replace the insolvency practitioner should be censured. The sanctioning of the insolvency practitioner by the local disciplinary court UNPIR for irregularities committed in the united procedure in breach of the

21 Decision no. 4 / 09.19.2014 issued in case no. 4/2014 of Local Discipline Court Suceava of UNPIR.
22 Authentication no. 1 / 08.29.2014 issued in case no. 4/2014 of Local Discipline Court Suceava of UNPIR.
abstention obligation constitutes reasonable grounds for replacement of the culpable insolvency practitioner.