Information technology in insolvency proceedings

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Abstract—The work focuses on the potential implementation of information technologies in the area of insolvency proceedings and the expected impact of prospective implementation of modern technologies on the efficiency of insolvency proceedings. The foundation of the work is an analysis of the situation in specific countries and own surveys realized in the economic environment of the Czech Republic. The authors further demonstrate the possibilities which information technology and public sharing of data offer for increasing the efficiency of insolvency proceedings. The study also provides information on existing projects on this area in the Czech Republic and on certain surveys which generally focus on the possibilities of expanding the field of activity of information technologies in the area of enforcing receivables as a whole.

Keywords—Enforcing receivables, Forfeiture, Insolvency, Insolvency register.

I. ENFORCEMENT OF RECEIVABLES AS AN ECONOMIC PROBLEM

It is usually inferred that enforcement of receivables is primarily the province of the area of general enforceability of law and this area is therefore not considered to be a space for economic research, but rather the natural territory of law – the theory of law in this connection. However, it in fact applies that enforcement of receivables is primarily an economic problem, although it is handled in a specific legal environment. [1] This is given by the fact that modern states decided to regulate the enforcement of receivables as early as several hundred, and in many cases, even several thousand years ago. It is clear that societal and social reasons led to this, inasmuch as it was necessary, on the one hand, to create mechanisms for creditors which could serve as a support in the enforcement of their receivables, and given the identical character thereof, no other alternative of recourse against creditors than resorting to violent means. On the other hand, however, it was necessary to secure for the debtor fundamental protection of their mental and bodily integrity, for in the event of non-regulated enforcement numerous excesses or pressure on the debtor based on threats of physical violence would clearly occur, to say nothing of the high probability of a situation in which enforcement would indeed be accompanied by violence – whether physical or psychological. We now consider the regulation of enforcement of receivables to be an integral aspect of the most fundamental regulations by which the behaviour of every individual in society is adjusted.

Possible and permitted means of enforcement are thus defined by the state power, and two principle methods are at issue in developed countries. The first is individual enforcement, where a lawsuit between a single creditor and a debtor is concerned, and this creditor lays claim at a court (or arbitration) to recognition of the right to enforce a receivable further. This usually means that it acquires a forfeiture title, i.e. confirmation of the fact that forcible means may be used against the debtor – usually forfeiture of its property. Theoretically, several creditors could, in mutual agreement, utilize this individual method, although this is not standard in practice. However, cases where several distraintments against a debtor’s property (initiated by a larger group of creditors) are in progress simultaneously are more frequent – these distraintments are realized concurrently, but not in a coordinated manner. ¹

The second is collective enforcement – the method in which two or more creditors proceed together. This collective method is enforced by law, for one of the creditors will file an insolvency proposal when it is of the impression that its receivable has not been covered and there is, from its perspective, the danger that the creditor’s viable property would be acquired by a limited number of other creditors. Further individual enforcement is impossible after the proposal is filed, although within the bounds of insolvency proceedings creditors are satisfied according to the character of their receivables, and given the identical character thereof, in an essentially proportional manner.

¹ We could, for the purposes of placement into the general cultural context, here call to mind William Shakespeare’s The Merchant of Venice.

² This is a standard state of affairs among natural persons who are not entrepreneurial subjects.
II. THE STATE OF COMPUTERIZED ENFORCEMENT OF RECEIVABLES

Modern information technologies have, in the area of enforcing receivables, led to an increase in the efficiency of these processes and to a state of affairs where a relatively small number of (suitably qualified) workers are able to secure all legal and further actions connected with enforcement in a significant number of specific cases. We are not, however, going to focus on software and other aids for administration and enforcement, but rather on the computerization of proceedings *per se* (forfeiture and insolvency). It is here highly surprising that although a truly marked number of highly sophisticated methods using modern information technology are utilized in the given field, the proceedings as such lag very much behind in this sense, and most importantly, the potential of the high public monitoring thereof on the part of the public is not adequately utilized; the space for extremely effective control of proceedings on the state’s part has also been neglected.

It is here apposite to assert that both types of proceeding are socially demanding. They reach, on the one hand, the very existence of entrepreneurial subjects and therefore also such issues as employment or the social sensitivity of the enforceability of rights and the justice of the system, and then on the other hand, the standard of living and societal perspectives or the dignity of natural persons. It is unnecessary to elaborate on the extent to which this is a risky situation. It is for this reason that all developed societies are unusually sensitive to cases in which unauthorized or unreasonable enforcement, misuse of forfeiture or insolvency proceedings in the sense of damaging debtors’ rights, excessive inherence in their individual freedom and so forth occur. It is therefore clearly in the public’s interest that maximum state supervision over these proceedings is made possible, regardless of the fact that proceedings that usually take place between private subjects are at issue. However, states usually determine all aspects and methods of this enforcement to a highly detailed degree, and proceedings regulated by the state power are at issue; societies in developed countries expect adequate inherence of the state in supervisory activities over these proceedings.

From this perspective, however, the usage of modern information technologies is highly inadequate, which applies to the situation in the Czech Republic, with which we are here concerned, but also to the situation in developed countries (we can, for instance, speak of the OECD countries).

In the part of the study to follow, we will describe the state of affairs in the Czech Republic for 2008–2015, whilst this state of affairs can, in the general sense of the word, be applied to other developed countries.3

In the area of forfeiture proceedings, individual forfeiture authorities for the most part keep files electronically in relatively sophisticated systems. Of course, a further classical component is kept containing originals of correspondence, individual court distrainer rulings and other written material. The reciprocal content of the electronic file and this paper file is not usually at a 1:1 proportion, primarily due to the fact that the majority of forfeiture proceedings take place with natural non-entrepreneurial persons and the electronic version of these documents cannot be as valid as a paper original. Files are not accessible to the public and there is not even a publically accessible list of forfeitures in progress or previously in progress. It is possible to ascertain whether a specific subject or natural person is undergoing forfeiture, but not by means of a public source that is fully accessible without limitation. Neither state not supervisory bodies have remote access to files (access via internet); they can, however, force access to a file within the bounds of supervisory activity.

Statistics on forfeiture proceedings are kept, at least theoretically, by the Chamber of Distrainers of the Czech Republic, which is by law the association of court distrainers with mandatory membership, and it is also an autonomous body of distrainers. It has, however, transpired that the quality of statistical data is low and the Chamber of Distrainers releases only general data (especially the number of ordered forfeitures, the number of the liable (debtors) and certain other figures).

Insolvency proceedings in the Czech Republic are public in the sense that all insolvency proceedings are announced in the insolvency register, which is accessible freely and free of charge to any party interested in these proceedings. Practically all documents inserted into a classical file (all court rulings, insolvency administrator’s reports and numerous others) are made public in this register - usually in pdf. format. This then means that, in the course of insolvency proceedings, it is possible to monitor and check these proceedings, although in the bounds of individual proceedings it is in substance impossible to search for connections or successions of individual documents, as this is demanding both technically and in terms of time.

The course of insolvency proceedings is made public by statistics, although these only record partial (if general from the perspective of volume) data. This concerns especially the number of insolvency proceedings, the methods of settling the debtor’s bankruptcy, duration of proceedings – but no figures on real results of insolvency proceedings or the costs of these proceedings and other important circumstances are available.

If we were somehow to characterize generally this state of affairs in both areas of proceedings leading to the enforcement of receivables, the legal state of affairs and legal circumstances are relatively precisely recorded, although it can declared overall that our knowledge on the economic aspects of forfeiture and other proceedings are practically nil. In addition to this, one must add that, due to inadequately precise expressions in legislation, the situation in the area of forfeiture proceedings is fundamentally poorer than in insolvency proceedings, for neither forfeiture authorities nor even the Chamber of Distrainers of the Czech Republic have a definition of statistical obligation in a manner that would enable data collection and the meaningful interpretation thereof.

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3 Bearing in mind, of course, that neither forfeiture nor insolvency legislation are, in their parameters, regulated either by European Union law or by any international agreements. It thus applies that there are, in numerous countries, marked divergences and specific regulations or circumstances, although these proceedings are quite similar in given states.
III. CERTAIN DATA ON PROCEEDINGS THAT COULD BE ASCERTAINED

Thanks to the activity of the Insolvency Research scientific team, which has for several years been working with the support of the Technological Agency of the Czech Republic, certain steps have been taken towards the rectification of the above-mentioned situation.

First and foremost, statistical research of comprehensive samples of insolvency proceedings has been undertaken, thanks to which it has been possible to ascertain – at least partially – numerous important data on these events from the economic point of view. This especially applies to such data as the recoverability of receivables, i.e. the usual fulfilment acquired by a creditor in insolvency proceedings, costs of proceedings, duration of individual phases of proceedings and numerous others. These statistical surveys have focused on those debtors which are entrepreneurial subjects.4

As regards natural non-entrepreneurial persons, the situation is still unclear; nevertheless, in this case it is a problem that is more social than national-economic. Despite this, it would be highly apposite if similar research took place in the area of individual debtors (this area is usually also labelled with the term personal bankruptcy). Therefore, at the present time (first quarter 2015), we have no more substantial information from this area of insolvency proceedings that would be adequately relevant and which could, with its quality, measure up to data on insolvency proceedings with entrepreneurial subjects.

It was found that the standard yield of non-secured creditors (against debtors – entrepreneurial subjects) is lower than five percent of their claimed and substantiated receivables (including costs). Among secured creditors, the ratio of satisfaction reaches roughly 25 percent of the demanded sum. Receivables beyond property (bankruptcy costs), which are 80 percent covered,4 are relatively well satisfied; receivables placed on a par with receivables beyond property are repaid to almost a half. Substantially more information on results is contained in professional literature [2]–[5].

In the area of forfeiture proceedings, the above-mentioned scientific team has acquired data from certain major creditors and creditor groups, as it has transpired that there is little interest in releasing such data on the parts of forfeiture authorities and the Chamber of Distrainers of the Czech Republic. For instance, the Chamber of Distrainers refuses to release or merely does not possess data on the success of individual forfeiture authorities; figures on the general utilization percentage acquired in the bounds of forfeiture proceedings are also problematic. However, data from creditors (authorized persons) show, for instance, that between individual forfeiture authorities, marked differences have been detected in the utilization percentage; similarly, highly divergent costs are also demanded on their parts, yet this demand on costs is not in any fundamental relation to the utilization percentage. For instance, data on the number of motions in individual forfeiture proceedings have transpired to be entirely undetectable; these would be data by which (given appropriate analysis thereof) data on accounted costs could be gauged. Therefore, while it would be possible in the area of insolvency proceedings (with the aid of public sources) to acquire information on the real economic results of the process of collective enforcement of receivables, this has proven entirely impossible in forfeiture proceedings, for the only data which can be used further originate from participants of proceedings – authorized persons (creditors) in the given case.

In both cases, acquired data were subjected to analyses with the aid of various methods of approach. Pertinent professional literature is available also in this area [6]–[7].

IV. EXPRESSION OF THE LEGISLATIVE RECTIFICATION OF THE SITUATION

The main sense of the work of the Insolvency Research scientific team, however, is not the actual collection of partial data on the development and state of efficiency of insolvency and forfeiture proceedings, on costs connected therewith and other fundamental national-economic facts, but rather the definition of methods and approaches by which it would be possible to ensure fundamentally greater openness of these proceedings, the transparency and especially the improved monitoring thereof.

In this area, the team has arrived at certain conclusions which assume fundamentally greater inclusion of modern information methods into processes of conducting proceedings and processing the results thereof. The team’s basic hypothesis, then, is that the information asymmetry which is present in these proceedings either increases the costs of authorized persons (creditors) or leads to their passivity. We usually refer to this state as rational apathy.6

A necessary conclusion stems from the preceding hypothesis – that removal of information asymmetry has to lead to a reduction of transaction costs of participants of proceedings (especially creditors), which would be a

4 Over 3,200 legitimately closed insolvency proceedings were analyzed in the above-mentioned surveys; in the given period, this sample represents roughly twenty percent of the entire number of legitimately closed insolvency proceedings. One could of course lead a discussion as to whether such a sample is adequate in the specific case of insolvency proceedings. This, however, is not the subject of this study.

6 Rational apathy arrives at the moment when the potential of profit from a certain activity is so low that the entrepreneurial subject (or anyone else) senses no economic gain from exerting any effort, for the costs of such activities are probably higher than the gain which could arise therefrom. This is a situation which is unfortunate from the perspective of public interest, if understandable from the perspective of economic rationality. It would be extremely useful for creditor subjects to demand in a truly consistent manner the repayment of their receivables; if, however, the probability is low (see, for instance, the data on the standard yield from non-secured receivables in the Czech Republic in insolvency proceedings), we can hardly demand from private subjects the fulfilment of public interest. This, however, necessarily leads to the strengthening of moral hazard on the parts of debtors, for they can anticipate rational apathy of creditors.
development fully corresponding to public interest. The reduction of transaction costs will reduce the level of rational apathy in the economic environment. The transparency and public nature of proceedings (in the given context, this applies especially to insolvency proceedings) becomes an economic circumstance. One could also accept a further working hypothesis, that a higher level of transparency of proceedings would elicit consequent impacts (of which the reduction of the level of rational apathy of creditors and an increase of the space for effective monitoring of processes are especially fundamental); these impacts would then lead, on the one hand, to growth of yields from proceedings (it could be asserted yet again – especially from insolvency proceedings), and on the other hand, to a generally higher level of enforceability of rights, and in its final consequence, to a higher level of trust in the legal system as a whole on the part of the public.

Numerous steps present themselves in the area of insolvency proceedings; with the aid of greater usage of modern information technologies, these could benefit the general level of enforceability of receivables. This especially includes the implementation of electronic registration of receivables, and this should be in succession to electronic filing of an insolvency proposal. Furthermore, it would be possible to implement legislative and other communication between participants of proceedings and the court or the insolvency administrator in completely electronic form, with utilization of data boxes, which all entrepreneurial subjects (with the exception of tradesmen) in the Czech Republic are already obliged to have. In the case of other participants (of the non-entrepreneurial natural person or tradesmen types), it would be possible to enact the utilization of electronic methods at least when filing an insolvency proposal and when filing claims for receivables, and this by means of specialized insolvency courts workplaces. These measures would also entail significant limitation of space for so-called bullying proposals, which are an accompanying phenomenon of the present state of insolvency proceedings and the conducting thereof in the Czech Republic. These bullying proposals significantly misuse the situation where pertinent information technology is utilized only partially and inconsistently.

In the area of forfeiture proceedings, the Insolvency Research team approaches with the demand to establish a central forfeiture register which would be more accessible to the public than is the case with the current information sources. In the area of forfeiture proceedings, the Insolvency Research team approaches with the demand to establish a central forfeiture register which would be more accessible to the public than the current information sources. Furthermore, there are here proposals for specific electronic keeping of a forfeiture file and especially for structurally divided keeping of a financial account belonging to the file in such a way that it would enable highly effective monitoring not only of the real activity of the distrainer’s authority, but especially the payment morale of these authorities in the direction of authorized persons (i.e. to the creditors). This then assumes that this specific financial account will be accessible not only to supervisory bodies, but also to authorized persons.

In both cases it applies that the primary goal is not the actual supervision of processes by state bodies, but pressure on their increased activity and therefore on the higher economic efficiency of the system as a whole.

V. THE PROBLEM OF ECONOMIC EFFICIENCY

The problem of economic efficiency is of course far more comprehensive and deeper; it is impossible to solve it through simple pressure on the transparency of insolvency or forfeiture proceedings. The enforceability of receivables in insolvency proceedings has already been mentioned; the enforceability of receivables in forfeiture proceedings is roughly 30–40 percent of the demanded sum – this data is, however, confusing to some extent, as statistics from these proceedings are not based on particularly high-quality surveys and, most importantly, data provided by individual major creditors do not cover the entire problem of forfeiture proceedings and there is also the issue of various methodologies for acquiring a total figure in individual sources.

VI. CONCLUSION

The work provides information on the progress of the Insolvency Research scientific team in defining legislative changes which, in the bounds of the Czech Republic, are to lead to increasing the efficiency of insolvency and forfeiture proceedings. As it has transpired, it has been asserted, first and foremost, that the team considers the broadening of transparency of individual proceedings to be an appropriate method. In this sense, we see a significant space especially for a new approach in the utilization of information technologies and in the expansion of the possibility of supervision over enforcement processes, especially on the parts of creditors (authorized persons) and state bodies designated for this purpose. Our starting point is that the utilization of information technologies will enable the reduction of transaction costs for participants of individual proceedings, which will enable suppression of the effect of rational apathy.

REFERENCES


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