LIABILITY OF THE MANAGEMENT BODIES OF THE DEBTOR INSOLVABILITY

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The legal relations between the director and the company have a double relation: contractual and legal, insofar as they refer to obligations arising from the mandate or to obligations incumbent to the director according to the law. The double legal nature of the civil liability of the directors expresses itself both against the company and against third parties. Contractual liability, mainly against the company is when it arises from breaching the mandate or the provisions of the articles of incorporation or, even more importantly, if it refers to breaching the law referring to the mandate of the directors, while the liability is delictual when it refers to breaching other binding provisions of the law (mainly against third parties). Besides the civil liability, the director can be liable under the criminal law for his deeds during the exercise of his duties. The civil liability does not exclude the criminal liability for deeds such as: crime of mismanagement, deceit by issuing uncovered cheques, dilapidation, simple or fraudulent bankruptcy, tax evasion, forgery, etc.

1. Regulation and types of liability in the law concerning the insolvability.

In the sense of the insolvability law , in line with the provisions of art 247 point (1), members of the managing bodies of the debtors may be: the debtor natural person carrying out independent activities as a freelancer, the founder of the individual enterprise or of the household (farm), the directors of the companies, the members of the executive bodies, the members of the surveillance (observers) committees, the liquidators and members of the liquidation commissions, the accountants, the provisions referring to the liability are applicable to the persons holding these positions upon holding starting the insolvability proceedings, as well as to those holding these positions in the last 24 months prior to the start of the insolvability proceedings.

The lawmaker first regulates a proceedings liability of the debtor, provided under art. 84, i.e. the possibility conferred to the insolvability court to oblige the debtor or his management bodies, automatically or upon the request of the receiver or of the liquidator not to leave the territory of the Republic of Moldova after the start of the insolvability proceedings without its express consent, if there is evidence that the debtor may hide or avoid the participation in the proceedings. This proceedings liability has the character of a warrant restricting the right to free movement. The text of the law does not explicitly regulate a way of appeal through which the "debtor or the representative of his management bodies", or the manner how the possible evidence is to be brought forward during a contentious proceeding or without summoning the person against whom such measure is to be taken.

For another deed, i.e. the debtor avoiding the fulfillment of his obligation, the insolvability court, upon the request of the receiver, of the creditors' meeting or of the creditors' committee, or automatically, may deprive the debtor from his right to manage his assets, if he has it, may forbid him from leaving the place of residence without its express consent or may apply other warranties acceording to the legislation in force. Ultimately, under point 3 of art 84 the

lawmaker stipulates that these "interdictions" are valid throughout the entire insolvability proceedings, of course unless the insolvability court otherwise decides.

As sanctions against the persons found guilty for the insolvability of the debtor, the special law provides for the disqualification of the debtor under article 227, i.e., if it is found that the debtor has contributed, by his fault or by negligence, to the occurrence of his own insolvability, the guilty may be deprived, by decision of the insolvability court on the cessation of the proceedings, of his right: to be elected or appointed in public office or to continue to hold such office; or of the right to act in insolvability proceedings as a receiver/liquidator; or of the possibility to be a member of a management or control body in a company or financial institution. These disqualifications referring to the interdiction to hold offices shall apply for a period of minimum 12 months and maximum 5 years.

If during the insolvability proceedings persons whom the insolvability of the debtor may be imputable to are identified, the insolvability court may, upon the request of the receiver or of the liquidator, decide for part of the insolvable debtor to be paid by the members of its management and/or surveillance bodies, as well as by any other person having caused such insolvability. The actions that may lead to insolvability are identified, i.e. the use of the debtor's assets or loans for personal interest; doing business for personal interest while covered by the debtor; fictitious increase of the debtor's liabilities and/or embezzlement (hiding) part of the debtor's assets; procuring funds for the debtor at exaggerated prices; holding fictitious accounting records or records contrary to the provisions of the law, as well as contributing to the disappearance of the accounting records, of the incorporation documents and of the law; instructing the continuation of an activity of the debtor which obviously leads to the incapacity of payment; deciding in the last month prior to payments cessation to pay first a creditor to the detriment of the other creditors; failing to file a petition to start the insolvability proceedings, the last paragraph thus enlarging the scope, including: committing any other deeds damaging the property of the debtor. The application of these provisions does not exclude the application against the debtor of contraventional sanctions or criminal punishments for such acts that are contraventions or crimes. In this respect, upon the request of the creditors' committee, the receiver/liquidator sends to the prosecutor's office all the documents to be examined as concerns the existence of reasons (facts) that may trigger the criminal investigation of the debtor or of the members of its management bodies, without the insolvability law to regulate distinctly certain crimes as provided by the Romanian law concerning the insolvency . The actions mentioned above shall prescribe within 3 years after the date when they become known or when the person having caused the insolvability situation should have been known, but not earlier than 2 years after the date of the decision for the start of the insolvability proceedings.

As concerns the capacity to pursue the proceedings of the person who can file the petition to engage the liability of the management bodies, it mainly belongs to the receiver or to the liquidator, as the case may be, and only subsidiarily to the creditors through the establisged Committee, as the receiver omits to file this action.

2. General civil liability conditions.

As concerns the classification of the personal patrimonial liability of the management, surveillance and control bodies, this is not a contractual liability on the base of the mandate contract of the directors, but a delictual liability.

Of course, not only committing the deeds leading to the insolvability of the debtor is enough to engage the liability, but also the other elements of the delictual civil liability, which is the prejudice, the cause-effect relation between the deed and the prejudice caused.

The lawmaker establishes a presumption of guilt as ground to engage the liability of the surveillance and control bodies of the debtor as concerns the illicit deeds listed in the frame law for this special procedure regulated by the Law 149/2012, as well as a presumption there is a cause-effect relation between the deed and the prejudice, the debtor being in charge to demonstrate the contrary. Of course, the provisions of the special insolvability law shall be completed with the general provisions of the delictual civil liability.

The volitional factor in delictual matters consists of the will of the perpetrator to commit the illicit deed, to choose a conduct contrary to the law, that is the guilt of the perpetrator is related to a deed which comes in conflict with the will of the lawmaker, breaching the obligations stipulated by him, thus the psychic attitude of the perpretrator of the illicit deed is analyzed starting from the objective elements of the liability. The issue of the objective liability is rather controversial, some authors supporting the solution of the subjective-objective ground, proposed in the legal doctrine for the cases of so-called objective liabilities to strengthen the idea of guilt – as a factor generating the legal liability. The literature outlines the close connection between the four elements of the delictual civil liability.

The literature also provides for opposite opinions. It mentions, for example, that the guilt of a legal entity cannot be reduced to the guilt of its collaborators, but represents the guilt of an entire group, collectively. Indeed, the qualities of a group cannot be reduced to a simple sum of the qualities of its components, but the guilt of the legal entities against the outer factors cannot express itself otherwise than by the guilty behavior of its collaborators.

The elements of the civil liability are: the prejudice, the illicit deed, the cause-effect relation between the first two elements and the guilt. The prejudice is the damage and detriment, determine or which may be determined, whose repair involves the passing of the assets from the patrimony of a participant to the civil legal relations (he who has caused the prejudice) to the patrimony of another participant to the civil legal relations (he who suffered therefrom).

Committing an illicit deed by action or inaction is an objective condition of the legal liability. For legal point of view, the inaction cannot be reduced to the simple passivity of the subject, but represents the non-execution of those actions he had to take based on a law or on a contract. Thus, the inaction is the illicit deed, each time the legal norms oblige a person to act in a certain manner, and such legal requirement has not been complied with. This inaction may represent a behavior, "an action" against the law, engaging the liability of the doer.

The legal literature defines the guilt as the "psychic attitude the perpetrator has against the illicit deed upon committing it or immediately prior to that, as well as the attitude against its consequences". The words include, on one hand, the intellective and volitional elements (the "psychic attitude"), and on another hand demonstrate the relation of this "subjective" of humans with his deeds and their consequences, i.e. the objective element.

Therefore, in order to withhold or claim the liabilities wholly or in part, the general condition is that the elements of the civil delictual liability are gathered followed by specifying the facts expressly stipulated by law which could trigger the legal sanctions.

3. Regulating the liability of the debtor and of his representative bodies in the European legislation

The deeds committed in guilt, whose consequence is the diminution of the debtor's assets to fraud the creditors, are punished. Therefore, it is first needed to define the notion of fraudulent act. The lawmaker did not consider the "fraud to the law", which is breaching or avoiding legal provisions, but fraudulent acts in the sense of fraud against the creditors, which are prejudiced by hiding or diminishing the assets of the debtor, being malitious acts, aiming at obtaining a material profit from the rights of others or at satisfying his receivables, the assets of the debtor itself being general pledge against the creditors.

It is obvious that opening an insolvency procedure against a debtor is based on a certain imbalance between the assets and liabilities of the debtor, the latter being at least equal if not bigger than the former from the point of view of the amount. Therefore, as the liquidities are lower than the receivables, the liquidation of the assets may often be a solution to observe the scope of the law, i.e. covering the liabilities of the debtor in insolvency. From the perspective of qualifying the action concerning the annulment of the fraudulent acts, this falls in the class of the special revocatory actions, which present special effects in annulling the legal acts. The effect of the action accepted in court is to revert to the initial situation, but protects the interests of the creditors who do not participate in the act whose annulment is required, who are thirt parties in this case. In order to enforce the purpose of the law, which is to maximize the assets of the

debtor, the law confers the creditors who should manifest an active role, as well as the receiver, the possibility to carefully analyze the causes having caused the insolvability, they being able to require the court to annul the acts prior to starting the procedure. Thus, the action for the annulment of the fraudulent acts, the action to engage the liability of the guilty for the insolvency situation or of those having contributed to rendering this situation more serious, the right to waive the contracts with successive execution in progress, the benefit of stopping the accumulation of the accessories related to the receivables from the insolvent debtor are only a few of the institutions the lawmaker has included among the tools required to fulfill the purpose of the insolvability law.

The Romanian law regulates the conditions for the receiver or the liquidator to order for the liabilities of the legal entity debtor, wholly or in part, to be settled by the members of the management and/or surveillance bodies of the insolvent debtor, as well as by any other persons having contributed to the insolvency of the debtor, without exceeding the prejudice related to that deed.

The deeds triggering the civil liabilities are described in their entirety, i.e.: whether it is proven that they have used the assets or loans of the legal entity to their profit or to the profit of another person or whether they have carried out production, trade or services business to their personal interest, under the coverage of the legal entity or whether that have decided, to their personal interest, to continue a activity which obviously led to the legal entity ceasing the payments.

At the same time, the deeds of holding fictitious accounting records, making accounting documents disappear or failure to keep the accounting records according to the law are also mentioned. For failure to provide the accounting documents to the receiver or to the liquidator, both the guilt and the cause-effect relation between the deed and the prejudice are presumed. In this situation, the presumption is relative, the person found liable being able to prove the contrary. The lawmaker also provides for the deed of embezzling or hiding a part of the legal entity assets or to fictitiously increase the amount of the liabilities thereof, as engaging the liability, irrespective whether the perpetrator has used ruining methods to procure funds for the legal entity, for the purpose of delaying payments, or paid or instructed the payment preferentially to a certain creditor, to the detriment of the other creditors, in the month prior to the cessation of payments.

A regulation newly introduced as sanction for the person against whom a final decision to engage the liability has been made is that such person cannot be appointed as director or, if such person is already a director in other companies, such person shall be deprived from this right for a period of 10 years after the decision becomes final. The action provided under art. 169 is prescribed within 3 years. The term of prescription begins on the date when the situation becomes known or when the person having contributed to the occurrence of the insolvency situation should have been known, but not later than 2 years after the court decision for starting the insolvency proceedings is made.

There are opinions in the Romanian doctrine that the actions for the annulment of the fraudulent acts have to be at least promoted, unless settled, based on a court decision prior to the actions engaging the liability. The purpose of both actions, that concerning the annulment of acts signed for the purpose of diminishing the assets and that concerning the engagement of the patrimonial liability, aim at maximizing the assets of the debtor by reinserting or recovering certain assets within the patrimony, as well as by recovering the prejudice caused to the creditors.

However, the point (2) of art. 247 in the Insolvability Law of Moldova clearly stipulates that the provisions concerning the engagement of the personal patrimonial liability is applicable to the persons holding these positions in the last 24 months prior to the filing of the petition in court. The regulation in the Romanian law seems to cover the situations when the companies change the structure of the capital and the management bodies, after which they no longer do business, for example for a period of 3 years prior to opening the procedure, thus the cause for insolvency being imputable to the persons guilty of illicit acts, i.e. who were in office upon the commitment for such deeds.The insolvency law distinctly incriminates the deeds committed wilfully, i.e. such crimes as the fraudulent bank-

ruptcy , mismanagement , dilapidation and other crimes.The engagement of liability does not operate automatically, as it is necessary to bring evidence for the illicit deeds and for the elements defining the delictual civil liability or the criminal liability, as the simple position of shareholder and/or administrator in a company in insolvency may be presumed as guilt.

The liability may be engaged both to the director and to the members of the surveillance bodies – auditors – as they may be liable for the deed of not having identifies irregularities. If for the same deed the criminal liability is engaged, and the criminal court has settled as well the civil part, the engagement of the liability under the insolvency proceedings is no longer possible, as the authority of the judgement made is in place. The civil liability cannot be engaged twice for the same deed, even if in the insolvency the liquidator is the holder of the action – but files such action to the interest of the creditors, and during the criminal court proceedings the holder of the civil action is the prejudiced creditor.

In the French doctrine, the liability of the directors in considered contractual in the relations with the company and delictual in the relations with the third parties. The practical interest of establishing the legal status of the civil liability of the directors is the establishment of the evidence and of the extent of the liability. In the case of the delictual civil liability, the guilt of the director is not presumed, as for the contractual liability, but has to be proven with all the other conditions of the delictual civil liability. Instead, for the contractual liability, the probationary system relies on the presumed guilt (the director has to overturn such presumption of guilt and prove his innocence). In any case, irrespective of the form of liability, its ground is the guilt of the director, presumed or proven, as the case may be. At the same time, depending on the form of liability the director may be obliged both to repair the predictable and unpredictable prejudice (based on a delictual liability), or only the predictable prejudice (based on contractual liability).

The legislations of the EU member states contain significantly different norms as concerns the liabilities of the directors, shadow directors, shareholders, financers and other parties associated to the debtor, determining attempts to obtain a more favourable legal situation (forum shopping) and diminishing good corporate governance. Most legislations contain provisions related to liability not only as concerns the directors of a company, but also the defacto or shadow administrator, i.e. the persons who may instruct the directors. However, the level of liability and the persons entitled to file actions against these parties differ from one legislation to another.

According to the English law, only a director (although in the extended sense above) may be liable for illicit commercial activities (i.e. in the case when the directors continued the business of the company and knew or should have known at that moment there was no reasonable possibility to avoid the liquidation of the company), but both the directors and persons outside the company may be held responsible for fraudulent commercial activities (transactions concluded for the purpose of fraud against the company or its creditors).

On another hand, according to the Italian law, the liability for acts or omissions of the directors is not applicable to a director who, without being guilty, expressed his disagreement with the decisions of the board of directors and has communicated such disagreement in writing immediately to the president of the board of directors. According to the legislations of certain Member States, the directors may be held responsible if they have not filed the petition for the start of the bankruptcy proceedings in due time, while in other Member States such provisions do not exist. According to the Swedish law, the shareholders may be liable, in certain situations, for the continuation of the activity if there is a loss of more than half of its share capital. The legislations of the Member States contain a variety of provisions related to the liability for issues such as underrated transfers, preparation and adoption of incorrect statements, failure to establish the required provisions for the payment of the taxes or hiding the financial difficulties. These also contain different norms concerning the exercise of the office of director. There are no general norms as concerns the moment when the civil and criminal liability of the director is engaged in relation with the above-mentioned issues. At the same time, the implementation and sanctions in this respect are different in the Member States of the EU.

It is desirable that the norms concerning the liability should be harmonized. In the first place, if the norms concerning the liability of the parties differ that much, it could lead to "insolvency tourism" (search for more favourable jurisdictions – forum shopping), by changing the CIP of the company or competition concerning the courts. Besides, the harmonization of these norms will significantly improve the equitable competition environment. It is suggested thus that he harmonization of the norms concerning liability should take place in connection with the following issues: quality of the proceedings to file the action, as well as the quality of those who may be held responsible or of the situations when the parties may be held responsible.

For conclusions

All these approaches or actions possible to exercise against the debtor are regulated by law in full compliance with the general scope of the insolvability law, i.e. to ensure the assets of the debtors to facilitate the recovery of the receivables by his creditors. It is very important to establish the proportions of the guilt, thus an improper operation having prejudiced the company, but which is not committed to the profit of the director, could not be considered in engaging the responsibility of the company liabilities.The amount of the liabilities represents the amount of the receivables that could not be covered, without considering the liabilities resulting from the continuation of the current activities after the start of the insolvency proceedings or the legal costs resulting after the start of the proceedings.

The Regulation EC1346/2000 coordinates 54 types of insolvency proceedings, being considered the "essence of the European insolvency proceedings, reflecting at an abstract level the common characteristics of the legislations in the member states". These proceedings described in the European regulations are structured in 14 chapters comprising clear, concise rules referring to the scope and principles of the proceedings, to the participants and institutions, to the rights and obligations. There are references to the effects of starting the proceedings, to the initial actions required, such as assets management, classification or treatment of the assets, of the creditors' guarantees, as well as to the various stages of the proceedings: reorganization and liquidation of the assets. There is an idea to elaborate a European Insolvency Code containing the Guidelines, comments and national reports of the member states in the application thereof.

Notes:

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