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ORIGINAL PAPER

The liability in the case of insolvency proceedings – practical-applicative aspects

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Abstract:
The provisions of the Romanian Insolvency Law seek to attract civil liability of people involved in the debtor's management. This liability differs according to the source of the breached obligation and the legal relationship between the debtor and the person with the vocation to the liability regulated by article 169 of Law no 85/2014. In this regard, the liability may be tortuous, as in most cases, or contractual.
For this special liability to intervene, under the provisions of art. 169 of Law no. 85/2014, is required the fulfillment of the following conditions: a) the existence of a prejudice to creditors; b) the deed falls within the cases provided for by law; iii) the existence of a causal relationship between the act and the insolvency of the debtor; iv) the fault of the person whose responsibility is exercised. The purpose of this article is to analyze the provisions of Law no. 85/2014 which outlines the parameters according to which it can activate the liability of single-person or collegial bodies vested with management and supervision of a company experiencing difficulties. Among these, the person who exercise their management duties in a fraudulent manner (wrongful trading) or those who, through the committed acts, abused the distinct legal personality of the company and the benefit of the limitation of liability (piercing the corporate veil) can be called to answer.
In conclusion, it is observed that the conditions of the civil liability of the administrators towards the company *in bonis* are, in the case of the insolvency procedure, replaced by other conditions, the stake being not only a new appearance of the liability, but also a change of it for the better.

Keywords: *liability, insolvency, prejudice, sanction, assets.*

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In the case of insolvency proceedings, the liability of the administrator acquires an aggravated character, because the purpose of the action to cover the liability is the reconstruction of the assets of the debtor company, the causal link between the mismanagement that can be imputed in this procedural framework and the value of social debts not being requested. Therefore, the patrimonial liability in exceptional cases - such as that of the cessation of payments - can extend up to the maximum limit expressed by the liability, exposing the administrator to the risk of bearing in full the social debts that make up the credit mass of the debtor company.

1. Establishing the acts that can lead to liability.

The judge will be able to incur liability at the request of the judicial administrator/liquidator if in the Report drawn up in accordance with the provisions of art. 97 para. (1) from Law no. 85/2014 regarding insolvency prevention and insolvency procedures, persons to whom the insolvency could be attributed are identified. Based on this report the judicial administrator/liquidator can file the action. For that reason, he has the obligation to analyze the causes of insolvency and to include this analysis in his report. This report is generically called the Report on the causes that led to the state of insolvency. At the same time, the identification of the commission of certain acts, among those listed in art. 169 of Law no. 85/2014 regarding insolvency prevention and insolvency procedures, can also take place later, for example during the drawing up of the inventory of assets (when it is found that some assets that are registered in the accounting of the company are *de facto* missing) or when an expertise of the company's accounting documents is made (in case of finding fictitious accounting documents). Consequently, even if in the first report it is concluded that there are no elements of liability or that the causes of insolvency cannot be analyzed due to the lack of documents, by means of a subsequent completion of the Causal Report, the judicial administrator/ liquidator can present the new facts and describe them accordingly.

2. The prejudice

The incurring of liability implies the existence of a damage in the patrimony of the legal person debtor and, implicitly, in the patrimony of the creditors. The insolvency itself should not, however, be confused with the prejudice sought to be remedied. The opening of insolvency proceedings against a debtor company does not constitute any prejudice to the social patrimony, nor any damage caused to creditors. (Bufan & Diaconescu & Moțiu, 2014:838).

The prejudice made to the legal person debtor consists in its insolvency because of the acts committed by those people. The shareholders/associates/members of the legal entity are also prejudiced by this. The damage is located directly in the debtor's patrimony. The prejudice of the creditors consists simply in the impossibility of collecting the receivables at maturity due to the debtor becoming a legal entity in default of payments and, correlatively, due to the insufficiency of the assets, a situation which will make it impossible for the creditors to fully recover their receivables from the debtor's assets.

3. The causal relationship between the committed act and the state of insolvency

The exercise of patrimonial liability pursuant to art. 169 of Law no. 85/ requires the fulfillment of the condition of the existence of a causal relationship between the act and the prejudice. The damage that has been made is located directly in the patrimony of

the debtor, a legal entity, and implicitly in the patrimony of the creditors, and is produced by the fact that the debtor stops making payments. Thus, the act must have produced the insufficiency of funds and the cessation of payments or have constituted only a favorable condition for the occurrence of the cessation of payments. (Turcu, 2009:716) Also, the act must have been committed in the period prior to the cessation of payments, in order to be the cause of their cessation, without there being a time limit from the point of view of insolvency law.

4. Guilt in the form of intention

Another condition for incurring patrimonial liability is the existence of the person's guilt, which can take the form of intention and must have existed at the time of the act. At the same time, the simple representation of the fact that by committing a deed from those listed by the law the debtor and his creditors are harmed, by producing or only conditioning the state of insolvency, involves a complex analysis of whether this representation is sufficient to incur liability. (Bercea, 2004:416)

To the extent that guilt takes the form of intention, some of the listed facts constitute crimes, so patrimonial liability and criminal liability can coexist. Of course, any liability implies guilt, and this must be analyzed by reference to the general conditions of guilt in civil law. At the same time, the provisions of art. 169 para. (1) from Law no. 85/2014, except for the fact provided for in letter d), does not establish a presumption of guilt, this must be proven. The consequence of limiting liability to cases of intentional wrongdoing is to avoid the interaction between the business judgment rule (possible cause of exoneration from liability) and the regime of liability for the state of insolvency, given that the application of this rule excludes the possibility of making an intentionally erroneous decision. (Bufan & Diaconescu & Moțiu, 2014:823)

The Court of Appeal Iasi gives an interpretation and application of article 169 paragraph (1) letter d) of Law no. 85/2014. According to Decision no. 222 of March 28, 2011, it cannot be claimed that there is a presumption of guilt in case of violation of the obligation to keep the companies accounting in accordance with the law. This clearly shows that these acts can only be committed with intent, which must be proven with convincing evidence, for every person considered responsible, an aspect that was not proven in the analyzed case.

The burden of proof rests with the holder of the liability request. At the same time, to incur liability, the person promoting the request must prove the guilt of the members of the supervisory/management bodies or of any other person who caused the insolvency of the legal entity debtor. The state of insolvency alone does not justify obliging the members of the management and supervisory bodies of the insolvent company to pay a part of the company's liabilities, if this is not the consequence of one of the culpable acts listed exhaustively by the legislator. Another argument according to which the establishment of guilt cannot be made based on presumptions is the one ruled by the Bucharest Court of Appeal, by decision no. 379 of March 03, 2011. According to this Decision, by the regulations of insolvency law, the legislator did not intend to establish a legal presumption of guilt and liability, but only provided for the possibility of incurring this liability, after the administration of evidence leading to the conclusion that the acts that were made contributed to the company becoming insolvent. As such, for example, the alleged illegal act cannot be considered as proven in the absence of concrete evidence from which it can be concluded which assets were used by the statutory administrator in his own interest or in that of another person, the manner in

which this act was carried out, the period of time and, last but not least, the fact that this act would have produced the state of insolvency.

Therefore, to be able to incur the special tortious civil liability regulated by the provisions of art. 169 of Law no. 85/2014, it is necessary to prove the guilt of the members of the supervisory/management bodies or any other person who caused the insolvency of the company.

Guilt is a necessary element of responsibility, expressing its subjective side and represents the mental attitude of the one who committed the illegal act, existing at that time, towards it and its consequences. (Avram, 2007:62)

From the point of view of establishing guilt, its effect is very important. In this case, the legislator determines the effects of the illegal act in causing the state of insolvency. It was also natural to make this limitation once the procedural framework is that of insolvency. In other words, the legislator requests this additional condition: the alleged illicit act must be the cause of insolvency. We thus have, in fact, two causal links: illegal act-prejudice and illegal act-insolvency, the lack of one of them obviously leading to the impossibility of retaining liability.

Under this aspect, in an ample motivation of the Iași Court of Appeal (decision 256 of May 31, 2010), the judge concludes that, independently of the provisions of art. 28 of the Law, based on which the appellant understood to substantiate his claim, the situation deduced from the judgment must be assessed according to the specific circumstance. The fact that the company's accounting was not handed over to the judicial liquidator does not prove *ut singuli* the failure to keep an accounting in accordance with the law or the alteration or destruction of the accounting documents. Therefore, the invoked presumption is not sufficient in the absence of proof of the commission of the act as well as of the causal link between it and the alleged prejudice caused to the insolvent company.

In this case, the prejudice caused to the company is represented by its very state of insolvency. Consequently, to carry out the responsibility provided for by art. 138 for one of the limiting facts enumerated by the legal text, that fact must obviously have participated in the company becoming insolvent. And here, like civil liability under common law, the sanction can intervene only if the elements of tortious liability are met simultaneously. Since the facts provided by art. 138 of the Insolvency Law can only be committed in the form of intention, which must be proven, obviously, also in the situation of not keeping a compliant accounting, the option of the existence of a presumption of guilt cannot be considered. Consequently, in the absence of proof of the intention of the person summoned to answer for the prejudice caused to the company, the act cannot exist.

In relation to the illegal act provided by art. 169 para. (1) lit. d) from Law no. 85/2014, in judicial practice it has been rightly ruled that regarding the inconsistencies that led to the recalculation of a tax, they cannot by themselves satisfy the legal requirements for incurring liability patrimonial under art. 169 of Insolvency Law. Such special liability can operate only in the situation where it is proven that the respective irregularities were committed intentionally by the perpetrator, to evade fiscal obligations. (Commercial decision no. 1159/R/2009 of the Timisoara Court of Appeal). Also, it was judiciously ruled that the provisions of art. 137 of Law no. 64/1995 (art. 169 of Law no. 85/2014) are analyzed, concretely, in relation to the person who holds the position in question and the facts retained. Thus, it was held that in the situation where the appellant transferred the social shares through an authenticated contract, the

obligation to keep the accounting in accordance with the law no longer belongs to the transferor. So, because the acts for which the administrator was held liable were committed after the termination of the functions held by the transferor, he cannot be held responsible. (Bucharest Court of Appeal, Decision no. 2614/R/2005)

We also consider that the liability regulated by art. 169 of Law no. 85/2014 is not an extension of the bankruptcy procedure on the administrator of the bankrupt debtor. This liability is a personal one that intervenes only when, by committing the listed acts, the state of cessation of payments by the company has been reached. The acts listed in the provisions of art. 169 of Law no. 85/2014, respectively the management error (in a broad sense), must have contributed to the insufficiency of the assets. Therefore, it must be proven that the administrators, through their culpable act, contributed to bringing the company into a state of insolvency. (Piperea, 1998:194)

The liability for the insufficiency of the asset must be engaged only if the damage resulted directly from the culpable act (mismanagement) of the administrator. It is obvious that the legislator intended to give a complex meaning to this situation, as it is necessary to fulfill several conditions to order the attraction of personal patrimonial liability. For example, the said act should have led to the company reaching a state of non-payment, the said act should have caused a certain damage to the creditors, and there should be a causal link between that act and the prejudice. In practice, the invocation by the plaintiffs of committing the act provided for by art. 169 para. (1) lit. d) from Law no. 85/2014 by the debtor's management bodies is the subject of many liability claims. At the same time, most of these requests are rejected by judges, with the reasoning that in the content of the request, when invoking the act provided by art. 169 para. (1) lit. d) from Law no. 85/2014, there is confusion between failure to keep the accounting according to the law and failure to submit accounting documents.

In conclusion, by conducting this research we observed the fact that the legislation of the last period has made certain progress regarding the legal institutions within the insolvency procedure and the fiscal procedure. Even under these conditions, we appreciate that there are still a number of problems that the legislator has left unresolved or improperly covered. One of the weak points of the regulation specific to the insolvency procedure is represented by the non-unitary application of the legislation by the judicial practice established around this matter [*e.g.*, the judge vested with the resolution of a request to attract patrimonial liability based on the provisions of Insolvency Law considered that it is not necessary to accept the request based on cash withdrawals made by the administrator without justification. (Oradea Court of Appeal, Criminal Decision no. 479/R/2009). In this case, the judge established that as long as the action of the administrator, to withdraw unjustified sums of money from the company's accounts, did not lead to its impoverishment, the simple fact that no supporting documents were drawn up to attest the manner in which the money taken from the company's accounts was used, it cannot lead to the conclusion that these amounts were used for personal purposes by the administrator or in the interest of any other company.

Therefore, although we have positive signals provided by Law no. 85/2014 in the matter of liability in case of insolvency proceedings, however, in our opinion, the special provisions become insufficient in the absence of a unified judicial practice.

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