Research Paper

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Personal liability in the Romanian insolvency procedure

Law

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Summary

In 1995, the first modern law of insolvency was disciplined in the Romanian law. After several significant legislative reforms following the trend of the French legislator, in 2006 Law no. 85 concerning the insolvency procedure was adopted. Neither Law No. 85/ 2006 that represented a profound reform of the provisions concerning the insolvency domain, nor the subsequent normative acts that brought several modifications to the legal text reformed the core of the mechanism of personal patrimony liability determination.

Recently, the Insolvency Code entered in force and the Parliament made modifications in connection to the conditions of personal patrimony liability determination of the members of management bodies of the debtor in a state of insolvency

If until now the mechanism of personal liability determination in the insolvency procedure has been dormant, the new legal provisions are meant to transform it into an efficient mechanism that can be applied in practice.

Since year 1995, when the first modern law of insolvency was regulated in the Romanian law, the provisions concerning the determination of liability have been mostly the same.

After several important legislative reforms, in year 2006 the Law no. 85 concerning the insolvency procedure was adopted. Neither that law that represented a profound reform of the provisions concerning the insolvency domain, nor the subsequent normative actsthat brought several modifications to the legal text reformed the core of the mechanism of personal patrimony liability determination.

On November 1, 2011, the Ministry of Justice announced beginning the works for drafting the Insolvency Code. Law no. 85/ 2014[1] (named the Insolvency Code) entered in force on June 28, 2014 and provisioned in article 343 that all insolvency procedures initiated previous to its entering in force would be governed by Law no. 85/ 2006, which was modified. As a conclusion, right now two legal regulations apply to the insolvency procedure: Law no. 85/ 2006 applies to the insolvency procedures initiated prior to June 28, 2014, and Law no. 85/ 2014 applies to the insolvency procedures initiated after June 28, 2014. This situation brings difficulties to the insolvency practitioners and syndic judges, but it was allowed by the Parliament for adequately completing the insolvency files opened prior to the entering in force of the Insolvency Code.

At this time, the matter of determining the personal liability of the members of management bodies is regulated by articles 138 through 142 of Law no. 85/ 2006 on the insolvency and by articles 169 through 173 of Law no. 85/ 2014. The Parliament sets out the conditions, the framework and the rules that apply to determining the personal liability of the members of management and / or surveillance bodies in the insolvency procedure. Important differences of approaching that matter exist between the two regulations, the modifications that the Parliament made to the Insolvency Code having the role of rendering more efficient the mechanism of determining the patrimony personal liability.

Article 138 paragraph (1) of Law no. 85/ 2006 sets out the possibility to making the persons making up the management and surveillance bodies liable, by them bearing part of the debtor's liabilities if they committed some illicit deeds and caused the insolvency state to the debtor. The Parliament does not refer to the punishment for committing any illicit deed, but enumerates them in a limitative manner, as it follows:

a) they used the goods or the credits of the legal person to their own best interest or that of another person;

b) they performed commerce actions to their best interest, under the cover of the legal person;

c) they ordered the continuation of an activity to their best interest that obviously led the legal person to payments cessation;

d) they kept forged accounting books, made accounting documents disappear or did not keep the accounting books according to the law;

e) they embezzled or hid part of the legal person's assets or falsely enhanced its liabilities;

f) they used ruin means for acquiring funds to the legal person in order to delay the payments cessation state;

g) in the month prior to the payments, they paid or ordered the payment of a particular creditor, while damaging the others.

This legal regulation comprises three particularly important limitations that paralyzed the implementation of the personal liability determination.

The first limitation

Article 138 paragraph (1) letter d) expressly provisions three concrete situations in which the liability of the members of management and / or surveillance bodies of the debtor company can be determined: they kept forged accounting books, they made accounting documents disappear, and they did not keep the accounting books according to the law.

The liquidator / official receiver must analyze the company's accounting books for being able to draft the report concerning the causes and reasons that led to the company becoming insolvent.

Law no. 85/ 2006, by article 28, paragraph (1) enumerates the documents that the debtor must deliver to the liquidator / official receiver, and article 35 regulates the situation in which the debtor does not possess those documents when the procedure is initiated, that company being bound to submit them in 10-day time.

Those legal provisions follow to be corroborated with the provisions of article 147 of Law no. 85/ 2006 that incriminate the refusal of the debtor that is a natural person or of the director, manager, executive manager or legal representative of the debtor to make available to the syndic judge, liquidator or official receiver the documents and information provisioned in article 28 paragraph (1), according to the conditions provisioned by article 35, or hindering them in bad faith to draft that documentation,

a deed punished with imprisonment from 1 to 3 years or with a fine.

In the legal doctrine(Avram, 2007, p.63), the requirements of the tort liability were rigorously interpreted and it was believed that not submitting the according books or the lack of accounting books can have other causes as well, of which the parties are not guilty, other than not keeping them according to the law. The financial statements submitted on time according to an accounting book cannot cease the interest and penalties given that the debtor was not able to pay the debt anyway. The text provisioned in article 138 paragraph (1) letter d) does not involve any presumption for liability determination. The deed of not delivering the documents provisioned by article 28 of the Law no. 85/ 2006 comes after the court of law finds the insolvency state, being impossible to cause the latter. The petition of determining the liability grounded on those provisions must be proven under all its aspects, as well as the other enumerated facts.

Right now, at national level two opinions are supported. The great majority of case laws indicates the fact that the deed of not delivering the documents and papers mentioned in article 28 paragraph (1) of Law no. 85/ 2006 cannot be assimilated to the deeds provisioned by article 138 paragraph (1) letter d) given that all four conditions of the tort liability are not met cumulatively(Dâmboviţa Court of Law, sentence no. 233 of December 6, 2007, Timisoara Court of Appeal, Decision no. 241 of February 22, 2010, Timisoara Court of Appeal, Decision no. 661 of May 18, 2010).

The second opinion believed that the requests of liability determination based on that are admissible in fact because the former directors are the only persons able to substantiate, within the insolvency procedure, the financial and accounting situation of the debtor company. If they do not meet the obligations derived from the Law of accounting, the assets and liabilities cannot be set out with certainty, that omission leading to damages to the creditors made up the amounts mentioned in the final receivables list. The case law[2] motivates that opinion by the fact that the Law concerning the insolvency procedure sets out for the debtor, by its statutory director, a cooperation obligation with the liquidator / official receiver. Not meeting it has especially severe consequences for the procedure, the participants in it being hindered from doing the necessary actions for reaching the procedure's purpose – covering the liabilities of the debtor company facing the insolvency.

The existence of two different opinions at national level, in connection to the legal classification of the deed of not delivering the accounting documents led to presenting that matter to the Practice Unification Commission("Judicial Practice Unification" Commission July 1, 2009, p.18-19). The participants in the debates believe that it is not a matter of judicial practice that must be unitary, but "a matter of the opinion of the court of law". Practically, in connection to that topic, no single solution was reached, the deed of not delivering the accounting documents can be or not a reason for determining the patrimony liability according to the "opinion of the court of law".

The second limitation

In the legal doctrine (Craiova Court of Appeal, Decision no. 1596 of October 23, 2007; Cluj Court of Law, Commercial Sentence no. 212 of September 24, 2008), most of the authors support the express and limitative character of the enumeration of deeds comprised in article 138 paragraph (1). The direct consequence is that the special form of liability would apply only if the members of the management bodies would have made one of the illicit deeds provisioned in a limitative manner by the law, cases that cannot be expanded by analogy, by way of interpretation.

The Parliament set out in a limitative manner the deed categories for which the personal liability can be determined in the insolvency procedure. The law can only provision punishments for determined or that can be determined deeds and not for those defined in general or as examples.

If one would analyze the abstract content of the illicit deeds provisioned by article 138 paragraph (1), it could be noticed that the terms used by the Parliament have a general character, which gives one the possibility for several actual contents to be absorbed by the limitative cases provisioned by the Law of insolvency.

The insolvency state of a company can be caused also by other illicit deeds not provisioned by the law or that cannot be assimilated to one of the cases provisioned by the law in a limitative fashion.

In practice, there are many cases when the liquidator / official receiver, in his activity report, or the judge by the liability determination sentence, convinced of the contribution of some persons to the company reaching the commercial insolvency state, but limited by the legal text, "forcedly" classified certain actual deeds in the cases expressly and limitatively provisioned by article 138.

Considering the damage existing in the patrimony of the creditors, in the cases when the provisions of article 138 would not apply, they requested the liability determination for the persons guilty of the debtor company entering the commercial insolvency state with the motivation of "wrong management", "faulty management" or "management error".

The third limitation

According to article 138 paragraph (1), the liability will be determined only if the person against which the action is exercised "caused the debtor's insolvency state". That expression suggests the need of the existence of a causality relationship between the personal deed of the members of surveillance and management bodies and the debtor's insolvency state.

Within that special type of liability, the committing of the illicit deed is considered as regards causing mainly the effects of the insolvency state and the damage of the creditors in a derived manner.

Because the liability regulated by article 138 paragraph (1) can be determined as belonging to the members of the management bodies, between the illicit deed of those that caused the company reaching the insolvency sate and the damage a causality relationship must exist, which relationship is not presumed and must be proven before the court of law.

The causality relationship that must be proven before the court of law concerns the connection between one of the deeds expressly enumerated by article 138 paragraph (1) letters a) through g) and the insolvency state. The insolvency state is defined according to article 3 item 1 of Law no. 85/ 2006 as that state of the debtor's patrimony characterized by insufficient money available for paying the due debts.

As regards the producing of insolvency, the causality relationship is without a doubt a complex aspect because there can be several persons that caused together, by their illicit deeds, the causing of the damage. Causing the damage can be preceded or accompanied by several inactions that can be direct or indirect, successive or concomitant, immediate or mediated, main or secondary, making up a complex of circumstances, some being the causes, others the conditions, thus that it would be difficult to identify which of them have a causality relationship with the damage sufficiently to be characterized.

In the insolvency procedure, one can notice that at least part of the illicit deeds provisioned by article 138 paragraph (1) that contribute to causing the damage can certainly have only the value of an occasion condition because they can never be enough for causing the direct damage. Their role is to favor the birth of the causality relationship, to ensure the producing of the damaging or to enhance it. Nevertheless, given that an illicit deed can never cause by itself the damage, in a direct manner, one cannot overlook that reality and award it the value of direct and necessary cause, while disregarding the legal provisions.

The New Insolvency Code profoundly modifies the institution of determining the personal patrimony liability of the members of management and / or surveillance bodies by the legal text comprised by article 169 paragraph (1). The new regulation eliminates the three limitations (analyzed above) thus:

for the first time in the insolvency legislation of Romania, the premises for determining the personal liability of members of the management bodies not collaborating with the insolvency practitioner for delivering the accounting documents is created. The Parliament included in article 169 paragraph 1 letter d) a relative presumption in connection to the fault and causality relationship for the members of the management bodies that do not deliver the accounting documents to the official receiver / liquidator;

for the first time in the insolvency legislation of Romania, it is allowed the determination of the personal patrimony liability of the members of management bodies for any deed committed with intent. Although the Parliament took over from the Insolvency Code the seven deeds set out in an limitative manner (in article 138 paragraph 1 letter a through g of Law no. 85/ 2006 that became article 169 paragraph 1 letters a through g of Law no. 85/ 2006 given the renumbering) according to which the liability can be determined, letter h) was introduced in the same article and it refers to any other deed committed with intent.

the causal relationship necessary for determining the liability between the illicit deed and the damage was altered by replacing the expression "caused the insolvency state" by the expression "contributed to the insolvency state". By using the "contributed" term, the category of illicit deeds that can lead the legal person to the insolvency state comprises not only the deeds that directly caused the insolvency, but also those that represented only an occasion condition for the result to occur. The importance of that modification comes from the idea that between the deed and the insolvency state a firm causality relationship must not exist anymore; the committed deed can represent also a favorable condition for the occurring of the insolvency state.

As a conclusion, one could say that the institution of determining the personal liability of members of the management bodies in the insolvency procedure has evolved by the entering into force of the Insolvency Code. The real perspective of the members of the management bodies of a debtor of being held accountable for the committed deeds prior to beginning the insolvency procedure but also during its development will certainly contribute to rendering the participants in the business environment responsible. It will also lead to recreating a normal climate in the development of an insolvency procedure in which the accounting documents can be analyzed and pertinent conclusions can be drawn in connection to those that contributed to the debtor company's insolvency state.

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