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THE LIABILITY OF THE MANAGING BODY WITHIN THE INSOLVENCY PROCEEDINGS IN ROMANIA: CASE-LAW STUDY[†]

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Abstract

The study aims at identifying the new elements that the Insolvency Code in Romania, Law 85 of 2014, brings in what concerns entailing the liability of the managing body as well as that of other persons having contributed to the debtor's state of insolvency, compared to the previous regulation provided by Law 85 of 2006. The identification of these elements is carried out by making reference to the types of deeds that, following taken legal action, can entail liability and the coverage of the debts by the members of the managing body as well as by other persons having contributed to the debtor's state of insolvency. The analysis of the deeds concentrates around two connected centers of interest: The analysis of the deeds such as they are regulated by the two regulations and the case where for certain deeds there need to be identified the elements of repeatability in the two regulations and then the relevant case-law applicable for the respective deed is analyzed. In conclusion, in this way are identified the case-law variations met by the regulations applicable to the respective deed, in the judgments grounded on Law 85 of 2006. These variations represent landmarks for the regulations comprised by the Romanian Insolvency Code – Law 85 of 2014. Following the analyzed legal precedents – a number of 30 case-law judgments issued by courts of appeal being at the highest level of jurisdiction, there are identified *in concreto*, the type of acts which may entail the liability of the managing body for the insolvency of the enterprise. Through the present study we aim to guide the local administrators, as well as the future foreign investors who engage in foreign direct investments (FDI) in Romania with regard to the liability of the managing body in within the insolvency proceedings.

Keywords: Insolvency, Liability of the Members of the Managing Body, Patrimonial Liability, Types of Deeds, Joint Liability

1. Introduction

Regulating the liability of members of the managing and/or supervisory bodies as well as any other persons who caused or contributed to debtor company's insolvency during the insolvency procedure "opens the gate, at least in theory, for the doctrine of piercing the corporate veil" (Horvathova and Stanescu, 2012, p.8). The right to request the lifting of corporate veil and

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exercising this right are regulated as to emphasizing the liability of those who caused the insolvency and by way of consequence to recover from the same persons' own assets the necessary amounts to cover the debts of the insolvent debtor. According to the doctrine "the law regulates the liability of the members of the managing and/or supervisory bodies within the debtor company when these persons, through their actions have contributed to the insolvency of the debtor" (Carpenaru, 2014a, p.797).

2. The Liability of Members of the Managing and/or Supervisory Bodies who Contributed to the Debtor's Insolvency

2.1. *Sedes Materiae* and Applicability of Law 85/2014 regarding the Procedures of Insolvency and Insolvency Prevention – Insolvency Code

Art.138 and following of the Law 85/2006 on insolvency, hereinafter called Law 85/2006, as subsequently amended and completed between 2006 and 2013 and which had been repealed upon enactment of Law 85/2014 regarding the procedures of preventing insolvency and of insolvency (published in the Official Gazette no.46 of 25.06.2014 and entered into force on 28.06.2014), hereinafter called Law 85/2014, also stipulated the liability of members of the managing and/or supervisory bodies as well as any other person who caused the insolvency of the debtor company. Also, Letters A-G of the first paragraph of Art.138 stipulated the company's acts that could lead to debtor company's insolvency.

Upon enactment of Law 85/2014, the liability of members of the managing and/or supervisory bodies as well as any other person who caused the or contributed to insolvency of the debtor company was regulated in accordance with stipulations of Art.169 Par.1. Letters A-H of same article provide the unlawful acts that lead to insolvency of the debtor company.

Where there is more than one liable person, pursuant to Art.169 Par.1 there is joint liability provided that the insolvency would have occurred in the same time or earlier than the time period when such persons were the officers of the company and contributed to the insolvency. The persons who could hold passive legal capacity or persons against whom the civil liability action is filed are provided by Art.19 Par.1, Section I of Law 85/2014. These are the members of the managing and/or supervisory bodies and are the same to those provided by Art.138, Section I of Law 85/2006.

We notice in the content of Art.169 Par.1, Section I of Law 85/2014 a subtle yet essential extension of the number of persons who could be held responsible for the insolvency of the debtor company, compared to the persons provided by Art.138 par.1, Section II of Law 85/2006. Where Law 85/2006 stipulated that shall be held responsible for the insolvency the persons who caused the debtor company's insolvency, the new Law 85/2014 shows that the persons who contributed to the insolvency of the debtor company are liable.

The provisions of Law 85/2006 had been applied even after their repealment for the proceedings started when the Law was still in force and for a coherent application of the law the same law applied to the case file attached to insolvency case for the prosecution of members of the managing and/or supervisory bodies and other persons who caused the insolvency while Law 85/2014 is applied for the insolvency proceedings started after the date of law enactment and for the unlawful acts subsequent to the date of law enactment.

2.2. Holders of Active Legal Capacity in the Civil Liability Action during the Insolvency Proceedings

Pursuant to Art.170 of Law 85/2014, holders of active legal capacity or the person who files the civil liability action are the receiver or the liquidator, as the case may be. Moreover, the entire edifice of civil liability action lies on the foundation of the liquidator's report concerning the reasons and circumstances leading to debtor company's insolvency. Where the liquidator did not mention in the report any liable persons for the insolvency of the debtor company and/or decided that there are no grounds for filing the civil liability action, such action may be filed by the president of the creditors'committee following the decision of the creditors'general assembly or, if there is no creditors'committee, by a creditor appointed at the creditors'general assembly.

The creditor who holds more 50% of the total amount of receivables entered on the statement of debts and assets may, in the same terms and conditions, initiate such civil liability action. Therefore, any of the above persons may hold plaintiff capacity in such law suit (upon filing the claim or subsequently the receiver or liquidator or the creditors' committee may ask the syndic judge to order precautionary measures for the assets of the liable persons.)

2.3. Legal Nature of the Liability

Law 85/2006, doctrine determined the legal nature of the liability of persons who caused the insolvency as being "a special liability that employs most of the features of tort liability" (Hajjar 2012, p.47). The elements of this type of liability are proven tort, a pecuniary loss and a cause-effect relationship between tort and damage.

Regarding the proof of the causality report the doctrine marks that "it cannot be sufficient when it results only from the statements of the judiciary administrator," (Turcu, 2007, p.523). Regarding the prejudice the doctrine remarks that "The creditors of the company suffered prejudice, the existence of which can be established when the syndic judge acknowledges not only that the company reached cessation of payments but also the circumstances where the obligations towards the creditors can not be paid fully out of the debtors's assets," (Turcu, 2003, p.402).

By way of consequence, the court resolutions based on case law ruled that members of the managing and/or supervisory bodies should pay the debts of the debtor company if the above conditions of civil liability in tort are met. There must be observed the distinction made by the doctrine, according to which "The liability regulated by art.168 of the law does not represent the personal bankruptcy of the members of the managing and/or supervisory bodies..." (Carpenaru, 2014b, p.797).

The reviewed liability falls in the category of civil liability in tort and therefore the liable persons shall, pursuant to Art.169 of Law 85/2014, cover totally or partially the debts of the debtor company provided that the amount should not exceed the damage caused by the acts of the liable persons. Therefore, the elements of the civil liability in tort are also identified in the special liability stipulated by Law 85/2014.

2.4. The Typology of Illicit Acts Causing the Insolvency

Typology of illicit acts stipulated by Art.138 Par.1, Letters A-G of Law 85/1996 and Art.169 Par.1 Letters A-G of Law 85/2014 is similar, having however some subtle nuances, as follows:

Art.138 Par.1, Letters A-G of Law 85/1996:

- a) Used the assets or monies of the company to their own or other person's benefit;
- b) Continued, for their own benefit, the business in a direction leading to payment default;
- c) Were engaged in trading activities to their own benefit in the name of the company;
- d) Were guilty of false accounting, misappropriating accounting records or not keeping the books in accordance with the law;
- e) Stole or hid a part of the company's assets or falsely raised the debt;
- f) Used damaging alternatives to provide funds for the purpose of delaying the payment default;
- g) During the month preceding the payment default they paid or ordered payments to a certain creditor to the detriment of other creditors.

Art.169, Par.1, Letters A-G of Law 85/2014:

- a) Used the assets or monies of the company to their own or other person's benefit;
- b) Were engaged in trading activities to their own benefit in the name of the company;
- c) Continued, for their own benefit, the business in a direction leading to payment default;
- d) Were guilty of false accounting, misappropriating accounting records or not keeping the books in accordance with the law ;if the person does not submit the books to receiver or liquidator the fault as well as the causal relationship shall be presumed and the

- presumption is relative;
- e) Stole or hid a part of the company's assets or falsely raised the debts;
 - f) Used damaging alternatives to provide funds for the purpose of delaying the payment default;
 - g) Any other intentional tort that contributed to the insolvency of the debtor company proved pursuant to this section.

We notice that the limitative nature of the stipulation concerning the acts causing the insolvency pursuant to Art.138 of Law 85/2006 and indicated by the doctrine in their diversity (Turcu, 2009, p.673) is not maintained in the new law. Art.169 Par.1 Letter H of Law 85/2014 says that any intentional tort contributing to the insolvency of the debtor company identified subsequently according to law shall draw liability of the above persons. We cannot help to notice that including such stipulation in the new law is like opening the Pandora's box. Which shall be the typology of the acts committed by a person who contributed to the insolvency if the law is expressed in such broad manner? It is the mission of the court to decide the founding role of the case law.

On the same level of typology of acts leading to insolvency, case law resulted from all the years of application of Law 85/1996 may be a landmark to identifying the patterns that can be found in the content of the new law. Based on these grounds, the second part of the study shall be dedicated to a study of case law concerning the typology of acts causing the insolvency pursuant to Law 85/1996. We aim to guide the local administrators, as well as the future foreign investors who engage in foreign direct investments (FDI) in Romania with regard to the liability of the managing body during the insolvency proceedings. In the same time, although case law does not constitute a source of law, by studying it we are able to predict decisions that shall be ruled by courts pursuant to Law 85/2014.

As far as the acts enumerated at Art.169 Par.1 are concerned, these are prior or subsequent to the date of debtor company's insolvency and for the act stipulated in the Art.169 Par.1 Letter A, *used the assets or monies of the company to their own or other person's benefit*, as well as Letter D, *were guilty of false accounting, misappropriating accounting records or not keeping the books in accordance with the law*.

The law introduces the relative legal presumption of using the assets to own benefit, respectively not keeping accounting records, if the books are not submitted to receiver or liquidator, fault and causal relationship between tort and damage (provided by Letter A and D) are presumed. Both legal presumptions are relative and may be reversed by parties.

2.5. Consequences of Admitting the Action – Enforcement over the Liable Person's Assets

After the action is admitted by syndic judge, the creditors of bankrupt debtor, giving the fact that they are the holders of enforcement rights over the liable persons' assets, may seize the assets of the person causing the insolvency and that person shall cover with own funds all or one part of the debtor company's uncovered debts. Enforcement over these persons' assets shall be performed by judicial executor according to the provisions of Civil Procedure Code or by the fiscal execution bodies according to the Fiscal Procedure Code.

The amounts recovered through the civil liability action shall be included in the debtor's assets and, in case of reorganization, shall be used to pay the receivables according to payment schedule, to complete the necessary funds for continuing the businesses of the debtor and in case of bankruptcy to cover the debts. After closing the bankruptcy proceedings the amounts resulted from the enforcement shall be distributed by judicial executor according to this law to the creditors according to definitive consolidated list of receivables supplied by liquidator.

The punitive aspect provided by Law 85/2014 has not only a pecuniary component but another dictated by ethical and preventive reasons according to which persons against whom the definitive decision of civil liability was ruled shall never be appointed again administrators or if the person currently holds this position he/she shall be withdrawn the right to be administrator for 10 years from the date of definitive decision. The procedural tool by which the punishment shall

be imposed is communicating ex officio the civil liability decision to the National Trade Registry.

3. Case Law Study on the Typology of Unlawful Acts that Draw Liability of Members of the Managing and/or Supervisory Bodies for the Debtor Company's Insolvency

This case law study comprises 30 decisions ruled between 2012 and 2014 by the Court of Appeal in Cluj regarding the liability of the statutory administrator for the insolvency of managed company. These decisions were published in extenso on the website of the court.¹ Case law study comprises the relevant decisions published on the website. We should mention that at the court of appeal are judged recourses (and appeals pursuant to Law 85/2015) against decisions ruled by first instance courts in this matter and the decision of such court is definitive and irrevocable. Four civil courts are subordinated to Cluj Court of Appeal and each of them has jurisdiction over a county.

Therefore, we shall focus on the decisions ruled by the court and the grounds leading to such decisions and shall categorize the decisions by typology of unlawful acts committed including the following elements: identifying the decision ruled on first instance, indicating the typology of unlawful act(s) and legal grounds of action. Following this study we shall draw our conclusions regarding the typology of unlawful acts, frequency of some typologies and the legal grounds of court decisions. All these aspects are relevant for company's businesses and should be observed by Romanian statutory administrators as well as foreign investors who engage in foreign direct investment (FDI) in Romania and hold or shall hold in the future the administrator position.

3.1. The Unlawful Act provided by Art.138 Letter A

It is committed solely or together with the unlawful act provided by Letter D:

- a) Used the assets or monies of the company to their own or other person's benefit;
- b) Were guilty of false accounting, misappropriating accounting records or not keeping the books in accordance with the law.

A.1. Decision no.370 of 14th January 2013: Court ruled that the statutory administrator is liable and therefore shall cover all debts of the bankrupt company on grounds of the act of using the credit facilities for other purposes than those for which the credit was granted, namely the liable person made payments to other companies using the financial resources from credit facility (Art.138 Letter A); the act of not submitting the balance sheets of the company at the tax authorities for multiple years, and the act of illegal accounting. The illegal accounting is identified by tax inspectors who also found extra taxes to be paid and the debtor did not challenge the decision and as a result the company entered insolvency proceedings (Art.138 Letter D).

A.2. Decision no.2946 of 1st April 2014: Court rules that the statutory administrator is liable and therefore shall cover all debts of the bankrupt company on grounds of the act of transferring the debtor company's shares knowing the insolvency is imminent. The transfer is fictitious, usually this act is committed together with misappropriating accounting records, and is done for the purpose of preventing the auditors to carry out the inventory of debtor company's assets (Art.138 Letter A); the act of misappropriating the accounting records by giving them to bogus companies and as a result preventing the auditors to carry out the inventory of the debtor company (Art.138 Letter D).

A.3. Decision no.5820 of 4th June 2014 similarly grounded: Court rules that the statutory administrator is liable and therefore shall cover all debts of the bankrupt company on grounds of the act of transferring the debtor company's shares knowing the insolvency is imminent. The transfer is fictitious, usually this act is committed together with misappropriating accounting records, and is done for the purpose of preventing the auditors to carry out the inventory of debtor company's assets (Art.138 Letter A).

A.4. Decision no.9389 of 4th October 2013: Court rules that the statutory administrators are jointly liable and therefore shall cover all debts of the bankrupt company on grounds of the

¹ www.curteadeapel.ro, Case Law Section [Accessed 15.04.2015-05.05.2015].

act of not handing over the assets of the debtor company in order to be sold during the insolvency proceedings giving the fact that according to balance sheet the company has inventories and cash accounts (Art.138 Letter A); the act of transferring the company's shares at the nominal value and replacing the administrator committed together with the act of not handing over the assets of the debtor and the act of not submitting the annual financial statements and quarterly statements as well as not submitting the accounting records to the liquidator (Art.138 Letter D).

A5. – A.6.: Similarly grounded decisions and same liability for Section III of the Decision no.9389 of 4th October 2013 and Decision no.11296 of 22nd November 2013 as well as Decision no.372 of 14th January 2013 grounded on the act of transferring the company's shares at the nominal value and replacing the administrator committed together with the act of not handing over the assets of the debtor (Art.138 Letter A).

A.7. – A.8.: Similarly grounded decisions and same liability for Section I of the Decision no. 9389 of 4th October 2013 and Decision no. 9282 of 9th November 2012 as well as Decision no. 9378 of 13th November 2012 grounded on the act of not handing over the assets of the debtor company in order to be sold during the insolvency proceedings giving the fact that according to balance sheet the company has inventories and cash accounts (Art.138 Letter A)

A.9. Decision no.9383 of 4th October 2013: Court rules that the statutory administrators are jointly liable with the de facto administrator and therefore shall cover all debts of the bankrupt company, grounded on the act of using the rent of the company's property to his/her own or other persons benefit.

A.10. Decision no.11301 of 22nd November 2013: Court dismisses the civil liability action against the statutory administrator;

A.11. Decision no.9251 of 9th November 2012: It contains similar grounds and ruling as Decision no.11301 of 22nd November 2013;

A.12. Decision no.7962 of 10th July 2013: Court rules that the statutory administrators are jointly liable and therefore shall cover all debts of the bankrupt company grounded on Art.138 Letter A that stipulates the act of not handing over the liquidator any assets owned by company and the act of not submitting to the liquidator any document proving that the assets were used to the benefit of the company, giving the fact that, according to accounting records registered at the tax authorities, the company owns assets and monies.

A.13. Decision no.9043 of 5th November 2012: It contains similar grounds and ruling as Decision no.7962 of 10th July 2013 grounded on Art.138 Letter A that stipulates the act of not handing over the liquidator any assets owned by company and the act of not submitting to the liquidator any document proving that the assets were used to the benefit of the company, giving the fact that, according to accounting records registered at the tax authorities, the company owns assets and monies.

A.14. Decision no.8566 of 16th September 2013: Court rules that the statutory administrators are jointly liable and therefore shall cover all debts of the bankrupt company grounded on Art.138 Letter A that stipulates the act of cashing advance amounts that were never settled and Art.138 Letter D stipulating the act of not submitting the annual financial statements and quarterly statements as well as not submitting the accounting records to the liquidator and the act of recording in the books an invoice issued without economical and legal reason. However acts that did not draw the liability of the above persons were the following: the statutory administrator did not take the necessary steps to recover the debtor company's receivables.

A.15. Decision no.11010 of 15th November 2013: It contains similar grounds and ruling as decision 3333 of 14th April 2014, section I on grounds of the act of cashing advance amounts that were never settled.

A.16. Decision no.654 of 30th January 2012: It contains similar grounds and ruling as decision 3333 of 14th April 2014, section II on grounds of the act of cashing advance amounts that were never settled.

A.17. Decision no.8246 of 2nd September 2013: Court dismisses the civil liability action against the statutory administrator, according to Art.138 Letter A: Statutory administrator cashed advance amounts that were never settled but the insolvency was not caused by those acts.

3.2. The Unlawful Act provided by Art.138 Letter C

It is committed solely or together with other acts provided by Art.138 Par.1, Letters B-F:

a) Continued, for their own benefit, the business in a direction leading to payment default.

B.1. Decision no.8918 of 3rd November 2014: Court rules that the statutory administrator is liable and therefore shall cover all debts of the bankrupt company on grounds of the act of entering into renting contracts between debtor company and other companies and following these contracts the bankrupt company paid unreasonable rent that was constantly increased with no legal grounds and the act of selling products at the international markets based on a contract that did not provide any details concerning price and no explanation as to the reason the price of products was higher than the local market.

B.2. Decision no.7979 of 2nd September 2013 similarly grounded: Court rules that the statutory administrators are jointly liable and therefore shall cover all debts of the bankrupt company on grounds of the act of continuing the businesses even though the company had losses followed by loss and debt increase.

B.3. Decision no.8916 of 2nd November 2012: Court dismisses the liquidator's recourse and maintains the decision of dismissing the civil liability action against the statutory administrator, according to Art.138 Letter C mere occasional losses and debts of the company could not and should not cause us to draw the conclusion that the company was run for the above persons' benefit.

3.3. The Unlawful Act provided by Law 84/2014 Art.138 Letter E

It, which stipulates *stole or hid a part of the company's assets or falsely raised the debts*, was invoked in the decisions below.

C.1. Decision no.383 of 17th January 2014: Court rules that the statutory administrators are liable and therefore shall cover all debts of the bankrupt company on grounds of the act of recording in the company's books trading stocks that are not real or lack of fixed assets at the date of asset inventory although those assets were never removed from the company's patrimony.

C.2. Decision no.9048 of 5th November 2012 similarly grounded: Court rules that the statutory administrator is liable and therefore shall cover all debts of the bankrupt company on grounds of the act of recording in the company's books trading stocks that are not real or lack of fixed assets at the date of asset inventory although those assets were never removed from the company's patrimony.

C.3. Decision no.6077 of 5th September 2014: Similar grounds and ruling to the Decisions 9048 of 5th November 2012 and 383 of 17th January 2014 based on the act of recording in the company's books trading stocks that are not real or lack of fixed assets at the date of asset inventory although those assets were never removed from the company's patrimony.

C.4. Decision no.388 of 17th January 2014: Court rules that the statutory administrators are jointly liable with the de facto administrator and therefore shall cover all debts of the bankrupt company resulting from act of removing from the company's patrimony, before the insolvency proceedings, of an amount that remained unsettled and unpaid; The act of recording in the books an invoice issued without economical and legal reason and the act of doing trade activities i.e. debtor company sells products to company G. with a lower price than the cost as well as the act of issuing uncovered cheques a few days before the request for insolvency.

Associated with the above was the act of selling valuable assets a few days before opening the insolvency proceedings; the liable person explained that the assets were sold for the compensation of receivable owed by the same company and payment to another creditor.

3.4. The Unlawful Act provided by Art.138 Letter D

It, which stipulates *were guilty of false accounting, misappropriating accounting records or not keeping the books in accordance with the law*, was found in the decisions below.

D.1. Decision no.904 of 31st January 2014: Court dismisses the civil liability action against the statutory administrators associated with the act of not paying to the state budget the withholding taxes (i.e. salary taxes for the company's employees).

D.2. Decision no.3333 of 14th April 2014: Court dismisses the civil liability action against the statutory administrators associated with the act of calculating, recording and quantifying all the company's debts to the consolidated state budget (i.e. taxes and contributions for the employee salaries) followed by not paying these taxes because the company did not have the necessary financial resources.

D.3. – D.4. – D.5.: On similar grounds the court dismisses the civil liability action against the statutory administrators in the following decisions:

Decision no.170 of 12th May 2014, Decision no.168 of 12th May 2014 (debts of the debtor company amounting 19.233 Lei) and Decision no.135 of 7 April 2014 (debts of the debtor company amounting 12,094 Lei) grounded on the act of calculating, recording and quantifying all the company's debts to the consolidated state budget (i.e. taxes and contributions for the employees salaries) followed by not paying these taxes because the company did not have the necessary financial resources.

D.6. Decision no.901 of 28th January 2013: Court dismisses the civil liability action against the statutory administrators by way of exception grounded on the lack of active legal capacity of the plaintiff.

4. Conclusion

First conclusion that may be drawn from the case law study has in view the frequency of acts provided by Art.138.

Of the total number of 30 reviewed cases, the most frequent is the act provided by Art.138 Letter A, the liable persons *used the assets or monies of the company to their own or other person's benefit*– 17 cases, 56.66% of the total reviewed number of cases. The act provided by Art.138 Letter D, the liable persons *were guilty of false accounting, misappropriating accounting records or not keeping the books in accordance with the law*– 5 cases, 16.66% of the total. The act provided by Art.138 Letter E, the liable persons who *stole or hid a part of the company's assets or falsely raised the debts*– 4 cases, 13.33% of the total. The act provided by Art.138 Letter C, the liable persons *continued, for their own benefit, the business in a direction leading to payment default*– 3 cases, 10% of the total. The act provided by Art.138 Letter B, the liable persons *were engaged in trading activities to their own benefit in the name of the company*, Letter F, *used damaging alternatives to provide funds for the purpose of delaying the payment default*, Letter G, *used damaging alternatives to provide funds for the purpose of delaying the payment default* – 3.33% of the total. Also, we should mention the fact that these acts are almost always connected with each other, rarely being committed as single acts.

The second category of conclusions that could be drawn from the study concerns the grounds on which the courts ruled the liability of the administrator during the insolvency proceedings. These aspects are relevant for the business activities carried out in Romania. They should be carefully observed and for this reasons we decided to guide the foreign investors who engage in foreign direct investments in Romania and hold or shall hold the administrator capacity. We should emphasize the following aspects:

a) In the matter of active legal capacity – the statutory administrator capacity and the right of the administrator to delegate his/her powers and duties to a *de facto* administrator to manage the company is relevant to the active legal capacity of a person against whom a civil liability action was filed is the statutory capacity in some cases while in the other is the *de facto* administrator capacity. Moreover, delegation of powers by the statutory administrator to other persons shall be legally performed according to the regulations concerning oposability by

registering the document at the local Trade Registry such as in cases A.1; A.2; A.9 and case A.14). Also, failing to fulfill the obligations of the statutory administrator does not hold harmless same administrator against claims, and carrying out by other persons or shareholders the actions within his/her area of competence do not remove liability. In that case, the joint liability shall be applied if the above acts lead to insolvency, see case A.1. and C.4. In short, delegating the statutory administrator's powers and duties to a de facto administrator shall be done only in a limited number of cases and for clearly determined operations pursuant to oposability regulations valid for any operations for which the mandate was granted.

b) In the matter of elements that attract the liability of statutory administrator, when the insolvency proceedings are opened, the analysis of debts entered on the statement of affairs shall be calculated for the period of the administrator's mandate and the administrator shall be liable totally or partially only for the unlawful acts committed during his/her mandate and only for the pecuniary losses caused by such acts, such as in cases A.2, A.2 and A.4. We mention that we shall review the occurrence of insolvency and the fulfillment of administrator's duties when there were more statutory administrators managing the company succesively. It is important to identify the level of liability for each of the statutory administrators who were not gathered in a comradely body, to review the financial status of the company during their mandate and to detemrine if the insolvency ocured or the tort was committed during their mandate, see cases A.3 and A.4. It is assessed that if the committed torts, identified by typology, determined the occurrence of insolvency even if not directly and in connection to other objective elements, then the statutory administrator shall be held responsible for the insolvency, as observed in case A.1.

c) In the matter of statutory administrator's liability toward company's patrimony, the aforementioned is fully responsible for the company's assets, the correctness of inventories, the lawful recording in the accounting records and for using them for the benefit of the company and not his/her own interests, see case A.2. and C.2.

Not delivering the assets by the administrator to liquidator during the insolvency proceedings shall lead us to the presumption that those assets were used by the statutory administrator for own or other person's (de facto administrator, shareholder, other statutory administrator) benefit giving the fact that in the accounting records there were entered inventories and cash accounts, as encountered in cases A.2, A.4, A.7, A.8, A.12, and A.13.

The court assesed that if the statutory administrator does not submit real and clear information about the company's patrimony, that is an important indication that the administrator committed fraudulent acts concerning the company's assets – goods, receivables, values – and the insolvency may have been caused by this tort, in which case the administrator shall be fully liable, see case A.4. and A.12.

Also, the statutory administrator shall use the amounts received from customers for the delivered products or services only for company's purposes. Otherwise, the administrator is presumed guilty for using the respective amounts or assets for own benefit or for stealing or misappropriating a part of the company's assets causing by this behaviour the insolvency of the company, as it may be seen in cases A.12 and A.16.

The court acknowledges in case A.9. that fraudulent acts concerning social assets means fraud against company's assets. Therefore, the amounts resulted from using the company's assets should be remitted in the company's accounts and not used for personal benefit by the statutory administrator or other persons. This kind of behaviour shall undoubtedly draw the liability of the administrator.

The statutory administrator shall be held responsible for any passive behaviour, i.e. not recovering the receivables from company's debtors within the time limit, if this behaviour leads to pecuniary losses for the company and together with other deeds can entail the liability for the insolvency, see case A.10.

According with the legal provisions the unlawful acts of the administrator(s) may cause the company to lose its assets and the assets are the only possible sources of covering the debts. The decrease of assets without compensation, the lack or insufficiency of assets may be a cause for insolvency and justify coercive measures against the administrators who shall be obliged to cover the debts of the company, see case A.12 and C.4.

Cases A.14, A.15, and A.16. underpin another action that may attract the administrator's

liability is taking and using cash advances from the company's cash department shall be followed by settlement of such advances by submitting documents proving the amounts were used for the benefit of the company and recording such documents in the accounting records.

It is recommended to avoid the conflict of interests between company's interests and personal interests of the statutory administrator by avoiding to hold the capacity of statutory administrator of the company and also de facto administrator/manager/ statutory administrator in another company so that the financial operations between those two companies would not cause only losses for one and only benefits for the other company. Otherwise, the administrator shall be liable for unlawful behaviour as you may see in case B.1.

The case law acknowledges that issuing uncovered cheques immediately before the opening of insolvency proceedings is considered to be a damaging way of delaying the payment default and if the company financial situation is already precarious, that might attract patrimonial liability of administrator – see case B.1. At the same time discriminating payment, may it be payment of a debt or compensation of receivables which is similar to a payment, if that payment had been effected to the detriment of other creditors increasing the gravity of company financial situation. In that case, the statutory administrator shall be held responsible, see case B.1. As well, knowing the company has important losses and yet continuing the company's activities and that way increasing losses may draw the liability of statutory administrator, see case B.1 and B.2. The payment default caused by objective reasons like market crisis in the company's industry – see case D.1. – and not paying the withholding taxes to the state budget due to a lack of cash inflow, may contribute to statutory administrator's liability exoneration during the insolvency proceedings, see cases D.2., D.3. and D.4.

d) In the matter of transferring the shares of the company during the normal carrying out of company's businesses and before the opening of insolvency proceedings: a proof of paying the price to transferee is required, i.e. payment of an amount reflecting the value of transferred assets. If the transfer is made at the nominal value, that is a clear indication of a fictitious transfer or a fraudulent complicity between transferors (who could simultaneously hold double capacity as shareholders and administrators) and transferees – see case A.1, case A.2, case A.4, and case A.5. The delivery-receipt of accounting records by transferees and new administrators shall be made by delivery-receipt protocol. Otherwise, the transferors and former administrators shall be liable for the content and delivery of accounting records in front of tax authorities during the normal carrying out of company's businesses as well as in front of the liquidator during the insolvency proceedings – see case A.4. A detailed list of company's assets, an inventory and a books checking shall be done upon share transfer as well as delivery of documents required for the recovering of receivables. Otherwise, the transferors shall be held responsible for assets and receivables of the company – see case A.6. and case A.14.

e) In the matter of statutory administrators' liability for the keeping of financial and accounting records of the company, keeping accounting records is an obligation by law of company's administrator. Otherwise, it could not be possible identification of financial difficulties the company goes through and therefore the insolvency. A real and clear keeping of accounting records allows the administrators to take early measures to prevent payment default – see case A.1. The obligation of keeping account records might be fulfilled either by administrator himself or by another person or entity, provided that the administrator shall insure the observance of legislation – see case A.1. The case law acknowledges that lack of accounting documents makes virtually impossible the inventory of debtor company's patrimony and checking the status of assets identified in the balance sheets submitted to the tax authorities. Moreover, an obligation provided by law is that all accounting documents should be kept at the company's address – see case A.2. For the administrators who do not deliver the accounting records, if the insolvency proceedings are opened, they are presumed to have lawfully kept accounting records – see case A.2, A.12 and A.13. Recording documents with no legal and economical reason may result in expenses increase increasing therefore the debts of the company, see case B.1, which may also attract the liability of the insolvent debtor's administrators.

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