

EURASIAN JOURNAL OF BUSINESS AND MANAGEMENT

<http://www.eurasianpublications.com>

THE COMPANY LIQUIDATION – A PATH TO AVERT THE ACCRUAL OF NEW LIABILITIES

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Abstract

The economic deficit registered by almost all the countries in the world, the extension above expectations of the economic and financial downfall, the disruption or even collapse of some markets have compelled companies to leave their expectant position. The accrual of liabilities has become the main predicament for many of them and has even determined the governments and international organizations to amend the current legislation in the case of the companies having a significant impact on national economies. Overnight bankruptcies no longer terrify anyone these days, but the troubled investors need a judicious procedure of company liquidation in order to ensure the clearing of the creditors' debts and, if applicable, the recovery of the capital that they invested. Taking into consideration these aspects, the present study approaches the most important legal, economic and accounting steps that must be followed by companies incorporated in Romania in order to perform the voluntary liquidation.

Keywords: Company, Liquidation, Procedure, Law Amendment Proposals

1. Introduction

Globalization and the extension of the companies' activity areas beyond national borders have determined these latter to take the place of states and play the most important role in the global economy (Drury, 1998, p.165). The prejudicial outcome of the worldwide financial crisis that began in 2008 has determined companies to raise the level of economic concentration through mergers and acquisitions in order to survive on certain markets. Nevertheless, smaller companies above all could not be restructured because of the significant accrued losses and the lack of public takeover bids. For these latter, the only viable solution is to exit the market, in order to prevent deteriorating their current financial situation even more. Under these circumstances, every country is compelled to ensure an adequate legislative framework for companies, characterized by clarity and accessibility. As for Romania, the country provides such a framework, which is compliant with that of all EU member states (Hanion, 2000, p.27).

2. The General Rules Applicable to Liquidation and the Relevant Legislation

According to Law No 31 of 1990, the cessation of the activity of companies incorporated in Romania entails their dissolution, as a preliminary stage. The dissolution is voted by the company's shareholders or associates and involves restricting the company's legal capacity, in

the sense that its governing bodies cannot conduct new operations, except for those necessary for the company's liquidation.

As it has been pointed out in the Romanian juridical doctrine, the dissolution determines at its end the company's liquidation, a mixture of operations through which the company's patrimony is divided, the debts towards creditors are cleared and the remaining capital is allotted to the former associates (Georgescu, 2002, p.577). During liquidation, the company maintains its legal personality in order to finalize the already begun operations, but cannot conclude contracts with other companies anymore.

Starting with 1997, the law allows the associates of limited liability, collective and simple commanded companies to decide the allotment of the company's patrimony at the same time with dissolution. This is a legal benefit that was granted to these company types with a view to streamline the procedure of termination of the company's existence, by merging the 2 stages.

Taking into consideration the importance of the company restructuring through mergers and acquisitions in the global economic context after 2009, Romania has incorporated numerous European Directives into its national law. As such, the current form of the Romanian Company Law (article 233 paragraph 1), as well as the current Civil Code (article 248 paragraph 3) state that the dissolution may take place without liquidation when a merger or a full division is involved. In fact, the liquidation requires completing a sequence of legal, financial and accounting techniques from the dissolution phase to the distribution of the remaining capital between associates (Scheaua, 2002, p.310). In the French law, the distribution of the capital remained after the clearing of the company's debts towards creditors is considered a separate stage from that of liquidation, that starts only after this latter is completed.

The final stage of liquidation of a company incorporated in Romania is its delisting from the Trade Register of incorporation. This moment marks the final and irreversible end of the company's existence. The liquidation of all Romania legal persons in general is regulated by the current Civil Code (articles 248-249), which entered into force on October 1st 2011. This also comprises the rules applicable to "simple companies" (articles 1941-1948).

As for the liquidation of the companies with juridical personality, Company Law No 31 of 1990, Title VII, Chapters I-III, constitutes common law. The judicial liquidation of the Romanian companies is performed according to a distinct law, No 85 of 2014 on the procedures of insolvency prevention and insolvency. The voluntary liquidation of a company must not be mistaken for the judicial liquidation, as this latter inevitably involves the participation of the courts of justice (Nemeş, 2012, p.181).

The accounting operations that must be conducted during liquidation are comprised in the Methodological Norms regarding the entry in the accounts of the main operations of merger, division, dissolution and liquidation of companies, as well as the withdrawal or exclusion of certain associates and the applicable fiscal treatment, approved by the Order of the Public Finances' Minister no. 1376/2004. As it has been previously shown, the dissolution determines the liquidation of the company, hence its binding nature, with the mentioned examples, also prescribed by the French law.

The company's legal personality must be maintained in certain limits in order to carry out the liquidation procedure. Thus, the governing bodies do not cease their activity until their powers are not taken over by liquidators, but they cannot, however, undertake new businesses and to conclude other contracts (Gower *et al.* 1992, p.60). During liquidation the company preserves all its identification attributes, namely its label, headquarters, registration number in the trade register, fiscal code, patrimony and nationality. According to Romanian law, all the documents issued by the company should evince that this latter is in liquidation (Lefter, 1996, p.327). The General Meeting of the Shareholders or Associates, as the highest governing body, designates the liquidators and the grants them powers. According to article 253 paragraph 5 of Company Law, liquidators carry out their mandate under the supervision of the censors or the surveillance board, in the case of companies organized in the two-tier system.

Liquidation always takes place in the associates' interest, as the final aim constitutes the distribution of the remaining capital among them after the clearing of all debts.

Moreover, even in the case of "simple company", that has no legal personality, Romania's current Civil Code stipulates that the remaining capital is destined to reimburse the

contributions subscribed and paid by associates, after the settlement of all liabilities. However, the liquidation cannot infringe the creditors' rights because the law prohibits the associates to receive any sums of money before the settlement of the company's liabilities (article 256 of Company Law). By exception, if an amount of 10% remains after the payment of the company's debts, the associates may demand that the amount withheld is deposited at the Savings and Consignments House C.E.C. S.A. or at a bank, and that distribution is made according to their number of shares or social parts, even during liquidation.

3. The Powers of the Company's Liquidators

The operations of liquidation can only be conducted by physical or moral persons legally authorized, namely insolvency practitioners. At present, the legal status of the liquidators is set forth by the Emergency Government Ordinance no. 86/2006. The judicial officers and liquidators can be insolvency practitioners. According to Company Law, the liquidation may also be conducted by the company's officers or executive board members, elected by associates. In case these latter do not come to an agreement as far as the liquidators' appointment is concerned, they can also be designated by the court. The appointment decision of the associates or that of the court is lodged with the trade register of company incorporation, together with a sample of the liquidators' signatures.

The powers of the liquidators are similar with those of the company's officers, and for their activity they will be remunerated established either by associates or the court (Cărpenu *et al.* 2009, p.975). Liquidators are the one that represent the company in court and are compelled to execute and finalize all current trading operations. They will be personally and jointly liable in case of non-compliance with the legal prohibition against the undertaking of new operations.

Pursuant to Law No 31 of 1990, the liquidation of the company's patrimony can also be conducted through the sale of the movable and immovable assets of the company in bulk, starting with 2007. However, provided that the company possesses satisfactory financial resources for the clearing of all debts, the associates may decide to perform the sale by voluntary agreement.

The submission of the entire patrimony to the capital of another company as contribution is prohibited, as well as the partial asset contribution, because the operation would require the decision of the general meeting of associates, body that has already ceased to function. The sums of money resulted from the sale of the company's assets are used for the payment of the creditors' claims and the outstanding ones are distributed to associates, according to their contribution to the company's capital.

Liquidators are also entitled to conclude transactions with other companies in order to terminate the legal disputes or to avert the emergence of new ones, if these do not prejudice the rights of the company and those of its creditors. Moreover, liquidators are entitled and, at the same time, compelled, to execute the company's debtors in court, and to register their company's claims in the creditors' table, if these debtors have been legally declared bankrupt. The company's assets may also be mortgaged in order to settle debts, provided that there is a relevant provision in the constitutive act or in the act of appointment of the liquidators. The courts are also entitled to authorize mortgages on company assets under emergency procedure if necessary.

4. The Liquidation's Procedure

The main operations of liquidation set forth by Law no. 31/1990 are the following:

- the replacement of the company's officers and directors with liquidators;
- the handover of the administration;
- the finalization of the ongoing operations;
- the inventory of the company's rights and liabilities;
- the drawing up of the company's last balance sheet.

From an accounting standpoint, the techniques are prescribed by Chapter II of the Methodological Norms approved by the Order of the Public Finance Minister no. 1376/2004, which complements the provisions of Company Law (Rolea, 2014, p.43). The liquidation of the assets and other rights precedes the liquidation of the liabilities. The movable and immovable assets are turned into sums of money by means of the previously evinced methods and the company's claims towards third parties are settled. The assets upon which the company has only a right of use or usufruct are not to be transferred to other parties, but returned to their rightful owners. By contrast, under the French legislation this restitution is not mandatory, but the constitutive act may stipulate otherwise. During this stage, the tangible assets such as land, buildings, equipment, etc., as well as inventories and other assets of the company are sold.

Sometimes, according to the annual financial situation of the company, the existing funds cannot cover the outstanding liabilities. In this case, liquidators are entitled to claim the necessary amounts from the associates with unlimited liability or those who have not completed the capital payments (Căpățână, 1996, p.382). If these latter do not give satisfaction to this requirement, liquidators are entitled to take legal action against them. Following the liquidation of the company's assets, creditors' claims are satisfied according to their maturity. If necessary, liquidators are entitled to conclude loan agreements or to subscribe promissory notes (article 255 paragraph 1 of Company Law).

5. The Distribution of the Remaining Assets between Associates

The share of the company's assets that remain after the settlement of the company's debts is called net assets. Naturally, the liquidation may result in profit, but also in loss. Taking into consideration that the liquidation is conducted for the benefit of associates, they are entitled to be reimbursed with the value of their contributions to the company's capital. Provided that following liquidation, there is a net profit that has remained undistributed, the associates may receive other sums of money. The allotment of the net assets is performed on the basis of the final liquidation balance sheet, after the debt settlement and the payment of the profit, income or dividend tax, as appropriate.

By means of the current Romanian Civil Code, article 2328, it has been prescribed that the preeminence granted to the state and its territorial units for their claims against companies cannot infringe on third parties' rights that were previously acquired. Thus, pursuant to article 153 of the Law on the enforcement of the Civil Code, the claim of the state and its territorial units must be disclosed by means of the registration in the advertising register (The Land Register for immovable assets and the Electronic Archive of Movable Collateral for movable assets, respectively).

Asset distribution is made on share/social part, i.e. the net outcome of the liquidation is divided to the number of shares or social parts, according to the type of company. The associates whose rights were prejudiced by the final financial situation and the distribution project are entitled to file an opposition (article 62 of Company Law). Following its drawing up, the final financial situation is signed by liquidators, is registered in the trade register and published on the trade register's website. The disclosure of this document must also be made in the Official Gazette of Romania, provided that a joint-stock company is involved. The associates may collect the sums of money to which they are entitled to according to the approved allotment proposals, within 2 months from the publication of the final liquidation situation. If this term is exceeded these sums of money are deposited to a bank and will only be released to the specified person or the shareholder, by retaining the title. The payment can also be made to the heirs of the former associate or shareholder.

6. The Closure of the Liquidation's Procedure and its Effects

The Romanian law imposes that the liquidation is finalized within a year from the date at which the associates have decided the dissolution of the company. Sometimes however this deadline cannot be complied with, due to reasons that are independent of the associates or other participants to the liquidation procedure. Upon request, the tribunal in whose jurisdiction the

company's headquarters is situated may grant 4 extensions of 6 months each. Consequently, the liquidation cannot last for more than 3 years.

On 14th July 2014 The Romanian Ministry of Justice has launched for public debate a bill concerning, among others, amendments of Company Law on the streamline of the dissolution, liquidation and delisting procedures, by harmonizing it with the provisions of Law No 85 of 2014 on the procedures of insolvency prevention and insolvency. According to this bill, the power to settle the claims in extension of the voluntary liquidation term will be transferred from the tribunal to the trade register in order to simplify the liquidation procedure and reduce the attributions of the courts. Moreover, the liquidation period will only be extended up to 2 times, with 1 year each.

The companies against which insolvency is meanwhile filed have a special status. Article 260 paragraph 2 of Company Law stipulates that liquidation cannot impede on the opening of the insolvency procedure. The maximum term of these companies' liquidation will be extended with the whole period within which the insolvency procedure is conducted. With the above-mentioned exception, when the maximum deadline (that of a year or the extended one) expires, liquidation is considered finalized, even if some assets have remained unsold or certain debts were not settled (Angheni *et al.* 2000, p. 249). Within 15 days, liquidators must file a demand for the delisting of the company to the trade register. In order to render this provision effective, the law grants every interested person the right to ask the entitled tribunal to fine the expert for each day of delay in filing the demand. The delisting will be operated upon the decision of the bankruptcy judge, provided that an insolvency procedure is meanwhile carried out. This delisting does not entail the removal of the company from the trade register's records. It merely implies an entry into the ledger that mentions next to the company's status "delisted". From this moment on, the company ceases to exist, as it permanently and irrevocably loses its juridical personality. After the delisting of the company from the trade register measures are taken in order to ensure the preservation of the company's files. This provision comprises the records that must be kept by each company, as well as those that were drawn up according to the constitutive act, except those which have a special derogatory status of preservation and storage.

The registers of limited liability and personal companies may be kept by an associate, with the approval of the others. Due to the importance of the joint-stock companies, their main records are lodged with the trade register of incorporation. These are the following: the shareholders' register, the register of the meetings and decisions of the general meeting and of the administrative or management board, the register of the surveillance board and that of the censors or internal auditors, as well as the bond register. The other company files of the joint-stock and stock-commanded companies are deposited at the National Archives.

7. Conclusions

In the Romanian law system, the voluntary liquidation is preeminently an extrajudicial, non-contentious procedure, unlike the judicial liquidation, which is mainly carried out under the supervision of the bankruptcy judge. In order to streamline the procedure as much as possible and, consequently, to ensure its velocity, The Romanian Ministry of Justice has drafted an appropriate bill through which Company Law could be amended, in the sense that the approval of the procedure's extension will be transferred to the trade register. As far as the business environment is concerned, the limitation of the extension period might also prove beneficial. However, Company Law must be subject to continuous improvement. For instance, the provision of article 252 paragraph 2 on the requirement that all company documents bear the mention "in liquidation" should be accompanied by a penalty in case of non-compliance, such as a fine imposed by the judge. Moreover, in the case of companies structured on a two-tier system, liquidators fulfill their mandate under the control of the surveillance board. This provision could be amended, as the members of the surveillance board are the representatives of an executive body that does not possess the same attributions as censors, although they do not perform a management activity anymore. The control of the liquidators' activity could be transferred to the internal or financial auditor, as in the case of the other types of companies.

Liquidators are, undoubtedly, the main actors in the process of terminating the company's legal existence. Consequently, their activity is thoroughly regulated, they must be special trained and legally authorized. Equally important is the participation of the company's governing bodies, which draw up together with the liquidators the first documents on the financial status of the company. These bodies appoint and dismiss the liquidators, determine their powers and remuneration and exercise control over their activities. In turn, the associates are also entitled to exercise their control over the liquidators' activity and to demand the court to replace them or hold them accountable for those acts concluded in violation of the law or of their rights, provided that the company has no censors.

The current provisions of the Romanian Company Law in the matter of liquidation are the result of a process of harmonization with the European legislation, this latter also being subject to a continuous improvement.

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