Incurring Civil Liability towards the Administrator of the Insolvent Company

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Abstract

The responsibility training of the persons responsible for the insolvency of a debtor company is one of the mechanisms typical of the insolvency procedure, whereby creditors can recover the amounts owed to them. This is entailed by the violation of some legal norms in force, through an illegal deed, which requires the guilty person to bear the effects of this conduct. The liability of guilty persons is a special tortious civil liability that takes over the conditions of the civil liability for one's own deed, respectively: the existence of a prejudice, the commission of an illicit deed, the existence of guilt and the establishment of a causal connection between the illicit deed and the damage. The jurisprudence has raised the issue of the compatibility of this action with the request for a guarantee from those persons to whom the concrete exercise of the attributions has been delegated, by the statutory administrator of the debtor company.

The purpose of this analysis consists in presenting the novelties to the regulation of the insolvency law incurring civil liability towards the administrator of the insolvent company

Key words: insolvency law, administrator, damage, litigation process, jurisprudence
J.E.L. classification: K41

1. Introduction

In the Romanian legislation, incurring the civil liability of the persons who caused the state of insolvency of the debtor subjected to the insolvency procedure is expressly stipulated in the provisions of art. 169 of Law no. 85/2014, according to which "At the request of the judicial administrator or of the judicial liquidator, the syndic judge may order for a part or the entire liabilities of the debtor, who is a legal person, which has reached the state of insolvency, without exceeding the damage that has a causal link with the respective deed, to be borne by the members of the management and / or supervisory bodies within the company, as well as by any other persons who contributed to the debtor's state of insolvency, in one of the following ways:

a) they have used the assets or credits of the legal person for their own benefit or for the benefit of another person;

b) they have undertaken production, commerce or service provision activities for their own benefit, under the cover of the legal person;

c) they have ordered, for their own benefit, the continuation of an activity which, obviously, was leading the legal person to the suspension of payments;

d) fictitious bookkeeping; they have arranged for certain accounting documents to disappear or have not done the bookkeeping in accordance with the law. If accounting documents are not presented to the judicial administrator or judicial liquidator, the fault, as well as the causal link between the deed and the damage are presumed. The presumption is relative;

e) they have embezzled or hidden some of the assets of the legal person or have fictitiously inflated liabilities;

f) they have used ruining methods in order to attract funds for the legal person, in order to postpone the suspension of payments;

g) in the month prior to the suspension of payments, they have paid or have ordered for debts to be paid to a certain creditor, to the detriment of the other creditors;

h) any other deed undertaken with intent, which has contributed to the state of insolvency of the debtor, determined according to the provisions of the present title".

2. Theoretical background

The notions presented in this paper deal with the general regulatory framework of insolvency law, namely: the New Romanian Civil Procedure Code, special insolvency laws, the Constitution, commercial practices, doctrine and the jurisprudence. The synergetic approach in legal knowledge has found its theoretical reflection in the works of researchers cited.

3. Research methodology

There were a few general scientific research methods that were used in this paper and methods of legal interpretation; it is based on analysis of legislation and scientific literature. The following methods were used: comparative and legal, logical and legal, the synergetic method and the teleological interpretation method.

4. Findings. The civil liability of the administrator of an insolvent company

The liability of the guilty persons is a special civil liability in tort/ tort liability which takes over the conditions of civil liability for one's own deed, respectively: the existence of a damage, committing a wrongful act, the existence of guilt and the determination of a cause-effect relationship between the wrongful act and the damage.

In judicial practice it has been shown that, in order to attract the personal patrimonial responsibility of the members of the Board of Directors of the debtor company, it is necessary to commit one of the acts expressly and restrictedly provided by law and to prove that all four elements of civil liability in tort are met, since the liability regulated by the insolvency law is a civil liability in tort. (Bufan *et al,* 2014, pp.56-58)

The fault of the administrators, the illicit deed, the prejudice and the causal relationship between the illicit deed and the prejudice must be proved; the law did not establish a presumption regarding them (except for the case mentioned in art.169 paragraph 1 letter d). Therefore, it is necessary to prove that the administrator, by the commission with guilt of one or more of the acts expressly and restrictedly provided by the law, led to the bankruptcy of the debtor company. Both the existence of illicit acts must be determined, as well as the extent to which they contributed to the insolvency, since a judgment can be based only on complete and relevant evidence. At the same time, it is necessary for the respective acts to have been committed for their own benefit or with the intention of obtaining the results stipulated in art. 169 of Law no. 85/2014.

*On December 15, 2020**, the Meeting of the presidents of the specialized (former commercial) divisions of the High Court of Cassation and Justice and the Courts of Appeal** took place, a meeting designed to discuss the aspects of non-unitary judicial practice related to the litigation involving professionals and insolvency.*

One of the legal issues subject to the debate referred to the compatibility of the third-party practice/impleader regulated by art. 72-74 of the Civil Procedure Code with the request for liability based on the regulations of art. 169 of Law no. 85/2014 (Cluj Court of Appeal).

At first glance, in the sense of the admissibility of the third-party practice, it was considered that the recourse action is possible in all the cases in which the former administrator is legally responsible for the irregularities found and for the damage thus created, however, in fact, another person delegated to actually carry out the tasks is responsible. An example given in this sense is bookkeeping in violation of the applicable legal provisions, a fact for which the statutory administrator is responsible according to art. 73 of law no. 31/1990, i.e., a text which establishes that the administrators are jointly and severally liable to the company for the existence of the registers required by law and their correct bookkeeping, as well as art. 10 of Accounting Law no. 82/1991, republished, i.e., a text according to which the responsibility for the organization and

management of bookkeeping rests with the administrator.(Ludușan, 2018, p.140)

If, in fact, the bookkeeping is done by an accountant / accounting company, the administrator may use a recourse action for the recovery of the damage he/she was obliged to repair, either by a separate subsequent process or by a third-party claim in the same proceedings.

In contrast, it has been argued that the liability of the guilty party for the state of insolvency of the debtor subject to the procedure is personal, based on legal obligations, and he/she cannot go against another person for a third-party claim in the same proceedings or subsequent to it, in order to recover the amount paid. Such an approach would be synonymous to removing one's own liability.

In the opinion of the National Institute of Magistracy/INM, the issue that needs to be analyzed at this point is that of the admissibility of the third-party claim in the litigation having as object the request for incurring liability for going into insolvency pursuant to art. 169 of Law no. 85/2014, the analysis being similar also in the context of art. 138 of Law no. 85/2006.

According to art. 72 of the Civil Procedure Code, "the interested party may implead a third party, against whom he/she could go with a separate third-party claim or compensation claim".

According to art. 169 para. 1 of Law no. 85/2014: "At the request of the judicial administrator or of the judicial liquidator, the syndic judge may order for a part or the entire liabilities of the debtor, who is a legal person, which has reached the state of insolvency, without exceeding the damage that has a causal link with the respective deed, to be borne by the members of the management and / or supervisory bodies within the company, as well as by any other persons who contributed to the debtor's state of insolvency, in one of the following ways: (…)"

Analyzing the arguments formulated in support of the two opinions conveyed, it can be seen that they focus on identifying specific cases in which the former administrator whose liability is to be incurred could file a claim for damages against another person.

So as to analyze the admissibility of a third-party claim within such a litigation, we consider that it is necessary to verify the compatibility of the provisions of art. 72-74 of the Civil Procedure Code with the insolvency procedure from the perspective of art. 342 of Law no. 85/2014 (art. 149 of Law no. 85/2006).

Although **based on a form of tort liability**, the action of incurring liability for going into insolvency **takes into account a series of special conditions** regarding the objective content of the wrongful act, the justification of the procedural quality, the calculation method of the prescriptive period and, at the same time, it is judged according to a procedure aimed at quickly recovering the damage suffered by the insolvent company, the amount recovered entering the debtor's property and serving to cover the liabilities. (Brașoveanu, 2013, p.145)

The formulation of a third-party claim would broaden the procedural framework by also admitting in the proceedings a possible non-participant in the procedure; this approach would not serve the purpose of the insolvency procedure as it is illustrated in art. 2 of Law no. 85/2014 (art. 2 of Law no. 85/2006), i.e., to cover the debtor's liabilities, but only the interest of the author of the request.

On the other hand, if such a claim were settled within the already initiated litigation, the third-party defendant would follow the specific course of this proceeding, being deprived of a number of procedural rights he/she would have benefited from in the case of an action brought under common law, although incurring his/her liability would not serve the general purpose of the insolvency procedure so as to justify a different treatment. (Cărpenaru, 2014, p.258)

At the same time, one should not overlook the fact that the **request to incur liability** according to art. 169 of Law no. 85/2014 (art. 138 of Law no. 85/2006) **can be formulated** not only against the members of the management / administration bodies, **but also against any person who would have caused the state of insolvency** by committing the facts stipulated in the law, so that the respective person, also guilty, should appear in the process as a defendant, not as being impleaded.

In view of the above, we consider that filing a third-party claim is incompatible with the insolvency procedure and, therefore, inadmissible in a litigation having as object the incurrence of liability for going into insolvency.

Secondary in importance, it is necessary to emphasize the arguments regarding the personal character of the liability established by art. 169 of Law no. 85/2014 (art. 138 of Law no. 85/2006), resulting from the violation of certain obligations incumbent on certain persons according to the

law and the articles of incorporation, thus contributing to the state of insolvency.

Thus, INM's opinion was that of the inadmissibility of the third-party claim formulated within a litigation regarding incurring the liability for going into insolvency pursuant to art. 169 of Law no. 85/2014, respectively art. 138 of Law no. 85/2006.

The issue was discussed during a division meeting of the **Cluj Court of Appeal** and, unanimously, a **conclusion** was reached on the **compatibility** between the third-party practice and the insolvency procedure. The example given was that of the statutory administrator who impleads the accountant or the de facto administrator who has effectively carried out (totally or partially) the specific tasks of this position. By considering such a request as admissible, the procedural framework would be widened by admitting in the proceedings a possible non-participant in the insolvency procedure, which does not serve the purposes provided by Law no. 85/2014 regarding the insolvency procedure.

The provisions of art. 10 of Law no. 82/1991 - the accounting law, which establishes that the liability lies with the administrator, can also be taken into account. According to the aforementioned legal provisions, the liability for the organization and management of the accounting lies with the administrator, the authorizing officer or another person who has the obligation to manage the respective entity. Consequently, the liability lies with the administrator, who is the one who hires the accountant, who coordinates and approves the documents and takes responsibility for the accounting activity. (Terré *et al,* 2005, p.306)

On the other hand, the option of **such a request** not being considered **inadmissible de plano may be taken into account, i.e., the admissibility or inadmissibility would be analyzed on a case-by-case basis.**

In favor of this solution is the hypothesis in which there is a jointly and severally liability, i.e., there are two administrators who managed the company at the same time and to whom one of the acts among those provided by law could be imputed, but the insolvency practitioner / the other active subjects of the request file(s) the claim only against one of the two administrators.

In this situation, if the liability of the administrator who is sued is incurred, he/she would have the possibility for a separate recourse action against the other administrator, requesting the coverage, in part or in full, of the damage suffered by the latter administrator (even if according to the law the liability is joint). (Nemeș *et al,* 2020, p.230)

In such a situation, there is the possibility of invoking the *exceptio mali processus* (exception for a mistrial), if he/she had been admitted in the litigation which requested incurring patrimonial liability towards the defendant, the guilty person would have paralyzed the plaintiff's claims, through the defenses he/she could put up.

The case of both administrators being sued, and one of them making a third-party claim against the other in order to establish joint liability between them may also be taken into account.

We consider that, through such a claim, the normative framework established by the insolvency law is exceeded, since the third-party claim leads to the introduction of another defendant in the proceedings (another person called to be liable). Consequently, although the insolvency law stipulates that the plaintiff can be represented only by those persons expressly provided by law, an extension of the procedural framework would be achieved.

Given the fact that **there is no text of law that unequivocally establishes the incompatibility of this institution with the insolvency procedure, it cannot be considered, de plano, inadmissible.** To the extent that the insolvency law does not contain clear provisions in this field, the analysis is to be made by reference to the provisions of the Civil Procedure Code.

5. Conclusions

The third-party claim formulated in a litigation regarding the liability for going into insolvency pursuant to art. 169 of Law no. 85/2014 (art. 138 of Law no. 85/2006) is inadmissible; however, the admissibility or inadmissibility must be assessed on a case-by-case basis.

The liability for causing the state of insolvency of the debtor company does not represent either the personal bankruptcy of the statutory administrator or any enforcement on him/her, but a liability to the passive subject of the insolvency proceedings, whereas the amounts recovered would enter the debtor's property, being intended for the payment of the creditors in the creditor's group,

and incurring this form of civil liability does not remove the implementation of the criminal law for the acts which constitute crimes.

6. References

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