SOME CONSIDERATIONS ON THE RIGHT OF REPRESENTATION AND LIABILITY OF THE COMPANY'S DIRECTORS[1]

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Abstract

The management of a company, as the expression of its social will, is performed by acts of individual persons or bodies entrusted with the management of the company. The activity and the formation of these bodies are regulated by Law no. 31/1990 on business entities with regard to each form of company.

Precisely due to the importance of the role that these individuals, named directors, have in the operation of companies, the law lays down certain rules that define their status, i.e. their appointment, duration of mandate, the legal nature of their duties, their obligations and how their function ceases. [3]

Moreover, a company may have one or several directors. The law stipulates the rules according to which a company with several directors is managed, as well as how the decisions are made.

Key words: *company, director, representation, liability*

JEL Classification: *K22, K23*

1. Introduction

In the case of general partnerships, of limited partnerships and limited liability companies, the law does not provide collegial management bodies, but only the manner in which the company is managed. In the case of the joint-stock companies and partnerships limited by shares, the law regulates the plurality of directors in certain specific structures.

This does not mean that, for the general partnerships, the limited partnerships or the limited liability companies, there is no collegial management, because it is at the associates' discretion to decide if the company is managed by one or several directors.

Under these circumstances, sometimes in practice, problems arise related to the directors' modality of working when it comes to collegial management bodies and the directors' liability in these cases.

Art. 7 of Law no. 31/1990 on companies ("Law nr. 31/1990" or the "Law") establishes that the articles of association shall appoint the persons managing and representing the company, their duties and the manner in which they work, namely if they fulfil their duties jointly or severally.

Consequently, if the articles of association establish that the directors shall jointly work, their decisions shall be unanimously made, and in case of divergences, the shareholders representing the majority of the share capital shall decide. Only in case of urgent acts and in the absence of the other directors, it shall be possible that a single director decides.

If the articles of association decided that the directors shall work severally, then each director shall make decisions but only within the limits of the powers conferred to it.

If the articles of association did not establish the work modality of the directors, art. 78 of the Law provide that, if decisions are made exceeding the normal operations, that director shall notify the other directors who, if they disagree, the shareholders holding the absolute majority of the share capital shall decide.

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[3] Also see, in this respect, St. D. Cărpenaru, „*Tratat de drept comercial român*", 3rd edition, revised, Universul Juridic Publishing House, Bucharest, 2012, p. 206

2. Issues regarding the representation

It should be noticed that, with regard to the company's representation, a distinction is made between the power of representation and the power of administration, the representation in principle not being of the essence of the mandate but only of its nature.[4]

However, in the case of the general partnerships, limited partnerships and limited liability companies, the right of representation belongs to each director, unless there is a contrary provision in the articles of association. As such, if there is no contrary provision in the articles of association, art. 75 and art. 90 of Law no. 31/1990 establish a lawful presumption of representation as incumbent upon each director.

Thus, a recent decision of the High Court of Cassation and Justice[5] ruled that, when the company's by-laws provides that the general manager – who is the chairman of the Management Committee – is appointed by the general meeting of the shareholders, it is not possible that, by a commercial mandate contract, one of the directors acquires the capacity as general manager, because otherwise, the competence of the general meeting of the shareholders is infringed, which would equal the absence of the company's consent for the conclusion of such contract, and consequently, the it would be absolutely null.

The existence in the company's by-laws of a provision regarding the net delimitation between the duties of the general manager and of the managers – directors and them – conferring the exclusive duty of representation in the relationships with third parties to the general manager renders null an act performed by the director, which concludes a contract called individual employment contract with a third party whereby such is employed as general manager.

In the case at issue, a decision of the general meeting of the shareholders whereby a person is appointed director of the company was cancelled by the court but, before this cancellation, the director had concluded an individual employment contract with a third party which was thus appointed general manager of the respective company, and this individual employment contract was actually qualified as a commercial mandate contract and, consequently, is subject to the regulations of the Company Law and not to labour law.

It is true that the Law does not specifically regulate what happens with the acts drawn up by a single director whey they refer to regular trade operations and, in the absence of a regulation, the rules governing the mandate must be applied.[6]

In the case mentioned above, since it is not an employment contract but a commercial mandate contract, a person could not be appointed, by this means, as general manager because the by-laws of the respective company provides that the general manager is appointed only by the general meeting of the shareholders, and the civil law provisions regarding the mandate are not applicable in the case at issue, but the regulations included in Law no. 31/1990.

If this is the situation in the case of the right of representation, which is the situation in the case of the directors' liability if there are several directors?

3. About the liability of the directors in case of management collective bodies

The literature presented that the directors' liability may be a contractual or tort liability, depending on whether they breached their obligations resulting from the mandate or their legal obligations by illegal or even criminal deeds.[7] Other authors[8] considered that the director's liability may only be tort liability, but, in our opinion, this standpoint is not supported by the legal provisions and, consequently, it is ungrounded.

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[4] Fr. Deak, St.D.Cărpenaru, "*Drept civil*", Bucharest University, 1987, p. 197.
[5] High Court of Cassation and Justice, Civil Section II, Decision no. 1393 of 8 April 2014
[6] O.Căpăţână, "*Societăţile comerciale*", Lumina Lex Publishing House, Bucharest, 1996, p. 331
[7] See Gh.Piperea, "*Obligaţiile şi răspunderea administratorilor societăţilor comerciale*", All Beck Publishing House, Bucharest, 1998, p. 154; St.D.Cărpenaru, "*Administrarea societăţilor comerciale în reglementarea Legii nr. 31/1990*", in RDC no. 2/1993, p. 40-44;
[8] I.Turcu, "*Teoria şi practica dreptului comercial roman*", Volume I, Lumina Lex Publishing House, Bucharest, 1998, p. 339;

Without making a distinction depending on the legal form of the company, the Law provides – art. 73 – the joint liability of the directors to the company for the truth of the shareholders' contributions, the actual existence of the dividends paid, the existence and accurate keeping of the company's registers, the fulfilment of the decisions of the general meeting, the fulfilment of the obligations required by the law or by the articles of association.

This is regular liability for own deeds, but, in certain cases, namely in the situations provided by art. 144 para. (2) of the Law, they are also liable for prejudicial deeds perpetrated by other persons. Consequently, we are in the situation of indirect liability, in which case the liability is no longer joint, but severable.

The mentioned text of law establishes that the directors are liable to the company for prejudices caused by the deeds fulfilled by the managers or the personnel employed if the damage had not occurred if they had exercised the supervision imposed by their position.

In other words, their liability in this case is triggered by a non-fulfilment of the obligations incumbent upon them to supervise the activities of the company's employees, and this situation is not limited only to the joint-stock companies or the partnerships limited by shares but also applies to other forms of companies, when deeds of the employees are at issue.

While in the cases provided under art. 73 the Law establishes that the liability is joint, in the other cases – those involving indirect liability – the Law no longer makes such a specification. Since the joint nature should result from the law or from an agreement, it results that, in this case, the liability is no longer joint, but severable liability[9].

Consequently, in this case, the liability strictly belongs to the director who failed to exercise its supervision obligation and, consequently, the prejudice occurred.

But, according to the general law principles, this indirect liability of the directors has a subsidiary nature and shall never replace the liability of the employee who perpetrated the deed which caused the prejudices.

Paragraph (4) of art. 144 of Law no. 31/1990 regulates a special case of the directors' liability, which is also joint liability. Thus, the mentioned text of law establishes that the company's directors are jointly liable with their immediate predecessors if, being aware of the irregularities conducted by them, they fail to inform the censors or, as the case may be, the internal auditors and the financial auditor thereof.

The case is regulated in the situation of the joint-stock companies or partnerships limited by shares, but may also be applied to the other forms of companies.

In this case, the law establishes the director's obligation to immediately inform, after taking the office, of any irregularities it finds having been committed by the previous director, and otherwise it is also liable jointly with the previous director for the prejudice it caused to the company.

As regards the conditions of the liability, it should be mentioned that they are those of the common law with regard to liability.

A special situation is regulated by Law no. 31/1990 by art. 144 para. (4) which establishes the manner in which directors' liability is established in the companies with several directors, when one or some of them did not agree or did not participate in making the decisions prejudicing the company.

In these cases, the directors which caused their contrary opinion to be mentioned in the register of the board of directors' decisions and informed the censors thereof.

Consequently, if, upon making a decision by vote within the board of directors, one or several directors voted against the prejudicing decision, they shall not be held liable if they caused their position to be recorded in the register of the decisions and notified the censors thereof. In this case, there cannot be liability of the person who voted against because an essential element of the civil liability is absent, namely the fault.

[9] Supreme Court of Justice, Commercial Section, Decision no. 2763/2000, in Juridica no. 3/2000, p. 138

The law also regulated the situation in which a director was absent from the meeting in which the prejudicing decision was made. In this case, the simple absent is not the equivalent of the absence of fault.

In its capacity as director, the respective person has the obligation to become aware of the decisions of the board of directors from the respective register and either acknowledges the decision or disagrees with it. In this latter case, if the decision is prejudicial, in order to be exonerated from liability, the director shall have to express his opposition by recording it in the register of the decisions and by notifying this position to the censors or the internal auditors and the financial auditors.

If it adopts a passive position, this is the equivalent of the acknowledgement of the prejudicial decision and it shall be held jointly liable for the damage caused.

The analyzed civil liability does not exclude the criminal liability of the directors, for deeds which are incriminated and punished as criminal offences[10].

Thus, in a recent decision of the High Court of Cassation and Justice[11], it was ruled that, since the provisions of art. 73 para. (1) of Law no. 31 /1990 establishes the joint liability of the directors to the company for the non-fulfilment of the imposed duties, the lawful joint liability of the members of the board of directors may not be removed by applying the authority of *res judicata* from a criminal decision issued against the director to whom the duties of company management have been delegated.

In the respective case, during the civil lawsuit whereby the claimant company filed a legal action against one of the directors in order to hold him liable for the prejudices caused, by the decision of the criminal court, the director was sentenced for fraudulent management and ordered to pay damages for the prejudice caused.

In the lawsuit, the respondent filed an impleader against the other members of the board of directors, whose arguments for defence invoked the power of *res judiciata* of the civil side within the criminal trial, asserting that the criminal court had decided, with the power of *res judicata,* both the extent of the prejudice and the persons responsible for such.

The court mentioned that art. 73 of the Law establishes the rule of the joint liability of the members of the board of directors in the fulfilment of their obligations to the company whose directors they are, by virtue of the commercial mandate entrusted to them. Consequently, this is a presumption of joint liability, a presumption which may be cancelled by contrary proof, namely by proving the existence of concerted obligations which were incumbent upon each director taken separately.

The court rejected the allegations of the impleaded directors regarding the power of *res judicata* for the reason that the criminal court analyzed and decided with regard to the respondent's liability to the company only by reference to art. 155 of Law no. 31/1990 republished, but not by reference to art. 73 para. (1) letter e and, consequently, it cannot be alleged that criminal court proved, with the power of *res judicata,* the exclusive fault of the respondent director and, as such, the presumption of joint liability of the directors was not cancelled.

Even if the criminal court established that the general manager, the director subject to criminal investigation – the respondent in the civil lawsuit – failed to inform the other members of the board of directors on the prejudicial operations which entailed his criminal liability for the offence of fraudulent management, this is not relevant in the civil case, maybe at most as a beginning of a proof which, in the absence of corroboration with other evidence, does not remove the obligation of prudence and diligence incumbent upon all the members of the board of directors in the company's management.

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[10] Also see: D.Clocotici, "*În legătură cu răspunderea penală, contravenţională ori prin aplicarea unor amenzi civile, în cazul încălcării dispoziţiilor legale care reglementează activităţile comerciale*", in RDC no. 4/1991, p. 27; A. Ungureanu, „*Noua reglementare a infracţiunilor înscrise în Legea nr. 31/1990 privind societăţile comerciale, modificată şi completată prin O.U.G. nr. 32/1990 aprobată prin Legea nr. 195/1991*", in RDC no. 3/1998, p. 62; M.A.Hotca, M.Dobrinoiu, „*Elemente de drept penal al afacerilor*", C.H.Beck Publishing House, Bucharest, 2009, p. 29;

[11] High Court of Cassation and Justice, Civil Section II, Decision no. 1187 of 26 March 2014;

The court also established that, if the company's management was delegated to the general manager – the respondent in the respective case – such delegation, usual in practice – does not lead to the removal of liability of the other members of the board of directors in consideration of the provisions of art. 73 and art. 144 of the Law in supervision of the performance of the legal relationships established by the company and, implicitly, in following the collection of its receivables.

The fact that the other members of the board of directors understood to limit to taking into account only the situations presented by the general manager – the respondent in the case at issue – and he failed to inform them on real situations which led to the occurrence of the damage, this does not mean that the presumption of joint liability established by the law was cancelled, even if, in the criminal trial, the general manager – the respondent in the civil lawsuit – was sentenced for fraudulent management.

4. Conclusions

Given the crucial role they have in the company, its administrators enjoy a careful regulation in terms of their status.

In practice, some problems arise in relation to the way of working of the management in companies where these bodies have a collegial character, especially in terms of their liability or representation in relation to third parties.

In this regard, the jurisprudence has established that it is not possible that one of the directors to acquire the status of general manager through a commercial mandate since it can be appointed only by a decision of the General Meeting of the Shareholders, according to the the company by/laws .

Also, in terms of liability, directors are jointly liable, solidarity which can not be removed by *res judicata* resulting from a criminal judgment against a director havinf management duties, in capacity of general manager.

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