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OUTLOOKS ON THE JUDICIAL REMEDIES FOR THE FRAUDULENT ASSIGNMENT OF COMPANY SHARES IN THE LIMITED LIABILITY COMPANY; LEGAL AND CASE-LAW LANDMARKS[1]

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ABSTRACT: *The economic reality revealed cases of diversion of the assignment of company shares from the purpose for which it was instituted and using it as a means to fraud creditors. Under the conditions of the evanescence of the procedural means of opposition to the assignment of shares, the fraudulent character of these assignments is incorporated in the remedy offered by the procedure of the attachment of liability of the persons who caused the insolvency. The fraudulent assignments generate, in practice, the initiation of court actions for the attachment of liability to persons who transferred the company shares, at nominal value, without proceeding to hand in the company's patrimony and accounting documents to persons who did not exercise, after the assignment, the mandate of administrator or hold the statute of associate.*

KEY WORDS: *insolvency, special civil liability in tort, fraudulent assignment.*
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1. INTRODUCTION; PERSPECTIVES ON THE THEME OF THE STUDY

In the previous studies (Miff, Apan, 1/2016) (Miff, Apan, 2/2016), we analyzed the mechanism of the opposition to the assignment of company shares while highlighting its components and at the same time the doctrine and case law aspects regarding the creditors' legal standing, including the fiscal authority and its prerogative of opposing the assignment of company shares.

Hence, if the creditors' opposition to the assignment of company shares was generally incorporated in the regulations comprised by the Company Law, consolidated version, the specific elements concerning the attachment of company shares initiated by the fiscal

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authority were regulated since 2010. Also, if the reasoning for establishing this procedural means is without doubt the protection of creditors, generally the need for enhanced protection of the fiscal creditor for recovering the fiscal debt was followed by the mapping out of specific outlines for the case where the opposition is submitted by the fiscal authority.

The result of the analysis pointed out that the oppositions to the assignment of company shares were initiated mostly by the fiscal authority, following the regulation of the appropriate framework, and experienced an upward trend. *Illo tempore*, after the position of case law was shaping-out, in the meaning of rejecting the majority of these oppositions, it was observed a back stroke of this procedural means used by the fiscal authority, and then the trend became downwards, with a clear tendency for minimizing. The grounds of case law which determined the evolution and then the involution of the use of the procedural means of opposition in general and of the special opposition to the assignment of company shares were also indicated in Apan & Miff 2016 (1), (e.g. it was considered as being a reason for rejecting the opposition initiated by the fiscal authority, the non-fulfillment of the conditions provided by the law such as the condition regarding the generation of prejudice to the creditor, although the rejection of the opposition of the fiscal authority did not operate "de plano"). Therefore, although regulated, the mechanism of the opposition of the fiscal authority to the assignment of company shares was not trusted the efficiency expected to enjoy at the moment when the amendments to the Company Law, consolidated version, were adopted in 2010.

Despite that this "phenomenon" emerged from legal practice, the economic reality continues to reveal cases of diversion of the assignment of company shares from the purpose for which it was instituted and using it as a means to fraud creditors. A particularly important aspect having serious consequences in practice, not only in the segment of application of private law norms in the matter, but also in fiscal segment and in the enforcement of public law norms, indicated by case law in relation with the assignment of company shares, the actual means of carrying out the operation and it consequences, reveals the deviation of the assignment from its goal when the associate uses it for fraudulent purposes.

A highly important aspect having significant consequences in practice, not only in the segment of the enforcement of the provisions of private law in the matter but also in the fiscal segment and in the enforcement of the public law provisions, determined by case law in connection with the assignment of company shares, the actual way of carrying it out and the consequences of the operation, reveal the misappropriation of the judicial institution of assignment, from its meant output to the usage of assignment by the associate(s) for fraudulent purposes.

2. EFFECTIVE JUDICIAL REMEDIES AGAINST FRUADULENT ASSIGNMENTS OF COMPANY SHARES IN THE LIMITED LIABILITY COMPANY

Under the conditions of the evanescence of the procedural means of opposition to the assignment of shares, we ask ourselves what are the remedies offered by the legal framework in commercial matter aimed at exterminating the fraudulent character of these assignments that entail prejudice on the creditors' patrimony.

The response comes also from case law, following an analysis in the matter of the liability of the members of the managing/supervision body within the company as well as of any other persons who contributed to the state of the debtor facing insolvency, which reveals that *in sintesis*, the assignments of company shares concluded in the fraud of the creditors, represented and continue to be the ground calling for this special liability, under certain circumstances that we are to develop as follows.

3. THE MECHANISM OF ATTACHMENT OF LIABILITY OF PERSONS WHO CAUSED OR CONTRIBUTED TO THE DEBTOR'S INSOLVENCY, BY MEANS OF FRAUDULENT ASSINGMENTS OF COMPANY SHARES

The regime of attachment of liability to persons responsible for the debtor's state of insolvency, in the context where the insolvency proceedings are applied, is currently provided by art.169 – art. 173 of Title II of "Insolvency Proceedings", chapter I of "Common provisions", section 8 "Attachment of liability for entering insolvency" of Law no.85/2014 on the procedures for insolvency and insolvency prevention.[3]

The current legal regulation replaces the previous regulation comprised by art.138 – 142, chapter IV "Liability of members of the managing body", of Law no.85/2006 on insolvency proceedings[4], consolidated version of 01.02.2014, presently abrogated.

A first observation has in view the regulatory approach of the subject, with regard to the set of regulations that are particular, from formal point of view, to the regulations' applicability in the case of attachment of liability to the "managing body" of the debtor undergoing insolvency, falling within the former Law no.85/2006, abrogated now, although the text of art.138 of this law made clear reference to the syndic judge's prerogative to rule that one part of the debts of the debtor - legal person, undergoing insolvency, shall be either incurred on the *members of the managing and or supervising body or on any other person who caused the debtor's state of insolvency,* through one of the means stipulated by the text of the law, as it was amended through point 20 of the GEO no.173/2008, starting with 26.11.2008.

Unlike the previous wording in the former law on insolvency proceedings, the current regulation makes the neccessary correction in accordance with the content of the legal provisions in the matter from Law no.85/2014 which renamed the marginal title of section "Attachment of liability for entering insolvency" thus adding a first indication regarding the legal texts of art.169-173 which outlines the wide range of persons to which liability may be attached.

However, we mention that in the case brought under analysis, the provisions of Law no.85/2006 were applied in accordance with the rule established through the transitional provision of art.343 of Law no.85/2014, according to which the actions opened in court before the entrance into force of the current law "shall remain under the rule of the law applicable previously to this date".

The liability of the persons who caused the state of insolvency, in the meaning of art.169 of Law 85/2014, is not limited to the category of *members of the managing and or supervising body* of the debtor – legal person, but it may be attached, according to the law,

[3]Official Gazette of Romania, Part I, no.466 of 25.06.2014
[4]Official Gazette of Romania, Part I, no.359 of 21.04.2006

to *any other persons who contributed to the debtor's insolvency* through any of the *actions mentioned in restrictive manner* by the text of the law. A similar provision, from the point of view of determining the category of persons to whom may be attached liability for the unlawful actions that led to the debtor's state of insolvency, was comprised in former art.138, para. 1 of Law 85/2006, a text which also incriminated, although rather in restrictive manner, the same type of actions for which liability could be attached.

Hence, the actions for which art.169, para.1 of Law no.85/2014 (almost in full correspondence with former art.138, para.1 of abrogated Law 85/2006) provides the possibility of attaching liability to persons who contributed to the state of insolvency [5] refer to:

- the use of goods or credits for itself or in that of another legal person (letter a);
- entering in production or trading activities for personal benefit, under the cover of the legal entity (letter b);
- continuing the debtors activity in the personal interest or by clearly leading the legal entity into a cease of payments (letter c);
- keeping fictional accounting, making some accounting documents disappear or do not keeping

accounting records in accordance with the law(letter d);

- embezzlement or concealment of part of the asset or increase the debtors liabilities – (letter e);
- using ruinous means to procure the legal entity with funds, with the purpose of delaying cessation of payments (letter f.)
- preferably making payments to a creditor at the expense of other creditors in the month before the cessation of payments (letter g.)
- any other culpable act, which contributed to the insolvency of the debtor, as provided by the law (letter h).

The legal text institutes the *double relative presumption* for the fault as well as for the existence of the causality relation between the action and the prejudice, in the case of not handing the accounting records to the judicial administrator or to the judicial liquidator[6]. We notice the element of novelty of the *in terminis* establishing of this relative presumption, compared to the former regulation, of art.138 of Law 85/2006, which did not have a correspondent to it.

The attachment of liability to persons who caused the insolvency is *conditioned*, just as it is in the case of civil liability (tort or contractual) in common law, by the harmful action of the responsible person(s), the prejudice, the causality relation between the action and the prejudice as well as the fault of the persons held responsible.

Nevertheless, the nature of this type of civil liability was considered, by both the doctrine and case law, as being a special one - the *special civil liability in tort* (Catana, 2013)

The arguments that stand as fundament for this nature of legal liability, that may be attached to the person(s) who caused the debtor's insolvency, have in view mainly the *authorized statute of these persons*, who hold the capacity of "managing bodies or

[5] The types of actions are analyzed in Apan, R.D., *The liability of the managing body within the insolvency proceedings in Romania: case-law study*, Eurasian Journal of Business and Management, 3(4), 2015

[6] art.196 para.1,letter d., final thesis, Law 85/2014

supervising bodies" of the debtor, or they are persons who contributed to the state of insolvency, as well as the *framing substantiated by the actions restrictively provided by the law*, which if committed may incur the attachment of this type of legal liability in the factual and procedural context of insolvency.

In both cases of attachment of liability of the members of the managing and/or supervising body, or of other persons who caused or contributed to the debtor's (legal person) state of insolvency, *the nature of the liability is tort,* considering the fact that between the persons mentioned, having the passive legal standing in the legal action on liability, on the one hand, and the holder of the action on liability, which is, depending on the case, the judicial administrator/ judicial liquidator or the representative of the creditors / respectively the creditor having a share of at most 50 % of the value of debts listed on the statement of debts, there does not exist a direct relation having a contractual nature, which would justify the thesis favoring the application of the form of contractual liability.

The category of persons who may hold *passive legal standing* within the procedural framework of the legal action on liability incorporates the members of the managing and/or supervising body of the debtor – legal person, administrators, directors or members of the managing board and of the supervising council, as well as other persons – from the internal structure of the debtor or from the outside of it but who contributed to the debtor's insolvency.

These persons' fault conditions the attachment of liability, and it is even relatively presumed by the current law (presumption *iuris tantum)* in the case of not handing the debtor's accounting records to the judicial administrator or to the judicial liquidator. We notice that the presumption of guilt is absent for such a case, in the context of former art.138 of Law 85/2006.

The active legal standing in the case of judging the action for special liability – within the insolvency proceedings – is exercised, depending on the case, by the judicial administrator or judicial liquidator, or by the president of the creditors' committee (based on the decision of the creditors' assembly) or by the creditor appointed by the creditors' assembly (if the creditors' committee was not constituted), by the creditor who holds at most 50% of the value of the debts listed on the statement of debts.

In other words, the prerogative of exercising the legal action for liability, in the mentioned context, is available also to the creditors participating in the proceedings, if the judicial administrator, respectively, the judicial liquidator, having legal standing within the proceedings, did not indicate in the report on the causes of the debtor's state of insolvency the persons responsible for the debtor's state of insolvency or decided that it was not necessary to file the action in court.

The category of persons, who hold the active legal standing, and respectively the passive legal standing, were regulated in a similar way in the proceedings ruled by former Law 85/2006.

The same rule of *joint liability* of persons holding passive legal standing, *in case of plurality*, instituted by former art.138, para.4 of Law 85/2006 is continued and enshrined now by art.169 para.4 of the current law. To qualify the liability as being joint, is conditioned by the fact that the development of the state of insolvency must be contemporary or previous to the period of time in which the persons liable exercised the mandate or position from which they contributed to the state of insolvency.

The *prejudice* – prerequisite for attaching civil tort liability of common law but also for attaching special liability within the insolvency proceedings – is located in the debtor's patrimony as legal person, because it relates to actions that contributed to the development of the debtor's state of insolvency, but also in the patrimony of the creditors whose right to obtain the recovery of their debts under the appropriate conditions, was imperiled.

A particular aspect regarding this prerequisite, for the attachment of legal liability to persons who caused the debtor's insolvency, results from the *limitation of liability* for the prejudice "in casualty relation with the respective action", being attached the liability for the prejudice generated by the unlawful action (*damnum emergens*) without being involved also the loss of benefit (*lucrum cessans*), unlike the case of *civil liability of common law* governed by the principle of *full compensation for the prejudice* which implies the two components – the actual prejudice and the loss of benefit.

In the meaning of art.169, para.1 of Law 85/2014, the syndic judge may rule that a part or the entire debts of the debtor – legal person, which entered insolvency, shall either fall on the person(s) who contributed this state of insolvency "*without exceeding the prejudice that is in causality relation with the respective act"*, more precisely, *within the limit necessary to cover the debts generated by the harmful act, but not more than the prejudice resulted from the harmful act,* even if that does not cover the entire debt owned by the debtor.

To put it differently, this form of special civil liability represents an exception to the rule instituted by the common law regulation, however, enshrined is the *special regulation* in the matter of insolvency, in accordance with the specific principles that govern this procedure.

The relation of causality between the prejudice and the harmful act is the necessary connection which together with the fault of the responsible person(s) fundaments the liability in any of its forms – common law or special.

Art.169, para.1 of Law 85/2014 underlines *expressis verbis* the prerequisite of the causality relation between the prejudice and the harmful act, for the attachment of special liability to persons who led to the debtor's state of insolvency.

The explicit approach by the current legal text, of the relation of causality between the action and the prejudice, differentiates the current regulation from the previous one comprised in art.138 of Law 85/2006 which did not state *in terminis*, probably because of considering it as being a *sine qua non* condition for the attachment of liability to persons, in general, not only in the special context of insolvency proceedings, but also for the emphasizing *the special and limited character of liability for the actual prejudice,* or in the terms of the text of the law, art. 169, para.1, "without exceeding the prejudice resulted from the relation of causality with the respective fault".

In the practice of insolvency proceedings, it usually is not simple to demonstrate the relation of causality between the prejudice and the harmful action of the person(s) responsible for the debtor's state of insolvency.

Moreover, from a procedural point of view, neither the authorized bodies of the procedure – the judicial administrator, the judicial liquidator, nor the court of law which has the proceedings under trial *cannot merely settle with a strictly formal approach by stating in the procedural documents the existence of the relation of causality without it being backed-up by rigorously administered evidence.*

Specifically, the *report* issued by the judicial administrator or if applicable – the judicial liquidator, is the document that determines the *causes and circumstances that led to the onset of the debtor's insolvency* and it should mention, if applicable, and identify the person(s) who could be responsible the onset of the debtor's insolvency, as provided by art. 97, para.1 of Law 85/2014. A similar provision mentioned that the report must clarify these elements and be the fundament, as evidence, of the action for the attachment of special liability, initiated in accordance with the provisions of former art.138, para.1 correlated with art.59 para.1 of Law 85/2006, abrogated.

The report must be drawn and submitted to the syndic judge within the term established by the syndic judge, without exceeding 40 days from the date of the assignment of the judicial administrator or judicial liquidator, excepting the cases of motivated requests when for situations of a higher complexity, the term can be extended by the syndic judge with maximum 40 days.

Nevertheless, if the judicial administrator or liquidator did not proceed to identify the persons liable for the debtor's state of insolvency, or decided not to submit the action for attachment of liability considering it unnecessary, the action can be submitted by the president of the creditors' committee, respectively by the creditor appointed by the creditors' assembly (if the creditor's committee was not established) or by the creditor having at most 50% of the amount of receivables listed on the statement of debts, in exercising the active legal standing that is entitled by the law.

4.CASE LAW STUDIES ON THE ATTACHMENT OF LIABILITY TO PERSONS WHO CAUSED OR CONTRIBUTED TO THE DEBTOR'S STATE OF INSOLVENCY RESULTING FROM THE FRUADULENT ASSIGNMENTS OF COMPANY SHARES WITHIN THE LIMITED LIABILITY COMPANY

(i). Decision no. 2946 of 1 April 2014by the Court of Appeal Cluj

Through the action opened by the plaintiff L.I. SPRL in his legal standing of judicial liquidator of debtor SC D.M. SRL against defendant SD, it was requested that the defendant bear the payment of the entire amount of debts, in total amount of 1.579.640 lei, for committing the actions provided by art.138, letter a. and d. of Law 85/2006, consisting in that the assignment of the debtor's company shares carried out by defendant S.D. who held both the capacity of associate as well as administrator of the debtor company, was carried out having in view the possible state of insolvency of the debtor company, the assignment having a fictitious nature, correlated with the disappearance of the accounting documents which were allegedly handed over to fictitious companies in order to prevent compiling the inventory of the debtor's patrimony, fact which made it impossible to verify the situation of the assets identified in the last balance sheet and which were not handed to the judicial liquidator.

At first, the county court ascertained that the assignment of shares carried out by SD to companies O.B. SRL and T.B was made having in view the possible state of insolvency of the debtor company, and had a fictitious nature because the assignment of company shares was carried out for the nominal value of 200 lei; secondly it was not provided the proof of payment of the price by the assignors; the capacity of administrator was taken over by O.B. SRL, the name of the company was changed as well as the registered office of the debtor in Baia Mare; the companies that acquired the company shares have registered

offices in Bucharest, while the associates and the persons acting on behalf are companies having registered offices in USA and are represented by a citizen of New Zeeland - I.T., who according to the letter of the General Inspectorate of the Border Police was not registered entering or leaving Romania; it is commonly known that the two companies registered in Bucharest are fictitious companies having a real *modus operandi* through which a number of companies in Alba county make use of these two fictitious companies as front companies having the purpose to fraud the companies' creditors; the economic activity of the company was stopped immediately after the assignment of shares.

The company's debts listed in the statement of debts amounted to 1.579.640 lei, out of which 1.394.407 lei were owed to the General Directorate of Public Finance Alba Iulia and originate from the time when the defendant SD held the capacity of associate and administrator of the debtor. This amount was established through the notice of assessment issued following the fiscal inspection procedures for 2007-2009. Defendant SD made the accounting documents disappear, an aspect that result from the fact that the documents were handed over to "fictitious companies", making their recovery impossible. The absence of accounting documents prevented the inventory of the debtor's patrimony so that it was impossible to verify what was the course of the assets listed in the last balance sheet in 2007, assets which were not handed in to the judicial liquidator, fact that further consolidates the presumption according to which defendant SD used the assets or company's credits in his own personal interest or a third party's interest.

The county court admitted the action for attachment of liability opened by plaintiff L.I. SPRL, in his capacity of judicial liquidator of debtor SC D.M. SRL, and the defendant SD was obliged to bear the entire amount of liabilities owed by the debtor. The court rejected the appeal filed by defendant SD and fully maintained the judgment delivered by the county court.

(ii). Decision no. 9389 of 4 October 2013 by the Court of Appeal Cluj

Through the action filed by plaintiff judicial liquidator I. IPURL it was requested that the defendants K.J., K.E. is L.A.S., to be held to jointly bear the debts of debtor company SC J.K. SRL in total amount of 181.117,21 lei, based on art. 138 letter a and d of Law 85/2006, grounded on that: thesis I – the action of the administrators K.J., K.E. si L.A.S as to not hand in the assets of the debtor in order for them to be capitalized in the insolvency proceedings, considering that in the balance sheet there were stocks and financial resources; thesis II – omit submission of the annual financial records and quarterly fiscal statements; not handing in the accounting documents; thesis III – the assignment of company shares at nominal value and the change of administrator, without the company further carrying out economic activity.

Firstly, the county court ascertained that since the balance sheet of 2010 did not list sales of assets or did not register any type of outgoing assets from the company's patrimony, and the administrator did not hand in these assets so that they could be capitalized in the insolvency proceedings, it is presumed that the assets were either disposed of, or used in the administrator's personal interest or that of a third party. It was also determined that the assets could have covered the debtor's liabilities if the necessary efforts had been made in order to hand them over to be capitalized. As the administrator K.J. did not hand in the accounting documents, could not produce explanation regarding the book keeping within the company, it is presumed that the accounting records were not kept in accordance with the legal provisions; moreover, the administrator did not submit

the annual financial records and quarterly fiscal statements, practically not keeping evidence of the fiscal obligations and of the other debts that could not be identified.

On these grounds, the court partially admitted the request of the judicial liquidator I. IPURL and the defendants K.J. and K.E. were obliged to pay the debts of company SC J.K. SRL in total amount of 181.117,21 lei, rejecting the request regarding LAS.

In the appeal filed by K.J., K.E. the court partially reversed and partially maintained the judgment appealed, considering that the two plaintiffs should be treated differently, having in view that the elements on which the application for opening legal action is based are mainly the ones resulting from the balance sheet for 2007, as defendant K.E. held the capacity of legal representative of the debtor company since its set-up on 10.12.2004 until 02.10.2009, and the liability can be attached only if the events that caused it existed at the date when K.E.'s prerogatives ceased, otherwise the relation of causality cannot be determined, therefore the appeal filed by the defendant K.E. was admitted and the judgment was partially reversed, in the meaning of rejecting the legal action filed against the defendant – plaintiff K.E.

In what concerns the assignment, the court concluded that defendant K.J., in August 2011 assigned the company shares of the debtor to defendants L.A. and I.M., L.A. being appointed administrator, and from the date of the assignment of company shares, no economic activity was carried out by the company and no type of fiscal statements were submitted. Moreover, when the company shares were transferred, at the Trade Registry Office in Salaj, the company registered office was also changed, and the accounting documents should have been stored at the registered office in accordance with the legal provisions, office that belonged to K.J.

The assignment was operated at nominal value, hence assets of a value exceeding 100.000 lei were handed over, apparently without a counter value to reflect the value of the assigned assets, aspects that reveal either the fictitious nature of the assignment, or the complicity in fraud of the assignors and the assignees. The report of receipt of the accounting documents by the new associates and administrators does not relieve the liability of the former representatives of the debtor, considering that the company debts were accumulated during the period when plaintiff K.J. was administrator of the debtor company.

The assignment of company shares and the change of administrator were carried out with the purpose of circumvention of assignee from liability, but this change operated by the associates cannot relieve the liability of the person responsible for triggering the state of insolvency of the company. The debts started building-up in the same period -2010, considering the fact that following the assignment of shares no economic activity was further carried out and no balance sheet was submitted, although the debts of the company but also the assets listed in accounting documents existed at the date when plaintiff K.J. was administrator of the company.

Not making available relevant data regarding the situation of the debtor's patrimony, in this case is significant evidence to support the judicial assumptions according to which accounting records were not at all kept or they were destroyed in order to hide the existence of assets. Between this fact and the triggering of the debtor's state of insolvency there is a clear relation of causality. Moreover, not handing the data concerning the debtor's patrimony represents a significant act indicating us to presume that fraudulent maneuvers were pulled in relation to assets, valuables, patrimony in general, all these

being used to the detriment of the company's interests, and the state of insolvency is the direct consequence of this unlawful act. Based on the grounds presented above, the court rejected the appeal filed by KJ.

(iii)Decision no.372 of 14 January 2013by the Court of Appeal Cluj

Through the legal action filed by the appellant judicial liquidator CII R.A.D appointed to administer the insolvency proceedings of debtor SC D.P. SRL, it was requested the attachment of liability for the actions provided by art.138, letter a and d of Law 85/1996 and ordering the defendants S.O. and S.D to bear the debtor's liabilities in total amount of 54.069 lei.

The county court admitted the application submitted by the judicial liquidator CII R.A.D appointed to administer the insolvency proceedings of debtor SC D.P. SRL and ordered the defendants S.O. and S.D to be held to jointly bear the debtor's liabilities in total amount of 54.069 lei, holding them responsible for not handing in the amounts of money that were clearly available in the treasury of the company, according to the last accounting documents identified, presuming that these amounts were used for personal interests, this act falling under the scope of art.138, letter a of Law 85/2006. At the same time, not keeping the inventory of the patrimony was considered to fall under letter d. of art.138, the attachment of liability being substantiated of the fact that the members of the managing or supervision body, or any other person, contributed to the debtor's state of insolvency.

Amongst the obligations set-out for the company's administrators by Law 31/1990, art.71 provides that the administrators be jointly responsible towards the company for keeping, in an appropriate manner, the ledgers established by the law, while art.11 of Law 82/1991 on accounting, stipulates that the responsibility for organizing accounting records and book keeping is on the administrator. In this case, not carrying out the cyclical inventory of the patrimony prevented from determining the difficulties that the company was confronting with and the state of insolvency could not be discover in time. It is also acknowledged that not carrying out the inventory of the patrimony attracts the presumption of the existence of the relation of causality between the unlawful action and the prejudice resulted in the outstanding liabilities of the debtor.

Consequently, in accordance with art.138 letter a) and d) of Law 85/2006 the action was admitted and the defendants had to pay the entire amount of outstanding liabilities of the debtor, in amount of 54.069 lei.

Regarding the appeal filed by S.D. through which it is requested that all outstanding liabilities should be borne by defendant S.O. based on the motivation that through the contract of assignment registered at no.6/25.03.2009 by attorney N.C., the defendant assigned to S.O. all the company shares owned at the time, handed over to S.O. the book keeping of the company, the assets registered in the patrimony of the company, the assignor taking over the company with full knowledge over its financial situation, as well as over a judgment through which debtor S.C. G. SRL was forced to pay a debt owed to S.C. D.P. SRL, that was to be enforced by S.O. in his capacity of sole associate and administrator of S.C. D.P. SRL, stated the following:

- in the content of the contract of assignment, only general reference is made to the financial – accounting situation of the company, of which the new associates took notice and it is mentioned that the handing over of the documents and stamps of the company was to be carried out in the course of the same day but there is no written evidence that a

detailed situation of the assets and documents that were handed over, or inventory, or accounting documentation were drawn-up

- Theallegations of appellant S.D. that he had taken over the financial situation from the assignee administrator without it being accompanied by supporting documents, this being the reason why he should not be held responsible for the absence of the documents, were considered as a course of action that is not proper to a professional, and was blamed for accepting to take over the financial situation without being provided supporting documents. After the assignment was concluded, the defendant did not proceed to the verification of the accounting situation of the company and did not take action to redress the company. The causative context indicated above determined the cessation of payments and the accumulation of outstanding debts towards the creditors, who lodged claims and were registered in the final statement of debts.

Consequently, the appeal was rejected and the judgment was fully maintained.

(iv) Decision no. 11296 of 22 November 2013 by the Court of Appeal Cluj

Through the action filed by appellant judicial liquidator CII C.S of debtor S.C. N.S.S.A. S.R.L., it was requested that against defendant A.T., should be attached liability for the actions provided by art.138 letter. a) and d) of Law 85/1996 and should bear the payment of the debtor's outstanding liabilities in amount of 90.566 lei.

The county court rejected the action based on the fact that defendant A.T. held the capacity of administrator and associate of the debtor company but this role ended on 17.12.2008, being taken over by deceased defendant S.L.D., circumstance that doubtlessly results from the evidence submitted, while the insolvency proceedings against the debtor was initiated on 05.10.2012, almost three years after the moment of the assignment.

The proof of handing over the accounting documents, which took place following the assignment of the company shares owned by defendant A.T to S.L.D who deceased on 08.07.2009 was carried out through a document under private signature called "report of receipt". This document did not bear certified date, but considering that the defendant assignor S.L.D. deceased on 08.07.2009, the document could only have been signed previously to that date, therefore at least two years before the initiation of the insolvency proceedings against the debtor, and the signature is similar to that of the deceased written on the contract of assignment of company shares of the debtor, of 17.12.2008. For not fulfilling the obligation to register the financial situation of 2008 with the fiscal authority, defendant A.T. cannot be held responsible because his capacity of administrator of the company stopped on 17.12.2008, at an earlier date than the legal due date for registering the financial situation of the company to the fiscal authority.

The ruling of the court in the appeal filed by CIPI C.S., in the capacity of judicial liquidator of SCN.S.A. SRL:

- having in view that , in the financial situations presented, the debtor registered at the end of 2006 liquid assets of 321.765 lei, and the total amount of debts was 125.391 lei, this proves that the resources were sufficient to repay the debts. The only creditor listed in the table is the Public Finance Authority Cluj Napoca, and the debts to the state budget started to accumulate since 2006, that is previously to the assignment of shares. This way it is verified the thesis of the contemporariness between the date of the debts and the period in which the appellant exercised the prerogatives of administrator, and thus it is demonstrated the relation of causality between the facts and the state of insolvency.

- "the report of receipt" correlated with the circumstances in which this document was not handed in to the judicial liquidator, although the defendant was requested to do so, leads to the conclusion that the documents was drawn pro-causa, hence it does not exempt the former representative of the debtor of his liability, considering that the company debts are contemporary with the period when the defendant was administrating the debtor company. All in all, the defendant did not provide evidence that he handed over the company assets to the new administrator of the company.

- although the defendant states that he handed over to the new associates all the assets in the patrimony of the company and the accounting records, the assignment was carried out at nominal value, consequently the assets were handed over at the value listed in the balance sheet of 2007, without a counter value to reflect the value of the assigned assets, aspects that reveal either the fictitious nature of the assignment, or the complicity in fraud of the assignors and the assignees. Taking into consideration these aspects, it is ascertained that the assignment of company shares and the change of administrator were carried out with the purpose of circumvention of assignee from liability, but it does not exempt the liability of the person, who is guilty for triggering the state of insolvency on the debtor company.

The court admitted the appeal and shall reverse the appealed judgment, admitting the action for attachment of liability submitted by CII C.S against defendant A.T. who is to pay the debts of 90.566 lei.

5. CONCLUSIONS

Therefore, the assignments of company shares carried out in the fraud of the creditors, examined by the case law above, may stand as the grounds for attachment of liability to the members of the managing and/or supervision bodies within the company, as well as to any person(s) who contributed to the debtor's state of insolvency, in the following conditions:

- the way in which the assignment of shares was carried out corresponds to one of the acts provided expressly but restrictively by art.138 of Law 85/2006, committed by the persons who triggered the state of insolvency. But considering that art.169, para.1 letter h of Law 85/2015 provides that liability may be attached for "any other act committed intentionally, which contributed to the debtor's state of insolvency." Therefore, these types of acts are no longer regulated in a restrictive manner, butthe pattern of fraudulent assignment can be determined in any action that contributed to the debtor's state of insolvency, even if that action does not fall under a certain category.

- the way in which the assignment of shares was carried out, considering the previously mentioned cases,is doubtlessly paired with other actions or omissions of the assignor or of the assignee (e.g. not handing over the assets in the patrimony, the accounting records, when the assignment is concluded, the disappearance of the assets and accounting documents of the company, the assignment of company shares to persons who hold the capacity of associate in several companies, the change of registered office followed by the cessation of the company's activity right after the assignment) correlated with the proximity of insolvency, which outlines the fraudulent complicity between them for the purpose of vanishing the company's patrimony, action that triggers the irreversible collapse of the company.

- the pattern of fraudulent assignments revealed by the examined case law is in line with the divergent nature of the characteristics of the associate – administrator. The assignments of company shares exposed in this study do not have the mere role of transferring company shares from the assignee to the assignor, as the transfer of shares is doubled by the transfer of the capacity of administrator, or of the capacity of associate with all the consequences deriving from therein. The multitude of obligations that derive from the divergent nature of the characteristics of the associate – administrator, are in their turn divergent and facilitate the fraudulent intention and end purpose.

If in the case of transfer of company shares we are talking about the specific obligations concerning the handing in and the receipt of the certificates of company shares, that confirm the capacity of associate, in the case of transfer of capacity of administrator are essential the obligations deriving from this capacity, which are related to carrying out the inventory and handing it over together with the accounting records and documents to the administrator that is taking over this position. Whereas by quoting a well-known motto „pas d'interet, pas d'action", we can claim that one cannot show fraudulent interest for a vanished patrimony.

We would like to state that through the mechanism of opposition, the formal aspects of the assignment of company shares are subject to censorship by the court, whereas the actions or omissions of the assignee and assignor correlated with the assignment and the proximity of insolvency, exceed, in most cases, the verifications carried out by the court judging the case and enhance the fraudulent intention of the assignee and of the assignor.

Engaging the liability of the members of the managing and/or supervision bodies within the company, as well as any other persons who caused or contributed to the debtor's state of insolvency becomes a kind of universal remedy for the situations in which by misappropriating judicial institutions from the end purpose for which they were designed, such as the case of the institution of assignment of company shares, the company was spoliated of its patrimony and as a consequence, the creditors suffered prejudice.

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