



Basic rules of conduct (Do's & Dont's) around insolvency

by Mihai Lanțoș, Attorney at law RO, Insolvency administrator RO

According to Law No. 85/2014, Romanian insolvency exists when the existing liquidity of the company is insufficient to pay the debts as they fall due. This means that in Romania, insolvency is confirmed on the basis of a cash flow test. Nevertheless, not all ups and downs in the cash flow of a company lead to its insolvency. Below we briefly analyze when to file a petition to open insolvency and what basic rules must be observed before and after the opening of insolvency proceedings.

Obligation to file for insolvency

Since the opening of insolvency proceedings in almost all cases has the effect of restricting the rights of creditors, it is important that this measure is taken in good time. According to Romanian law, the petition to open insolvency proceedings must be filed with the competent district court within 30 days of the determination of the insolvency status. This duty is incumbent on the director.

It is certainly advisable to let the shareholders decide on the application. If this delays the timely submission of the application, the director must act at short notice. If he or she fails to do so, the failure to file the application may constitute a criminal offense if the delay exceeds 6 months from the expiration of the 30-day period. Further sanctions (e.g. assertion of personal liability) are not excluded.

Liability for insolvency

To ensure that insolvency proceedings are not exploited, statutory liability has been provided for the persons causing the insolvency. Most of the facts that can lead to personal liability relate to the devaluation of the insolvency estate in favor of certain persons. This also includes the continuation of an economic activity that obviously led to insolvency, again benefiting certain persons. Moreover, production or sales activities could be carried out for the benefit of other persons, but under the cover of the insolvent company. If loans or assets of the Company are used in the directors' own interest or that of persons other than the company, this shall also be deemed to be a ground for liability.

Another circumstance that may result in liability is improper accounting or failure to file accounting records with the bankruptcy trustee.

However, liability can also be affirmed if there is no favoritism of other persons, but the relevant circumstances have contributed to the state of insolvency. This happens, for example, if loans were procured by the company which had ruinous effects on the insolvency estate and delayed the occurrence of insolvency.

Personal liability does not apply exclusively to the managing directors, but can also affect any person, as long as the liability facts provided for by law can be proven. For example, persons benefiting from the above activities may also be held liable.

Claw-back actions

The liability of certain persons is not the only variant by which the insolvency estate is rebuilt. The insolvency administrator, the creditors' committee or a creditor holding more than 50% of the registered claims against the debtor may file claw-back actions concerning certain contracts and/or transactions. These applications are directed against contracts, payments or other transactions that arose within 2 years prior to the opening of insolvency proceedings.

These may refer to preferential payments favoring a creditor who would have received much lower payments in a bankruptcy case, contracts free of charge or those that have led to the devaluation of the bankruptcy estate and therefore have adversely affected creditors, transfer of assets instead of payment to creditors, provision of security to creditors.

Contracts with a shareholder, persons related to the debtor, or persons who control the debtor company in any way may be challenged.

Conclusion

As a rule of thumb in the insolvency process, the generally accepted rules of conduct must be followed in order not to cause further damage. Therefore, in the first place, it is necessary to file the petition in time, to preserve the insolvency estate, not to harm creditors and not to discriminate among them. In addition, accounting must always be maintained to ensure a transparent process.

Contact and further information:



STALFORT Legal. Tax. Audit.
Bucharest – Bistrița – Sibiu

Office Bucharest:

T.: +40 – 21 – 301 03 53

F: +40 – 21 – 315 78 36

M: bukarest@stalfort.ro

www.stalfort.ro