The Civil Liability of the Trustees of the Insolvent Debtor (thesis summary)

Key words: liability, civil, insolvency, law, case law, bankruptcy, debtor, creditor, associates, shareholders, tort, fiduciary duty.

Introduction

The difficult times inside a company that is facing a cash impairment can and must influence the concept that trustees delineate about the company's interest and the criteria that they must take into account when they make a decision in favor of the business, aiming to regain the patrimonial balance.

If the executive does not take its position as promptly as possible, bankruptcy followed by the collective procedure may be accompanied by insolvency, a situation in which the creditors facing such a harsh truth have sorely insignificant remedies.

For such situations, when a debtor's bankruptcy was caused not only by an unpropitious economical context, but also by the improper attitude of the governing body, Law 85/2006, assuming the provisions already contained by Law 64/1995, established the possibility to force the governing body to pay a part of the debtor's liabilities as they take responsibility for having committed one of the stipulated crimes as we shall see in the following, briefly.

Although it has been a long time since the approval of the laws that establish the responsibility of the decision-making body that contributed to the debtor's bankruptcy, these are far from flawless, the judicial practice being quite eclectic. As a consequence, a change of the law-making framework was essential, yet the actual interventions were quite reserved, certainly not having the expected effect.

The passiveness of the law-maker diminished the chances of an efficient protection of the group that was a part of the legal environment that involved the operation of the companies, equally influencing both the creditors and the executive, even though the weaknesses of the liability mechanism arise on unlike occasions.

Inside the practical process of the company, the administrative must constantly ask itself what is or it is not allowed and what should be improved in order to accurately define the company's economical tactic. Inexorably, such constraints may amplify the trustees' discretion, but the lack of swiftness in taking the decision may lead to wasting the company's chances to profit.

There trustee is the one that handles a twofold burden: 1). to stand up to the associates' expectations and 2). to protect the creditors, the community of interests around the company that he represents; as he submits to these standards, he may commit errors.

Demarcating the management errors entailed by the normal completion of his job from the management errors entailed by the abnormal completion of his job is extremely difficult, though, and this duty solely befalls on the judge invested with the liability procedure.

In order to see whether the chances to mark the objective of a timely and complete liability of the executive as long as the company is in bonis can be enhanced and what the serious limitations inside an aggravated liability instigated by the company's bankruptcy are, we considered that synthetizing the responsibility in covering for the liability as being convenient, in order to provide useful tips the practitioner that is facing everyday situations that he has to unravel.

In view of the law examination, the case law and the juridical bibliography, we will mostly determine aspects that did not receive a unanimous and crucial solution in doctrine and which still cause different resolutions in the jurisprudence, obviously trying to endorse certain versions that will hopefully determine a synchronization of the court practice.

We will observe whether the company's insolvency determines the alteration of the trustee's liability and whether he is set for the company's new economic situation, meantime trying to capture the role of the other ones involved in the liability scenery, the restrictions of their liberty to act and whether the right to fair law suit is guaranteed by our laws.

At the same time, the purpose of this approach will be to determine whether different diagnosis, inside a subjective outline, of the unlawful that lies at the basis of the bankruptcy, is grounds for additional liability processes, and if positive, to establish where exactly the focus of

the operations for reunifying the patrimony is, who is in charge and how the results of this process are yielded.

The first chapter is dedicated to the juridical nature of the trustee's liability from the perspective of the in bonis and insolvent companies.

Bearing in mind the trustee's place, we picked this approach for two reasons. The first one was that the identification of the items on which the companies' in bonis trustees' allows, by comparison, a better observation of the liability organization in case of insolvency of the debtor involved in the insolvency procedure. The second one is that the examination of the management standards should not fluctuate according to the economic status of the company, which is precisely why we followed the premise that the same unit should be used in both situations of the liability.

As a consequence, chapter II inspects the contrasts between the juridical system of the liability in case of insolvency, starting with the way in which the insolvency law explains the notion of damage, the values of the fraud and the other parameters in view of which this liability can be triggered. We have not overlooked the impact that an ongoing crime instruction may have on the trustee's civil liability.

In chapter III, which observes the framework of the responsibility to cover liability, we meant to identify the criteria that help the determination of the fraud in insolvency, the relationship between fraud and the impairment liability, the analysis regarding the special features of the fraud inside bankruptcy.

In the last chapter we insist on the question apropos the procedural legitimacy, from the perspective of fairness policies, the right to a fair law suit and the eventual limitations concerning the right to use justice. Similarly, we try to find answers to the need to reconfigure the idea regarding the criteria that define the notion of managing in effect, analyzing the means of intruding in the management of a company and its actors. We assumed that the problem of the actual trustee's responsibility and the fact regarding activation of the solidarity principle must be examined warily, because in this area our case law has been eclectic, most of the times choosing restrictive interpretations.

The entire thesis is essentially a justification for the coordination of the liability system with the obligations system that defines the management position.

Chapter I

The juridical nature of the trustees' liability

1. On the juridical relation between the trustee and the company in general

1.1. *Approach*. There are multiple controversies relating to the status and the type of relations between the trustee and the company. The practical aim of establishing the juridical nature of the trustee's civil liability consists of the probation and the extent of this liability. More questions have been articulated concerning the status of the one that decides the prospect of the company in order to determine whether he should be seen as a company entity or, on the contrary, a company mandatory.

The core of the dichotomy of the solutions given by the doctrine in this matter lies in the extensive debates concerning the institutional or contractual nature of the company.

The eagerness with which the arguments have been spotted and used in favor of one of the above mentioned theories, instead of firming the proposed approaches, created gaps, increasing their weakness.

In search of a balance, as if fatigued of so much fluctuation, a part of the doctrine picked methods which seemed to announce reconciliation. The reconciliation seemed promising, not because of the concessions, but because of the flexibility shown when trying to redefine the company leader.

This is how the idea of social representative for common interest appeared and the perspective according to which the relations between the trustees and the company are eclectic, contractual, fiduciary and functional, derived from the complementarity of the commercial mandate basis and the function theory.

1.2. *The views regarding the judicial nature of the relations between the trustee and the company*.

1.2.1. A part of the doctrine and the case law has been and still is tributary to the mandate theory, the common civil liability of the trustee being unsurprisingly denominated as contractual. According to this theory, the trustees are company representatives, and the origin of the representation is the company contract.

1.2.2. The supporters of the organic theory claim that the trustees, while completing their duty, do not have free will; however, they express the collective voice of the associates, without being legal subjects of the company, but a part of it. As such, their power does not originate from the contract between the company and themselves, but from the law.

1.2.3. The supporters' position on the institutional theory has been contested, observing that the origin of the representation has a different nature, clearly not a legal one. As for the origin of the judicial situations, the will which generates them is decisive, the company representation centering on an act of will that does not relate to law, inasmuch as the content of this representation is largely "legalized".

1.2.4. Other authors cherish the thesis according to which the relations between the company and the trustee are twofold – contractual and legal, his liability being either contractual or criminal, according to the nature of the infringement.

1.3. *The opinion to which we subscribe*. The approach according to which the relations between the trustee and the company have a contractual-fiduciary and functional eclectic nature derived from the complementarity between the basis of the commercial obligation and the function theory stands up, in our opinion as well, to the expectations regarding the improvement of the liability system, for, as it has been properly pointed out, it supports an aggravated liability system through relations to the culpa levis in abstracto criterion.

2. The trustees' liability in case of in bonis companies

2.1. The common liability of the trustees' regarding the company in bonis

Infringing the obligation to act in the company's interest may be grounds for the direct liability for the represented entity. The company, as a keeper of the patrimony that constitutes the common guarantee for its creditors, may set the action that leads to the patrimonial reconsolidation.

A. The fiduciary obligation system (Fiduciary obligations system)

a. The obligation to execute the mandate in good-faith according to the company's interest as well as the obligation to diligence and discretion established by art. 144^1 of LSC are reference coordinates for the fiduciary duties, but a positive balance is most of the times hard to achieve, since the company's interest – as a chameleonic landmark – can change the perception on the way that the mandate is being executed, the areas between the compliance and defiance fluctuating according to the economic status of the entity and the community of interests that revolve around it.

The obligation to execute the mandate in good-faith and according to the social interest is taken by: the loyalty duty, the duty to clearly offer information and the duty not to disclose confidential information and confidential business, without any of them prevailing, the perspective – and not the extent of the liability being, in our opinion, equal, no matter the type of the infringed fiduciary duties.

The meaning and the role of the information should not be altered however, which is why relating to a behavioral standard is an appropriate antidote for this kind of corruption. In our opinion, the excessive formalization or temporization of the information procedures, the policy that independent entities should supervise the information offered by the executive contains as many threats to ruin the business as does the incomplete information or its absence.

b. The duty to discretion and diligence

The standard for the good trustee established by article 144^1 LSC should be related to the knowledge, competence and abilities that a person having this position ought to have in abstracto, the reflection of this standard being, in our view, connected to the present economic and social background, and that is the case because the leaders of the company are faced with the globalization of the economy, with an unprecedented intensification of the concurrence, the administration of the company lucratively inferring a high professionalism from their side.

Inside this whirlpool, the lack of action may be a critical error. It might be generated by restraint to act – a consequence of a strategy meant to encounter not the company's interest, but a divergent one.

The conflict of interests may be dissimulated through inferring the policy referring to the compliance to the duty to diligence and discretion. Behind closed doors there may be hidden interests unrelated to the company's interest, because the strategy "not to have a strategy" is often explained by the trustees as being a submission to this policy.

Being assigned to complete all the necessary and useful documents for the company's objective, the administration defines the company's strategy.

If the stern preservation of a risky strategy, whose damaging effects might have been foreseen logically and naturally by a good trustee, proved to be damaging to the company's assets the trustee is held responsible, inasmuch as he proved to be ignorant of the information and the subsequent decision.

The establishment by lege lata of the duty to diligence and discretion therefore creates the conditions to reduce liability to the easiest error. But the lack of discretion and neglect seem to matter more in the liability system as long as the society is in bonis and not when bankrupt.

c. The statutory duties system

It should be prompted that not only the ignorance towards the fiduciary duties may entail the civil liability of the trustee, but also his ignorance of the legal-statutory duties.

Among the established legal duties that legally befall on the trustees are the duties provided by art. 73, 49, 78, 117, 119, 150 from LSC. Even the duty to fulfill the establishments of the deliberative body was arguably categorized by the doctrine as organic. Since we are talking about duties of result, the trustee's fault is alleged.

d. The procedure of the company action inside liability

The fate of the company action ut-univeri depends on the majority of shareholders' will. Very often, their hidden interest to keep the management deprives it from the efficiency projected by the law-giver. In this case, the only chance is the action ut-universy.

The individual action, belonging to the minor shareholders, may be exercised only in the situations stipulated in art. 155^1 LSC and has an obvious subsidiary character, perpetually maintaining its company bias, nevertheless the minor shareholders incurring of the court expenditures marks an efficient deterrent to the demarche itself.

e. The weakness of the liability

We notice that, de lege lata, the theoretical chances to repair the company's damage when the company is in bonis are higher than when the entity is bankrupt, because not only the fraud and the company's interest are real indicators of the liability, but also the management errors entailed by neglect and indiscretion.

First of all comes unresponsiveness, the shareholder's refusal to start legal procedures, be it out of hidden interests to maintain the management, be it for his insufficient information because the financial situations often do not reveal the actual image of a company. The first and most efficient remedy for this kind of attitude coming from the major shareholder is the ut-singuli action. The establishment of an self-governing financial audit – usually external, regardless to the company's profile, may become a precaution to certify the applicable information.

The second aspect inside this liability weakness is the one pointing at the difficulty to define the causal relationship between the act ascribed to the trustee and the damage, the estimation of this causal relationship being reasonably delicate in practice, given the "company's maneuvers" (the documents of the company) and the external events that might amplify the damaging effects of some company resolutions. A moderation of the liability would be possible if the judge were to resort to the notion of evident damage. This potential remedy sheds light onto the debate related to the nature of the liability, without being practical in case of tort. Moreover, using the notion of wasting a chance is a promising alternative.

The third aspect is represented by the principle of full repair damage. The risk inferred by the principle of full repair damage might be a solid inhibitory for the single action within the trustee's activity, and the consequences of this inhibition are as undesirable as the lack of discretion. Such a impasse can be avoided by including liability limitation clauses in the memorandum.

2.2. *The relation between the illicit action and position – a criterion to demark the trustee's responsibility in front of the society and the third parties*. The trustee's civil liability in front of the company will be direct when the damage is caused to the company, and it will be indirect when the damage is incurred by a third party when the trustee exercises his powers and the third party has been reimbursed by the company.

B. From the offense committed in management…

In normal operating conditions, the third parties have the opportunity to act against the company, and the efficiency of this legal remedy is indisputable as long as the solvency of the company represents the surest guarantee to repair the damage.

One may think without cause that it was opted for the abolition (suppression) of the company liability towards the third parties in case of unlawful deeds that only have an illegitimate, frail and apparent relation with the assigned attributions and functions, a solution that will dramatically affect the proportions between the company liability and the outstanding liability.

The liability would become exceptional and the trustee's outstanding liability towards the latter would become rule. We wonder whether the changes in strength would render the expected results. In our opinion, the prognostic can only be a reserved one.

Considering this restrictive interpretation, the company's tendency to avoid liability, invoking the absence of any relation with the trustee's attribution or position goal, would grow, and the mission to spot the abuse (the abnormal function exercise) would become burdensome, hence the dissociation of the moral and the trustee becoming extremely costly for the third parties, yet beneficial for the company.

C. … to the actions detachable from the trustee position

According to the French case law, the trustee is personally accountable towards the third party that suffered damages as a consequence of a managerial error detachable from the position held, that does not relate to the normal exercise of his duty within the company and is outside the contract between the company and the injured third party. The doctrine has harshly criticized this approach, remarking that it creates an enormous space for impunity.

Through the new civil code, the Romanian law-maker responded warily seemingly to restrict without any nuance the third parties' access to the company liability, as for the acts that could be dissociated from the purpose of the position held by the trustee, the sole possible solution, de lege lata, was returning to the personal liability.

Yet interpreting the new legal solution this way would create an immense impunity space, as it would irrevocably invalidate the company's liability. We assume that a deed that does not have any relation to the purpose of the position, but still is a part of the administrative exercise, should not exclude liability and only entail the trustee's personal liability towards the third party. If we are to admit the fact the law-maker considered to extract this kind of errors from the company's liability area, transferring them to the trustee's outstanding liability towards the third party, the area of the liability pretended by the third party by liability in tort would shrink so

much that the burdensome task to reimburse the damage caused by the abnormal exercise of powers would exclusively incur to the latter. One could say that in these conditions the injured party could easily think that their dream to be reimbursed for the damage would become reality, but this reality is not as indulgent when the trustee is bankrupt.

2.3. *The personal liability towards the associates*. The fact that the trustee has attributions – powers essentially established by law and that must be exercised on others' assets and in others' interest: the company's and the associates' – justifies in principle the admission of a direct liability of the former towards the associates. However, there is not any unanimity of perspectives on the origin of this liability.

D. The associates, creditors of a fiduciary duty?

A part of the doctrine and the case law asserts that the contractual nature of the liability, starting from the admission of the trustee's fiduciary duty towards each of the associates, but the option for tort liability is the most frequently met. We do not deny the fact that the trustee's attributions are channeled on the company's interest, but the extension of the direct fiduciary duties towards each of the associates seems excessive. In the end, the associate is an internal creditor of the company and if one accepts the idea that the fiduciary duty operates directly with the associates, why shouldn't one go further with this idea, in order to consider it activated, in some conditions – such as the vicinity of insolvency – and towards the creditors. The fact that the company's interest may be regarded as a common interest of the associates for the prosperity of the company's business cannot be the sole argument that categorizes the trustee's direct liability as being contractual and towards the associates. First of all, there is not a contractual relation between the trustee and the associates that may incur direct fiduciary duties of the former towards the latter. The contractual liability is a special liability, derogatory from the tort liability common law that does not exist without a contract.

On the other hand, the company's interest may include at times the creditors and the community of interest around the company, without the existence of an extension of a fiduciary duty of the trustee towards these categories.

Most of the times, the liability steps in this area thanks to the infringement of some legal obligations that are associated with the position, unrelated to any fiduciary relation and which triggers an organic liability.

E. An outstanding liability restricted to the individual damage

Aside from the debates related to the contract or tort basis of this liability the associates'/ shareholders' individual actions often get to no result.

The trustee's immunity in this field is owed to the extremely discrete case law politics that seldom admits the requirement referring to an individual damage as being accomplished distinctly from the company damage.

Although from his position as an internal "claimer" of the company, the shareholder can easily call for the trustee's liability, the shareholder's reimbursement for personal damage is outstanding, therefore whenever the personal damage is a consequence of the company damage the direct civil liability of the trustee toward the associates/shareholders does not work.

Thus, the role given to the personal damage is insignificant. The cases that are generally accepted by the case law refer to the infringement of the shareholders' personal rights, which do not affect the company in itself, as it follows: the diversion of dividends, the violation of the right to be informed and the right to vote.

3. The trustees' liability in case of companies in trouble

3.1. *A special tort liability*. The liability can be engaged just inside the classic scenery of insolvency, and its start is marked by the present procedure, while the asset insufficiency is the only environment within which such a liability can exteriorize. Moreover, the illegal acts that may entail this kind of liability are briefly mentioned by the law as being intentional acts.

These particularities prove that a common law special civil liability tort is at stake.

3.2. *The liability coverage – endorsement or sui generis action*

To clarify this aspect we regard as relevant the following aspects: the action has as a basis the insolvency procedure; the proof of the relation between the management error and the value of the company's debts is not necessary, the only condition needed in this way being to prove that the imputed infringement lead to the payment termination; the judge can force the trustee to entirely reimburse the company debts. Although this possibility could bestow the action a rather punishing character, in our opinion, the punitive thesis is not incompatible with the one according to which it is a civil liability, inasmuch as the civil liability is always the result of an endorsement.

3.3 *The efficiency of the access to justice*

External factors, that do not relate to the will of the subjects entitled to act, may constrain the three years term within which the action prescribes, the fate of the procedure being decided, if it is noted that there are no assets in the debtor's property, or that these are insufficient to cover for the administrative expenses and the creditors to not volunteer to offer the necessary amount of money. The bankruptcy judge has no other option but to close the procedure, which has as a consequence the debtor's radiation form the register ad.

The rule established by article 131 transfers all the risks to the creditor's management when the relation between the expected benefits, in case of continuation of the procedure, and the costs of these procedures becomes uncertain, the solution being justified by the state's interests to promptly cleanse the business environment.

Yet, through the closure of the procedure before the ending of the prescribed term the damage repair resulting in its author asset insufficiency becomes practically impossible. Hence we wonder to what extent one can actually guarantee the victims' access to justice.

The claim that creditors should bring the necessary amount of money to cover for the administrative expenses, in order to avoid the premature ending of the procedure, is, without any doubt, a limitation to the access to justice.

We consider that the limitation is admissible just as long as it does not affect the body of the law through establishing excessive pecuniary obligations which would entail defection.

F. The prescription of the right to act

The right to act to cover liabilities is prescribed to three years, and it has its start when the person who caused insolvency is indentified or should have been identified, but no later than 2 years from the delivery of the decision to start the procedures. Mainly, the assembly of creditors may become acquainted with the person responsible for the insolvency from the content of the report trustee, the liquidator in accordance with art. 59 of Law no. 85/2006. The significance of other test means should not be overlooked, in this case the invested bankruptcy judge being sovereign in appreciating this particular question.

G. The enforcement of the decision to engage responsibility as in forcing the accused trustees to support a part of the debtor's liabilities is final and executor and the enforcement is performed by the judicial executor in accordance with the code of civil procedure, and the bankruptcy judge or the liquidator will not have any other role apart from the one enlisted in art. 142^2 of Law 85/2006. Consequently, the effectiveness of the access to justice is also ensured by the way in which the enforcement is performed.

The enforcement may occur during the observation period, during the actual procedure (of the judicial reorganization or/and bankruptcy) and the resulting sums will be turned to the debtor being prepared, in case or reformation, for the payment of claims according to the payment draft, for the supplement of the funds required to continue the debtor's activity and in case of bankruptcy, to cover for liabilities.

The case law also established that persons interested in the enforcement of the decision against the statutory trustees of the debtor are entitled to put forward claims to enforcement, and they are also forced to pay the judicial executor, since there is no legal basis to use the funds

constituted in accordance with art. 4 of Law 85/2006 for this particular purpose when there are no assets in the debtor's property. Should the procedure come to an end, the distribution of the sums resulting from the enforcement is performed by the judicial executor, but if the procedure was not concluded, only the liquidator may perform this particular distribution.

Chapter II

The dychotomy contained by the legal regime around liability in case of bankruptcy

A. The utility of redefining the concepts of company damage, personal damage as being different from the company damage

The temporary reconstruction of the company patrimony within the insolvency procedure has its flaws, inasmuch as it ignores the company prejudice that exceeds the asset insufficiency or that are not related to there, disregards the damage caused to the creditors through the cessations of cash flow after the start of the procedure. Moreover, it does not offer the associate/shareholder the opportunity to recover in any way the individual prejudice induced by the loss of the business, that this time is indisputable.

In our opinion, we consider that the right to recover the damage caused to the shareholders by the loss of the business as a consequence of insolvency should be admitted. Even though it is related to the company prejudice, having as origin the obvious disregard of a fiduciary duty, this kind of damage ought to be repaired. We are undoubtedly talking about an indirect prejudice endured by the investors that lost their business.

Thus the trustee's liability must be dissociated both from the company and from the third parties, if the notion of company prejudice were to be extensively defined, not only in relation to the collective damage endured by the creditors, the company and inherently its associates would be more protected against theft risk.

Yet, as long as de lege lata the maximum limit of the liability within insolvency is the value of the liabilities expressed by the creditors' claims, the society affected by the ut univeri action cannot even remotely hope to a repair for the damage that exceeds these liabilities.

Although the "weakness" (the economic impairment) of the company determines a series of individual damages that affect the associates and the creditors, giving way to the collective procedure, the definition of these damages does not relish the a softer approach towards the company in bonis.

We concede that the correct strategy to cancel all the noticeable hindrances is either the reconfiguration, in case of insolvency, of the notion of company damage, or the acknowledgement of the concept of "personal damage different from the one suffered by the associates/creditors".

B. The liability for the damage that exceeds the liabilities acknowledged within the procedure

In the French doctrine it was assumed that the principle of the full damage repair is a hindrance to receiving the reimbursement, given the problems raised by the clear definition of the damage. This rationale may somehow explain why the liability promoted within the collective procedure evades the principle of full damage repair.

In our opinion, we assume that when statutory clauses to limit liability are missing, the purpose of full damage repair should be fulfilled in case of bankruptcy as well. Otherwise, a differentiated treatment would be created and it is inconceivable that the situation of the trustees that contributed to the company's bankruptcy (lato sensu) be more favorable than the situation of the trustees of in bonis companies.

1. The restrictive character of the damaging acts

A. The liability for the illicit act committed with intention that does not submit to any of the situation restrictively enlisted in art.138 or in the modality of the fault

As we previously saw, the bankruptcy law associated a few illicit acts enlisted in art. 138 to the outstanding liability. All of these are only intentional acts, and the category of management errors committed by neglect or indiscretion has been completely forgotten.

The deeply hostile and injurious meaning of the acts restrictively enlisted in art. 138 towards the company is easily acknowledged, the trustee's betrayal of the company's interest and his clear preference for a conduct that is compatible with his personal interest, but incompatible with the company's interest being the expression of an intentional fault.

The legal approach inside the bankruptcy law ignored the critical regime of the liability through the relation to the culpa levis in abstracto criterion. But an aggravated regime of the liability can only manifest before the commercial court, if the idea of the concept of the functional performance of the bankruptcy judge does not apply and, in this case, starting form the fact that this kind of action has as a purpose the very unification of the debtor's property. In such cases there is no unitary case law.

Should the assembling of the two actions not be accepted, the damage repair related to the unintentional acts becomes impossible and the victim's access to justice would be seriously affected.

The shrinking of the trustee's limitation towards the bankrupt company to the acts enlisted in art. 138 not only evades the culpa levis in abstracto, but also encourages the disregard of the trustee's duty of discretion within the management of the debtor's business.

The message, although unperceivable, would entail a diminishing of the manager's keenness and the lowering of the appreciation of the standard referring to the conformity of the managerial decision, having as a consequence the encroachment of the influence area belonging to the obligation to diligence and discretion and that would happen because the trustee would feel protected from the liability entailed by the unintentional errors.

B. The trustee's civil liability or the acts subsequent to bankruptcy

The responsibility to cover the liabilities does not intervene if the trustee's illicit act is subsequent to the opening of the procedure.

The disposition contained by art. 138 of the bankruptcy law do not leave place for interpretations, since the illicit acts that are associated to liability are acts prior to the opening of the procedure and which lead to the instauration of bankruptcy.

2. The accumulation of liability action contained by Law 85/2006 and lau 31/90, potential remedy

A. The conditions of admissibility of the coexistence of the two liability forms

The common law action is usually absorbed within the special action that is established by art. 138 in case of illicit acts that may be a part o the category that is restrictively mentioned in this article.

If the reason of the action is: 1). the management error committed by fault or 2) an illicit act subsequent to the era of the opening of the procedure, or 3). the damage is not only submerged to the asset insufficiency, the common law procedure is the only appropriate strategy. The same strategy applies in case of a personal damage, different from the company one, regardless to the intentional or unintentional nature of the error inferred by the victim.

In the above mentioned situation, by victim we understand the company (for the company damage), the shareholders/associates (for the company damage or the personal damage different form the company one) and the third parties (for the personal damage, different form the company one).

In the Romanian law if there is only one creditor in the assembly of creditors, he may engage liability even though the procedural entities deny the exercise of the action, even though the prejudice that was brought up cannot be strictly defined from the cessation of cash flow.

That is more than can be said about the minor creditor, in whose case the law was not as generous. The latter cannot engage liability within the liability procedure, and not even in front of the common law court, inasmuch as on one hand he is not recognized the standing position to act individually inside the procedure, and, on the other hand, the damage, although personal, cannot be regarded as different from the social one, the classic remedy being the reimbursement way promoted against the procedural entities that denied without reason the exercise of the action.

The weakness of the liability incurring to the trustee as the author of the damage artificially grows even more powerful for the victim with the faintest chances to succeed, intensifying his weakness, and the juridical claims of the minor creditors – that do not submit to

the major will – headed directly against the author of the faults are systematically overlooked by case law.

It apparently smothers the benefits that seemed to arise from the establishments of art. 73, c. from LSC.

What is the so called new right for the creditors that this new norm mentions in case of bankruptcy, when the right to take action is subjected to the collective will of the creditors, and the common law liability to cover for the individual damage suffered by the creditor was already started when the situation was in bonis?

The actual ignorance of the right to claim for the legal reparation of the undertaken damage alienates the creditors from justice, and the absence of a real appeal, that flows from the principle of non-overlapping the two actions is, in our opinion as well, the source of some critical injustice.

B. The particularities of the outstanding liability towards the third parties engaged during the insolvency procedure

The admission of the liability of the trustee promoted by the third parties for acts prior to the opening of the collective procedure is governed by extremely restrictive conditions that actually diminish the positive chances such as: the creditor invoking a personal damage, different from the one presented by the other creditors and with the condition that the prejudice be determined by an error dissociable from the position held. When the problem of repairing the common damage arises the context of the ascribed act is or not related to the attribution and purpose of the position entrusted is without reason.

Regardless of the differentiated treatment, the opening of the collective procedure does not impede the third parties to obtain the reimbursement for the individual damage. Such an action would happen in front of the common law court and not in from of the one solving the collective procedure. It will be also exercised after the end of the procedure, but in the term of the extinctive prescription.

C. The regime of the liability of the trustee that, in opposition to the creditors, misused the limited nature of his limited liability and his legal personality that is distinct from the company

The responsibility of the associate trustee to cover for liabilities may join the unlimited liability as associate for the incomplete duties of the company that is being liquidated as long as the covering for the same damage.

The fate of the company damage consisting in the insufficiency of the assets (as a condition of the patrimonial bankruptcy) would be marked just in case of the liability mentioned in art. 138 of bankruptcy law.

D. The liability regime of the trustees of the companies with collective name in limited partnership. The action to cover for liabilities vs. the extension of the insolvency procedure towards the associate trustee

The bankruptcy judge may decide for the liability of the unassociated trustees, as long as they are subject to one of the illicit acts mentioned in act. 138 just in case of the enforcement of the associates and the debts have not been completely covered for.

3. The liability for one of the situations contained in art. 138 that constitutes tort and the procedural means of objectifying

3.1. The impact of the crime investigation on the covering for liabilities

The scenario of the cumulating actions to cover for liabilities with the common law liability exercised in criminal court becomes possible just when the illicit that caused bankruptcy generates criminal liability and is the origin of several other damages, different form the asset insufficiency.

3.2. The victims' right to choose between the commercial jurisdiction the criminal jurisdiction in order to engage the trustee's patrimonial liability for the insufficiency of assets, reality or fiction?

The fate of the civil liability for the asset insufficiency generated by crime may be decided exclusively by procedure. The victim's right to choose between the commercial jurisdiction and the criminal jurisdiction in order to engage the trustee's patrimonial liability for the insufficiency of assets is not there for the mere reason that the company, as a victim of the

damage caused by tort and the associates, de lege lata, cannot bestow the claims for restoration to the bankruptcy judge.

The possibility to apprehend the commercial or repressive jurisdiction being profoundly attached to the notion of holder of the right to action cannot work as long as the very right to exercise action to cover for liabilities does not belong to the company, associates or shareholders.

3.3 The celerity principle of the insolvency procedure vs. the rule that "the crime holds back he civil" and the principle of reaching the judicial true

Without admitting the existence of a right to choose between the repressive jurisdiction and the trial performed by the bankruptcy judge, the issue of enforcing art. 19 from the Code of Criminal Procedure is not real.

A relatively new case law admits the thesis regarding the independence of these two procedures, stating that, in the event of the existence of a crime action, the collective character of the procedure established by law 85/2006 and the economic interest encircling the creditors would be compromised by the suspension of the action. Celerity cannot however compromise the chance to finding the judicial truth and, for this particular reason, as long as the celerity principle overshadows this prospect, it should be sacrificed.

3.4. The prosecutor's role – from the Commercial code to the Bankruptcy law

In the Romanian law, the possibility of the participation of prosecutor to the insolvency procedure belongs exclusively to the latter and it is part of the rules delineated by art. 45^3 form the Code of Civil Procedure. Law 85/2006 does not mention the obligation to communicate the opening resolution of the Public Minister and the prosecutor is not the titleholder of the action to cover for liabilities.

Maybe establishing the prosecutor's obligation to participate and draw conclusions inside the procedure would ensure and efficient defense of the public order, offering the premises for the fulfillment of plenary justice, inside which the private interest and the general ones would be

efficiently protecte. De lege ferenda, the compulsory participation of the prosecutor to the action to cover the liabilities would be a step forward.

Chapter III

The background condition for engaging the civil liability to cover the liabilities

1. The subversion of the company interest the promotion of the trustee's personal interest – criteria to identify the fraud in insolvency

1.1. The management errors and the fraud in insolvency

In the French law, the patrimonial sanction to bearing liabilities can be applied to any management error that lead to the debtor's bankruptcy according to provisions of art. 651-2 from the new French commercial law adopted through law 2005-845 from July 26th, entered into force by January 1st 2006.

Art. 138 from bankruptcy law punishes, in some of its provisions, the abuse of the executive, who had as a purpose the fulfillment of a personal interest at the expense of the company one, injuring through its conduct not only the company, but also the entire community of interests around it.

The bankruptcy judge is given the mission to check the reliability of the management documents towards the company interest and to identify the abuse which lead to bankruptcy, since the duty to cover for the liabilities can be assigned only to the trustees found guilty of revaluation of the company's assets for their personal purposes or which, through the management policies, did not take the company's interest into account, but protecting other interests.

Even though the relegation of the company interest and the illegitimate ascension of the personal interest of the trustee inside the company life are critical signs of disparity, these symptoms are not always relevant for bankruptcy.

The promotion of the trustee's personal interest marks a sign of the fraud in insolvency only when the disregard of the company interest was expressed by:

- the usage of the assets or credits of the legal person

- the continuation of an activity that inevitably lead to the cessation of cash flow.

In case of the actions stipulated in art. 138, letter d-g, the importance of the personal interest fades away from the fraud perspective, there being no importance whether the act was or not determined by the trustee's personal interest. The actions against the company interest committed by the trustee with a willingly or not, for personal reasons or not, that are not encompassed by art.138 do not count the coverage for the liabilities. Therefore, the elements that constitute the fraud physiognomy in bankruptcy are not flexible, the laws firmness in this area being inopportune. However, the mission to identify the fraud that lead to bankruptcy can and must be facilitated through the definition of the concept of personal interest and the notion of company interest, as well.

1.2. Does the company interest concur with the associates' interest or does match the business purpose?

We see the following variables: the creditors' interest and the community o interests surrounding the company are able to define the company interest inasmuch as the vicinity of insolvency changed the appearance of this notion, so that the creditors' interests become more influential whereas the company's interest – regarded as a group of shareholders – remain obscure.

In our view, the overly complicated nature of the mission to identify the members of the group with the greatest interests, at some point, and the practical intricacy to determine the vicinity of bankruptcy make the issue even more complicated.

Still, we acknowledge that the disregard of these variables is dangerous. Their usefulness is certain as long as the company interest is the only place to be related to the normal exercise of powers entrusted to the trustee, and the multiplication of the tools to delineate its area are not meant to enhance the precision of the operation.

1.3. The company interest model – a perfect guide to discover the fraud

The singular notion cannot generate juridical effects, and the convenience of the company interest concept becomes obvious in case of the occurrence of an abuse or a conflict inside the company entities. The vicious nature of the model is easily noticed, as long as the company interest idea becomes useful just when claiming and abuse and the abuse may be revealed by that which is opposed to the company interest. The more referential points for this concept, the higher the chances to fairly identify the smallest trace of abuse.

1.4. The action opposed to the company interest, the action alienated from the company's object and the abnormal management actions, potential delimitations

The action that is not related to the company objective and the abnormal management action are two landmarks according to which one could define the notion of action opposed to the company interest, whereas the nature of different notion has been recently admitted for the company interest.

The contiguous nation of the notion of an action unrelated to the company object and the abnormal management action cannot be denied, the idea from the doctrine that the notion of company interest is a cornerstone, also being a valid and standard concept through its content.

1.5. The fraud and the asset insufficiency inside the bankruptcy. Not any action that is opposed to the company interest that caused bankruptcy may also justify the liability to cover liabilities. The bankruptcy judge has to control its regularity and the opportunity of an act related to the company's interest only if the asset insufficiency for the entire coverage of liabilities was noticed.

Consequently, the existence sufficient assets prevents the fraud and its consequences within the insolvency procedure and the concepts of company interest, the trustee's personal interest lessen their significance.

2. The fraud physiognomy

2.1. The trustee's liability for the usage of the assets and credits belonging to the legal person in their personal interest or in another person's interest

Popular authors admit that the abuse should not be the basis of the civil liability of the trustee during the insolvency procedure.

If insolvency originates in not following the cash flow of the debtor and if the these of the restrictive nature of the presentation in article 138 is accepted, acknowledging that the special assets abuse cannot be committed through inaction, the fate of the trustee's liability for this illicit deed depends on a different liability action, that would be the competence of a common law commercial jurisdiction.

Oddly enough, this type of aggravated liability, which should occur in case of insolvency, becomes milder through the dissociation of the procedure and its estranging from the influential area of the bankruptcy judge. In such circumstances, the liability action tends to become a damaging question, definitely opposed to the celerity principle. Therefore the need of a stringent reformation, the need to abandon the restrictive nature of the enlisting and the substantiation of the liability on any management error committed intentionally of by fault if the latter entailed bankruptcy. A preliminary condition to engage liability is that the assets be a part of the company's property. It might be said that the abuse may also refer to the immobile assets or the company or non-company mobile assets, but also the rights that come along with these, including the right to claim. Even though the immobile assets may be the target of the abuse this is rarely happening in practice. The action that endanger the financial resources of the company and that jeopardize its patrimony may be defined by the notion of abuse of company credit. The company credit is described according to the company's assets, the nature of the business, involving all the resources that contribute to the well functioning of the company. In a wider sense, it also includes prerogatives such as the notoriety, and the fame enjoyed by the legal person.

The notion of disposition of property involves all the disposition acts for the assets that are a part of the company patrimony and which can affect its content.

The appreciation criteria of the excessive nature of the remuneration are:

- the trustee's activity;
- the financial situation of the company.

Even though the remuneration was at some point normal, the incident of some financial crises might make it excessive, determining the good-faith trustee to diminish it.

The personal financial interest and the legal personal interest can be distinguished just apparently. In reality the latter is diminished and, one way or another, it becomes a financial interest.

The trustee that was not aware that his act was opposed to the company interest is in bad-faith, unlike the trustee that committed this acts knowingly aware of their opposing company nature. In most of the cases, the bad faith comes down to the material abuse of the company assets.

The exposure of the assets to such risks nurtures the eventual value of the company, the trustee's option for risky actions towards the assets that should cover for its debts becomes tort as well as being a sign of abuse.

2.2 The poor service. The personal interest, the poor service and the causal relation between the cessation of cash flow and poor activity are indicators of this kind of liability

The actions that compromise the chances of an eventual reorganization are damnatory if their source is the trustee's personal interest and this is because a loyal and diligent trustee is expected to always cease poor service that would not cause the cessation of cash flow. He has to have the dexterity to differentiate between the passing crisis, related to slight liabilities and the other ones related to the importance of liabilities and the impossibility to stop them, as the continuation of activity in this case is damaging both for the creditors and the company that would be denied any chances to recover. The deduction of the onerous nature of the commercial mandate cannot be the indicator of the sheer presumption that "behind poor service" there is a hidden interest of the trustee, because the payments of any allowance should be proved. The occurrence of any financial difficulties makes the trustee diminish the amount of money he gets, that in another economic context would seem normal. If behind the furtherance of activities there is the trustee's interest to cash in his salary, even though the company is getting through financial crisis, or any other economic interest that is opposed to the collective interest of the company, the elements enlisted by art. 138 are accomplished.

2.3. The liability in case of fictional legal person

The fictional company can be presumed through the following indicators:

- the family relation between the major shareholder and the other holders of company titles, especially when the latter are underage and do not have any interest in the ongoing company business;
- the absence of any individual activity of the company, with it being an interposed legal person;
- the absolute control exercised by an associate on the company
- the absence of any board of directors
- the non-performance of any accounting;
- the cash flow just in favor of one of the associates.

2.4. The noncompliance of accounting. The fictive accounting, the disappearance of some relevant accounting documents and the absence of accounting whatsoever in accordance with law do not mean represent damaging activities, but they may favor bankruptcy through the concealing of some parts of it, through the delay of debt coverage as long as the delay entails supplementary interests or penalties.

We often see case law approaches according to which the infringement of the duty to have accounting evidence according to law generates further fault to the trustee, inasmuch as the incorrect accounting inevitably leads to the obscure administration of the patrimony, of its assets.

The judicial practice that does not attribute the lack of accounting this particular effect seems more stable and we appreciate it as being correct, starting from the fact that the liability to cover for liabilities is a subjective liability, only founded on the deliberate fault and not the presumed one.

2.5. Illicit ways concerning the patrimonial assets and liabilities

As in the asset abuse case, we consider that the trustee's option for risky actions towards the company's assets that is designed for payment, his purpose being to increase the eventual value of the company becomes tortuous within the coverage for liabilities, with it being a meaningful sign of the fraud contained by art. 138, e. The action consisting in the misappropriation of assets may be equally seen as a company asset abuse, and that is why the illicit contained in art. 138 a are meaningful in the case enlisted in art. 138, e. With a sole nuance, that the importance of the concept of personal interest fades away from the scope of the fraud mentioned in art. 138 e, and it becomes meaningless whether the act was or not opposed to the company interest or was determined by a personal interest of the trustee. The titleholders of the action to cover for liabilities that assign the trustee the deeds stipulated by art. 138 e, may support their claims on the meaningful clue that comes out of the documents susceptible of invalidation, according to art. 79 and 80 from the bankruptcy law.

2.6. Providing funds by ruinous means. The contrast between the financial expenses and the turnover may be an important clue to the fact that appealing to a credit might have been in itself a ruinous means. The same applies to the credit that is unfit to the financial needs and capabilities of a debtor, if the cessation of cash flow occurs as a consequence of an inappropriate credit. The credit adaptation should be related to the debtor's needs and ability to reimburse. Any credit must be adjusted through these methods. The credit may become a ruinous means if its amount is not in accordance with the needs and the capabilities of the debtor.

2.7. Preferential payments. There are four premises that allow the objectification of this kind of liability.

Firstly, the payment must be identified, secondly, the settlement of the debtor must be prior to the cash flow cessation and not last, the enforcement should be a priority for the recipient and harmful for the other creditors, and a causal relation between the occurrence of the bankruptcy and the preferential payment should be evident. Law 85/2006 does not establish the need to indicate the date of payment cessation through the disposition to open procedure, without interdicting this fact. Even though date of the cessation of payments was inserted in the

disposition to open procedure we think that the solution is not a ta boo and there should be a debate on this aspect.

3. The damage

The existence and the value of the asset insufficiency should be appreciated along with the decision delivery, through which the court decides on the action to cover for liabilities and would take into account the debts that occurred before the start of the procedure. The asset insufficiency should be decisive, even though parts of the assets have not been completely realized or parts of the liabilities completely individualized. Thus, the prosecution of a trustee may be justified by the acknowledgement of an insufficient asset, in spite of the contestation of its value, from the moment this insufficiency is sure and superior to the value of the reimbursements. The scope of the damage repair would be estimated in accordance with the liabilities extent, any other elements, such as the seriousness of the actions, the nature of the position held or the real value of the damage being of no importance.

4. The causal link

The causal link sheds a new light on the liability action established by art. 138 and following, from the bankruptcy law. The solution adopted by the Romanian law-maker, through which the content of article 138^1 meaning the phrase “contributed” was substituted by “caused”, seems to shrink the scope of the illicit conducts that are susceptible to entail the civil liability of the trustee and other entities within the procedure established by art. 138 and following from Law 85/2006. And this is because there may be cases in which the responsible persona that committed one or more action enlisted in art. 138,^1, will not be held liable through this special action, if there is no direct link between the act and the insufficiency of assets. Actually, it is not that the scope of the deeds to be liable for within insolvency diminished, but the effects of the fraud in insolvency were stopped.

The indulgence caused by the establishment of a causal link is not the same option the French law preferred.

Chapter IV

1. The titleholders of the right to action

Mainly, the action can be exercised by the trustee and the liquidator; in subsidiary it belongs to the assembly of creditors.

1.2. The guarantee of impartiality and the right to a fair law suit

Art. 11^1 letter g, final thesis stipulated that one of the attributes of the bankruptcy judge is the one to announce the prosecutor when he notices the signs of tort encapsulated by art 143-145 from law 85/2006.

Often times, these actions may cause the engagement of liability as in art. 138. The accomplishment of the duty contained in article 11^1 letter g final thesis may cause serious worries regarding the fact that the bankruptcy judge would prefer the solution to admit a claim to engage liability according to art. 138.

1.3 The creditors and their defense strategies

The creditor that feels threatened by such a decision from the assembly of the creditors will not be given active standing within the action established by art. 138. The tendency to appeal to the principle of repair in kind the damage through admitting the active standing cannot be denied, but should be overcome, inasmuch as it does not have any legal grounds. To admit the contrary would mean the bankruptcy judge explore the opportunity of the decision put forward by the assembly of creditors, which does not seem acceptable in our opinion.

Not even the interwar doctrine attributed the right to exercise such actions to the creditors, action that the bankruptcy judge refuses to promote, and the only convenient way would be the reimbursement solution. It has been conceded that admitting the opposite would mean to destroy the unanimity of perspective and management of bankruptcy.

1.4. The maintenance of the availability of the parts

The engagement of a patrimonial liability is governed by the availability of the entities. The bankruptcy law has its ways to defend public order. An example is the bankruptcy judge's obligation to announce the prosecutor when noticing the traces of crime.

In our opinion, the transaction is allowable, and the assigned procedural report being a private one. The law assigned active procedural legitimacy to the trustee and the liquidator for purposes that relate to their acknowledged prerogatives. Having the information on the creditor as well as the attribute of procedural entity, impartial and independent, the receiver or the liquidator is the first to evaluate the opportunity to take action and how to direct this kind of action. Having such a position we consider that he cannot trade in the action to cover for liability without the consent of the assembly of creditors. A supportive argument is the art. 138^6 from the procedural law, a fact that cannot mean the sheer authentication of the transaction, but its confirmation through a decision under appeal.

The court not only checks to some extent the convention between the parties but also confirms it.

The bankruptcy judge will analyze whether the transaction that is mean to settle the liability corresponds to the conditions of a contract. The null aspects will be sorted in court, incidentally, together with the conformation of the transaction.

2. The trustees that are passive inside the procedure within the action established by art. 138

Theoretically, the burden of the liability to cover for liabilities should fall on the statutory trustee's shoulders, his position being relevant not only for his activities, duties and competence, but also the character established by the memorandum or the decision of the deliberative body. The establishments referring to the fiduciary duties of the trustee, in most countries, do not differentiate between the positions of a member with executive or nonexecutive prerogatives. The liability works both for the trustees with executive positions and the ones that do not have such a position. The mere non execution of the advertisement formalities referring to the designation of the legal representative cannot mark an exemption. The trustees whose attributes ceased at the opening of the collective procedure are held responsible just if the events that lead to bankruptcy were absent when the prerogatives disappeared, the present law asking for the

evidence of a causal link between the assigned illicit act and the bankruptcy of the debtor. Whereas the identification of the legal trustee is easy to perform (through administrative and legal document), the existence of an executive trustee is hard to be proven.

The executive trustee position is not supposed, but proven by the analysis of conduct performed both on the legal trustee, and the one that supposedly lead the company. In the French law, the existence of an executive trustee is proven by his very actions. In this context, it was stated that the evasion of the silent do not allow the keeping of the executive trustee position, the inaction of a so-called shareholder, even a major one, regarding to the repeated severe infringements committed by the trustee are not enough to assign to this particular person the position of an executive trustee. However, from a subjective point of view, there might be an equivalent between evasion and action, both coming from bad faith, and we might get to an odd situation and a certain different liability, according to the way in which one accepts that the administration may objectify.

The reconfiguration of the perspective on the criteria that defines the actual administration may be a remedy and may manifest through the elimination of this inequity. A direct intervention inside the company management may take the shape of the failure to achieve a right claim, preventing the company form the cash needed for the economic growth. Such a behavior and its impact cannot be denied. Whereas in the given example the objective criteria of the administrative positive action is not enough, the subjective criterion of the author's attitude towards the inaction that he was assigned proves to be more flexible. It somehow becomes more natural to admit that the executive administration is in special cases inaction. In our opinion, there are juridical meanings both for action and inaction. We take into account the failure to preserve or manage the patrimony, whose urgent nature would have otherwise justified the avoidance of the occurrence of damages impossible to be repaired.

Even though this thesis would never be accepted, we can concede that once repeated, the positive management acts that can reshape the existence of executive administration is admissible as long as the extent of the liability of the "intruder" and the inaction that naturally develop upon the statutory trustee.

The activation of the passive solidarity between the statutory trustee and the actual one, the broadening of the liability of the one that interfered and for this inaction may enhance the chances to an efficient coverage of liabilities and satisfies, in out view, the equity principle. The frequency of such intruding acts is, therefore an important doctrinaire and case law cornerstone in the definition of the executive administration. Still, what would be the fate of the liability in case of a single act of intrusion with an overwhelming impact on the company's future?

An apparent answer is offered by out law in article 138^1 final thesis. The above mentioned law establishes that the liability can be extended on any person that caused insolvency through the actions contained by this article.

In a classical approach, the isolated intrusion act cannon determine an executive administration. The French doctrine and case law reject the admission of the existence of an executive administration because of a singular intrusion act. However, the Romanian legislation allows the engagement of liability within the collective procedure if the isolated act corresponds to the features mentioned in art. 138 and is accompanied by the rest of the premises that justify the action to cover for liabilities.

While offering exclusiveness to the continuity criteria, the future of the liability for an isolated intrusion act that does not correspond to the features contained in art. 138 seems hopelessly compromised inside the collective procedure. The only available way is to engage common law court for the liability action. If we accept that the enlisting in art. 138 is restrictive, the already mentioned remedy is the only correct one.

"The fruit" of the solidarity can be yielded not only before the jurisdiction that regulates the insolvency procedure, but also by engaging the common law jurisdiction; if the damaging act exceeds the scope of the action to cover liabilities or the damage is different from the asset insufficiency. In such a case, the directions that also govern the solidarity system are not different from those in case of in bonis companies.

De lege lata, the trustee's exemption from liability is not possible for the sheer fact that he was not present at the board of directors or he voted against it.

Therefore, the nonparticipation at the board of directors does not constitute an argument not to fulfill the legal duties, the absent trustee having the duty to inform himself about the entire activity of the executive; moreover, to be rightfully called a "bonus pater familia", we assume that nothing stands against his conviction that the adopted decision not be fulfilled, to try to limit the damage that would incur the company in the even of the accomplishment of such a decision.

In both of the situations – of absence or the opposite vote – according to art. 144 paragraph 5 from law 31/1990, the opposing trustee has to mention the reasons of his opposition to the decisions taken and to inform the censors in writing to avoid liability. Lat 85/2006 established a milder regime for the solidarity of the executive part that "opposed to the acts that caused insolvency" and made their opposition clear, being exempt from liability, even if they did inform the censors or the financial auditors after the consignment. Renouncing to this formality has its logics, if we take into account the devastating and sometimes irreversible consequences that insolvency has and that eventually nullify the eventual management. Even though inside the insolvency there is no independent liability of the trustee through the absence form the board of directors, as far as the act itself does not submit to the ones described by article 138 letter a – g, and it is no the result of an intentional fault, the effects caused by the solidarity rule must and can and must be cherished de lege lata inside the procedure, inasmuch as article 138 paragraph 4 establishes the solidarity rule, without any other nuance pointing at the nature of the act or the attitude of the one responsible for in terms of solidarity.

Justified or not, the law-maker's exigency towards the trustee that is held responsible together with the author, even though the former's fault is just the expression an unintentional fault, that does not fit the restrictive enumeration in art. 138 a-g.

Consequently, the case law that offers exemption to the systematic absence without taking into account this distinction is not critic free. The downstream liability of the trustees for the acts committed by the executive directors or other persons that were endowed with specific administration activities, are founded on the culpa in vigilando, and the Romanian law maker establishing a relative legal presumption of failure to accomplish the duty to survey the in order to ease the engagement of the trustees' liability, even though the vigilance duty is a resource duty. In case of insolvency, the downstream solidarity becomes possible if the occurrence of

insolvency is simultaneous with the non performance of the trustees that do not have executive attributes.

It looks as if the trustees with nonexecutive attributes may be liable for the coverage of the liability, in terms of solidarity, together with the subordinate guilty of the company's insolvency, if the duty to survey is proved not to have been performed.

Therefore, the solidarity of the nonexecutive trustees for the liabilities may be activated to identify the simple culpa vigilando, whereas the liability of the guilty one may function inside the procedure just after the proof of the existence of an intentional act enlisted in art. 138 are related to the debtor's insolvency.

In our opinion, the differentiated approach of the executive and nonexecutive trustees' liability in cae of insolvency would be explained through the fact that they are responsible from two points of view, both from culpa eligendo and from culpa viilando.

Conclusions

The liability aggravated regime for the trustee - expressed by the risk to entirely support the company duties – is strongly crossed by the inadmissibility of the engagement of liability in procedure when insolvency is a consequence of the management errors committed out of neglect or indiscretion.

A liability for such acts may manifest, de lege lata, just in front of the common law commercial court, but the dissemination is a hopeless legal solution, that should be rapidly amended, in our opinion.

We strongly believe that this new legal approach would not only be natural, synchronizing the regime of the duties that develop upon the trustees with the liability regime for their disregard, but it would also be fair, through the elimination of the facts that can cause critical unfairness.