

MANAGER'S LIABILITY WITHIN THE FRAMEWORK OF BANKRUPTCY PROCEEDINGS. THE IMPORTANCE OF PROPER LEGAL AND FINANCIAL ADVISING

Madrid, May 2008

The still recent Spanish Bankruptcy Law more fully examines the legal system regarding company managers' liability. This new liability system serves to supplement the system already provided for in the Public Limited Company and Limited Liability Company Laws, as well as the Criminal Code, within the framework of corporate crime.

In effect, one of the areas or sections comprising bankruptcy proceedings shall be the "classification" of such proceedings. Here, the Judge shall examine whether the company manager or managers were involved in any way in the company's bankruptcy situation. If the Judge considers that such is the case, the resulting consequences, as we shall see, constitute a serious threat to managers who have not performed their duties diligently. Below, we shall analyse the issue in further detail, clarifying the following points:

- § when the bankruptcy classification section is going to be created, which, as mentioned above, shall lead to the Judge's analysis of the managers' liability
- § which managers shall be affected by the liability system set forth under the Bankruptcy Law
- § when the bankruptcy proceeding shall be considered guilty
- § what the consequences will be for the managers if the bankruptcy is classified as guilty.

Before analysing each of these points, we should point out that the Judge may order the seizure of the manager's assets at any time during the bankruptcy proceedings if he considers that there is evidence pointing to the latter's liability in the insolvency and that the company's assets may not be sufficient to settle all its debts. Section 48 of the Bankruptcy Law sets forth such action and Commercial Courts have issued orders to this regard in numerous bankruptcy proceedings.

As regards, the first of the points mentioned above, we must clarify that the bankruptcy classification section is not always created, but rather, only in the following cases: firstly, whenever the bankruptcy proceedings lead to the winding up of the affected company. And, secondly, when the bankruptcy proceedings lead to an agreement with the creditors in which a partial acquittance of over a third of the amount owed or a grace period of over three years is established.

In the event that the bankruptcy classification section is employed, the threat of liability not only affects the company's current managers, but also:

- § managers appointed in the last two years,

- § so-called “de facto managers”. In this case, these are individuals who, despite not having been formally appointed as managers and there being no such record to this end in the Trade Registry, are in fact managing and administering the company in reality. In our experience, this situation is common at subsidiaries of foreign companies, in which the individual appointed as the manager acts according to instructions given by executive(s) of the parent company. Therefore, the Judge may assess the liability of these de facto executives or managers and pass sentence against them as stated below.

Within the classification section, the Judge may classify the company bankruptcy as accidental or guilty. The managers shall only be liable in the latter case. Hence, the bankruptcy will be charged as guilty, and managers shall consequently be held liable, in the following cases, mainly:

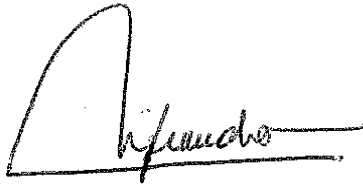
- § when the company substantially fails to comply with the obligation to keep accounting records, or relevant irregularities are committed in keeping such records,
- § when the documents submitted by the company within the bankruptcy proceedings framework contain serious inaccuracies,
- § when the company conceals or disposes of all or part of its assets to the detriment of its creditors,
- § when the company has performed actions intended to simulate a fictitious picture of its assets.

In other situations, the Bankruptcy Law provides for presumptions of bankruptcy guilt that do not admit proof to the contrary, such as:

- § when the company fails to fulfil the duty to file for bankruptcy,
- § when the company fails to fulfil its duty to collaborate with the Judge and the bankruptcy administration,
- § when the company has not prepared its financial statements or submitted them for audit, being required to do so, or if, after they are approved, it fails to deposit them at the Trade Registry for any of the last three periods. This presumption of guilt highlights the importance of depositing the financial statements at the Trade Registry, an obligation that companies often fail to comply with, in a bid to avoid publicising their economic situation.

The classification section concludes with a sentence that, as mentioned before, may declare the bankruptcy as accidental or guilty. If the bankruptcy is classified as guilty, the consequences for the managers may be quite serious, because the Judge may order them to pay the creditors in bankruptcy the amount they do not receive in the company winding-up. Likewise, they may be barred from performing managerial or representational duties for a period of 2 to 15 years. The Judge may even sentence them with the loss of any rights they may have had with regard to the bankrupt company, to return any assets obtained therefrom and to compensate for damages incurred.

Therefore, it is advisable for company managers to take the advice of competent legal and financial professionals in their daily decisions, thereby reducing the severe consequences that failure to fulfil their management and administration obligations would lead to.

A handwritten signature in black ink, appearing to read 'Mariano Jiménez', with a horizontal line underneath.

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