INSOLVENCY & RESTRUCTURING - AUSTRIA

Liability for payments after company has become insolvent

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Introduction

If a managing director of a company makes payments after a substantive insolvency, they may be liable for damages under Section 25(3)(2) of the Statute on Limited Liability Companies. This does not apply to payments that comply with the duty to exercise due care and diligence of a prudent and conscientious manager even after the occurrence of substantive insolvency. Such liability will arise if there is a reduction in the company's assets which are distributable as part of the insolvent's estate because the managing director filed for insolvency late and payments were made in the meantime. The company is the party entitled to such damages.

Occurrence of substantive insolvency

Whereas Section 25(3)(2) provides that the time at which a petition for insolvency must be filed is decisive, Section 84(3)(6) of the Stock Corporations Act considers the time at which insolvency or overindebtedness of the company occurs to be relevant. However, in consideration of the two statutory provisions, the courts have ruled that the managing director's liability arises as soon as substantive insolvency occurs and not only after the expiration of the 60-day period defined in Section 69(2) of the Insolvency Code.

Liability for reducing insolvent estate

Section 25(3)(2) provides for entitlement to damages for the deliberate delay of filing for insolvency. Even though payments made at a point where the company is on the verge of insolvency do not harm the company, any following reduction in the company's assets reduce the remaining creditors' chances of satisfaction (ie, the insolvency dividend). Accordingly, the prohibition of payments aims to preserve the distributable assets of a company that is on the verge of insolvency in the interest of all creditors and to prevent the preferred satisfaction of specific creditors to the disadvantage of the group of creditors as a whole.

Therefore, managing directors are liable for reducing the future estate, irrespective of whether the reduction in the estate is attributable to the settlement of claims that were established before or after the occurrence of substantive insolvency.

Scope of liability

The term 'payment' as defined in Section 25(3)(2) must be interpreted broadly. The decisive factor is whether a payment leads to a reduction in the insolvent's estate (ie, to a reduction in the assets). Accordingly, this includes not only cash payments, but also other forms of creditor satisfaction,

including:

- delivery of goods;
- furnishing additional collateral for existing liabilities; or
- creating a set-off situation.

In this context, the managing director need not personally make the payment. The decisive factor is that the managing director is accountable for the reduction in the insolvent's estate. Accordingly, a managing director is also liable if in connection with their supervisory duties they do not prevent inadmissible payments by employees or fail to revoke a direct debit authorisation.

No reduction in the insolvent's estate occurs if there are equivalent transactions requiring simultaneous performance. With such transactions there should be an exchange of assets that does not affect the estate, provided that the consideration is customary in the market. Satisfying claims for separation and recovery or claims for preferential treatment of parties entitled to a set-off is also admissible up to the value of the collateral or their counterclaim.

Creating new liabilities does not constitute payment under Section 25(3)(2). However, the securing of such liabilities is inadmissible if the company receives no equivalent consideration.

With respect to payment transactions via bank accounts, the following must be observed:

- Money transfers from the debtor's account which is kept as a debit account are normally admissible if the bank holds no collateral covering such payments. In contrast, money transfers to a debtor's account which is kept as a debit account are normally inadmissible, because they reduce the debit balance, which leads to a reduction in the balance sheet total, which is problematic from the creditor's perspective.
- On the other hand, payments by which the immediate breakdown of the company is prevented or which are urgently required in the interest of the insolvent's future estate are lawful, including payments for:
    - rent;
    - electricity; and
    - fire insurance.

In these cases, the managing director is not liable even if the company receives consideration which is not equivalent. According to prevailing opinion, the managing director may only rely on this privilege during the 60-day period defined in Section 69(2) of the Insolvency Act, during which the managing director may endeavour to bring about a reorganisation of the company.

Amount of damage

Damage arising from inadmissible payments by the managing director after substantive insolvency occurs if there is a reduction in the company's assets which are distributable as part of the insolvent's estate because the managing director filed for insolvency late and payments were made in the meantime. According to court decisions, damages equal to the amount of the prohibited payments will be presumed but this is subject to rebuttal. This means that the managing director may provide evidence in rebuttal to the effect that the payment required to reach the fictitious dividend in case of timely filing for insolvency (ie, the damage caused to the group of creditors as a whole is lower than the amount claimed in court). The damage caused to all creditors equals the amount by which the insolvent's estate must be increased to bring about the dividend that could have been achieved but for the delay in filing for insolvency.

However, the claims for damages as defined in Section 25(3)(2) of the Statute on Limited Liability Companies and Section 84(3)(6) of the Stock Corporation Act compete with the company's claims for avoidance as defined in Section 27 of the Insolvency Act. This means that in the case of a successful avoidance of the claim regarding insolvency, the managing director will be released from liability. In addition, the managing director has a right to refuse payment if that payment to the payee can still be avoided in court.

Moreover, the damage suffered by the company is reduced by the dividend which the creditor who

was unlawfully satisfied by the managing director would have received.

Comment

Managing a company in a crisis situation requires special diligence and care. Managing directors and executive board members must regularly check whether substantive insolvency has occurred. If substantive insolvency occurs, they are liable for any payments that reduce the insolvent estate. In order to avoid unpleasant surprises later on, where possible the admissibility of envisaged future payments should be checked in advance. In addition, the structuring of the company's payment transactions via bank accounts should be given careful attention.

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