

## **THE RESPONSIBILITY OF THE MEMBERS OF THE MANAGEMENT BOARD UNDER THE REGULATION OF THE ART. 299 OF POLISH CODE OF COMMERCIAL COMPANIES**

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### **Abstract:**

THE AUTHOR HAS NOT DULY SUBMITTED ANY ABSTRACT.

### **Key words:**

Article 299 Polish Commercial Code of Companies.

*Art. 299 of Polish Code of Commercial Companies:*

*§ 1. If the execution against the company proves ineffective, members of the management board shall be jointly and severally liable for the company liabilities.*

*§ 2. A member of the management board may be discharged from liability referred to in § 1 above if he proves that the petition in bankruptcy was timely filed or arrangement proceedings were initiated, or that a failure to file the petition in bankruptcy or a failure to initiate arrangement proceedings occurred through no fault on his part, or that despite the failure to file the petition or initiate arrangement proceedings the creditor suffered no damage.*

*§ 3. The provision of §§ 1 and 2 above shall not prejudice the provisions whereby further liability of members of the management board is envisaged.*

The institution created in art. 299 of the Polish Code of Commercial Companies is an original Polish achievement. The law was firstly established in art. 128 of the decree – law announced by the President of the Republic of Poland, dated Oct. 27th 1933. It was repeated in art. 298 of Polish Commercial Code and later in art. 299 of Polish Code of Commercial Companies.

The institution was established as a reaction to the high level of distrust to companies. It was not rare for the of the company to simply disappear from market without completing formal liquidation procedure the company or paying it's debts. Therefore, we may assume that establishing the rule was the clear approach of rule instrumentalism. In other words, the policymaker established the legal rule because it was a good instrumental to the achievement of his goal, which was to obtain law and order.<sup>1</sup>

The rule was set as a type of social consensus, which was aimed to avoid the legal risk of the potential for loss arising from events such as bankruptcy and potential legal proceedings. The art. 299 of Polish Code of Commercial Code clearly states that in case of insolvency of the

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<sup>1</sup>To read more about the economic analysis of law see: <http://plato.stanford.edu/entries/legal-econanalysis/#TwoStrThoWitEcoAnaLaw>, first published Mon Nov 26, 2001; substantive revision Tue May 16, 2006.

Limited liability company, if the execution against the company proves ineffective, members of the management board shall be jointly and severally liable for the company liabilities.

For many years there had been a quarrel in Polish doctrine and jurisdiction upon the legal nature of the responsibility based on art. 299 of Polish Code of Commercial Code. It was widely discussed whether the members of the management board are responsible for their own debt or whether they are responsible for the debt of the limited liability company.

Nevertheless, more important issues were discussed, i.e. whether the responsibility of the management board is based upon the rule responsibility of risk or upon the rule of fault. Most of the doctrine view the responsibility as the type of legal responsibility based upon the rule of risk, which equaled the position of the members of the management board with the position of joint yet subsidiary guarantee<sup>2</sup>, who is not responsible for his own debt<sup>3</sup>. Yet in most sentences of the courts, including the sentences of the Highest Court, the nature of the of legal responsibility established in the art. 299 of Polish Code of Commercial Companies was based upon the rule of fault.<sup>4</sup>

Eventually, the Highest Court in the resolution from Nov. 7th 2008<sup>5</sup> gave a statement that the nature of the responsibility members of the management board is based upon the rule of fault.

It should be underlined that by the end of these the views in opinion about the legal nature of the responsibility mentioned above seemed not to be particularly essential due to

Despite of the definition of the nature of responsibility established in art. 299 of Polish Code of Commercial Companies, it is presumed that the member of the management board is guilty of the damage he cause as the result of the execution against the company being ineffective. The other presumptions are: the presumption of unlawfulness of the behavior of the member of the management board (which equals strictly disobeying the rule of being good manager) and the presumption of causal nexus between the lack of proper behavior of the member of the management board and the damage. As the result, the only circumstance that has to be proved by the claimant is the damage itself and the fact that it was not executed from the Limited Liability Company itself. It should be noted that it is irrelevant whether the damage is defined as abasement of the Limited Liability Company solvency or it the damage simply equals the debt that wasn't executed for the Limited Liability Company. The enforceable title against the Limited Liability Company is sufficient evidence to prove the damage. Furthermore, the conditions under that a member of the management board may be

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<sup>2</sup> E.g.: Śmieja A., *The nature of legal responsibility established in art. 299 of Polish Code of Commercial Companies after five years of binding force*, Wrocław 2008.

<sup>3</sup> *About the nature of responsibility of guarantee see also: Tracz G., Guaranty agreement with the regard upon bank guaranty agreement*, Kraków 1998.

<sup>4</sup> *See The Highest Court resolutions: No. III CZP/162/92 dated Jan. 19<sup>th</sup> 1993 published OSNCP No. 6 position 103, No. III CZP 116/93 dated Aug. 9<sup>th</sup> 1993 published OSNC 1994 No. 2 position 35, No. II UZP 15/93 dated Sep. 15<sup>th</sup> 1993 published OSNC 1994 No. 3 position 48 and the statement of the Highest Court dated Apr. 29<sup>th</sup> 1998. No. I CKN 654/97, published OSP 1999, NO. 1 position 6.*

<sup>5</sup> *The resolution was published under the No. III CZP 72/08, published in The Highest Court Statements and Resolutions No. 2/2009,*

discharged from liability are strictly credited in art. 299 § 2 of Polish Code of Commercial Companies.

Therefore the reader can determine that the regulation established in art. 299 of Polish Code of Commercial Companies protects the creditors from the legal risk, but it doesn't protect the management of the board and as the result the whole financial system from the typical systemic risk known as "Type 2 risk". R. McCormick defines this kind of risk as the risk of technical defects in the manner in which a transaction is carried out, resulting in loss, for those who put money at risk in this transaction.<sup>6</sup>

The Polish law hasn't established the optimization techniques in order to define unlawful behavior of the members of the management board except for "the rule of being a good merchant".<sup>7</sup> It can be said that according to Shavell's risk allocation model, the law regulations, including the art. 299 of Polish Code of Commercial Companies gives the courts the unwritten and unspoken presumption that the management board operates only at the level of the contributed accuracy but it avoids to regard the intensity of the activity of the management board.<sup>8</sup>

Due to lack of the proper standards of unlawfulness it should be noted that in practice it is unusual for to the members of the management board to file the petition in bankruptcy even due to lack of realization that the board of directors is liable towards the company as a separate legal person, not to the shareholder's meeting. In other words, in the harsh reality it is better for the members of the management board not to operate at all than take a risk filling the petition in bankruptcy, whereas the management of legal risk is essential in the era of economical crisis.

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<sup>6</sup> *To read more about the risk see: McCormick R., Legal risk in financial markets, Oxford University Press 2006*

<sup>7</sup> *Read: the sentence of the Highest Court No. V CSK 128/05 was published in Transformations of Private Law, No. 2/2006, ISSN 1641-1609; see also: Sottysiński, Szajkowski, Szwaja, Commentary to art. 291 of Commercial Cod ,C.H. Beck Press, Warszawa 1994.*

<sup>8</sup> *Shavell S., Economic Analysis of Accident Law, Harvard University Press 1987 Edition,*