**7th Lesson**

1. **Some Notes About Bankruptcy/Insolvency**

**4.1Bankruptcy/Insolvency concept**

There is a situation of bankruptcy/insolvency when debtors find themselves unable to fulfill most of its due obligations. In the case of a legal person, if no individual person answers for their debts, unlimited, will also be considered insolvent when its liabilities are clearly higher than its assets.

The bankruptcy/insolvency proceedings runs on a court of law and aims to satisfy, by the most efficient way, creditors' rights. This satisfaction can be reached in the manner provided in an insolvency plan, which will be based on the recovery of the debtor one the one hand or, on the other hand, by the liquidation of its assets and the distribution of its product by the creditors.

**4.2 The duty to apply for bankruptcy/insolvency**

The legal persons are obliged to present themselves to bankruptcy/insolvency in the thirty days that follow to the realization that they are in such a situation, that is, when they find themselves unable to fulfill their due obligations. The initiative belongs to the Administration Body.

In what concerns to the violation of the duty to apply for bankruptcy/insolvency can lead to the qualification of the bankruptcy/insolvency as culpable.

In addition to the debtor, may still require the declaration of insolvency, any creditor, whatever the nature of his claim, provided that there is one of the following facts:

1-Generalized suspension of due obligations payment;

2-Default of one or more obligations which, by their amount or the circumstances, reveal the impossibility of the debtor promptly satisfy them;

3-The escape of company holder of the company managers/directors;

4-Dissipation, abandonment, quick or ruinous liquidation of assets;

5-Insufficience of attachable assets for credit payment verified on a judgment in enforcement proceedings brought against the debtor;

6-Breach of obligations in insolvency plan;

7-Failure in the last six months, of the accomplishment of any of the following debts:

i) Tax;

ii) Contributions and deductions for social security;

iii) Debts towards workers of the company;

iv) Failure to pay any rentals value;

8. Superiority of liabilities over the assets according to the last approved balance sheet, or delay of more than nine months in approving the accounts.

**4.3 Bankruptcy/insolvency declaration effects**

After the insolvency declaration by the judge, the debtor loses all the powers over his goods and that goods will be arrested in order to integrate the insolvency estate (whole property of the debtor). The bodies of the debtor lose their management powers and those are assigned as long as the administration of the insolvency estate to the Insolvency Agent.

**4.4 Culpable bankruptcy/insolvency**

Insolvency can be culpable or fortuitous

It is culpable if the situation has been created or exacerbated due to a gross negligence of the debtor or its management, in the three years preceding the insolvency proceedings beginning, and fortuitous when this has not been originated this way.

There is an irrefutable presumption of culpability (not refutable by proof) when the debtor is a legal person and their managers/directors performed certain acts, especially when they have destroyed, damaged, hidden or made disappear all or part of debtor's assets; when they have disposed of the debtor's assets for personal benefit or third parties benefit; when they have created or exacerbated artificially liabilities or losses or reduced profits, causing, for example, the celebration of ruinous agreements on their own benefit or on the benefit of the people with they are dealing.

Culpability can be severe if the directors of the debtor had not applied for insolvency or when they didn´t make the annual accounts.

On the sentence that qualifies the insolvency as culpable the judge may:

-Identify culpable people (managers or directors), establishing, where appropriate, the respective level of culpability;

-Decree the inhibition of those people to manage assets for a period of 2 to 10 years;

-Declare those people forbidden to exercise the trade for a period of 2 to 10 years;

-Determine the loss of any claims of those people against the insolvency estate.

-Condemn them to pay a compensation to the creditors of the debtor.

**4.5 The role of the bankruptcy/insolvency Administrator**

The insolvency Administrator is appointed by the judge.

It is therefore up to the Administrator prepare the payment of the bankrupt's debts by promoting the sale of goods that integrate the insolvency estate; provide the continued operation of the insolvent company, avoiding as much as possible to the worsening of the economic situation.

Many people, seeing that their economic situation is deteriorating, begin to dissipate their assets. In order to provide this situation, the Law determines the termination possibility of this acts. So, they can be solved/terminated by the insolvency Administrator acts that can harm the insolvency estate, acts with the intention of diminish, frustrate, obstruct, endanger or delay the satisfaction of creditors, practiced within the two years preceding the date of insolvency proceedings.

**4.6 Special process of revitalization**

The special process of revitalization aims to allow the debtor that is in an economically difficult situation or near insolvency, but it is still likely to be recovered, to negotiate with creditors with a view to an agreement that leads to the revitalization of that debtor.

Debtors are in an economically difficult situation when they are facing serious difficulties to accomplish its obligations on time.

The process begins with the expression of will by written declaration, by the debtor and at least one of his creditors, declaring that they will negotiate the revitalization of the debtor, by a recovery plan. The debtor and all creditors who wish to participate in the negotiations must sign the declaration.

If the recovery plan is unanimously approved, must be signed by all (debtor and creditors) and sent to the approval or disapproval by the judge. If there is unanimous consent, the plan is submitted to the court, considering approved if voted favorably by creditors whose claims represent at least one third of the total debts.

The process may end, or because there was no agreement, or because the time to conclude negotiations has finished. In this case, if the debtor is not insolvent, cease all the effects of the special process of revitalization.

However, if the debtor is already insolvent, the end of the special process of revitalization involves the declaration of insolvency of the debtor declared within 3 working days counting from the court notification that the negotiation was finished.

.

**Case studies**

**On January of 2001, was incorporated the company "X, PLC". The share capital is 50.000 euros divided by shares of 1 euro each. "O" is the only director. The last balance sheet approved is the one of 2012 and it reveal liabilities of 200.000 euros. In February of 2014 the company suspended the accomplishment of all due obligations, namely to suppliers and workers.**

**a) Do you consider "X, PLC", in a situation of insolvency?**

The company is considered insolvent when its liability is clearly higher than its assets so we can assume that the company is insolvent. However, we don´t know the value of the asset and if it is superior than liabilities the company is not in an insolvency situation.

One the other hand, any creditor can require the declaration of insolvency because of the generalized suspension of due obligations payment and because of the delay of more than nine months in approving the accounts.

**b) If the company realizes that is in an insolvency situation what are the duties of the director “O”?**

The legal persons are obliged to present themselves to bankruptcy/insolvency in the thirty days that follow to the realization that they are in such a situation, that is, when they find themselves unable to fulfill their due obligations. The initiative belongs to the Administration Body in this case to “O”.

In what concerns to the violation of the duty to apply for bankruptcy/insolvency can lead to the qualification of the bankruptcy/insolvency as culpable.

**c) If the insolvency is qualified as culpable what could be the consequences for “O”?**

On the sentence that qualifies the insolvency as culpable the judge may:

-Identify culpable people (managers or directors), establishing, where appropriate, the respective level of culpability;

-Decree the inhibition of those people to manage assets for a period of 2 to 10 years;

-Declare those people forbidden to exercise the trade for a period of 2 to 10 years;

-Determine the loss of any claims of those people against the insolvency estate.

-Condemn them to pay a compensation to the creditors of the debtor.

Culpability can be severe if the director had not applied for insolvency or when the company didn´t make the annual accounts.

**d) Could "X, PLC" have used any preventive measure in order to avoid the declaration of insolvency?**

Yes. By the special process of revitalization that aims to allow the debtor that is in an economically difficult situation or near insolvency, but it is still likely to be recovered, to negotiate with creditors with a view to an agreement that leads to the revitalization of that debtor.

Debtors are in an economically difficult situation when they are facing serious difficulties to accomplish its obligations on time.

1. **Imagine that "X, PLC", is declared insolvent on August of 2014 and 2 days earlier, "O", sold two cars of the company and three computers bellow the market value. Can anything be done?**

The sales can be solved/terminated by the insolvency Administrator. Because they are acts that harm the insolvency estate, acts with the intention of diminish, frustrate, obstruct, endanger or delay the satisfaction of creditors, practiced within the two years preceding the date of insolvency proceedings.