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Liability of newly appointed directors

Madrid, May 2022

The Madrid Court of Appeal (MCA) has rendered a judgment[1] on the scope of the liability of newly appointed directors for the company's debts incurred after an event of compulsory dissolution (typically, a net equity drop below fifty per cent of the share capital).

According to article 367 of the Spanish Companies Act (SCA), directors are jointly and severally liable for the company's debts incurred after an event of compulsory dissolution if they fail to call a general shareholders' meeting (GSM) to address the situation within two months from the date when they knew or should have known about the event[2].

The case adjudicated by the MCA is as follows. A company (Jupiter) became debtor to another company (Orion) when the former had already incurred in an event of compulsory dissolution. Sometime after, Jupiter replaced its director by a new one, neither of whom ever called a GSM to dissolve the company or remedy its undercapitalisation.

Orion sued Jupiter's new director before a Madrid commercial court, that found her jointly and severally liable for Jupiter's debt to Orion, as the debt arose after the occurrence of the event of compulsory dissolution and she had not taken the action required by the law, namely calling a GSM to deal with the situation.

Jupiter's director challenged the commercial court's judgment and the MCA reversed it on the grounds that, as Jupiter's debt arose before the new director was appointed, she had no liability for that debt. The MCA noted that:

(i) Directors appointed by a company in a situation of compulsory dissolution are not obliged to call a GSM immediately, but within two months from the date they knew or should have known about that situation, following the acceptance of their appointment.

(ii) Directors that do not comply with the above obligation will be liable for the company's debts incurred after the acceptance of their appointment, but not for those incurred before.

The second rule was established by the Supreme Court (SC) in a relatively recent judgment[3], which the appeal court follows in its judgment after pointing out, however, that some scholars have criticised this view for being laxer than the actual tenor of article 367 SCA, among other reasons.

This criticism makes it advisable that directors do not rely much on this SC benign interpretation but instead carefully consider the situation of the company before accepting their appointment and immediately react to redress the situation or at least take the steps required by the law.

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[1] Judgment 8/2022 dated 14 January 2022.

[2] As regards compulsory dissolution due to a net equity drop below fifty per cent of the share capital, we note that, pursuant to law 3/2020 of 18 September 2020 (measures to deal with COVID-19 in the judiciary), (a) losses suffered in financial years 2020 and 2021 are not to be considered and (b) losses suffered in financial year 2022 will only trigger the directors' obligation to call a GSM within two months from the year end.

[3] Judgment 601/2019 dated 8 November 2019.