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LEONID TOLSTOV

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Faculty of Law, University of Tartu, Estonia

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Supervisor: Assoc. Prof. dr iur Janno Lahe (University of Tartu)

Opponent: Prof. dr hab. Fryderyk Zoll (Jagiellonian University in Krakow)

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LIST OF ORIGINAL PUBLICATIONS

This dissertation is based on the following publications:

1. "Limitation of Personal Tort Liability of a Member of the Management Board of a Company – Perspective of Estonia", European Business Law Review, Vol. 24, Issue 2 (2013) 243–259.
2. "Personal Liability of a Director in the Insolvency of a Company", International Insolvency Law Review, Vol. 4, Issue 3 (2013) 268–284.
3. "Personal Liability of a Director to Creditors in Case of Thin Capitalisation of a Company", Juridica International, Vol. 21 (2014) 168–175.
4. "The Company Director's Liability for Untrue Statements", Baltic Journal of Law and Politics, Vol. 7, Issue 1 (2014) 70–96.

Im Kampfe sollst du dein Recht finden.
Rudolf von Ihering

ANALYTICAL COMPENDIUM TO A CUMULATIVE DISSERTATION

1. INTRODUCTION

In a perfect world, all parties participating in economic activities would perform their duties as required and the issue of liability would not come into question at all. However, the reality is far from perfection and many parties often come across situations where an obligated person fails to perform duties at all, performs them only partially or does not perform the duties in due time. Therefore, the question of liability in economic circulation is of central importance. In the case of a legal person, the possible liability of a member of its directing body comes into question in addition to the liability of that legal person. This dissertation covers the tort liability of the director of a company to the creditors of the company.

By referring to 'company', the author refers to limited liability capital companies, primarily private limited companies and public limited companies, which are the most common types of companies.[1]

The director is the legal representative of a company (irrespective of whether his/her right of representation is based on sole or joint representation) who runs the company and organises its everyday economic activities.[2] The director directly influences the profit or loss of the company with his/her management decisions, and the protection of investments made by third persons and performance of concluded contracts directly or indirectly depends on the activities of the director.

As a rule, the director is liable to the company only in an internal relationship. If a person is elected as director, a legal relationship similar to the authorisation agreement is deemed to be established with the company. However, in the case of an external relationship, generally only the company is liable to the creditors and, as a rule, the creditors cannot file claims directly against the

[1] In Estonian Commercial Code (Est. *äriseadustik*, hereinafter **CC**) (State Gazette (*Riigi Teataja* in Estonian) I, 1995, 26/28, 355) private limited companies have been regulated in sections 135–220 and public limited companies in sections 221–383. Most important Estonian legislation is available in English on https://www.riigiteataja.ee/en/

[2] Section 34 of Estonian General Part of the Civil Code Act (Est. *tsiviilseadustiku üldosa seadus*, hereinafter **GPCCA**). State Gazette I 2002, 35, 216. Section 180 of the CC.

director. Nevertheless, in some exceptional cases, tort liability of the director to company's creditors is possible.[3]

The dissertation consists of the current compendium, which, in turn, is based on the author's four publications:

- "Limitation of Personal Tort Liability of a Member of the Management Board of a Company – Perspective of Estonia".[4] The article has two authors: Leonid Tolstov and Janno Lahe. Leonid Tolstov worked through the majority of source materials on which the article is based and composed the main part of the text.
- "Personal Liability of a Director[5] in the Insolvency of a Company".[6]
- "Personal Liability of a Director to Creditors in Case of Thin Capitalisation of a Company".[7]
- "The Company Director's Liability for Untrue Statements".[8] The article has two authors: Leonid Tolstov and Janno Lahe. Leonid Tolstov worked through the majority of source materials on which the article is based, put in place the structure of the article and composed the main part of the text.

The above articles deal with analysing the main situations in which creditors may have direct claims against the director for compensation for damage.

Creditors' claims against the director may arise when the director has breached any protection provision provided by law for the protection of creditors. One such provision stipulates director's obligation to submit the bankruptcy petition of an insolvent company.[9] An analysis of this issue has been given in the article "Limitation of Personal Tort Liability of a Member of the

[3] In Estonia general tort liability is regulated in sections 1043–1055 of the Estonian Law of Obligations Act (Est. *võlaõigusseadus*, hereinafter **LOA**). State Gazette I 2001, 81, 487.
[4] European Business Law Review (Vol. 24, Issue 2, 2013) 243–259.
[5] The articles were written at different times and the author has in the meantime changed the terminology used in the English translations. Estonian *juhatuse liige* is translated in the English version of Estonian Commercial Code as 'the member of the management board' – this term has also been used in the translation of the first article written by the author. However, in English legal literature (not related to Estonia) mainly the term 'director' is used when referring to the position which corresponds to the position of the member of the management board. Since the term 'director' is more common to the readership of the articles, the author has decided to use that term throughout the following articles to assure better comprehensibility. Therefore, even though the first article and the following articles use different terms to refer to 'director', the object of research is still the liability of the same person.
[6] International Insolvency Law Review (Vol. 4, Issue 3, 2013) 268–284.
[7] Juridica International (Vol 21, 2014) 168–175.
[8] Baltic Journal of Law and Politics (Vol 7, Issue 1, 2014) 70–96.
[9] In Estonia, according to section 180 (5^1) of the CC the director of a limited liability company is obligated to promptly, but not later than within 20 days after the date on which the company became permanently insolvent, submit the bankruptcy petition to a court. Corresponding obligation of the director of a public limited company derives from section 306 (3^1) of the CC.

Management Board of a Company – Perspective of Estonia". A more thorough analysis has been presented in the article "Personal Liability of a Director in the Insolvency of a Company".

The author has also studied whether the director's obligation to call for a general meeting in the case of thin capitalisation of the company, could also be a protection provision on which the director's tort liability is based.[10] This issue has been analysed in the article "Personal Liability of a Director to Creditors in Case of Thin Capitalisation of a Company".

Additionally, the author has analysed the liability of the director for disclosure of false information. Those issues have been covered in the article "The Company Director's Liability for Untrue Statements".

[10] For the purposes of this dissertation, thin capitalisation is a situation when the net assets (total assets minus total obligations shown under liabilities on a balance sheet) of the company are less than the minimum amount provided by law. In Estonia the net assets may not fall below one-half of the registered share capital or below minimum amount of the share capital provided by law (section 171 (2) 1) of the CC for private limited companies; section 292 (1) 1) of the CC for public limited companies).

2. POSING AND DEFINING THE RESEARCH PROBLEM

2.1. Posing the Research Problem

During the writing of this dissertation from 2011 to 2014, Europe has constantly been either in clear financial crisis or at least in danger of a crisis. Hence the topics concerning protection of creditors and encouragement of the spirit of entrepreneurship have been especially relevant. Quintessentially, these two topics are controversial – encouragement of the spirit of entrepreneurship presumes, among other things, that entrepreneurs are induced to take larger business risks while larger business risks may often damage the interests of creditors to a greater extent. Therefore, it is important to consider with every solution the interest of creditors to maintain their financial investment on the one hand, and on the other hand, the interest of the director who is using that investment in the business activity to be protected from the attacks of creditors in case s(he) should economically fail.

Pursuant to section 31 (5) of Estonian GPCCA, the activities of a body of a legal person (board of directors) are deemed to be the activities of the legal person. Hence the company can be held liable for the director's activity as for its own breach.[11] Thus, one drastic solution that could be offered is that the directors will never be held personally liable on tortious grounds and only the company will always bear liability. However, acting in someone else's name does not exclude tort liability of the representative, which is why the other extreme would be to always hold the director liable for damage caused to a third person, irrespective of whether the company is held liable or not. Both solutions have their own risks – the first solution would indeed encourage the director to take business risks, but it might give rise to the temptation to abuse the company as a corporate shell; in the case of the second solution, however, the director would be exposed to a possible array of claims and that might make the director indecisive since (s)he will not have the nerve to take any business risks. Based on the above, the **objective** of this dissertation is to determine the reasonable boundaries of the director's tort liability that, one the one hand, would protect the legitimate interests of creditors and, on the other hand, would limit the liability of the director in such a way that the director's spirit of entrepreneurship would not be hindered.

In order to achieve the objective of the work, the author will analyse the following **research questions**:

- Is it grounded to simplify the burden of proof of old creditors upon enforcement of quota loss claims against a director who has breachd the duty to file a bankruptcy petition?

[11] Paul Varul, Irene Kull et al, *Tsiviilseadustiku üldosa seadus, Kommenteeritud väljaanne* [General Part of the Civil Code Act, Commented Edition] (Tallinn, Juura 2010) 110–111.

- Should the protection purpose of the duty to file the bankruptcy petition also be the compensation for new creditors' reliance loss in addition to the compensation for old creditors' quota loss?
- Is the director's tort liability to creditors grounded when the director has failed to act in the situation of thin capitalisation of the company, and if so, then on what conditions?
- Is the director's tort liability to creditors grounded when the director has caused damage by intentionally disclosing untrue statements, and if so, then on what conditions?
- Is the director's direct liability to company's creditors grounded for negligent misrepresentation, and if so, then on what conditions?

Posing the research questions the author has kept in mind primarily Estonian law. However, the statements set forth by the author are in principle universal and should be considered in all countries under comparison.

2.2. Defining the Topic

2.2.1. The Director of the Company as the Subject Obligated to Compensate for Damage

The author has primarily analysed the liability of directors of private limited companies (in Estonian *osaühing*) and public limited companies (in Estonian *aktsiaselts*) as those are the most widespread forms of companies.[12] Companies corresponding to private limited companies and public limited companies exist in all countries studied within the framework of this dissertation: *Gesellschaft mit bergenzter Haftung* (GmbH) and *Aktiengesellschaft* (AG) in Germany, Private Limited Company (Plc) and Public Limited Company (Ltd) in England and *Sociedad de Responsabilidad Limitada* (Srl) and *Sociedad Anónima* (SA) in Spain. Liability of the director of the private limited company and the public limited company is quintessentially very similar; therefore, for better readability, this dissertation mainly talks about the liability of the director of the private limited company while presuming that the liability of the director of the public limited company follows the same pattern. Other forms of associations have not been covered in the dissertation primarily due to their little practical meaning. Since other forms of associations are rare in practice, the number of litigations related to them is small. However, it must be noted that quintessentially there can only be subtle differences in tort liability of directors of other forms of associations.[13]

[12] As at 1 January 2014, ca 93% of the 145,971 companies registered in Estonia were private limited companies. Private limited companies were followed by public limited companies by ca 2.6%. Statistics available at http://www2.rik.ee/rikstatfailid/failid/tabel.php?url=14_01tg.htm, (last accessed on 1.2.2014).

[13] There is, however, a fundamental difference in the liability of partners trusted to manage general partnerships and limited partnerships since, pursuant to section 101 (2) of the CC,

Pursuant to section 180 (1) of the CC, the board of directors is a directing body of the private limited company which represents and manages the private limited company.[14] When a person is elected as director, exchange of an offer and acceptance takes place as a result of which a contract, irrespective of its form, is deemed to have been concluded between the company and the director. Out of the main types of contracts established by the LOA, it corresponds to the regulation of authorisation agreements (section 619 ff of the LOA) the most.[15]

In the current dissertation, the author has only studied the liability of the *de iure* director. A person can be deemed to be a *de iure* director if his/her election as director is valid and s(he) has valid powers. However, acting in place or in parallel with the *de iure* director, there can also be a *de facto* director who does not have the powers of the director, but who, in legal transactions performs duties of the director.

A person can prove to be a *de facto* director because s(he) has been negligent and has forgotten that his/her term of authority has expired.[16] However, taking on the position of the *de facto* director may also be a conscious choice, especially if the *de facto* director acts secretly in the background (e.g., the company's actual manager who has appointed his stay-at-home wife director).[17] As it have been pointed out in legal literature the main criterion on the basis of which a person can be deemed to be the *de facto* director is permanent and independent performance of the functions of the director.[18] This usually takes place when the company does not have directors with valid authority, but someone is still performing the duties of the director in practice. Nevertheless, it is also possible to run a company *de facto* in parallel with the directors appointed to office if those directors are passive in their role or follow the orders of the *de facto* manager without intervention. However, activities of members of the supervisory board or shareholders who have control over the board of directors and who as the superior body give orders that the board of directors is obligated to follow cannot be considered as the activities of the *de*

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partners will be solidarily liable for the obligations of the general partnership and limited partnership with all their assets.

[14] Corresponding provision on the director of the public limited company is section 306 (1) of the CC.

[15] Judgements of the Supreme Court of Estonia of 8 October 2008 in civil matter No. 3-2-1-65-08 and of 9 December 2008 in civil matter No. 3-2-1-103-08. Decisions of the Supreme Court of Estonia are available at www.nc.ee (in Estonian).

[16] According to Estonian judicial practice, term of office of the director cannot be deemed renewed merely for the reason that the person continues to act as a director – judgement of the Supreme Court of 8 October 2008 in court case No. 3-2-1-65-08.

[17] Fernando Martínez Sanz, Los administradores responsables, in Àngel Rojo, Emilio Beltran, Ana Belén Campuzano (eds), *La responsabilidad de los administradores de las sociedades mercantiles*. 4th edn. (Valencia, Tirant lo Blanch 2011) 64–65.

[18] Pablo Girgado Perandones, *La responsabilidad de la sociedad matriz y de los administradores en una empresa de grupo* (Madrid, Barcelona, Marcial Pons, Ediciones Jurídicas y Sociales 2002) 183.

facto director.[19] Provision of advisory services to the director or, for instance, the activity of a creditor towards the company cannot, as a rule, be deemed to be the activity of the *de facto* director either.[20]

One consequence of acting as a *de facto* director in Estonia is that it may bring about non-contractual liability of the director to a legal person.[21] To third persons, including creditors of the company, such a director may still be held liable on tortious grounds. However, it is important to keep in mind that if a person does not have the legal authority to act as a director in Estonia, s(he) cannot have the statutory duties of the director either. For example, from a formal legal point of view a person who is not a *de iure* director can neither call the general meeting of shareholders should it prove necessary to do so to resolve issues related to negative shareholders' equity, nor file the debtor's bankruptcy petition when the company has become permanently insolvent. There is no reason to claim that a person who is not a *de jure* director would have the obligation to observe a protection provision arising from law.[22]

Therefore, it can be said that, as a rule, the *de facto* director cannot be held liable in Estonia to third persons on tortious grounds if the potential liability is based on the person's inactivity. For the person to be held liable for damage caused by inactivity, a corresponding protection provision or general duty to maintain safety must arise from law. In the absence of such protection provision or duty to maintain safety, unlawfulness of inactivity, which is a necessary precondition of tort liability, ceases to exist. As an exception, tort liability of a director who is acting *de facto* can be affirmed if his/her inactivity could be treated also as causing intentional damage that is contrary to good morals.

In addition to the director, there are other persons who could be in a position similar to the position of the director, such as the liquidator, procurator and trustee in bankruptcy.[23] In the case of disclosure of untrue statements, the

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[19] Fernando Sánchez Calero, Ricardo Alonso García et al, *Los administradores en las sociedades de capital*. 2nd edn. First published 2005 (Thomson 2007) 316.

[20] Derek French, Stephen W. Mayson, Christopher L. Ryan, *Company Law*. 26th edn. First published 1982 (Oxford University Press 2009) 429–430.

[21] In its judgement of 11 June 2008 in court case No. 3-2-1-44-08 the Supreme Court has found that since the defendant was no longer director of the plaintiff starting from 23 December 2003 and the defendant found out about his removal from the board of directors on that same day, he may be held liable on non-contractual grounds for the damage caused to the plaintiff by transferring 500,000 kroons over to the employer.

[22] In exceptional circumstances, it cannot be ruled out that if the *de facto* director knowingly takes advantage of the situation and fails to file the bankruptcy petition, his/her activities can be considered as being contrary to good morals (but not as the breach of a protection provision). See on this: Franz Jürgen Säcker, Roland Rixecker, Gerhard Wagner et al, *Bürgerliches Gesetzbuch, Schuldrecht, Besonderer Teil III*. Vol. 5. (München, C.H. Beck 2009) 1925.

[23] Pursuant to section 209 (1) of the CC, liquidators have the rights and obligations of the board of directors which are not contrary to the nature of liquidation. Pursuant to section 16 (1) of the CC, procuration is an authorisation which grants the procurator the right to represent the undertaking in concluding all transactions related to economic activities. Pursuant to section 54^1 (3) of Estonian Bankruptcy Act (Est. *pankrotiseadus*, hereinafter **BA**,

question of tort liability may arise concerning those persons similarly to the liability of the director. Nevertheless, liability for failure to file the bankruptcy petition cannot become an issue with regard to the procurator and trustee in bankruptcy. It is doubtful whether the question of liability in the case of thin capitalisation of a company could become an issue with regard to the liquidator.[24]

Pursuant to section 31 (2) of the CPCCA, the board of directors and the supervisory board are the directing bodies of a company. The competence of the supervisory board significantly differs from that of the director. Unlike the board of directors, the supervisory board neither has the right to independently represent the company nor does it manage the company's everyday activities. For that reason, as a rule, the issues referred to in the research questions cannot arise with respect to the supervisory board.[25]

In the current dissertation, the author has studied the liability of the *de iure* director of the company. Analysis of the liability of the *de facto* director, liquidator, trustee in bankruptcy, procurator and member of the supervisory board remains outside the scope of this dissertation.

2.2.2. Civil Liability of the Director

The liability of the director is a broad topic that is connected to different fields of law, such as company law, law of obligations (contract and tort law), criminal law and tax law. Therefore, full coverage of all aspects of the liability of the director within a single dissertation is not possible and due to that, the author has limited his research to tort liability of the director of the company to creditors. In order to define the topic, the author will give a brief overview of civil liability of the director as follows.

What is meant by civil liability of the director is the obligation of the director to compensate for damage. Obligation to compensate for damage may arise from breach of the duties of the director either in an internal or external relationship.

State Gazette I, 2003, 17, 95), the trustee in bankruptcy may enter into all transactions and perform all legal acts with the bankruptcy estate of a debtor who is a legal person.

[24] The work of the liquidator is aimed at liquidating the company, including distributing the assets among the shareholders (section 216 (1) of the CC). Therefore, it could be said that the task of the liquidator is to induce the company's thin capitalisation which will result in deletion of the company from the Commercial Register (section 218 (1) of the CC).

[25] Pursuant to law, the supervisory board does not have the obligation to file the bankruptcy petition; the supervisory board does not have any direct obligations in the case of thin capitalisation of the company either. In theory, a member of the supervisory board could be held liable for disclosure of untrue statements; however, since the supervisory board does not have the right to represent the company it cannot, as a rule, happen in practice that, for example, the member of the supervisory board enters into a transaction in the name of the company (it can become an issue if a separate authorisation document has been issued to the member of the supervisory board; however, in that case s(he) will not be performing the usual functions of the supervisory board anymore).

General duties that are based on the director's internal relationship derive from section 35 of the GPCCA pursuant to which, the members of a directing body of a legal person must perform their obligations arising from law or the articles of association with the diligence normally expected from a member of a directing body and must be loyal to the legal person. Same obligations have been listed in the regulation concerning authorisation agreements (section 620 of the LOA).

As noted above, internal relationship between the director and the company is based on (authorisation) agreement and, therefore, the liability of the director can, first and foremost, be contractual as well. Section 35 of the GPCCA and section 620 of the LOA define the general contractual duties of the director, the breach of which may bring about liability based on the director's internal relationship. Since general duties of the director only apply to the company to which s(he) is the director, third persons cannot refer to the director's breach of the duty to act diligently with respect to creditors. This is, among other things, supported by section 31 (5) of the GPCCA pursuant to which, the activities of a body of a legal person are deemed to be the activities of the legal person. Consequently, the director can, as a rule, only be held liable to the company on contractual grounds and with respect to third persons, activities of the director are deemed to be the activities of the company.

Pursuant to section 37 (2) of the GPCCA, the creditor can indeed file an action against the director; however, in that case the object of claim will be damage caused to the company (not to the creditor) and compensation for that damage can be ordered for the benefit of the company and not the creditor.[26] From the perspective of substantive law, this claim is no different from the company's contractual claim against the director. The difference is mainly procedural, enabling the creditor to file the compensatory claim instead of the company if, for any reason, the company should refuse to file the claim or delay so doing.[27] Contractual liability that is based on the director's internal relationship will not be analysed in this dissertation.

However, the above does not mean that the director has no duties whatsoever with respect to third persons. The director must refrain from causing damage to other persons' life, health and assets; the director must perform the duties arising from the protection provisions provided by law and must not cause intentional damage contrary to good morals to third persons. Breach of the said duties may bring about tort liability of the director to third persons.

What is meant by the director's tort liability is liability for causing damage to third persons which is not based on contracts. Within the scope of this dissertation the author studied the following bases of the director's tort liability:

[26] This basis for a claim is specified in sections 187 (4) and (5) of the CC with regard to the private limited company and in sections 315 (4) and (5) of the CC with regard to the public limited company.

[27] Maivi Ots, Äriühingu juhtorgani liikme vastutus äriühingu võlausaldaja ees [Liability of the Members of the Management Bodies in Relation to the Creditors of the Company]. Master's thesis (University of Tartu 2006) 44, 75.

- **Breach of a protection provision.** Pursuant to section 1045 (1) 7) of the LOA, the causing of damage is unlawful if the damage is caused by behaviour breaching a duty arising from law. In legal literature, the kinds of provisions that stipulate duties have also been called protection provisions.[28] Criteria for protection provisions have been determined in legal acts and literature only in general. A protection provision must establish the interest that is being protected and the manner in which it is being protected; also, it must be possible to derive a specific addressee of protection from the protection provision itself or from its purpose.[29] Final assessment on whether the provision is a protection provision or not will be given through judicial practice.[30] However, since judicial practice concerning protection provisions is constantly changing and developing, it would be complicated to present a full directory of protection provisions in the dissertation[31] and doing that is not the objective of the dissertation either.

  The dissertation analyses one of the main protection provisions laid down for the protection of creditors – first sentence of section 180 (5^1) of the CC,[32] which provides for the obligation of the director of a permanently insolvent company to file the bankruptcy petition. Although the addressee of protection is not directly visible from the referred provision, it has been expressed in the judicial practice that the bankruptcy petition must, above all, be filed to protect the interests of creditors.[33]

  In addition, the author has also studied the probability of tort liability of the director on the basis of section 1045 (1) 7) of the LOA in the case of thin capitalisation of the company.
- **Intentional behaviour contrary to good morals.** Pursuant to section 1045 (1) 8) of the LOA, the causing of damage is unlawful if the damage is caused by intentional behaviour contrary to good morals.

  The dissertation covers the possibility of tort liability of the director for intentional behaviour contrary to good morals primarily in the context of disclosure of untrue statements. Section 1045 (1) 8) of the LOA is a uni-

[28] Paul Varul, Irene Kull et al, *Võlaõigusseadus III, Kommenteeritud väljaanne* [Law of Obligations Act III, Commented Edition] (Tallinn, Juura 2009) 650.

[29] Ingo Drescher, *Die Haftung des GmbH-Geschäftsführers.* 7th edn. (Köln, RWS Verlag Kommunikationsforum 2013) 227.

[30] E.g., in its judgement No. 3-1-1-41-11 of 3 June 2011 the Criminal Chamber of the Supreme Court has found that deceiving someone into making ungrounded bank transfers may be unlawful pursuant to section 1045 (1) 7) of the LOA in co-effect with section 209 (fraud) of Estonian Penal Code (*karistusseadustik*, hereinafter **PC**, State Gazette I, 2001, 61, 364) as a tort protection provision. Also, see judgement of the Criminal Chamber of the Supreme Court of 30 November 2009 in court case No. 3-1-1-101-09.

[31] Examples on protection provisions see, for example, from Rolf Stürner, Arndt Teichmann et al, *Jauernig Bürgerliches Gesetzbuch mit Allgemeinem Gleichbehandlungsgesetz. Kommentar*. 15th edn. (C.H.Beck 2014) Art. 823, Rn 43-45.

[32] With regard to public limited company, section 306 (3^1) of the CC.

[33] Judgement of the Supreme Court of 22 September 2005 in civil matter No. 3-2-1-79-05; judgement of the Supreme Court of 17 December 2009 in civil matter No. 3-2-1-150-09.

versal provision that is applicable in all cases when the director has behaved intentionally and that behaviour has been contrary to good morals. It is a provision that enables filing a compensatory claim in circumstances where there are no other effective grounds for filing compensatory claims, but the director has intentionally created an unfair situation that is contrary to the beliefs of an honest and fair person.[34] The author has not thought it necessary to analyse all the situations in which the director could be held liable on tortious grounds for intentional behaviour contrary to good morals – studying the facts of different cases related to the behaviour contrary to good morals has little influence on the nature of liability deriving from section 1045 (1) 8) of the LOA; furthermore, composing a full directory of all cases related to the behaviour contrary to good morals would not be possible anyway due to the constant development of judicial practice.

- ***Culpa in contrahendo*** (hereinafter also ***c.i.c.***). The author has additionally analysed the liability of the director as the representative of the company for disclosure of untrue statements on the basis of *c.i.c.* It is arguable whether it is a case of contractual or non-contractual (tort) liability or the so-called reliance liability instead.[35] The author has not analysed the legal nature of *c.i.c.* liability in the dissertation, but instead the question whether the director can be held liable to third persons on the basis of *c.i.c.*

This dissertation does not cover the liability of the director for causing damage to legal rights on the basis of sections 1045 (1) 1) and 2) of the LOA pursuant to which, the causing of damage is unlawful if the damage is caused by causing the death of the person or causing damage to the health of the person. If the director causes bodily injury to another person, s(he) will be held liable for his/her tort irrespective of his/her official position. In some circumstances, causing damage to a person's life or health may be specifically related to the

[34] This is roughly how it has been tried to define behaviour contrary to good morals in German legal literature (In German *Anstandsgefühl aller billig und gerecht Denkenden*). See Kurt Rebmann, Franz Jürgen Säcker, Roland Rixecker, *Münchener Kommentar zum Bürgerlichen Gesetzbuch, Schuldrecht, Besonderer Teil III*. Vol. V. 4th edn. (München, C. H. Beck 2004) 1898.

[35] In Estonia this issue has been studied more thoroughly by Urmas Volens in his disseration, Usaldusvastutus kui iseseisev vastutussüsteem ja selle avaldusmisvormid [Reliance Liability as an Independent System of Liability and Its Forms] (University of Tartu Press 2011). According to Volens, *c.i.c.* liability should be handled as a separate reliance liability next to contractual and non-contractual liability. In its judgement of 5 June 2013 in civil matter No. 3-2-1-62-13 the Supreme Court has found that section 14 of the LOA that forms the basis of *c.i.c.* gives rise to an obligation between the negotiating parties and the person that breached the obligation will be held liable on the basis of section 115 of the LOA for non-performance of the duties arising from that obligation. However, the Supreme Court is of the opinion that the duties provided by sections 14 (1) and (2) of the LOA do not only apply to persons on whose behalf the negotiations are being held, but also to the representatives of those persons. The liability of the person taking part of the negotiations as the representative of the party for non-performance of obligations is, however, not based on section 115 of the LOA, but on section 1043 and section 1045 (1) 7) of the LOA, i.e., the liability is tortious.

performance of the official duties of the director. For example, if a director places a company's product on the market knowing that it may cause health damage (is toxic), the question arises: Should the victim, after all, find a protection provision or should s(he) prove that the director behaved intentionally and contrary to good morals in order to hold the director liable? The director who has caused the death of the victim or damage to the health of the victim with his/her active behaviour could be held liable for the reason alone that his/her behaviour has caused the person's death or damage to the person's health.[36]

The issue of possible tort liability of the director for breach of general duties to maintain safety will not be covered in the dissertation.[37]

In the case of tort liability, it is grounded to talk separately about the preconditions of liability and extent of liability (i.e., amount of the compensatory claim). The dissertation has primarily focused on the preconditions of liability; however, in some cases it has been necessary to pay attention to the extent of the claim as well to cover the issue (in the case of breach of the director's duty to file the bankruptcy petition).

The content of dissertation is limited to the analysis of the director's tort liability which is why administrative (tax) and criminal liability is not studied. However, it should be briefly noted that the Estonian Supreme Court has recognised the possibility of the director's tort liability in the case of failure to pay tax arrears due to the breach of the director's duty to file the bankruptcy petition (section 1045 (1) 7) of the LOA and section 180 (5^1) of the CC).[38] The Supreme Court has noted in the referred decision that "section 180 (5^1) of the CC has the same effect on both the protection of the claims of private creditors and the protection of the tax claims of the state. Therefore, there is no reason to apply the said provision as a protection provision differently in the case of different claims."

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[36] E.g., in Germany the director is held liable to third persons if health damage is caused during careless implementation of decisions that belong to the director's area of responsibility. Gert Brüggemeier, *Common Principles of Tort Law. A Pre-statement of Law* (London, The British Institue of International and Comparative Law 2004) 148. In Spain, the director's tort liability may also be possible if health damage or death of the person was caused through omission. E.g., tort liability of the directors of a mining company has been affirmed in judicial practice in a situation where the directors failed to take sufficient precautionary measures to avoid damage when a minor climbed on the territory of an abandoned mine and was hurt when coming into contact with the mining equipment located on the premises. The court noted that the directors had been grossly negligent by leaving the mine unattended, unfenced and without any warning signs. The court was of the opinion that by doing so the directors breached general safety requirements and requirements for the protection of third persons. Judgement of Spanish Supreme Court (STS) 22.01.2004 (RJ, 2004/207). Spanish court decisions are available at http://www.poderjudicial.es/search/indexAN.jsp (in Spanish).

[37] See on this: Iko Nõmm, Käibekohustuse rikkumisel põhinev deliktiõiguslik vastutus [Delictual Liability Based on the Breach of the Duty to Maintain Safety]. Dissertation (University of Tartu 2013) 83, 88.

[38] Judgement of the Supreme Court of 25 February 2013 in civil matter No. 3-2-1-188-12.

With regard to criminal liability, the author would like to note that criminal liability may intertwine with tort liability in a situation where the provision that provides the necessary elements of a criminal offence has also been recognised as a protection provision for the protection of creditors.[39]

2.2.3. The Creditor of the Company as the Subject Entitled to Compensation for Damage

This dissertation studies the liability of the director to the creditors of the company. The creditor of the company can be any third person who has a claim against that company. Therefore, the creditor can be a person who has a financial claim which arises from a contract (e.g., a claim arising from a loan agreement, a lease contract, a contract of sale). The creditor can also be a person who has a non-monetary fulfilment claim arising from a contract (e.g., a claim arising from the contract of sale for the delivery of a thing). The creditor can also be a person who has a (compensatory) claim arising from a breach of non-contractual obligation.

Creditors can be both legal and natural persons whereby the legal person can be a legal person in private or public law. For the purposes of this dissertation, legal persons in public law have, however, been considered as creditors only in those cases when that person has a civil claim against the company. As noted above, the compensatory civil claim of legal persons in public law may, for example, also arise from the decrease in the value of a tax claim.[40]

Shareholders can be creditors of the company if they have a claim against the company. For the purposes of the dissertation, investment made into the company's capital will not make shareholders creditors of the company. Pursuant to section 157 (4) of the CC, a shareholder has the right to demand payment of a dividend corresponding to his/her share only if it is so prescribed by a resolution of the shareholders.[41]

Pursuant to section 32 of the GPCCA, the shareholders and the members of the directing bodies of a legal person must act in accordance with the principle of good faith and consider each other's legitimate interests in their mutual relations. The nature of this legal relationship is disputable (is it a non-contractual, contractual or maybe some in-between quasi-contractual relationship instead)[42] and worth discussing in a separate dissertation; therefore, this issue is not covered in the current dissertation. For that reason the author will not separately study the liability of the director to shareholders of the company.

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[39] E.g., the Estonian Supreme Court has recognised fraud (section 209 of the PC) as a protection provision in its judgement No. 3-1-1-41-11 of 3 June 2011.

[40] n 38.

[41] Corresponding provision on shareholders of public limited companies is section 279 (1) of the CC.

[42] Paul Varul, Irene Kull et al (n 11) 114.

3. CURRENT STATUS OF THE FIELD OF RESEARCH AND POSITION OF THE RESEARCH PROBLEM WITHIN IT

On the entire topic of company law, no thorough law books have been published in Estonia to this day.[43] Main contributors to the scientific research into company law in Estonia have been Andres Vutt and Margit Vutt, who have published several articles in various Estonian and foreign law journals.[44] Nevertheless, according to information available to the author, they too have not published any research articles that would explicitly have the director's tort liability to company's creditors as their object of research.

Tort liability of the director of the company, which is the object of research of this dissertation, has to a small extent been covered in several dissertations defended at the University of Tartu. Margit Vutt has studied in her dissertation[45] the possibility of shareholders to file a derivative claim against the director of the company. The shareholder's derivative claim is a compensatory claim against the director which is based on breach of a mandate originally belonging to the company and could, on certain conditions, be enforced by the shareholder in his/her name. Although Estonian law is lacking the possibility of filing shareholders' derivative claims, Margit Vutt finds that it would be grounded to amend Estonian law accordingly and enable filing of shareholders' derivative claims.[46] The shareholder's derivative claim against the director is substantially

[43] Some works that resemble the form of handbooks and have a certain practical value have been published; however, a profound legal analysis is still missing. E.g., Paul Varul, Aldo Kaljurand et al, *Äriühingu juhtorganid* [Directing Bodies of Companies] (Äripäeva Kirjastus 2005); Marko Kairjak (ed), *Äriõigus, näidised ja kommentaarid* [Commercial Law, Examples and Commentaries] (Äripäeva Käsiraamat 2013).

[44] E.g., Andres Vutt, Margit Vutt, Äriühingu osaniku ja aktsionäri teabeõigus Eesti kohtupraktikas [Company's shareholders' right to information in Estonian judicial practice], in *Juridica* (9/2012) 709–716; Andres Vutt, Dividend payments and protection of minority shareholders, in *Juridica International* (16/2009) 135–140; Andres Vutt, Margit Vutt, Ühinemine ja jagunemine Eesti registri- ja kohtupraktika peeglis [Merger and division as reflected in Estonian registry and judicial practice], in *Juridica* (3/2009) 173–180; Andres Vutt, Some features of legal capital regulation in Estonia, in *European Business Law Review* (16(6)/2005) 1385–1392; Margit Vutt, Aktsionäri kahju hüvitamise nõue aktsiaseltsi ja selle juhtorgani liikmete vastu [Shareholder's compensatory claim against the public limited company and the members of its directing body], in *Juridica* (2/2012) 90–100; Margit Vutt, Systematics of shareholder remedies – origins and developments, in *Juridica International* (2010) 188–198; Margit Vutt, Shareholder's derivative claim – does Estonian company law require modernisation? in *Juridica International* (2/2008) 76–85; Margit Vutt, Legal regulation of the board structure of public limited companies in the light of regulatory communication between the European Union and Member States, in *Juridica International* (11/2006) 118–128.

[45] Margit Vutt, Aktsionäri derivatiivnõue kui õiguskaitsevahend ja ühingujuhtimise abinõu [Shareholder's Derivative Claim as a Legal Remedy and a Measure of Corporate Governance]. Dissertation (University of Tartu Press 2011).

[46] Ibid, 197.

different from the object of research of current dissertation since the shareholder's derivative claim is a contractual claim arising from internal relationship, but the author of current dissertation studies tort liability of the director, i.e., direct liability to creditors based on external relationship. Margit Vutt has indeed touched upon the topic of tort liability of the director when defining her object of research; however, her dissertation dealt with the liability of the director to shareholders, not creditors.[47]

Andres Vutt has, among other things, covered in his dissertation[48] issues related to thin capitalisation of companies; however, Andres Vutt has not analysed the particular issue of the liability of the director in the case of thin capitalisation.

Kalev Saare has studied the issue of legal person as the subject of law and distinguished the legal person from other pools of assets such as civil law partnerships, companies being founded, successors' communities, but also from partnerships of persons, such as general and limited partnerships which according to German and Swiss law are not considered to be legal persons.[49] Kalev Saare has, among other things, raised the issue of distinguishing legal persons as subjects of law from natural persons acting under the cover and in the interests of legal persons as subjects of law. As one attribute for making the distinction, Saare has used the fact that legal persons can be held personally liable, which, in turn, relates to the liability of members of legal persons' directing bodies both in internal and external relationships. Within that topic, Saare has also briefly covered the issue of liability of members of directing bodies (including tort liability) as an exception from independent sole liability of legal persons.[50]

In his dissertation, Urmas Volens has studied reliance liability as an independent system of liability.[51] Herewith, studying the liability arising from pre-contractual negotiations, i.e., *culpa in contrahendo* liability as one form of manifestation of reliance liability. In some exceptional cases, the director as a legal representative of a negotiating party (the company) may be held liable on the basis of *c.i.c.* for damage caused to the other negotiating party. Since some countries see *c.i.c.* liability as quintessentially tortious,[52] the author of this

[47] Ibid, 33 et seq.

[48] Andres Vutt, Legal Capital Rules as a Measure for Creditor and Shareholder Protection. Dissertation (University of Tartu Press 2011) 25 et seq.

[49] Kalev Saare, Eraõigusliku juriidilise isiku õigussubjektsuse piiritlemine [Determination of Legal Persons in Private Law as Legal Subjects]. Dissertation (University of Tartu 2004).

[50] Ibid 163 et seq.

[51] U. Volens (n 35).

[52] As there is no separate basis for a claim for *c.i.c.* in Spanish law, corresponding disputes are resolved based on general regulation of tort liability (section 1902 of Spanish Civil Code (*Codigo Civil*). Official State Bulletin [*Boletín Oficial del Estado, BOE*] BOE-A-1889-4763). Spanish legislation is available at http://noticias.juridicas.com/base_datos/ (in Spanish). For that reason *c.i.c.* liability is seen as tort in Spain. STS 16.5.1988. Gema Tomás Martínez, Naturaleza de la Responsabilidad Precontractual (Culpa in Contrahendo) en la Armonización Jurídica Europea, in *Revista de Derecho (Coquimbo)* (1/2010) 187-210,

dissertation has also studied the possible liability of the director on the basis of *c.i.c.* and, therefore, certain connection exists between this dissertation and the dissertation of Urmas Volens.[53]

The topic which is the object of research of this dissertation has also been covered in some master's theses in Estonia.[54]

In brief, it may be said that different aspects of the director's liability have been studied by only a few authors in Estonia so far. In the other countries of comparison, liability of the director has been studied much more profoundly. The topic is relevant in all countries under comparison since the optimum extent of the director's liability is constantly changing, being dependent on how the economy is doing. For example, it was inevitable that directors had to take more risks and face more failures in their business during the years of financial crisis than during the years of economic growth. This, in turn, means that the issue of the liability of the director is more likely to rise during the years of crisis than during the good times. However, it is still evident that more severe liability of the director alone is not a precondition for economic recovery. Hence it is relevant in all countries under comparison to what extent protection of the interests of a single creditor (read: increasing the liability of the director) should be favoured over the economic growth as a whole (read: restricting the liability of the director and through that increasing his/her willingness to engage in enterprise).

available at http://www.scielo.cl/scielo.php?pid=S0718-97532010000100009&script=sci_arttext, (last accessed on 25.3.2014).

[53] U. Volens (n 35) 283 et seq.

[54] E.g., M. Ots (n 27); Tuuve Tiivel, Äriühingu juhtorgani liikme kohustused ja vastutus [Duties and Liability of the Member of the Management Organ of the Company]. Master's thesis (University of Tartu 2004).

4. METHODS

The comparative method has been used as the main research method – the author has analysed the research questions comparatively in Estonian, German, English and Spanish law.

Estonia is the country of author's origin. Estonia has experienced a relatively recent legal transformation from a totalitarian regime to democracy and hence has the least developed legal practice from countries under comparison. From the perspective of Estonian law, comparison with German law is the most relevant, since it was German Civil Code (**BGB**)[55] which was used as the main model law for Estonian Law of Obligations Act (including tort liability) that entered into force on 1 July 2002.

In addition to the comparative analysis of Estonian and German law, the author has also analysed the research questions of the dissertation in English[56] and Spanish law. Both England and Spain represent principal legal families with long traditions, respectively the Anglo-American and the Romance legal family. Hence the comparative analysis of current dissertation covers Anglo-American and main continental European (Romance, Germanic) legal families.

The author has drawn new ideas from the comparison with English law on how to shape judicial practice, e.g. how it would be possible for the courts to apply more discretion in situations where the director has caused damage to the creditors by not filing the bankruptcy petition in due time, but it is not possible to unambiguously determine the size of the damage.

In Spanish law, different approaches to the director's liability can be found, which are of great interest from the point of view of the objective of this dissertation (e.g., the possible shifting of the liability of the director from the moment of insolvency to the moment of thin capitalisation).

In trying to solve the research questions posed, an analysis of relevant Estonian, German, English and Spanish legal literature and legislation has been carried out in the dissertation. Validity of theoretical positions has been checked on the basis of judicial practice of respective countries.

By comparing law and judicial practice in different countries, the author has been able to ascertain various possibilities for filing creditors' tortious claims against the director. At the same time, the author has deliberated the risks related to the implementation of excessively severe liability. As a result of this

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[55] German Civil Code (*Bürgerliches Gesetzbuch*, hereinafter **BGB**). Federal Law Gazette [*Bundesgesetzblatt*, BGBl] I p. 42, 2909, 2003 I p. 738. Information about the model laws used for the development of the LOA: Paul Varul, Irene Kull et al, *Võlaõigusseadus I, Kommenteeritud väljaanne* [Law of Obligations Act I, Commented Edition] (Tallinn, Juura 2006) 2.

[56] For clarity, it should be noted that in addition to English law, the United Kingdom distinguishes between the Scots law and Northern Ireland law. The dominant law in the United Kingdom is mainly English law, which can be explained by London's strong hold on the country's economy and capital. For that reason, English law is the most studied and offers the most comprehensive judicial practice.

deliberation, the author has tried to determine the reasonable boundaries of the director's tort liability and modelled some potential optimum solutions for filing tortious claims against the director.

To a lesser extent, the author has also studied the historical development of certain issues. Unlike in Estonia, issues concerning the liability of the director have been studied and covered in legal practice for a long time in other countries of comparison. With regard to some issues, Estonian judicial practice is in the same place where, for example, German judicial practice was decades ago. Therefore, it was justified to study the historical development of respective countries of comparison additionally and draw parallels relevant to Estonia. For example, with respect to possible *c.i.c*. liability, German judicial practice has gone through a notable development since the 1960's; when at first it was thought that the fact alone that the director is a shareholder is enough to hold the director personally liable, in the course of time the so-called personal economic interest as basis for liability has virtually been reduced to zero. However, the Estonian Supreme Court rendered only on 5 June 2013 the first decision which referred to personal economic interest as a supplementary condition of *c.i.c*. liability (the issue was, nevertheless, not explored in detail).[57] Thus, the historical experience of German judicial practice is definitely relevant for current Estonian practice.

[57] More thorough analysis in section 5.3.2 of the dissertation.

5. SUMMARY OF THE MAIN CONCLUSIONS OF THE PUBLICATIONS INCLUDED IN THIS COMPENDIUM

5.1. Obligation of the Director who has Breached the Duty to File the Bankruptcy Petition to Compensate for the Damage Caused to Creditors

5.1.1. Compensation for Quota Loss of Old Creditors

Description of the Problem

Pursuant to section 180 (5^1) of the CC, the director is obligated to file the bankruptcy petition of the private limited company to a court without delay but not later than twenty days after the date on which permanent insolvency became evident.[58] In judicial practice this provision has been recognised as a protection provision for creditors for the purposes of section 1045 (1) 7) of the LOA enabling the creditors to file a compensatory tortious claim against the director who has breached the duty provided by that provision.[59]

In the case of creditors whose claims already existed when the company became insolvent (also called 'old creditors'), the purpose of section 180 (5^1) of the CC is to offer protection from damage caused by the decrease in the company's assets. If the director has breached the duty to file the bankruptcy petition, old creditors have the right to file a claim against the director for the compensation for quota loss. In order to calculate the amount of the claim it is necessary to determine the sum in which the respective creditor's claim would have been satisfied when the bankruptcy petition had been filed in due time, and compare it to the sum that will actually be compensated – the difference between the hypothetical and actual extent of satisfaction of the claim is the quota loss, compensation for which can be claimed from the director.[60]

In order to assess the hypothetical extent of satisfaction of the claim on the basis of which quota loss is calculated, it is necessary to establish two main facts: when did the company become permanently insolvent (the moment when the director was obligated to file the bankruptcy petition depends on that) and what was the exact volume of the assets and obligations of the company at that time (the hypothetical extent of satisfaction of the creditor's claim depends on that)?

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[58] General provision regarding legal persons on filing the bankruptcy petition derives from section 36 of the GPCCA. Duty of the director of a private limited company to file the bankruptcy petition derives from section 180 (5^1) of the CC and similar duty of the director of a public limited company derives from section 306 (3^1) of the CC.

[59] Judgement of the Supreme Court of 6 May 2003 in civil matter No. 3-2-1-45-03.

[60] Pursuant to the principle of the hypothesis of difference provided by section 127 (1) of the LOA, the objective of compensation for damage is to place the damaged person in a situation as near as possible to that in which the person would have been if the circumstances which are the basis for the compensation obligation had not occurred.

If company's accountancy is accurate, it will be rather easy to ascertain the said facts. However, in a situation of crisis it is understandable that organising accountancy may not be a priority for the director; furthermore, often it is the conscious choice of the director to leave accounting unorganised as it may make it more difficult to hold the director liable on civil grounds later on. In addition to unsatisfactory organisation of accountancy, in practice also destruction, concealment, misrepresentation and falsification of accounting records (e.g., *ex post* drafting of documents) can take place. What can also make it more difficult to hold the director liable on civil grounds is the breach of obligations provided in sections 85 to 87 of the BA (obligation to provide information, obligation to take an oath and obligation to participate in bankruptcy proceedings) by the director.

Although the director may bear criminal liability for the breach of the duty to organise accountancy and the court may impose a fine or compelled attendance or detention on the director for breach of the obligations provided by sections 85 to 87 of the BA, those breaches have basically no negative effect on the civil liability of the director; on the contrary, when the creditor's evidential position weakens, it reduces the probability of satisfaction of the claim filed against the director as well. This creates a controversial situation in practice as the director who has breached the obligation to file the bankruptcy petition is motivated to conceal accounting records because the possibility of being held liable on civil grounds often outweighs the risk of criminal liability.[61]

According to statistics, 58% of bankruptcy matters in Estonia are terminated by abatement without declaration of bankruptcy. In addition to that, 6% of bankruptcy matters are terminated by abatement after declaration of bankruptcy. From the perspective of creditors this means that in the case of abatement, their claims will remain fully unsatisfied. In bankruptcy proceedings that reach the stage of submitting of distribution proposals (i.e., 36% in total), in about 2/3 of the cases, creditors have their claims satisfied by less that 20% of the amount of their defended claims. Only in 9% of the cases have the claims of the creditors been satisfied by more than 50% (above data includes claims secured by a pledge).[62] There are no grounds to presume that no abuse by the director took

[61] E.g., pursuant to section 381^1 of the PC, breach of obligation to keep records is punishable by a pecuniary punishment or up to three years of imprisonment. As a rule, breach of the obligation to keep records is not punished by imprisonment and the amounts of pecuniary punishment are rather modest. E.g., with its judgement of 14 December 2010 in criminal matter No. 1-10-15520 Harju County Court sentenced only a pecuniary punishment of 759 euros to a convicted offender on the basis of section 381^1 of the PC (court decisions of Estonian courts of first instance and courts of appeal are available at https://www.riigiteataja.ee/kohtuteave/maa_ringkonna_kohtulahendid/main.html (in Estonian)). As the director's civil liability may amount to hundreds of thousands or even millions of euros, it is understandable that the director may be tempted to risk with a criminal punishment if that enables him/her to escape civil liability at the same time (due to unprovability).

[62] Survey on the effectiveness of insolvency proceedings during the period 1 January 2004 to 30 June 2012 ordered by the Government Office of the Republic of Estonia. The survey has been carried out by AS PricewaterhouseCoopers Advisors and is available at

place in any of the abatement cases; it would rather be grounded to presume that if creditors' claims are not satisfied, the director has probably breached the duty to file the bankruptcy petition on time.[63]

Although in theory the creditor can file a tortious claim against the director when the duty stipulated in section 180 (5^1) of the CC has been breached, in practice such actions are often dismissed due to unprovability.[64] It would even be more accurate to say that since according to the valid judicial practice, plaintiffs' bear a very high burden of proof, creditors often waive their right to have recourse to the courts.[65] Despite the fact that both section 127 (6) of the LOA and section 233 of the Code of Civil Procedure (hereinafter **CCP**)[66] enable the court to determine the amount of damage according to the conscience of the court by taking account of all facts if the compensatory claims are difficult to prove, valid judicial practice does not support more extensive application of the discretion of the court when it comes to satisfaction of old creditors' quota loss claims.[67]

Based on the above, it can be stated that old creditors' inability to enforce their tortious claims against the director in the court constitutes a massive problem in the economy.

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http://www.just.ee/orb.aw/class=file/action=preview/id=58338/Maksej%F5uetuse+menetlemise+t%F5hususe+uuring.pdf, (last accessed on 27.3.2014).

[63] Directors' frequent malevolent delay in filing bankruptcy petitions has been pointed out in the study carried out by AS PricewaterhouseCoopers Advisors as well, ibid.

[64] E.g., in its judgement of 28 September 2012 in civil matter No. 2-09-67882 Harju County Court refused to satisfy a tortious claim filed against the director despite the fact that it was evident from the description of the facts and reasons for court judgment that abuse by the director might have taken place. With its judgement of 30 April 2013 Tallinn Circuit Court did not amend the referred judgement of Harju County Court.

[65] According to the database of court decisions, only three court decisions have been rendered in court cases where creditors have claimed compensation for damage from the director on the basis of section 180 (5^1) of the CC and section 1045 (1) 7) of the LOA during the years 2012 and 2013. Out of those three decisions, claim of a creditor was satisfied by the judgement of Tartu Circuit Court of 20 April 2013 in civil matter No. 2-10-58837. By the judgement of Harju County Court of 23 February 2012 in civil matter No. 2-10-10257 and of 28 September 2012 in civil matter No. 2-09-67882, creditors' claims were left unsatisfied due to unprovability.

[66] Code of Civil Procedure (Est. *tsiviilkohtumenetluse seadustik*. State Gazette I, 2005, 26, 197).

[67] Parties often dispute over damage and even if sufficient amount of evidence on the extent of damage has been submitted with the court, the court always proceeds from its own conscience to some extent and, therefore, making a separate reference to section 233 of the CCP is not always necessary. However, the dissertation refers to a situation where there is no direct evidence on the damage caused or the evidence is clearly insufficient. At the same time, however, other circumstances indicate that damage might indeed been caused. The author of the dissertation has not found any court decisions from the database of court decisions in which the court has directly proceeded from section 127 (6) of the LOA and/or section 233 of the CCP when determining the extent of quota loss.

Statement set forth for defence

Enforcing quota loss claims the plaintiffs' burden of proof should not be too high; to simplify the situation of plaintiffs, reversing the burden of proof or giving more discretion to courts on certain conditions should be considered.

Reasoning

In Estonia, application of greater discretion of the courts is enabled by section 127 (6) of the LOA: if damage is established, but the exact extent of the damage cannot be established, including in the event of non-patrimonial damage or future damage, the amount of compensation must be determined by the court. As is visible from the wording of the provision, the provision is, above all, applicable to non-patrimonial and future damage. It could be presumed that in other cases (including in the establishment of quota loss) application of section 127 (6) of the LOA is more likely only when exceptional circumstances occur. If it is debatable whether damage has been caused at all, application of section 127 (6) of the LOA is also out of the question.

In addition, according to section 233 (1) of the Estonian CCP the court decides on the amount of damage according to the conscience of the court and taking account of all facts if causing of damage has been established in a proceeding, but the exact amount of the damage cannot be established or establishment thereof would involve major difficulties or unreasonably high costs, including if the damage is non-patrimonial. Even though the wording of section 233 (1) of the CCP is different from the wording of section 127 (6) of the LOA, according to legal literature it is just a duplicate provision which has no additional qualitative effect.[68]

As noted above, based on information available to the author, Estonian courts have not applied section 127 (6) of the LOA and section 233 of the CCP in disputes concerning old creditors' quota loss and failure to prove the existence of quota loss has resulted in dismissal of the respective creditors' claims against the director. As far as the author is aware, Estonian courts have not applied the rules of reversal of the burden of proof related to the concealment or destruction of evidence either in the referred situation.[69] This creates an unfair situation where the director cannot be held liable on civil grounds when s(he) has left accounting unorganised to a substantial extent.

Therefore, the author is of the opinion that it would be important to seek solutions which would make it easier to file claims for the compensation of

[68] P. Varul, I. Kull et al (n 55) 448.

[69] Pursuant to sections 283 and 284 of the CCP, if the defendant refuses to submit the required (accounting) document or has removed the document or rendered it unusable, the court may deem the statements of the plaintiff concerning the nature and content of the document to be proven. Due to lack of corresponding judicial practice in Estonia, it is not known if and how those provisions could be applied in cases concerning tort liability of the director for the concealment of accounting records as a whole, also whether the said provisions could similarly be applied if instead of concealment or elimination of documents accounts have not been kept at all.

quota loss against the director who has breached the duty to file the bankruptcy petition and, thereby, protect the interests of creditors to a larger extent.

Out of the countries of comparison, in Germany liability of the director for quota loss (In German *Quotenschaden*) is, in general terms, regulated similarly to Estonia. If the obligation to file the bankruptcy petition is breached, it is possible to file a tortious compensatory claim against the director on the basis of section 15a (1) of German Insolvency Act (**InsO**)[70] and section 823 (2) of the BGB; the amount of the claim will be calculated on the basis of the hypothesis of difference.[71] Unlike in Estonia, this claim cannot be filed directly by the creditors; instead the trustee in bankruptcy files the corresponding claim against the director. Only when the bankruptcy proceedings are terminated, including in the event of abatement, may the creditors file an action directly against the director.[72] Hence there are some procedural differences when compared to Estonian law. When in Estonia one specific creditor claims compensation for quota loss caused to him/her, in Germany the trustee in bankruptcy claims compensation for quota loss caused to all creditors.

Differently from Estonia, Germany has a rather wide judicial practice in cases concerning the obstruction of the obtaining of evidence. If a person destroys or conceals evidence, making it impossible for the other party to prove certain facts, then depending on the circumstances, the burden of proof of the other party may be simplified or even reversed in German court proceedings.[73] Thus, it has been repeatedly recognised in German judicial practice that if the director has breached the statutory requirements of organising and maintaining accounting, making it difficult to prove the facts that form the basis of the action, prerequisites of insolvency may be deemed as proved.[74] However, the author is not aware of any usage of the reversal of the burden of proof with respect to the amount of old creditors' quota loss by German courts; therefore, according to German authors quota loss cases are rarely successful in Germany.[75] It seems also that concentration of claims into the hands of the trustee does not give better results when compared to the possibility of each creditor enforcing the claim independently. The trustee is probably not motivated to commence an additional court action and creditors are not interested in financing proceedings (if there are no funds in the bankruptcy estate) from the proceeds of which they may only hope to get a fraction of the possible compensation.

However, in England and Spain the courts have much more discretion in determining the amount of damage. Pursuant to section 214 of English

[70] German Bankruptcy Act (*Insolvenzordnung*, Federal Law Gazette I p. 2866).
[71] Daniel Möritz, *Haftung des Managements und Drittschutz* (Nomos 2011) 121 et seq.
[72] Felix Steffek, *Gläubigerschutz in der Kapitalgesellschaft* (Mohr Siebeck 2011) 445–446.
[73] BGH 23 November 2005, NJW 2006, 434, 436.
[74] BGH 12 March 2007, ZIP 2007, 1060; BGH 24 January 2012, ZIP 2012, 723. Both court judgements are concerned with new creditors' claims against the director who has breached the duty to file the bankruptcy petition.
[75] F. Steffek (n 72) 538–539.

Insolvency Act 1986 (**IA 1986**), in a case of wrongful trading the court may declare that the director is to be liable to make such contribution (if any) to the company's assets as the court thinks proper. However, despite the broad wording of the provision, it is not considered to be unlimited and penal liability. The objective of the discretion of courts is to overcome potential problems concerning the amount of damage and ascertaining of causation more easily and to avoid rendering unfair decisions.[76] It enables the courts of England, differently from Estonia and Germany, to take into account other facts, such as unsatisfactory organising of accounting, more freely when determining the amount of damage.[77]

Although English courts have more discretion, cases concerning directors' compensatory claims are according to legal literature quite rare in English law as well. In addition to the difficulties related to the financing of proceedings, which most likely causes problems in all countries of comparison, it is complicated in English law to define the starting point of the director's liability.[78] Differently from Estonian and German law, in English law the director does not have an explicit duty to file the bankruptcy petition; however, pursuant to section 214 of the IA 1986, the court may order compensation from the director if damage has been caused some time before the commencement of winding up of the company, when the director knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation. To a large extent this is related to foreseeing of procedural consequences by the director (the director had to know that there was no reasonable prospect to avoid the insolvent liquidation) and in practice the courts have ascertained the arrival of the so-called moment of truth a while after the company has become permanently insolvent.[79] Therefore, in the comparable situation, the director of an English company may enter the zone of liability later than the director of a German (or Estonian) company, which also means that the probability that the director of the English company is held personally liable is lower than in the case of the director of the German (or Estonian) company.[80]

It seems that out of the countries of comparison filing of a compensatory claim against the director who has breached the duty to file the bankruptcy petition is the easiest in Spain. Pursuant to section 5 of Spanish Bankruptcy Act (**LC**)[81], the director in Spain has, similarly to Estonian and German law, the duty to file the bankruptcy petition to have the bankruptcy of an insolvent

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[76] Roy Goode, *Principles of Corporate Insolvency Law*. 4th edn. First published 1990 (Sweet&Maxwell 2011) 680–681.

[77] Purpoint Ltd [1991] BCLC 491. English cases available at Westlaw International legal database.

[78] Ian F. Fletcher, *The Law of Insolvency.* 3rd edn (Sweet&Maxwell 2002) 711–712.

[79] F. Steffek (n 72) 354 et seq, 551.

[80] Thomas Bachner, Wrongful Trading Before the English High Court in *European Business Organisation Law Review* (5/2004) 199; F. Steffek (n 72) 461 et seq.

[81] Spanish Bankruptcy Act (*Ley Concursal*, Official State Bulletin [*Boletín Oficial del Estado*], BOE-A-2003-13813).

company declared.[82] It is presumed that breach of the duty to file the bankruptcy petition forms the basis of a wrongful bankruptcy (in Spain *concurso culpable*). In the case of wrongful bankruptcy, pursuant to section 172bis (1) of LC, the court may order partial or full compensation for the deficit of the bankruptcy estate from the director who breached his/her duty in proportion with how much the respective breach deepened the company's insolvency. The purpose of the broad wording of the provision is to provide the courts with free discretion in situations when determination of damage is complicated.[83] As breach of the obligation to keep records may also be one of the bases of wrongful bankruptcy, the court may, among other things, take into account the unsatisfactory organisation of accounting as well when determining the amount of compensation.[84]

Based on the above, the author finds that the main problem concerning the enforcement of quota loss claims is the plaintiffs' high burden of proof. In disputes over quota loss, the plaintiff is required to submit evidence on circumstances that are fully in the sphere of influence of the director (i.e., the defendant) and which the director can very easily manipulate to serve his/her own best interests.

The author is of the opinion that relieving of creditors' burden of proof should be considered and suggests two alternative possibilities for doing that:

- **Giving more discretion to courts.** Providing the courts with more discretion in determining quota loss should be considered. The courts should take into account the breach of the obligation to keep records as a circumstance which would enable determination of the amount of compensation for damage according to the conscience and at the discretion of the court. In addition to the breach of the obligation to keep records, breach of the obligation to cooperate during the bankruptcy proceedings may likewise damage the plaintiff's evidential position.

For instance, the Estonian CCP could be amended as follows (text added to the current wording is underlined):

> *The court decides on the amount of damage according to the conscience of the court and taking account of all facts if causing of damage has been established in a proceeding but the exact amount of the damage cannot be established or establishment thereof <u>is complicated as a result of the defendant having breached the obligation to provide information, the obligation to keep records or any other obligation to cooperate provided by law, or</u> would involve major difficulties or unreasonably high costs, including if the damage is non-patrimonial.*

[82] When in Germany and Estonia the director has respectively 21 and 20 days to file the bankruptcy petition then in Spain the term is two months.

[83] Fernando Marín de la Bárcena, *La Acción Individual de Responsabilidad Frente los Administradores de Sociedades de Capital (Art. 135 LSA)* (Marcial Pons 2005) 375 et seq.

[84] Section 164 (2) of the LC.

The author would like to emphasise that the breach of the obligation to keep records alone cannot automatically form a basis for the director's tort liability. If the courts satisfied quota loss claims solely based on the fact that the director just happened to breach some accounting requirements, it could make the liability of the director sanctional, making it possible that the ordered compensation for damage has no relations whatsoever to the breach of the director. Therefore, in addition to the fact that the obligation to keep records has been breached, the court must have a conviction based on evidence taken and other facts in aggregate that it is highly probable that damage has been caused by breach of the duty to file the bankruptcy petition, but proving it will be complicated since the director has also breached the obligation to keep records.

- **Reversal of the burden of proof.** With regard to quota loss claims, reversal of the burden of proof could be considered in such a way that if it is probable[85] that the defendant has breached the duty to file the bankruptcy petition and with that damage to creditors might have occurred, but proving those facts has been rendered significantly more difficult due to the defendant's own breach of the obligation to keep records (or any other obligation to cooperate provided by law), it is presumed that the defendant has both breached the duty to file the bankruptcy petition and, with that breach, caused damage to the extent of the deficit of the bankruptcy estate. The defendant may, in turn, prove that the duty to file the bankruptcy petition has not been breached or no damage has been caused with that breach.

In both cases – when providing the courts with more discretion and when reversing the burden of proof – the director's possible tort liability is related to the breach of the obligation to keep records (or any other obligation to cooperate provided by law) by the director. It is something that is in the sphere of influence of the director and can easily be influenced by him/her – the director is able to manage the risks related to his/her liability by simply properly performing said obligations. Even if the obligation to keep records (or obligation to cooperate in the bankruptcy proceeding) has been breached, but the director has not caused damage, the director has still possibility to prove that no damage has been caused.

[85] Although assessment of probability in legal disputes is always subjective to a certain extent, in the given case, according to the assessment of the court the probability should be more than 50%. In other words, the probability that the director has caused damaged should be higher than the probability that the director has not caused damage.

5.1.2. Compensation for Reliance Loss of New Creditors

Description of the problem

The first time the Estonian Supreme Court recognised section 180 (5^1) of the CC as a protection provision for creditors was in one of its judgements in 2003.[86] Still, for a long time, no thorough analysis could be found from Estonian judicial practice on the protection purpose of section 180 (5^1) of the CC, i.e., from what kind of damage the corresponding provision should protect the creditors. Thus, for example, the Supreme Court has noted in its judgement of 2009, "If a Circuit Court establishes that the defendant has breached the duty to file the bankruptcy petition, it must be assessed whether it has been proven that this breach has caused damage to the plaintiff."[87] However, the instructions of the Supreme Court were unclear about what kind of damage was meant. For that reason, the practice of lower courts has been inconsistent. For example, in its judgement of 1 February 2008 Tallinn Circuit Court ordered payment of the entire creditors' claim and it was basically a sanctional compensation since, when rendering the judgement, the court did not establish the moment of insolvency, the exact amount of damage or causation.[88]

With regard to a debtor company, there is reason to define its activities before and after the occurrence of permanent insolvency. Before the occurrence of insolvency, the company operates in usual economic environment[89] by assuming obligations and receiving rights in return. The other party to the transaction bears the accompanying usual business risk that his/her business partner may become bankrupt sometime in the future. Yet in most cases it will be safe to assume that the business partner will not become insolvent in the near future. However, if the debtor has already become permanently insolvent, the situation changes fundamentally since the business partner joining in obligation with the debtor bears a considerable risk from the start that his/her claims against the debtor will not be satisfied.

Therefore, it is justified to ask whether there would be reason to treat the creditors joining in the obligation after the occurrence of the debtor's insolvency differently from the creditors joining in the obligation before the occurrence of the debtor's insolvency. The answer to this question should be sought from the protection purpose of section 180 (5^1) of the CC – is the sole purpose of this provision to protect the creditors from the decrease in the debtor's assets or should the provision also prevent the arising of new obligations?

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[86] n 59.

[87] Judgement of the Supreme Court of 17 December 2009 in civil matter No. 3-2-1-150-09.

[88] Judgement of Tallinn Circuit Court of 1 February 2008 in civil matter No. 2-04-1744.

[89] A separate question could be raised about the meaning of the so-called twilight zone when the company has clearly entered the hazard zone. Find out more from the next section.

Statement set forth for defence

The courts should clearly distinguish between old and new creditors. Differently from the quota loss of old creditors, in the case of new creditors, new creditors' reliance loss should be ordered from the director who has breached his/her duty to file a bankruptcy petition.

Reasoning

As noted above, the purpose of section 180 (5^1) of the CC is to protect the interests of creditors.[90] Protection of the interests of creditors lies in the fact that if the director files the bankruptcy petition on time, control over the debtor's economic activities will go to the bankruptcy trustee who is, pursuant to section 55 (1) of the BA, obligated to defend the rights and interests of all the creditors and of the debtor and ensure a lawful, prompt and financially reasonable bankruptcy procedure. Pursuant to section 1 (3) of the BA, the company is insolvent if the assets of the company are insufficient for covering the obligations thereof and, due to the debtor's financial situation, such insufficiency is not temporary.[91] Therefore, theoretically speaking, if the company's obligations exceed its assets by one euro, the director should already file the bankruptcy petition.[92] In that kind of a situation creditors' claims would be satisfied almost to a full extent. However, the above statistics[93] prove on the contrary that most bankruptcy proceedings in Estonia end in abatement, i.e., the extent of satisfaction of creditors' claims is zero. Based on that, it can be claimed that the majority of directors fail to file the bankruptcy petition on time and keep the company in operation until it is without any assets. Therefore, the purpose of section 180 (5^1) of the CC is to protect creditors from the decrease in the debtor's assets. If the duty to file the bankruptcy petition is breached, the creditors are entitled to claim compensation for quota loss to the extent in which the company's assets decreased as a result of the director's breach.

An important question in this section is whether in addition to maintaining the company's assets, section 180 (5^1) of the CC may have another protection purpose – to prohibit joining in new obligations with insolvent debtor. Pursuant to sections 35 (1) 2) and 4) of the BA, the right to administer the debtor's assets is transferred, by declaration of bankruptcy, to the trustee and the company is deprived of the right to enter into any transactions.[94] Although the bankruptcy of the company itself does not preclude that the trustee will conclude new

[90] n 59.

[91] Pursuant to section 1 (2) of the BA, insolvency may also be related to the cash-flow, i.e., if the debtor is unable to satisfy the claims of the creditors and such inability is not temporary. The company is deemed to be permanently insolvent if the company is either in balance sheet insolvency (section 1 (3) of the BA) or cash-flow insolvency (section 1 (2) of the BA).

[92] Presumed that such negative capital is not temporary.

[93] n 62.

[94] Pursuant to section 18 of the BA, the court may apply measures for securing bankruptcy petitions already when deciding on the appointment of an interim trustee and prohibit the director from entering into transactions without the consent of the interim trustee.

contracts, such new creditors will have an advantage over the other creditors.[95] However, if the director continues to operate the insolvent company, new creditors will be in a complicated situation where it will be obvious already during the conclusion of the contract that satisfaction of their claims will not be very likely; later on in the bankruptcy proceedings they will be treated on even terms with the other creditors. Therefore, there is reason to claim that another purpose of section 180 (5^1) of the CC is to prevent the arising of new obligations of an insolvent company.

Unlike the old creditors' quota loss, with regard to new creditors, damage that was caused as a result of abuse of their trust should be discussed. Both compensation for quota loss and reliance loss is based on checking the existence of causation; however, the important difference is with regard to what causation is checked. In the case of old creditors, it is checked on the level of causation whether the delay in filing the bankruptcy petition has caused the bankruptcy estate to decrease. In the case of new creditors, however, the size of the estate is not that important and it is checked on the level of causation whether the contract would have been concluded at all if the director had performed his/her duties as required. This kind of distinction is a result of different views on the protection purpose of the provision – with regard to old creditors, the purpose of the protection provision is to avoid the decrease in assets and through that offer protection to the existing creditors; however, with regard to new creditors, the protection purpose of the provision is to put a stop to entering into new contractual relationships with an insolvent company. However, if no clear legal dogmatic distinction has been made in judicial practice between the old and new creditors, giving proper meaning to the protection purpose of the provision will probably be complicated, which, in turn, may lead to mistakes in the application of causation.

The Estonian Supreme Court rendered a decision on 25 February 2013 in which it, for the first time, clearly distinguished between the two protection purposes of section 180 (5^1) of the CC.[96] The Supreme Court has noted the following in the said decision, "section 180 (5^1) of the CC protects the creditors of the company from two kinds of damage. First, filing of the bankruptcy petition on time must ensure that the company's assets are maintained to as large extent as possible and through that the claims of creditors are satisfied to as large extent as possible. Second, filing of the bankruptcy petition on time must ensure that a company which is basically insolvent would not continue to participate in economic activities from which obligations may arise which the company is not able to perform."

Considering the inconsistent practice of Estonian lower courts so far, the Supreme Court could, nevertheless, have explained the respective issue more thoroughly. Based on the referred decision of the Supreme Court, it may still

[95] Based on section 148 of the BA, it is a consolidated obligation, the performance of which will have priority pursuant to section 146 of the BA.
[96] Judgement of the Supreme Court of 25 February 2013 in civil matter No. 3-2-1-188-12.

remain unclear which creditor can claim compensation for which damage. For example, it is not evident from the decision of the Supreme Court, for which damage the creditor may claim compensation if the transaction has been entered into prior to the occurrence of insolvency, but the debt has incurred after the occurrence of insolvency, or even if the debt has incurred prior to the occurrence of insolvency, but it has been refinanced after the occurrence of insolvency? It remains unclear whether, as reliance loss, one may request compensation for claims arising from both contractual and non-contractual obligations, or whether it applies only to contractual obligations. The decision of the Supreme Court also does not provide an answer to the question what happens if the new creditor was aware of the insolvency of the debtor when concluding the contract.

In Germany it has been recognised that the duty to file the bankruptcy petition serves two protection purposes: first, it must ensure that the decrease in the assets of the company is avoided and it must protect from a decrease in the extent of claims of the creditors whose claims existed prior to the occurrence of insolvency (so-called protection of old creditors);[97] second, filing of the bankruptcy petition on time must prevent the participation of an insolvent company in economic activities and, through that, avoid the arising of new obligations (so-called protection of new creditors).[98] Differently from old creditors, determination of quota loss of new creditors is not necessary since what is being protected is new creditors' reliance loss instead – damage that was caused because the new creditor entered into a transaction with an insolvent company (the entire negative damage of the new creditor is to be compensated).[99]

In German judicial practice, new creditors' reliance loss claims are limited only by claims arising from contractual relationships, such as, granting of loans or making prepayments, since the purpose of the protection provision is to prevent conclusion of new contracts.[100] However, if the new creditor has a contractual claim against a company, it is much easier to enforce the claim against the director as a reliance loss than as a quota loss because there is no need to prove how quota loss was caused and the entire negative damage, i.e., direct damage that was caused to the creditor as a result of the conclusion of the contract, will be compensated.[101] Unlike the old creditors' quota loss claims, new creditors may enforce their reliance loss claims directly (i.e., without the mediation of the trustee).[102] As enforcement of the claims of new creditors is

[97] D. Möritz (n 71) 121 et seq.
[98] Michael Hoffmann-Becking, Achim Herfs et al, *Münchener Handbuch des Gesellschaftsrechts, Aktiengesellschaft*. Vol. IV. 2nd edn. (C.H.Beck 1999) 290.
[99] Wilhelm Uhlenbruck, Heribert Hirte, *Insolvenzordnung, Kommentar*. 13th edn. (Verlag Franz Vahlen 2010) 312
[100] BGH 8.3.1999, ZIP 1999 p 967.
[101] E.g., objective value of sold goods could be compensated as a negative damage, but not the loss of income due to the seller's markup. I. Drescher (n 29) 244–245.
[102] F. Steffek (n 72) 445–446.

easier from the evidential point of view and new creditors may have their claims satisfied to a larger extent than the old creditors, new creditors' reliance loss cases prevail in German judicial practice.[103]

Differently from German law, English law prefers equal treatment of creditors and there is no clear distinction between the old and new creditors. Although it is, in principle, possible for courts to take into consideration the abuse of new creditors' interests when determining the amount of compensation, it will not influence the distribution ratio paid to the new creditor since according to English courts, the purpose of section 214 of the IA 1986 is to compensate damage to creditors as a whole and claims of new creditors should not be preferred to the claims of old creditors.[104]

In Spanish legal literature, ambivalent opinions have been expressed concerning the position of new creditors. Pursuant to section 172bis (3) of the LC, amounts ordered from the director are received in the bankruptcy estate and distinguishing between old and new creditors is not possible when making payments. However, in literature the distinction between old and new creditors has been made[105] and filing of new creditors' reliance loss claims in parallel with bankruptcy proceedings has, in principle, been considered possible on the basis of section 241 of Spanish Companies Act (**TRLSC**).[106]

Based on the above said, the author is of the opinion that an old creditor is the kind of creditor who has joined in contractual obligation with the debtor prior to the occurrence of permanent insolvency of the debtor, irrespective of the moment when the claim has became enforceable. The old creditor bears the usual business risk related to the possibility that the debtor goes bankrupt and in the case of the old creditor, compensation for reliance loss is not grounded. Even if the claim becomes enforceable after the occurrence of insolvency, it does not change the position of the old creditor to the debtor since it may be presumed that the debtors' insolvency could not be foreseen and, therefore, there is no reason to claim that the director has abused the old creditor's trust. In authors' opinion the same principle should be applied to recurring obligations and obligations performed in parts (e.g., monthly rent or loan payments) if the contractual relationship was entered before the occurrence of permanent insolvency of the debtor. The actual moment when insolvency occurred is of decisive importance when assessing the occurrence of insolvency. A term

[103] Ibid, 468.
[104] Purpoint Ltd [1991] BCLC 491.
[105] Guillermo Guerra Martín, Alberto Alonso Ureba et al, *La Responsabilidad de los Administradores de Sociedades de Capital*. 1st edn. (Wolters Kluwer España, La Ley 2011) 161.
[106] Spanish Companies Act (*Texto Refundido de la Ley de Sociedades de Capital*, Official State Bulletin [*Boletín Oficial del Estado*], BOE-A-2010-10544). Section 241 of the TRLSC is a provision in Spanish law that forms the basis for filing direct claims that are based on external relationships against the director (in Spanish *acción individual*). See SAP CS 1534/2000, 2.10.2000; also Angel Rojo, Emilio Beltrán, *Comentario de la Ley de Sociedades de Capital*. Vol. I. (Thomson Reuters 2011) 1735.

established by law for submission of the bankruptcy application[107] should have no importance here as the objective of said term is not to continue the economic activities of an insolvent debtor, but to assess the reorganisation possibilities of the debtor and prepare for the filing of the bankruptcy petition.[108]

The position of the new creditor is, however, not related to the bearing of the usual business risks; with regard to new creditors, one can speak about abuse of trust right from the start. When the company's insolvency becomes evident, the director is obligated to file the bankruptcy petition with the court and that bankruptcy petition will form the basis for removing the company from economic circulation and precluding the arising of new contractual obligations. The economic substance of contractual obligations is important at this point as well – if joining in the contractual obligation formally takes place after the occurrence of insolvency, but substantially the debt has incurred prior to insolvency (e.g refinancing), there is no reason to speak about damaging of that creditor's trust. The author supports the position expressed in German judicial practice that compensation for reliance loss may be claimed by creditors whose claims have arisen from contractual relationships. The author finds additionally, creditors whose claims arise from the reversal of cancelled or void contracts, should be able to claim compensation for reliance loss. However, in the case of tort, for example, there is no reason to speak about trust violated by the director. For the same reason, the author is not a proponent of compensating for reliance loss of those new creditors who were aware of the companys' insolvency when they concluded the contract, as their trust has not really been violated.[109] However, if the creditor is unable to enforce his/her claim as reliance loss, s(he) may file it as a quota loss claim.

The author is of the opinion that clear identification of new creditors and recognition of their reliance loss claims enables better protection of the interests of new creditors as filing of new creditors' claims against the director is considerably easier when compared to the filing of old creditors' quota loss claims (no need to prove quota loss). Distinguishing between new creditors and old creditors does not mean that some creditors are preferred over the others since the company will still be held equally liable to all creditors. In the given

[107] In Estonia 20 days, in Germany 3 weeks (i.e 21 days), in Spain 2 month.

[108] Pursuant to section 180 (5^1) of the CC, the bankruptcy petition must be filed promptly after the date on which the insolvency became evident. The twenty-day term provided by the same section does not mean that irrespective of the circumstances, the director could always delay twenty days with the filing of the bankruptcy petition and meanwhile carry on with everyday economic activities. The purpose of the said term is to provide the director with the opportunity to further check the solvency of the company, assess reorganisation possibilities (including conduct negotiations with creditors, investors and shareholders) and make preparations for filing the bankruptcy petition depending on the specific circumstances. On the purpose of the term for filing the bankruptcy petition, see also: I. Drescher (n 29) 233.

[109] E.g., if a creditor grants a reorganisation loan to an insolvent company, the risk of the company going bankrupt later on is 'written' in their loan agreement right from the start (on the presumption that the director has adequately informed the creditor of the company's solvency).

case, however, it is the question of the director's tort liability and it is grounded to separately assess what kind of protection purpose the director has breached by failing to perform the duty to file the bankruptcy petition. The author finds that more severe liability of the director in this matter does not suppress his/her spirit of entrepreneurship since it is clearly in the director's own power to file the bankruptcy petition and breach of that duty cannot come as a surprise to the director. Furthermore, the author does not believe that encouragement of economic activities of insolvent companies would have a positive effect on the development of business activity and economy.

5.2. Obligation of the Director who has Failed to Act in the Case of Thin Capitalisation of the Company to Compensate for the Damage Caused to Creditors

Description of the problem

The concept of companies' limited liability is based on their capital – pursuant to section 135 (2) of the CC, a shareholder is not personally liable for the obligations of the private limited company.[110] Liability of a shareholder is limited to the capital paid by the shareholder. Thus, the capital of the company acts as a guarantee for creditors' claims and it is important to the creditors that the capital would be maintained at least in the minimum amount provided by law.[111]

Pursuant to section 171 (2) 1) of the CC, the director is obligated to call a meeting of shareholders if the net assets (total assets minus total obligations shown under liabilities on a balance sheet) of the private limited company are less than one-half of the share capital or less than the amount of share capital specified in section 136 of the CC or other minimum amount of share capital provided by law.[112] Pursuant to section 176 of the CC, the general meeting should decide on a reduction or increase of capital of the company, liquidation, transformation, dissolution or declaration of bankruptcy of the company or the implementation of other measures.[113] If, however, the general meeting does not take any decisions or if the decision taken is not adequate to overcome thin capitalisation[114] then in Estonia, the director has no other obligations or additional liability with regard to thin capitalisation of the company. Only after thin capitalisation has developed into permanent insolvency the director has an additional obligation based on section 180 (5^1) of the CC to file the bankruptcy petition with the court.

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[110] Corresponding provision on shareholders of public limited companies is section 221 (2) of the CC.

[111] T. Raiser, R. Veil, *Recht der Kapitalgesellschaften* (Verlag Franz Vahlen 2010) 328

[112] Corresponding obligation of the director of a public limited company derives from section 292 (1) 1) of the CC.

[113] Corresponding provision on public limited companies is section 301 of the CC.

[114] E.g., a decision is taken to wait for better times to come.

The thin capitalisation fact alone does not mean inevitable insolvency of the company. There are many companies that operate in the conditions of thin capitalisation.[115] Nevertheless, it is evident that a company which experiences thin capitalisation operates in a so-called twilight zone and thin capitalisation may be transformed into permanent insolvency. Based on accounting logic, in terms of balance sheet, thin capitalisation is one step away from permanent insolvency. The majority of insolvent companies have been in thin capitalisation stage prior to insolvency.[116]

According to the above statistics, more than half of the bankruptcies in Estonia are without assets and end in abatement.[117] One reason for bankruptcies without assets is the fact that liquidation activities are commenced too late. However, even if some assets remain in the bankruptcy estate that enable satisfaction of creditors' claims, for example, by 20%, it still means that the director has allowed the capital to become greatly negative before taking any decisive actions.

Pursuant to section 203 (1) 1) of the CC,[118] failure to act in the case of thin capitalisation may result in compulsory dissolution of the company on the basis of a court ruling. Andres Vutt has found in his dissertation that state intervention in that manner is not justified and has no effect on the protection of the interests of shareholders and creditors. For that reason, Andres Vutt proposes in his dissertation to annul section 203 (1) 1) of the CC[119] in the part in which the law enables the court to dissolve a company which is in the state of thin capitalisation.[120]

The author agrees that compulsory dissolution on the basis of section 203 (1) 1) of the CC may not assure effective protection to shareholders and creditors. However, the author thinks that partial annulment of section 203 (1) 1) of the CC, as proposed by Andres Vutt, alone would be insufficient since the question on how to ensure better protection of the shareholders and creditors in the case of thin capitalisation of a company would not be solved. Removal of the option of compulsory dissolution by court ruling by itself would assure neither

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[115] Cubelock Ltd [2001] BCC 523. Explanation by Park J on common practice where shareholders' equity of companies that have just started their business is often negative and the capital of companies already in operation may temporarily become negative, which does not mean wrongful trading yet.

[116] Of course, the net assets of an insolvent company are also less than the statutory minimum as in the case of thin capitalisation. In the dissertation, the author distinguishes between thin capitalisation and permanent insolvency. For the purposes of this dissertation, a company is considered as experiencing thin capitalisation if its shareholders' equity is less than the statutory minimum, but it has not become permanently insolvent yet. A company is considered to be permanently insolvent if its obligations exceed the assets or it is not able to constantly fulfil its payment obligations (i.e., the company experiences thin capitalisation, but in addition to that is also permanently insolvent).

[117] n 62.

[118] Similar provision on public limited companies is section 366 (1) 1) of the CC.

[119] In the case of public limited companies, section 366 (1) 1) of the CC.

[120] A. Vutt (n 48) 43–44.

performance of statutory capital requirements nor getting the company out of the so-called twilight zone.

In the dissertation, the author has analysed the possibility of filing a compensatory claim against the director when the director fails to act in the case of thin capitalisation. If the creditors had the option to at least partially file their unsatisfied claims against the director, creditors' rights would be protected to a greater extent and it would contribute to initiation of the liquidation or bankruptcy proceedings of the company at an earlier stage when the company still has assets on account of which creditors' claims could be satisfied.

Statement set forth for defence

The breach of the duty to call a general meeting alone cannot bring about tort liability of the director to the creditors of the thinly capitalised company. In order to form a basis for directors' personal tort liability the director should be additionally obligated to file a petition with the court for compulsory dissolution of the company if the general meeting of the company has not taken place in due time or if the general meeting has decided to liquidate the company or if the general meeting has not adopted any appropriate decision. The breach of said additional obligation should enable damaged creditors to file direct tort claims against the director.

Reasoning

Pursuant to section 171 (2) 1) of the CC, the director is obligated to call a general meeting if the net assets of the company are less than the statutory minimum. The said provision embodies a duty of the director and it may have a purpose to protect third persons as well. Therefore, it could be discussed whether it is a protection provision for the purposes of section 1045 (1) 7) of the LOA, which would enable creditors to file a compensatory tortious claim against the director.

Estonian courts of first instance have repeatedly seen section 171 (2) 1) of the CC as a protection provision, the purpose of which is to offer protection to creditors.[121] In later judicial practice, however, Tallinn Circuit Court has called into question whether section 171 (2) 1) of the CC is a protection provision provided for the protection of creditors. The Circuit Court sent the matter back to the lower court for rehearing with instructions to separately verify whether the protection purpose of section 171 (2) 1) of the CC is indeed to offer protection to creditors. For some reason the Circuit Court itself did not declare a final position in this matter.[122] Based on information available to the author, the

[121] Judgement of Harju County Court of 30 October 2008 in civil matter No. 2-07-46119; judgment of Tartu County Court of 23 October 2007 in civil matter No. 2-07-13801.

[122] Judgement of Tallinn Circuit Court of 21 December 2010 in civil matter No. 2-09-44968. In the later proceeding, the County Court did not analyse the protection purpose of section 171 (2) 1) of the CC in its judgement of 28 September 2011, but instead, established the breach of the director's duty to file the bankruptcy petition (section 180 (5^1) of the CC), which also formed a basis for partial satisfaction of the action against the director.

Supreme Court of Estonia has so far not rendered any judgements in the matter under discussion.

The author considers section 171 (2) 1) of the CC not to be a protection provision that offers protection to creditors. The said provision only provides the duty of the director to call the general meeting. Pursuant to section 292 (3) of the CC, a special general meeting of the public limited company will not be called if the time between becoming aware of the decrease in the assets and the annual general meeting is less than two months.[123] Based on that, it can be concluded that the maximum amount of time that may remain between the occurrence of thin capitalisation and taking place of the respective general meeting is two months. Nevertheless, even if the general meeting is called on time, it does not give a guarantee that the general meeting will take a decision to overcome thin capitalisation. The director can only make propositions, but cannot assure that decisions are taken on the basis of those propositions (on the presumption that the director is not a majority shareholder at the same time). Should the general meeting decide to do something to improve the state of capital, it could only indirectly and reflectively also protect the interests of creditors.[124] However, should the general meeting decide not to do anything, the director will have formally performed his/her duties, but the interests of creditors will have been left unprotected.

Out of the countries of comparison Germany has a similar regulation in section 49 (3) of the GmbH Act[125], pursuant to which the director is obligated to call a general meeting if half of the share capital of the company has been spent. According to German authors, the purpose of the referred provision is to protect the interests of shareholders, inform them about the economic difficulties the company is experiencing and enable them to apply appropriate measures promptly. Although this may indirectly also be in the interests of creditors since there is less chance of a company going bankrupt when the duties of the director are performed as required, for the purposes of section 823 (2) of the BGB this provision is still not a provision that provides protection to creditors.[126]

A regulation similar to that of Estonian and German law for calling a general meeting is provided in English law as well.[127] However, creditors cannot file

[123] There is no similar provision for the private limited company; however, the author is of the opinion that it would be justified to apply the same provision to private limited companies as well.

[124] E.g., a decision to increase the company's capital will decrease the risk of the company becoming insolvent and increase the probability of creditors having their claims satisfied.

[125] German GbmH Act (*Gesetz betreffend die Gesellschaften mit beschränkter Haftung*, Federal Law Gazette I p. 2586).

[126] Marcus Lutter, Peter Hommelhoff et al, *GmbH-Gesetz, Kommentar*. 18th edn. (Köln, Verlag Otto Schmidt 2012) 1321; G. Crezelius, V. Emmerich et al, *Scholtz Kommentar zum GmbH-Gesetz*. Vol. II. 9th edn. (Verlag Otto Schmidt 2002) 2586; Lutz Michalski, G. Dannecker et al, *Kommentar zum Gesetz betreffend die Gesellschaften mit begrenzter Haftung (GmbH-Gesetz)* Vol. II (C.H.Beck 2002) 1025–1026.

[127] Art. 656 of English Companies Act 2006.

tortious claims against the director who has breached the duty to call a general meeting in England either.[128]

An interesting solution is provided in Spanish law. Pursuant to section 367 of the TRLSC, a director is solidarily liable with the company for the performance of contractual obligations that have arisen after the occurrence of the bases for dissolution of the company (in Spanish *causa de disolución*). One such basis for dissolution may be thin capitalisation of the company. The director is obligated to call a general meeting that could take a decision to eliminate the respective basis for dissolution or liquidate the company within two months after the occurrence of thin capitalisation. However, if the general meeting does not take such a decision or if the general meeting does not take place or if the general meeting does take the decision, but it does not enable elimination of thin capitalisation, the director is according to Spanish legal literature obligated to file a petition for liquidation of the company (or file a bankruptcy petition if a basis for that exists).[129]

Upon breach of the above-mentioned duties, direct liability of the director to the creditors of the company may arise. However, it will not be tort liability, but, according to the prevailing opinion, sanctional liability instead (in Spanish *sancion civil*).[130] Spanish Supreme Court has emphasised that it is objective liability of the director, which is neither dependent on causation nor even the size of damage. It is merely important to establish that statutory duties of the director have been breached in the case of thin capitalisation of the company.[131] As there is no corresponding restriction deriving from law, the director will be held liable irrespective of the basis of the creditor's claim (including for satisfaction of creditors' claims arising from employment and non-contractual obligations).[132]

The author finds that the duty of the director to convene a general meeting of thinly capitalised company does fulfil the objective of informing shareholders, but does not automatically ensure sustainability of the company's economic activities. The purpose of the provision that provides the said duty is not the protection of creditors. Therefore, even if the director has breached the respective duty, it is not possible for the creditors to claim compensation for damage from the director.

The author thinks that in addition to the duty to call the general meeting, the director should have the duty to liquidate the company (or file a bankruptcy petition if basis for that exists) if the general meeting has not taken place in due time or if the general meeting decided to liquidate the company or if the decision of the general meeting is insufficient for eliminating thin capitalisation (including when the general meeting does not take any decision at all).

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[128] F. Steffek (n 72) 295–296.
[129] G. Guerra Martín, A. Alonso Ureba et al, (n 105) 238.
[130] Angel Rojo, Emilio Beltrán, *Comentario de la Ley de Sociedades de Capital*. Vol. II. (Thomson Reuters 2011) 2575 et seq.
[131] STS 3900/2010, 30.6.2010.
[132] G. Guerra Martín, A. Alonso Ureba et al (n 105) 267.

In Estonia, for example, section 203 of the CC could be supplemented with a new subsection 2^1 in the following wording:[133]

> If the net assets of a private limited company decrease below the limit provided by section 171 (2) 1) of this Code, the director is obligated to file a petition for dissolution of the company no later than twenty days after the date on which the general meeting took place or should have taken place if:
> 1): the general meeting has so decided pursuant to section 176 2) of this Code;
> 2): the general meeting has taken any other decision provided in section 176 of this Code, but the decision is not sufficient to bring the net assets of the company into accordance with the statutory requirements within the term provided by this subsection; or
> 3): the general meeting has not taken any decision at all.

The said new provision would similarly to section 180 (5^1) of the CC be aimed at terminating the activities of the company and liquidating the company during which the liquidator has the duty pursuant to section 209 (2) of the CC to terminate the activities of the private limited company, collect debts, sell assets and satisfy the claims of creditors. Pursuant to section 209 (3) of the CC, the liquidators may only conclude transactions which are necessary for liquidation of the private limited company. Therefore, the decrease in the company's assets due to further unprofitable economic activities should come to a stop through liquidation and the remained assets should be used for the specific purpose of satisfying creditors' claims. The author is of the opinion that it would be justified to treat this new provision as a protection provision for creditors similarly to section 180 (5^1) of the CC for the purposes of section 1045 (1) 7) of the LOA.

Unlike Spanish law, the author is not in favour of sanctional liability of the director; instead, the director should be held liable to creditors on tortious grounds similarly to the breach of the duty to file the bankruptcy petition; however, with the exception that the moment of potential liability of the director for failure to act in the case of thin capitalisation would occur prior to the company becoming permanently insolvent.

The offered solution would enable better protection of the interests of creditors since more severe personal liability would force the director to take the reorganisation of the company in the occurrence of thin capitalisation more seriously and apply measures to avoid further decrease in the assets sooner. From the perspective of the director, this kind of more severe liability would not come unexpected. The director has the duty to maintain the reports in any case and thin capitalisation of the company cannot come as a surprise to the director. When thin capitalisation occurs, the director has quite long time to call a

[133] With regard to public limited company, subsection 2^1 should be added to section 366 of the CC.

general meeting.[134] This time can be used to consider all possible ways for reorganisation of the company.[135] The author finds that if it is obvious by that time that bringing the company's capital into accordance with the statutory requirements is hopeless and it is probable that the company may become insolvent, it is justified to impose the duty to terminate the activities of the company on the director.

The proposed solution, nevertheless, has its risks as it may motivate directors to dissolve sustainable companies whose thin capitalisation is temporary or where thin capitalisation is merely a matter of accounting.[136] Still, the author thinks that the director should call a general meeting in the case of thin capitalisation of the company anyway. If thin capitalisation is temporary (e.g., in the case of a company starting its business), the director together with the shareholders can assess the risks associated with the continuing of activities in the situation of thin capitalisation and if thin capitalisation of the company does not affect the company's solvency, the director may also remain inactive because if no damage is caused, no claims against the director can arise. If the company's thin capitalisation is only an accounting issue then that kind of thin capitalisation can most likely be easily removed from the book records. However, if thin capitalisation may have an actual negative effect on the company's solvency, the shareholders must, after all, find ways to restore the capital. The author is of the opinion that in that kind of situation, business risks should be taken at the expense of shareholders and not creditors. If the shareholders are not willing to bear that risk, the director should take steps in order to liquidate the company. However, if (s)he remains inactive in the situation of thin capitalisation, the director should be held liable for damaging the interests of creditors.

[134] In Estonia, for instance, the director has to call the general meeting in 2 month after occurance of thin capitalisation. See n 123.

[135] Some examples about proper and adequate actions in the twilight zone of a company are pointed out in the Uncitral Legislative Guide on Insolvency Law, Part four: Directors` Obligations in the Period Approaching Insolvency (New York, United Nations 2013) 10–12. Available at http://www.uncitral.org/pdf/english/texts/insolven/Leg-Guide-Insol-Part4-ebook-E.pdf (last accessed on 2.2.2015).

[136] E.g., the company's share capital has been fictitiously increased by non-monetary contribution. Later, market value of assets has significantly decreased and caused net assets to fall below one-half of the share capital. At the same time, the company's total amount of liabilities is not big and its economic activities yield a profit.

5.3. Liability of the Director for Disclosure of Untrue Statements

5.3.1. Liability for Intentional Disclosure of Untrue Statements

Description of the problem

It may be generalised that when creditors lose money, it is always related to inaccurate assessment of business risks. Herewith, the inaccurate assessment may be objective (based on unexpected changes in the economic environment that could not be foreseen) or subjective (based on the creditor's own erroneous understanding of the economic environment, other party to the transaction or object of transaction). The creditor's subjective mistake may be the result of his/her lack of knowledge or an untrue perception created by the other party. Although the parties always have a certain common interest in the transaction (otherwise the transaction would not be concluded at all), the interests of the parties often lead them in separate directions (the seller wants to sell for the highest possible price and the buyer wants to buy for the lowest possible price). Therefore, it may often be that the parties tend to present facts in a more favourable light than they actually are or hide circumstances that when known could harm the party's position in negotiations. It could be any fact concerning the party's experiences and capabilities in the performance of the contract, the object of the contract or some other fact relevant for the performance of the contract.

Section 1045 (1) 8) of the Estonian LOA, pursuant to which, the causing of damage is unlawful if the damage is caused by intentional behaviour contrary to good morals, could be pointed out as one possible basis of liability for disclosure of untrue statements. It is a universal provision applicable in all situations when a person has behaved intentionally and contrary to good morals.

As a precondition for applying section 1045 (1) 8) of the LOA, the defendant's intent must be established and also that the defendant's behaviour was contrary to good morals. Intent does not necessarily have to be aimed at causing damage to the other party. It is sufficient if intent is aimed at breach and the defendant was aware or should have been aware that the breach could cause damage to the other party.[137] Sometimes, however, an act which is in accordance with good morals can turn into an act that is contrary to good morals if it is established that intent was specifically aimed at causing damage to the victim.[138]

How good morals are assessed, depends on judicial practice. In its judgement of 5 June 2013 the Supreme Court has covered the possibility of the liability of the director on the basis of section 1045 (1) 8) of the LOA and taken the position that double-sale of assets alone does not give grounds to say that a

[137] P. Varul, I. Kull et al (n 28) 651.

[138] Judgement of the Supreme Court of 21 December 2010 in civil matter No. 3-2-1-67-10 where it is stated that disclosure of data about the debtor is, in itself, not contrary to good morals unless the aim of disclosure is to disgrace the debtor instead of collecting debts.

transaction is contrary to good morals. It is, however, implicit in this decision that according to the Supreme Court, cheating someone out of money as one form of disclosure of untrue statements may be handled as intentional behaviour contrary to good morals.[139]

In German literature it has been attempted to formulate good morals through "persons with sense of common decency and fairness" (in German *Anstandsgefühl aller billig und gerecht Denkenden*).[140] It is understandable that resolution of a specific dispute based on this wide definition alone would be rather complicated. In order to do that, more precise criteria with which disclosure of false information should comply with should be defined. In the dissertation, the author seeks an answer to the question, when could the director be held liable for intentional disclosure of untrue statements.

Statement set forth for defence

The director is not held liable for intentional disclosure of every kind of false information. The precondition of the director's tort liability for intentional disclosure of untrue statements is that the presented information has decisive meaning on the injured party making the decision to conclude the transaction and the injured party has also relied on that information. Presenting of false information that forms the basis of liability may lie in active issuing of information, but also in concealing information that is identifiably important to the injured party.

The statement under question is based on the presumption that the director's intent has been established.

Reasoning

As noted above, section 1045 (1) 8) of the LOA provides a general basis for all intentional breaches that could be handled as behaviours contrary to good morals according to judicial practice. It is a kind of substitute provision for situations that are not regulated by a specific protection provision or any other basis for a claim, but where the breach is so severe that it would be extremely unfair to deny the injured party's right of claim. Alternatively, section 1045 (1) 8) of the LOA can also apply in situations where the law already provides a protection provision for the corresponding breach. For example, intentional causing of insolvency may be considered as being behaviour contrary to good morals[141] although in such a situation the director may also be held liable on the basis of the protection provision that provides the duty to file the bankruptcy petition (section 180 (5^1) of the CC in co-effect with section 1045 (1) 7) of the LOA). However, it should be kept in mind that only the defendant's negligence must be established to file a claim on the basis of section 180 (5^1) of the CC, but to file a claim on the basis of section 1045 (1) 8) of the LOA, the plaintiff must

[139] Judgement of the Supreme Court of 5 June 2013 in civil matter No. 3-2-1-62-13.
[140] K. Rebmann, F. J. Säcker, R. Rixecker (n 34) 1898.
[141] L. Michalski, G. Dannecker et al (n 126) 533 et seq.

separately prove the intent of the defendant, which may be a very difficult thing to do in practice.

If there is no corresponding protection provision or any other basis for a claim, the only option is to file the claim on the basis of section 1045 (1) 8) of the LOA. Intentional disclosure of untrue statements by the director is one of such cases.[142]

The central question when filing a claim on the basis of section 1045 (1) 8) of the LOA, is whether the breach that the director is being blamed for is contrary to good morals. Due to legal dogmatic differences, out of the countries of comparison, section 1045 (1) 8) of the Estonian LOA can be directly compared only to German law as German law provides a similar basis for a claim in section 826 of the BGB. In Germany, only such disclosure of untrue statements can be contrary to good morals that has a determinative importance on the injured party taking the risks s(he) would not have taken if s(he) had had a correct perception of the facts.[143]

In English law, the concept 'contrary to good morals' is foreign; however, they recognise a quite similar concept 'deceit', which is an independent tort. For example, a director who intentionally disclosed untrue statements with the aim to receive a payment on the basis of a letter of credit has been held liable in English judicial practice.[144] The plaintiff is required to prove that the disclosure of untrue statements had a significant influence on his/her decision.[145] In England, the director may be held liable for deceit for active misrepresentation; simply keeping quiet will usually not bring about liability of the director.[146]

The concept that is similar to German and Estonian concept 'contrary to good morals' and English concept 'deceit' in Spanish law is '*dolo grave*'. It is considered important in Spain as well that the presented untrue statements

[142] In Estonian law there is no general protection provision that would forbid the director to disclose untrue statements. However, it is possible that for certain special cases protection provisions do exist. In its judgement of 30 September 2010 in civil matter No. 2-07-7382 Tallinn Circuit Court has contemplated the possibility that the provision that provides the duty to organise accounting is a protection provision provided for the protection of the interests of creditors. The author is, however, doubtful as to whether it is a protection provision since it is not the primary purpose of general obligation to keep records to offer protection to creditors. The same position that merely breach of the general obligation to keep records cannot bring about tort liability of the director to third persons that arises from breach of a protection provision has been taken in Germany as well. Rocco Jula, *Der GmbH-Geschäftsführer*. 4th edn. (Springer 2012) 279.

[143] Maria Cristina Ciota, *Die deliktische Aussenhaftung des Vorstandes einer Aktiengesellschaft* (Aachen, Shaker Verlag 2008) 186 et seq.

[144] Standard Chartered Bank v Pakistan National Shipping Corporation, [2002] UKHL 43, [2003] 1 All ER 173.

[145] W.V.H.Rogers, *Winfield & Jolowicz on Tort*. 17th edn. (London, Sweet&Maxwell 2006) 480 et seq.

[146] Simon Deakin, Angus Johnston and Basil Markesinis, *Markesinis and Deakin's Tort Law*. 5th edn. (New York, Oxford 2003) 502.

would have a determinative importance on the injured party's decision to enter into the transaction.[147]

Based on the above, a position can be taken that the countries of comparison have all thought it necessary that untrue statements should have decisive importance on the injured party's decision to enter into the transaction for the director's personal liability to arise. It can also be said in such a way that if the injured party had been aware of actual facts, s(he) would not have entered into the transaction at all or would have done so on significantly different terms. Of course causation has to have been established, i.e., the victim has to have relied on the presented untrue statements while entering into the transaction. Therefore, just any kind of creative facts or other exaggerations that had no real influence on the decision of the injured party cannot form a basis for personal tort liability of the director.[148]

The author thinks that there is no reason to distinguish between whether disclosure of untrue statements was the result of the director's active or passive activity. Concealment of information that is of significant importance to the injured party is in no way a more minor breach than active submission of untrue statements. It is often just a matter of a "sales technique" whether to avoid giving an answer to the question that is of interest to the injured party, to only give a partial answer (so-called half-truth) or to lie when giving the answer. The real issue lies more in the fact that it is presumably more complicated for the plaintiff to prove intent in the case of passive disclosure of false information than in the case of active lying. Certification of the intent of the defendant is a complicated task in any case; however, in the case of active lying, intent can often be proved on the basis of facts, e.g., the director presented a false statement about fact A to the injured party during the conclusion of the contract while true circumstances about fact A had to have been known to the director for sure. However, passive presenting of untrue statements means that the director conceals the true circumstances about fact A during the conclusion of the contract, but does not present a false statement either. In such a situation it is far more complicated for the plaintiff to prove that the director intentionally concealed respective information.

5.3.2. Liability for Negligent Disclosure of Untrue Statements or for *Culpa in Contrahendo*

Description of the problem

Certification of intent during the disclosure of untrue statements may often prove to be problematic and, therefore, the author analyses on which conditions

[147] SAP Madrid 13150/2012, 11.07.2012.

[148] This certainly does not preclude company's own potential liability for breach of the contract (e.g., if the sold goods do not comply with the terms and conditions provided in the contract).

the director could be held liable for disclosure of untrue statements in the case of negligence.

If liability for the director's negligence would be as severe as liability for intentional disclosure of untrue statements, it could extend the boundaries of the director's liability too far – the director's own role in presenting false information would become secondary and his/her liability would depend more on how important is the particular information to the injured party.[149]

In exceptional cases, however, personal liability of the director for negligent disclosure of untrue statements could be considered. Pursuant to sections 14 (1) and (2) of the Estonian LOA, persons who engage in pre-contractual negotiations or other preparations for entering into a contract must take reasonable account of one another's interests and rights. Information exchanged by the persons in the course of preparation for entering into the contract must be accurate. Persons who engage in pre-contractual negotiations or other preparations for entering into a contract must inform the other party of all circumstances with regard to which the other party has, based on the purpose of the contract, an identifiable essential interest (*culpa in contrahendo, hereinafter* ***c.i.c.***). Section 14 of the LOA does not preclude personal liability of the representative of the party (director) on the basis of *c.i.c.* either.

Statement set forth for defence

Liability of the director as a representative of the company for damage caused to the creditor with negligent disclosure of untrue statements is possible only if special reliance has been created between the injured party and the director enabling the injured party to believe groundedly that the director has assumed personal liability for the correctness of presented information.

Merely the director's personal economic interest in the company does not form a basis for his/her personal liability. Depending on the circumstance, liability of the director for negligent disclosure of untrue statements may be affirmed in certain cases if the transaction has formally been entered into in the name of the company; however, in the economic sense, the transaction is only related to the director's private interests (acting on the principle of *procurator in rem suam*).

Reasoning

Obligations and liability arising from pre-contractual negotiations primarily apply to the negotiating party (the company). This is supported by section 31

[149] E.g., the director of a company that is the contractor discloses information that is based on information presented by the subcontractor to the customer. Later becomes clear that this information was not true and had determinative importance on injured party's decision to enter into the transaction. If it would be possible to hold the director liable for disclosure of untrue statements merely due to negligence, the possibility of personal tort liability of the director could arise in the current example since the director might have been negligent in verifying the information presented by the subcontractor.

(5) of the GPCCA pursuant to which, the activities of an organ of a company are deemed to be the activities of the company.

Nevertheless, section 14 of the LOA does not exclude the possibility that obligations and liability are also extended to the representative of the party. In Estonian legal literature, the position has been taken so far that the representative of the party may also be held liable for breach of the obligations provided in section 14 of the LOA if s(he) has caused the other party to feel justified reliance towards him/her as a potential party to the contract.[150]

On 5 June 2013, the Estonian Supreme Court rendered a fundamental decision in which it covered the possibility of personal liability of the director as a legal representative of the company on the basis of section 14 of the LOA.[151] The Supreme Court found that obligations arising from section 14 of the LOA do not extend only to the parties to the negotiations, but also to their representatives. According to the Court, the director may have breached the requirements of section 14 of the LOA if he has not informed the buyer about the impossibility of performing the contract of sale during the conclusion of the contract. The liability of the representative of the party for breach of the requirements of section 14 of the LOA is, however, not based on section 115 of the LOA, but on section 1043 and section 1045 (1) 7) of the LOA, i.e., at least should be more lenient. In the opinion of the Supreme Court, sections 14 (1) and (2) of the LOA are protection provisions for the purposes of section 1045 (1) 7) of the LOA. Pursuant to section 1045 (3) of the LOA, the plaintiff's damage should be included in the protection purpose of sections 14 (1) or (2) of the LOA. According to the Supreme Court, the liability of the representative primarily arises, "When the other party has special reliance towards a specific person who was engaged in negotiations, e.g., deriving from his official position in the company that takes part of the negotiations, or if his economic interests are the same as the company's economic interests." However, unfortunately the Supreme Court has not presented more precise criteria on how to give meaning to the referred reliance and economic interests.

The *c.i.c.* principle has originally been developed by German lawyer Rudolf von Ihering in an article published in 1861.[152] Liability of the director as a representative of the party on the basis of *c.i.c.* has been considered possible in

[150] P. Varul, I. Kull et al (n 55) 64.

[151] Judgement of the Supreme Court of 5 June 2013 in civil matter No. 3-2-1-62-13. According to the facts of the case, the director concluded a contract of sale with AS DNB Pank in the name of OÜ Staford. On the same day that same director concluded a leasing contract with AS DNB Pank concerning the same equipment in the name of AS Hotronic. Two years later the bank cancelled the leasing contract, but disposal of equipment turned out to be impossible since the same equipment had been transferred to a third person (Riigi Kinnisvara AS) before they were sold to the bank. The director had to have been aware that the seller had no right of disposal with regard to the assets, but he did not notify the bank about it.

[152] Rudolf von Ihering, Culpa in contrahendo oder Schadenersatz bei nichtigen oder nicht zur perfektion gelangten Vertragen, in *Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts* (4/1861) 1–112.

Germany on two occasions: if a special reliance has been created between the party and the director, or if the director has had personal economic interest in the transaction.

According to prevailing opinion in Germany special reliance must clearly go beyond the scope of common trust.[153] The fact that the director personally takes part in the negotiations is not enough; also, merely the existence of long-term business relationships does not form a basis for the creation of special reliance.[154] An example of special reliance would be a case where the director persuades the other party to conclude a contract based on existing close blood relationships between them.[155] A grounded impression must have been created in the other party that the director himself/herself will personally guarantee the performance of the contract.[156]

In earlier German judicial practice has been the position expressed that for the *c.i.c.* liability of the director is enough if the director is a shareholder of the company.[157] However, the BGH has later found that merely the fact that the director is a (sole) shareholder of the company does not cause the director to be personally economically interested in the particular transaction;[158] also, it is not grounded to attribute personal economic interest to the director if s(he) has given a personal surety or real collateral to secure an obligation of the company.[159] Personal economic interest of the director has been considered possible if the director has acted on the principle of *procurator in rem suam* when entering into a transaction; however, the latter group of cases has been called into question as well since merely the director's personal interest in the transaction should not make the other party expect that the number of persons liable for the performance of the contract has increased.[160]

In English law, the *c.i.c.* principle is not explicitly known; however, they have a principle with quite a similar effect called 'negligent misrepresentation', which has been recognised in English judicial practice as a separate tort. Two main cases have played a key part in the development of the tort in question: Hedley Byrne[161] and Williams v Natural Life Health Foods.[162] Based on these decisions, it may be concluded that the director can be held liable on the basis of negligent misrepresentation if, similarly to German *c.i.c.* liability, a special relationship has been created between the director and the other party to the transaction and the director has assumed responsibility. It is not visible from the

[153] I. Drescher (n 29) 179.
[154] BGH 1.7.1991, WM 1991, p 1548, 1549; M. Lutter, P. Hommelhoff et al (n 126) 1163.
[155] BGH 23.2.1983, BGHZ 87, p 27, 32.
[156] M. Lutter, P. Hommelhoff et al (n 126) 1164.
[157] BGH 19.12.1962, WM 1963, p 160, 161.
[158] BGH 23.10.1985, NJW 1986, p 586, 587; BGH 27.3.1995, NJW 1995, 1544.
[159] BGH 6.6.1994, BGHZ 126; BGH 13.6.2002, ZIP 2002, 1771.
[160] Frank Eckhoff, *Die Haftung der Geschäftsleiter gegenüber den Gläubigern der Gesellschaft wegen Insolvenzverschleppung* (Baden-Baden, Nomos 2010) 102, 109.
[161] Hedley Byrne and Co v Heller and Partners [1963] 2 All ER 575 (HL).
[162] Williams v Natural Life Health Foods [1998] 2 All ER 577.

approach to negligent misrepresentation that personal economic interest of the director could form a basis for the director's personal tort liability based on the principle in question.

C.i.c. liability is not known in Spanish *Codigo Civil* either; however, references to it have been made in the judicial practice.[163] For Spanish tort law is characteristic a laconic regulation[164] and for that reason, judicial practice has played a major role in the development of tort law. Since there is no separate basis for a claim for *c.i.c.* in Spanish *Codigo Civil*, corresponding cases have been resolved on the basis of general tort liability.[165] Therefore, *c.i.c.* liability has been considered as quintessentially tortious.[166] Unlike German and English law, Spanish courts do not seem to find it necessary that special reliance or personal economic interest would be established; however, this does not mean that the director's liability on the basis of *c.i.c.* would be limitless in Spain. If a creditor wishes to file a compensatory claim directly against the director, it is important to bear in mind section 241 of the TRLSC, which enables a third person to file an action against the director only if the director has directly damaged the creditor with his/her unlawful act and not reflectively through a decrease in the company's assets.[167] In Spanish law, this has been interpreted in such a way that in the case of potential direct liability of the director, existence of causation must be checked significantly more closely in order to rule out the possibility of holding the director solidarily liable for all obligations of the company.[168]

Based on the above comparative analysis, the author takes the position that liability of the director for negligent disclosure of untrue statements (or for *c.i.c.*) cannot be equal to the liability of the negotiating party (company). Since only the existence of negligence is needed, liability of the director would become unreasonably severe if the director and the company would be solidarily liable in every case of negligent disclosure of untrue statements.[169]

The director may be held liable for negligent disclosure of untrue statements primarily if special reliance has been created between the director and the other party to the transaction. Giving exact meaning to this special reliance will be in the discretion of the courts in every separate case; however, there is reason to point out as the main criterion that in no case can special reliance be equal to the reliance applied in usual economic circulation. It is natural that all

[163] STS 3068/2013, 6.5.2013; STS 6635/2011, 15.10.2011.

[164] Spanish Civil Code is based on French *Code Napoléon* (*Code Civil des Français* 1804). There are only nine sections on tort law in Spanish Civil Code; some of those sections are rather archaic – for example, section 1910 of the Civil Code, which stipulates the liability of the head of household for damage caused from falling objects from the house where he is living in.

[165] Section 1902 of the *Codigo Civil*.

[166] STS 9982/1988, 16.5.1988.

[167] SAP Salamanca 339/2013, 3.6.2013.

[168] STS 14024/1992, 21.5.1992.

[169] *C.i.c.* liability is, in principle, also possible in the case of intent; however, in that case, filing a claim on the basis of section 1045 (1) 8) of the LOA should be considered instead.

contractual relationships are, to some extent, based on reliance. Thus, merely having a long-term business relationship is not enough for the creation of special reliance since in that case, the director would be held liable with regard to long-term business partners to the same extent as the company. There is reason to talk about special reliance if a party groundedly feels significantly more reliance towards the director than to other persons during the conclusion of similar transactions.

The author is of the opinion that personal economic interest should, in general, not be a basis of the director's liability for negligent disclosure of untrue statements. The author agrees with German judicial practice according to which, the mere fact that the director is a shareholder of the company should not give rise to the director's liability on the basis of *c.i.c.* The author finds that this would be contrary to the principle of limited liability of the company since the fact of being a shareholder would cause the director to be additionally liable for the obligations of the company whilst liability of the shareholder is limited to his/her equity in the company. Likewise, liability of the director should not increase simply because s(he) has granted a loan to the company, provided surety to the company's obligations, etc. which may cause him/her to be more interested in the transaction that is being entered into in the name of the company. Clearly there is reason to claim that, to some extent, the director always has a personal economic interest in how the company is doing (even if just for the reason that the director's remuneration may depend on it); however, that in itself should not form a basis for the director's liability on the basis of *c.i.c.* since the result may be that the director's liability on the basis of *c.i.c.* will become equal to the liability of the company. The author considers it possible to hold the director liable for negligent disclosure of untrue statements due to personal economic interest only in exceptional cases if the director has entered into a transaction in the name of the company, but in the economic sense the transaction is only related to the director's own private interests (*procurator in rem suam*). As a supplementary condition, the other party to the transaction should also be aware that the transaction is related to the director's personal interests. If the other party to the transaction does not know anything about the director's personal interests, s(he) has no reason to assume while entering into the transaction that in addition to the company someone else will also be liable for the performance of the transaction. In the opinion of the author, the director could be held personally liable, for example, when the transaction is indeed entered into in the name of the company, but both parties are aware and equally understand that performance of the transaction takes place only in the private interests of the director.[170] Quintessentially, this situation is similar to the above-mentioned special reliance – the other party to the transaction

[170] E.g., the director concludes a contract for services in the name of the company for repair works to be done in the director's personal apartment. There is no connection between the company and the apartment and the other party to the transaction understands that although the company should formally pay for the works, they are only carried out in the private interests of the director.

understands that the performance of the contract will actually take place in the private interests of the director and, therefore, the party may feel justified reliance that if needed, the director is willing to assume personal responsibility for the performance of the transaction.

6. CONCLUSIONS

A company as a legal entity bears all its legal liabilities and its creditors may demand the satisfaction of their claims directly from the company. However, in certain circumstances the creditors may turn their claims also towards directors. The aim of current dissertation has been to find a reasonable balance between the creditors' interests and directors' tort liability.

The author has found that with regard to breach of the duty to file the bankruptcy petition, the enforcement of quota loss claims should be easier for old creditors. Due to high burden of proof the enforcement of old creditors' compensatory claims is too complicated, which is proved by the shortage of respective judicial practice. For that reason, in the case of company's bankruptcy, interests of old creditors are protected only to a small extent and the director may feel tempted to abuse his/her position since the probability of being held personally liable is very low. Filing of corresponding claims is especially difficult in the case of unsatisfactory organising of company's accounting. Therefore, the author proposes to give more discretion to courts in ordering quota loss in cases where the director has breached the obligation to keep records. As an alternative, the author proposes to reverse the burden of proof to the prejudice of the director who breached the obligation to keep records. Since correct accounting is in the power of the director, the director is able to regulate his/her own liability by keeping the company's accounting in order. Therefore, if the proposals of the author would be put into practice, liability of the director would remain within reasonable boundaries; however, at the same time, protection of creditors would be improved.

The author is of the opinion that with regard to the liability of the director who has breached the duty to file the bankruptcy petition a clear distinction should be made between old and new creditors. The duty of the director to file a bankruptcy petition in due time has two objectives: first, to avoid further decrease in the assets of an insolvent company (protection of old creditors) and second, to prohibit conclusion of new contractual relationships with an insolvent company (protection of new creditors). Making a distinction between old and new creditors is important because it can enable new creditors to enforce their reliance loss claims in court much more easily compared to the enforcement of old creditors' quota loss claims (no need to prove loss of quota). The fact that enforcement of reliance loss claims is far more widespread in practice than enforcement of quota loss claims is also confirmed by German judicial practice. Recognition of new creditors' reliance loss claims enables better protection of the interests of creditors since it makes successful enforcement of compensatory claims against the director more probable (at least with respect to reliance loss). At the same time, recognition of new creditors' reliance loss claims does not make liability of the director unreasonably severe. Breach of the duty to file the bankruptcy petition, which forms the basis of liability, is clearly in the director's own power. The director is also the one who can decide whether to conclude new contracts in the name of an insolvent

company or not. It is very easy for the director to avoid causing damage to new creditors and, therefore, be released from liability if s(he) files the bankruptcy petition of an insolvent company on time or at least refrains from concluding new contracts in the name of the insolvent company.

The author concludes that it should be possible to held a director personally liable for causing damage to the creditors not only in the insolvency of a company, but already in a so-called twilight zone when the company is still solvent but thinly capitalised. The author thinks that thin capitalisation of the company is a clear sign of danger that should not be taken lightly. If thin capitalisation of the company can be overcome, no negative consequences will arise. However, if thin capitalisation deepens into permanent insolvency then, in the opinion of the author, in such a situation law should enable better protection of the interests of creditors. The author's proposition for implementation of an additional protection provision would impose a duty on the director to terminate the activities of a company that is in the state of thin capitalisation if the shareholders of the company are not willing to take extra risks by investing additional capital into the company or by applying other measures. The author is of the opinion that the proposed solution would not make liability of the director unreasonably severe since it is in the power of the director to decide whether to file the dissolution petition of the company or not and (s)he her/himself can influence that decision. Quite a long period would precede the filing of the dissolution petition, which would give enough time for the director to consider possibilities for reorganisation, conduct negotiations with shareholders and creditors, and apply appropriate measures. Within that time period, the director can take a well-considered decision to either file the dissolution petition of the company or continue the activities of the company if s(he) is convinced that thin capitalisation is temporary and poses no threat to the solvency of the company.

In the last set of statements set forth for defence in this dissertation, the author has covered liability of the director for disclosure of untrue statements. The author has come to the conclusion that neither every kind of disclosure of untrue statements nor every form of fault can form a basis for the director's liability. Intentional disclosure of untrue statements contrary to good morals can form a basis for the director's tort liability. In order to file such a compensatory claim against the director, the injured party is required to prove intent of the director in addition to other necessary elements of tort. This places a high burden of proof on the injured party; however, at the same time, the condition of intent enables to keep the director's liability within reasonable boundaries to avoid a flood of claims for every negligent checking or presenting of information by the director. The central question is what kind of disclosure of untrue statements could be considered as being contrary to good morals. A conclusion has been reached in the dissertation that intentional disclosure of untrue statements (including concealment of information) can be contrary to good morals if that information had a determinative importance on the injured party's decision to enter into the transaction. The author finds that protection of

creditors in the above-mentioned situation is grounded and the possibility of filing a tortious compensatory claim against the director should be affirmed. The director, in turn, is able to regulate his/her liability by not lying intentionally.

In certain cases, the director may be held liable for negligent disclosure of untrue statements on the basis of *c.i.c.*, whereby in such cases negligence of the director is enough for liability to arise. However, liability of the director on the basis of *c.i.c.* can arise in very exceptional circumstances; primarily if special reliance that is clearly beyond the usual reliance common in economic transactions has been created between the director and the other negotiating party. In addition, depending on the circumstances, the director can also be held liable for negligent disclosure of untrue statements if s(he) has entered into the transaction in the name of the company, but in the economic sense, the transaction is only related to the director's own private interests and the other party is aware of that. Although *c.i.c.* liability of the director can be applied merely in the case of the director's negligence, it does not unreasonably extend the boundaries of the director's liability since cases where the director's liability on the basis of *c.i.c.* could at all be applied are very exceptional. Despite the fact that *c.i.c.* liability of the director may be of marginal importance from the point of view of the protection of creditors, recognition of this form of liability is, in the opinion of the author, important as it enables to offer protection to creditors from abuse of special reliance.

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ABBREVIATIONS

BA	Estonian Bankruptcy Act [pankrotiseadus]
BGB	German Civil Code [Bürgerliches Gesetzbuch]
c.i.c.	*Culpa in contrahendo*
CC	Estonian Commercial Code [äriseadustik]
CCP	Estonian Code of Civil Procedure [tsiviilkohtumenetluse seadustik]
GPCCA	Estonian General Part of the Civil Code Act [tsiviilseadustiku üldosa seadus]
IA 1986	English Insolvency Act 1986
InsO	German Insolvency Act [Insolvenzordnung]
LC	Spanish Bankruptcy Act [Ley Concursal]
LOA	Estonian Law of Obligations Act [võlaõigusseadus]
PC	Estonian Penal Code [karistusseadustik]
SAP	Judgement of Spanish Provincial Court [Sentencia de la Audiencia Provincial]
STS	Judgement of Spanish Supreme Court [Sentencia del Tribunal Supremo]
TRLSC	Spanish Companies Act [Texto Refundido de la Ley de Sociedades de Capital]

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SUMMARY IN ESTONIAN

Juhatuse liikme deliktiline vastutus äriühingu võlausaldajate ees

Käesolevas väitekirjas käsitletakse äriühingu juhatuse liikme deliktilist vastutust äriühingu võlausaldajate ees. Äriühingu all on silmas peetud piiratud vastutusega kapitaliühinguid, eelkõige osaühinguid ja aktsiaseltse, mis on enamlevinud äriühingute liigid. Juhatuse liige on äriühingu seaduslik esindaja, kes juhib ühingut ja korraldab selle igapäevast majandustegevust.

Väitekiri põhineb autori poolt avaldatud neljal õigusteaduslikul artiklil:

1. "Limitation of Personal Tort Liability of a Member of the Management Board of a Company – Perspective of Estonia".[172] Nimetatud artiklis on analüüsitud peamisi juhatuse liikme deliktilise vastutuse juhtumeid ühingu võlausaldajate ees: kaitsenormi rikkumisest tulenev vastutus (s.h pankrotiavalduse esitamisega viivitamisest tulenev vastutus), valeinfo avaldamisest ja tahtlikust heade kommete vastasest käitumisest tulenev vastutus.
2. "Personal Liability of a Director in the Insolvency of a Company".[173] Viidatud artiklis on analüüsitud juhatuse liikme vastutust ühingu maksejõuetuse olukorras pankrotiavalduse esitamisega viivitamisel.
3. "Personal Liability of a Director to Creditors in Case of Thin Capitalisation of a Company".[174] Nimetatud artiklis on esitatud analüüs juhatuse liikme deliktilise vastutuse võimalikkuse kohta ühingu alakapitaliseerituse olukorras.
4. "The Company Director's Liability for Untrue Statements".[175] Kõnesolevas artiklis on autor analüüsinud juhatuse liikme vastutust võlausaldajate ees valeinfo avaldamisel. Artiklis on eraldi uuritud juhatuse liikme vastutuse võimalikkust valeinfo tahtlikul ja hooletul avaldamisel.

Reeglina juhatuse liige vastutab vaid sisesuhtes äriühingu ees, mille juhatuse liige ta on. Isiku valimisel juhatuse liikmeks tekib tema ja ühingu vahel lepinguline suhe, mis olemuslikult vastab enim käsunduslepingule. Sisesuhte all ongi silmas peetud juhatuse liikme ja ühingu vahelist õigussuhet. Seevastu välissuhtes äriühingu võlausaldajate ees vastutab üldjuhul vaid äriühing ise. Siiski on teatud juhtudel võimalik ka juhatuse liikme deliktiline vastutus äriühingu võlausaldajate ees.

Väitekirja **eesmärgiks** on selgitada välja juhatuse liikme deliktilise vastutuse mõistlikud piirid, mis ühelt poolt kaitseks piisaval määral võlausaldajate huve, teisalt aga ei pärsiks liigse ranguse tõttu juhatuse liikme ettevõtlusvaimu.

Töö eesmärgi saavutamiseks on autor uurinud alljärgnevaid uurimisküsimusi:

[172] European Business Law Review (Vol. 24, Issue 2, 2013) 243–259.
[173] International Insolvency Law Review (Vol. 4, Issue 3, 2013) 268–284.
[174] Juridica International (Vol 21, 2014) 168–175.
[175] Baltic Journal of Law and Politics (Vol 7, Issue 1, 2014) 70–96.

- Kas on põhjendatud lihtsustada vana võlausaldaja tõendamiskoormist kvoodikahju nõuete maksmapanekul juhatuse liikme vastu, kes on rikkunud pankrotiavalduse esitamise kohustust?
- Kas pankrotiavalduse esitamise kohustuse kaitse eesmärgiks peaks olema lisaks vana võlausaldaja kvoodikahjule ka uue võlausaldaja usalduskahju hüvitamine?
- Kas ja millistel tingimustel on põhjendatud juhatuse liikme deliktiline vastutus võlausaldajate ees, kui juhatuse liige on jäänud äriühingu alakapitaliseerituse olukorras tegevusetuks?
- Kas ja millistel tingimustel on põhjendatud juhatuse liikme deliktiline vastutus võlausaldajate ees, kui juhatuse liige on tekitanud kahju tahtliku valeinfo esitamisega?
- Kas ja millistel tingimustel on põhjendatud juhatuse liikme otsevastutus äriühingu võlausaldaja ees hooletul valeinfo esitamisel?

Autor on kasutanud väitekirjas peamiselt võrdlevat meetodit (kasutatud metodoloogia kohta vt täpsemalt väitekirja p 4) ning analüüsinud uurimisküsimusi võrrelduna Eesti, Saksa, Inglise ja Hispaania õiguses. Nõnda on autori analüüsis esindatud Anglo-Ameerika, Germaani ning Romaani, ehk Euroopa suurimad õigusperekonnad. Eesti õiguse on autor valinud võrdlusobjektiks kui oma koduriigi õiguse. Võrreldes teiste võrdlusriikidega on Eesti teinud läbi suhteliselt hiljutise põhjaliku õigusliku transformatsiooni, mistõttu Eesti õigust on seni uuritud ja arendatud võrdlusriikidest kõige vähem. Uurimisküsimuste püstitamisel ja analüüsimisel on autor lähtunud esmajoones Eesti õigusest. Samas autori eesmärgiks on olnud leida lahendused, mis on universaalsed ja võiks põhimõtteliselt olla aktuaalsed kõigis võrdlusriikides. Loomulikult tuleb autori väidete kohandamisel eri võrdlusriikidele arvestada õigusdogmaatilisi ja materiaalõiguslikke erisusi (nii ei ole näiteks Inglise õiguses tuntud *culpa in contrahendo* põhimõte, kuid väitekirja viimases uurimisküsimuses esitatud põhiseisukohad võiks olla põhimõtteliselt huvipakkuvad ka Inglise õiguses vastava delikti – *negligent misrepresentation* – raames).

Väitekirjas uuritakse üksnes juhatuse liikme deliktilist vastutust ühingu võlausaldajate ees. Väitekirja raames ei ole uuritud teiste, juhatuse liikmega sarnases positsioonis olevate isikute vastutust (nõukogu liige, pankrotihaldur, likvideerija, prokurist, samuti *de facto* juhatuse liige, kes olemata õiguslikult juhatuse liige, siiski täidab faktiliselt juhatuse liikme rolli).

Väitekirjas ei ole uuritud juhatuse liikme sisesuhtel põhinevat vastutust ühingu enda ees. Samuti jääb väitekirja raamest välja juhatuse liikme võimalik vastutus ühingu osanike/aktsionäride ees (v.a juhul kui osanik/aktsionär on samal ajal käsitletav ühingu võlausaldajana). Väitekirja mahust jäävad välja ka juhatuse liikme maksuõiguslik ja karistusõiguslik vastutus.

Juhatuse liikme deliktiõigusliku vastutuse uurimisel on autor piirdunud küsimustega, kus on põhjust rääkida seosest juhatuse liikme tegevuse spetsiifikaga (nt kaitsenormi rikkumine pankrotiavalduse esitamise kohustuse rikkumise näitel, mis on omane eelkõige juhatuse liikmele). Väitekirja raamest on

välja jäetud võimalikud deliktilise vastutuse juhtumid, millel pole juhatuse liikmeks olemisega iseenesest mingit spetsiifilist seost (nt kui juhatuse liige tekitab teisele isikule tervisekahjustuse). Väitekirja raamest jäävad välja ka üldiste käibekohustuste rikkumise juhtumid.

Alljärgnevalt esitab autor kokkuvõtte töös esitatud väidetest ja nende põhjendustest.

I Vanade võlausaldajate kvoodikahju hüvitamine

Kaitsmisele kuuluv väide:
Vana võlausaldaja kvoodikahju nõude maksmapanekul on hageja tõendamiskoormis liiga kõrge ning selle leevendamiseks tuleks kaaluda kohtutele suurema diskretsiooni andmist või tõendamiskoormise ümberpööramist.

Probleemi kirjeldus ja põhjendused:
Vastavalt Eestis kehtiva äriseadustiku (**ÄS**) § 180 lg-le 5^1 on juhatuse liikmel kohustus viivitamata, kuid mitte hiljem kui 20 päeva jooksul osaühingu püsiva maksejõuetuse ilmnemisest esitada kohtule pankrotiavaldus. Kohtupraktikas on vastav norm tunnistatud võlausaldajaid kaitsvaks kaitsenormiks võlaõigusseaduse (**VÕS**) § 1045 lg 1 p 7 mõistes, mis võimaldab võlausaldajal esitada normis sätestatud kohustust rikkunud juhatuse liikme vastu deliktiline kahjunõue.

Kui juhatuse liige rikub pankrotiavalduse esitamise kohustust, on vanal võlausaldajal (s.o võlausaldajal, kelle nõue oli olemas maksejõuetuse tekkimise hetkel) õigus esitada juhatuse liikme vastu nõue kvoodikahju hüvitamiseks, mille suuruse arvutamiseks tuleb diferentsihüpoteesi põhjal välja selgitada, kui suures summas oleks õnnestunud vastava võlausaldaja nõuet rahuldada pankrotiavalduse õigeaegsel esitamisel, ning võrrelda seda tegelikult hüvitamisele kuuluva summaga.

Kvoodikahju arvutamise aluseks oleva nõude rahuldamise hüpoteetilise ulatuse hindamiseks on vaja välja selgitada kaks peamist asjaolu: millal tekkis ühingu püsiv maksejõuetus (sellest sõltub juhatuse liikme pankrotiavalduse kohustuse tekkimise hetk) ja milline oli ühingu varade ja kohustuste täpne maht pankrotiavalduse esitamise kohustuse tekkimise hetkel (sellest sõltub võlausaldaja nõude hüpoteetilise rahuldamise ulatus).

Kui ühingu raamatupidamist on korraldatud ebarahuldavalt, on eelnimetatud asjaolusid väga keeruline tõendada. See võib tekitada praktikas vastuolulise olukorra, kui juhatuse liikme üks rikkumine (aruandluskohustus) võib tõendamatuse tõttu vabastada vastutusest teise rikkumise (pankrotiavalduse esitamise kohustus) eest.

Kehtivas Eesti õiguses võimaldavad kohtute suurema diskretsiooni rakendamist VÕS § 127 lg 6 ja tsiviilkohtumenetluse seadustiku (**TsMS**) § 233, kuid autorile teadaolevalt ei ole Eesti kohtud vana võlausaldaja kvoodikahju vaidlustes viidatud sätteid seni rakendanud ning kvoodikahju tõendamatuse korral on vastavad võlausaldajate hagid juhatuse liikme vastu jäetud rahuldamata. See

loob ebaõiglase olukorra, kus ka suuremate kuritarvituste puhul pole võimalik juhatuse liiget tsiviilõiguslikult vastutusele võtta, kui ta on eelnevalt raamatupidamisdokumendid hävitanud või jätnud raamatupidamise üldse korraldamata.

Statistika kohaselt lõpeb Eestis 58% pankrotiasjadest raugemisega pankrotti välja kuulutamata. Sellele lisandub veel 6% juhtudest, kui menetlus lõpeb raugemisega peale pankroti väljakuulutamist. Raugemisega lõppenud menetlustes ei saanud võlausaldajad oma nõuetele ühegi euro ulatuses rahuldust. Samas on Eesti kohtud rahuldanud autorile teadaolevalt perioodil 2012 – 2013.a vaid ühe võlausaldaja hagi juhatuse liikme vastu kvoodikahju hüvitamise nõudes. Eeltoodud arvude võrdlus annab tunnustust sellest, et võlausaldajate võimetus oma deliktilisi nõudeid juhatuse liikme vastu kohtulikult maksma panna on majanduskäibes ulatuslik probleem.

Võrdlusriikidest Saksamaal on juhatuse liikme vastutus vanade võlausaldajate kvoodikahju nõuete eest reguleeritud põhimõtteliselt sarnaselt (InsO § 15a lg 1, BGB § 823 lg 2), peamise erisusega, et võlausaldajate asemel on vastava nõude esitamiseks õigustatud pankrotihaldur. See erisus omab siiski vaid menetlusõiguslikku tähendust. Saksa õiguskirjanduse ja kohtupraktika analüüsi käigus on autor jõudnud seisukohale, et ka Saksamaal on tõenduslikud probleemid vanade võlausaldajate nõuete maksmapanekul probleemiks ja pelgalt võlausaldajate nõuete esitamine halduri vahendusel ei pruugi tagada vanade võlausaldajate paremat kaitset.

Inglise kohtutel on suurem diskretsioon võlausaldajate kahjunõude kindlaksmääramisel (IA 1986 art 214), kuid vastavate nõuete maksmapanekul tekitab probleeme suurem keerukus juhatuse liikme vastutuse algmomendi kindlakstegemisel – erinevalt Eesti ja Saksa õigusest ei ole Inglise õiguses juhatuse liikme vastutuse algmomendi seisukohast määrav ühingu püsiva maksejõuetuse tekkimise hetk, vaid hoopis see, kas juhatuse liige pidi ette nägema ühingu pankrotimenetluslikke tagajärgi (*insolvent liquidation*).

Hispaania õiguse regulatsioon annab kohtutele samuti suurema diskretsiooni võlausaldajate nõuete kindlaksmääramisel (LC § 172bis lg 1) ning sarnaselt Eesti ja Saksa õigusega on ka Hispaania õiguses juhatuse liikme vastutuse algmoment seotud ühingu püsiva maksejõuetuse objektiivse tekkimisega. Küll on Hispaanias juhatuse liikmel oluliselt rohkem aega pankrotiavalduse esitamiseks (kui Eestis ja Saksamaal on pankrotiavalduse esitamise maksimaalne tähtaeg vastavalt 20 ja 21 päeva püsiva maksejõuetuse tekkimisest, siis Hispaanias on vastav tähtaeg 2 kuud).

Kõigis võrdlusriikides on juhatuse liikme vastutus vanade võlausaldajate kvoodikahju nõuete eest põhimõtteliselt võimalik, kuid probleemiks on hageja võimetus nõude aluseks olevate asjaolude tõendamisel. Kvoodikahju vaidlustes peab hageja esitama tõendid asjaolude kohta, mis on täielikult juhatuse liikme (s.o kostja) mõjusfääris ja millega juhatuse liikmel on väga lihtne enda huvides manipuleerida. Seetõttu tekib makseraskustesse sattunud ühingu juhatuse liikmel sageli ahvatlus rikkuda raamatupidamise korraldamise kohustust, muutes seeläbi enda tsiviilõiguslikule vastutusele võtmiseks väga keeruliseks kui mitte võimatuks.

Autori arvates on põhjendatud kergendada vana võlausaldaja tõendamiskoormist ning pakub selleks välja kaks alternatiivset võimalust.

Esiteks peaks kohtutel olema kvoodikahju määratlemisel suurem diskretsioon. Nagu ülal märgitud, kui ühingu aruandlust on peetud korrektselt, on kvoodikahju suuruse tõendamine tõenäoline. Kui aga aruandlus puudub, on kvoodikahju tõendamine praktiliselt võimatu. Seetõttu võiks kohtud võtta aruandluskohustuse rikkumist arvesse täiendava asjaoluna, mis võimaldaks kohtul lähtudes oma siseveendumusest määrata kahjuhüvitis omal äranägemisel.

Eesti näitel võiks kohtute diskretsiooni suurendamiseks kaaluda TsMS § 233 lg 1 täiendamist alljärgnevalt (kehtivale redaktsioonile lisanduv tekst alla joonitud):

> *Kui menetluses on tuvastatud kahju tekitamine, kuid kahju täpset suurust ei õnnestu kindlaks teha või selle kindlakstegemine on raskendatud rikkuja poolt seaduses sätestatud info esitamise, aruandluskohustuse või muu kaasaaitamiskohustuse rikkumise tõttu või see oleks seotud eriliste raskustega või ebamõistlikult suurte kuludega, muu hulgas kui tegemist on mittevaralise kahjuga, otsustab kohus kahju suuruse oma siseveendumuse kohaselt kõiki asjaolusid arvestades.*

Teiseks võib kaaluda tõendamiskoormise ümberpööramist. Kvoodikahju nõuete puhul võiks kaaluda tõendamiskoormise ümberpööramist selliselt, et kui on tõenäoline, et kostja on rikkunud pankrotiavalduse esitamise kohustust ning sellega võis kaasneda võlausaldajatele kahju, kuid nende asjaolude tõendamine on kostja enda aruandluskohustuse rikkumise tõttu oluliselt raskendatud, eeldatakse kostja poolt pankrotiavalduse esitamise kohustuse rikkumisega kahju tekitamist pankrotivara defitsiidi ulatuses. Kostja omakorda võib tõendada, et pankrotiavalduse esitamise kohustust pole rikutud või et selle rikkumisega pole kahju tekitatud.

Mõlemal juhul, nii kohtute diskretsiooni suurendamisel kui tõendamiskoormise ümberpööramisel seondub juhatuse liikme võimalik deliktiline vastutus tema poolt aruandluskohustuse rikkumisega. See on juhatuse liikme enda mõjusfääris olev asjaolu, mida tal on lihtne mõjutada – juhatuse liige saab maandada oma vastutusega seotud riske, kui ta lihtsalt täidab aruandluskohustust korrektselt. Kui ka aruandluskohustust on rikutud, kuid juhatuse liige pole kahju tekitanud, on tal jätkuvalt võimalus tõendada, et kahju pole tekkinud.

II Uute võlausaldajate usalduskahju hüvitamine

Kaitsmisele kuuluv väide:
Kohtud peaks pankrotiavalduse esitamise kohustust rikkunud juhatuse liikme vastutuse kontekstis selgelt eristama vanu ja uusi võlausaldajaid. Erinevalt vanade võlausaldajate kvoodikahjust kuulub uute võlausaldajate puhul hüvitamisele nendele tekitatud usalduskahju.

Probleemi kirjeldus ja põhjendused:
Kuigi Eesti Riigikohus tunnistas ÄS § 180 lg 5^1 ühingu võlausaldajaid kaitsvaks kaitsenormiks juba oma 06.05.2003.a otsuses, puudus Eesti kohtupraktikas pikka aega põhjalikum analüüs ÄS § 180 lg 5^1 kaitse eesmärgist, s.t millise kahju tekkimise eest vastav norm peaks võlausaldajaid kaitsma. Riigikohus tegi alles 25.02.2013.a lahendi, milles esmakordselt eristas selgelt ÄS § 180 lg 5^1 kahesugust kaitse eesmärki: pankrotiavalduse esitamine peab ära hoidma maksejõuetu äriühingu varamassi edasise vähenemise, kuid lisaks peab see ära hoidma ka maksejõuetu äriühingu edasises majandustegevuses osalemise. Siiski ei ole Riigikohus antud lahendis otseselt eristanud vanu ja uusi võlausaldajaid ning lahendi põhjal võib jääda ikkagi selgusetuks, milline võlausaldaja millise kahju hüvitamist võib nõuda.

ÄS § 180 lg 5^1 üheks eesmärgiks on kaitsta vanade võlausaldajate huve. Vanade võlausaldajate huvide kaitse seisneb selles, et kui juhatuse liige esitab õigeaegselt pankrotiavalduse, siis läheb kontroll võlgniku majandustegevuse üle pankrotihaldurile, kes vastavalt pankrotiseaduse (**PankrS**) § 55 lg-le 1 on kohustatud kaitsma kõigi võlausaldajate, samuti võlgniku õigusi ja huve ning tagama seadusliku, kiire ja majanduslikult otstarbeka pankrotimenetluse. Seega on ÄS § 180 lg 5^1 eesmärgiks kaitsta vanu võlausaldajaid võlgniku varamassi vähenemise eest. Vastava kohustuse rikkumise korral on vanad võlausaldajad õigustatud nõudma juhatuse liikmelt kvoodikahju hüvitamist ulatuses, mille võrra ühingu varamass vähenes juhatuse liikme rikkumise tõttu.

Lisaks eeltoodule läheb PankrS § 35 lg 1 p-de 2 ja 4 kohaselt pankroti väljakuulutamisega haldurile üle võlgniku vara valitsemise õigus ning juhatuse liige kaotab õiguse teha mis tahes tehinguid. Kui aga juhatuse liige hoidub pankrotiavalduse esitamisest ja jätkab maksejõuetu võlgniku majandustegevust (s.h sõlmib uusi lepinguid), satuvad uued võlausaldajad keerulisse olukorda, kus juba lepingu sõlmimisel on selge, et nende nõuete rahuldamine on vähese perspektiiviga, kusjuures hilisemas pankrotimenetluses koheldakse neid teiste võlausaldajatega võrdselt. Seetõttu on põhjust väita, et ÄS § 180 lg 5^1 eesmärgiks on läbi võlgnikühingu pankroti hoida ära ka tulevaste lepinguliste võlasuhete tekkimine ning kaitsta seeläbi uusi võlausaldajaid.

Saksamaal on võrdlusriikidest kõige põhjalikum kohtupraktika uute võlausaldajate usalduskahju kaitse osas. Erinevalt vanadest võlausaldajatest, kelle kahjunõude kohtulikuks maksmapanekuks on õigustatud haldur, võivad uued võlausaldajad hageda juhatuse liiget otse ning nõuda kogu negatiivse kahju hüvitamist (s.o võlausaldaja tuleb asetada olukorda, milles ta oleks olnud, kui ta poleks võlgnikühinguga lepingut sõlminud). Uue võlausaldaja positsioon saab olla vaid sellistel võlausaldajatel, kelle nõue tuleneb maksejõuetu võlgnikuga sõlmitud lepingulisest suhtest. Uue võlausaldaja usalduskahjust pole põhjust rääkida nt deliktiliste nõuete korral.

Inglise õiguses ei eristata uusi ja vanu võlausaldajaid. Kuigi kohus võib laialdase diskretsiooni tõttu neid asjaolusid arvesse võtta, mis on uue võlausaldaja kahjustamise aluseks, laekub väljamõistetav hüvitis pankrotipessa ning

sellest väljamaksete tegemisel pole võimalik uusi ja vanu võlausaldajaid eristada.

Sarnane olukord on ka Hispaanias, s.t juhatuse liikmelt välja mõistetud hüvitis laekub pankrotipessa, mistõttu uute ja vanade võlausaldajate eristamine on keeruline. Siiski ollakse Hispaanias seisukohal, et teatud tingimustel on uuel võlausaldajal võimalik juhatuse liiget hageda ka otse, sõltumata ühingu suhtes algatatud pankrotimenetlusest.

Kokkuvõtvalt võib väita, et vana võlausaldaja on selline võlausaldaja, kelle võlasuhe võlgnikuga on tekkinud enne võlgniku püsiva maksejõuetuse tekkimist, nõude sissenõutavaks muutumise hetkest sõltumata. Vana võlausaldaja kannab tavapärast võlgniku pankrotistumise äririski ning tema puhul usalduskahju hüvitamine ei ole põhjendatud. Isegi kui nõue muutub sissenõutavaks alles peale maksejõuetuse tekkimist, ei muuda see vana võlausaldaja positsiooni võlgniku suhtes, sest võlasuhte tekkimisel eelduslikult ei osatud võlgniku maksejõuetuks muutumist ette näha, mistõttu pole põhjust väita, et võlgniku juhatuse liige oleks rikkunud võlausaldaja usaldust. Sama peaks autori arvates kehtima ka korduvate kohustuste ja ositi täidetava kohustuse puhul (nt igakuiste üüri- või laenumaksete puhul), kui kohustuse aluseks olev võlasuhe on tekkinud enne võlgniku maksejõuetuse tekkimist.

Uue võlausaldaja positsioon ei ole seevastu seotud tavapärase äririski kandmisega, vaid tema puhul saab algusest peale rääkida usalduse kuritarvitamisest. Autor leiab, et usalduskahju hüvitamist saab nõuda vaid selline võlausaldaja, kelle nõue on tekkinud lepingulisest suhtest. Nt deliktiliste nõuete puhul ei saa rääkida usaldusest, mida juhatuse liige oleks rikkunud. Samal põhjusel ei toeta autor selliste uute võlausaldajate usalduskahju hüvitamist, kes olid ühingu maksejõuetusest lepingu sõlmimisel teadlikud, sest nende usaldust pole tegelikult rikutud. Kui võlausaldaja ei saa oma nõuet usalduskahjuna maksma panna, jääb tal võimalus esitada see kvoodikahju nõudena.

Uute võlausaldajate selge eristamine ning nende usalduskahju nõuete tunnustamine (ja juhatuse liikme vastu otsenõude esitamise võimaldamine) aitab paremini kaitsta uute võlausaldajate huve, sest nende nõuete esitamine juhatuse liikme vastu on märksa lihtsam võrreldes vana võlausaldaja kvoodikahju nõuete esitamisega (puudub vajadus tõendada kvoodikahju). Autor leiab, et juhatuse liikme rangem vastutus antud küsimuses ei pärsi tema ettevõtlusvaimu, sest pankrotiavalduse esitamine on selgelt juhatuse liikme enda mõjusfääris ning selle kohustuse rikkumine ei saa olla juhatuse liikmele ootamatu. Pealegi ei ole tõenäoline, et maksejõuetute ühingute majandustegevuse jätkamise julgustamine omaks ettevõtluse ja majanduse arengu seisukohast positiivset efekti.

III Ühingu alakapitaliseerituse olukorras tegevusetuks jäänud juhatuse liikme kohustus hüvitada võlausaldajatele tekitatud kahju

Kaitsmisele kuuluv väide:
Ainuüksi alakapitaliseeritud ühingu üldkoosoleku kokkukutsumise nõude rikkumine ei too enesega kaasa juhatuse liikme deliktilist vastutust võlausaldajate ees. Juhatuse liikme deliktilise vastutuse tekkimise eeldusena antud olukorras peaks tal olema lisaks veel kohustus ühingu likvideerimiseks, kui üldkoosolek pole seaduses sätestatud tähtaja jooksul aset leidnud või kui üldkoosolek on võtnud vastu otsuse, mis ei ole ühingu alakapitaliseerituse ületamiseks piisav või kui üldkoosolek on võtnud vastu otsuse ühingu likvideerimiseks.

Probleemi kirjeldus ja põhjendused:
ÄS § 171 lg 2 p 1 kohaselt kutsub juhatus kokku üldkoosoleku, kui osaühingul on netovara järel vähem kui pool osakapitalist või vähem kui äriseadustiku §-s 136 nimetatud osakapitali suurus või muu seaduses sätestatud osakapitali minimaalne suurus (alakapitaliseeritus). Üldkoosolek võtab omakorda vastavalt ÄS § 176 vastu otsuse ühingu kapitali suuruse muutmiseks, ühingu likvideerimiseks, ümberkujundamiseks, lõpetamiseks, pankroti väljakuulutamiseks vm abinõude tarvitusele võtmiseks. Kui üldkoosolek mingit otsust vastu ei võta või kui vastu võetud otsus pole alakapitaliseerituse ületamiseks adekvaatne, ei järgne Eestis juhatuse liikmele alakapitaliseerituse olukorras rohkem mingeid kohustusi ega vastutust. Alles siis, kui alakapitaliseeritus on kasvanud üle ühingu püsivaks maksejõuetuseks, on juhatuse liikmel ÄS § 180 lg 5^1 alusel kohustus esitada 20 päeva jooksul kohtule pankrotiavaldus.

Autor on väitekirjas analüüsinud võimalust esitada juhatuse liikme vastu kahjunõue, kui ta jääb alakapitaliseerituse olukorras tegevusetuks. Kui võlausaldajad saaks oma rahuldamata jäänud nõuded kasvõi osaliselt esitada oma kohustusi rikkunud juhatuse liikme vastu, kaitseks see suuremal määral võlausaldajate õigusi ja soodustaks ühingu likvideerimis- või pankrotimenetluse alustamist varasemas staadiumis, kui ühingul on veel säilinud vara, mille arvel võlausaldajate nõudeid rahuldada.

Autori arvates ei ole ÄS § 171 lg 2 p 1 võlausaldajaid otseselt kaitsvaks kaitsenormiks. Nimetatud sättest tuleneb üksnes juhatuse liikme kohustus üldkoosoleku kokkukutsumiseks, millise kohustuse täitmine ei anna iseenesest mingit garantiid, et üldkoosolek võtaks vastu otsuse ühingu alakapitaliseerituse ületamiseks. Juhul kui üldkoosolek otsustab ühingu kapitali parandamiseks midagi ette võtta, siis see võib vaid kaudselt kaitsta võlausaldajate huve. Kui aga üldkoosolek otsustab mitte midagi ette võtta, on juhatus formaalselt oma kohustused täitnud, kuid võlausaldajate huvid on jäänud täiesti kaitseta.

Saksa ja Inglise õiguses piirdub alakapitaliseeritud ühingu juhatuse liikme kohustus samuti vaid üldkoosoleku kokkukutsumisega (vastavalt GmbHG § 49 lg 3 ja Companies Act 2006 art 656), mistõttu ka nendes riikides pole võlausaldajatel võimalik juhatuse liikme vastu kahjunõudeid esitada, kui ta jääb ühingu alakapitaliseerituse olukorras tegevusetuks.

Seevastu Hispaania õiguses võib alakapitaliseeritud ühingu juhatuse liikme kohustuste rikkumisega kaasneda tema isiklik vastutus võlausaldajate nõuete eest (TRLSC § 367). Peamine erinevus teiste võrdlusriikidega seisneb selles, et Hispaanias on juhatuse liikmel alakapitaliseerituse ilmnemisel lisaks üldkoosoleku kokkukutsumise kohustusele veel seadusest tulenev kohustus ühingu lõpetamiseks, kui üldkoosolek ei leia seaduses sätestatud tähtaja jooksul aset või kui üldkoosolekul vastu võetud otsused pole alakapitaliseerituse ületamiseks piisavad.

Autor on seisukohal, et Eesti, Saksa ja Inglise õiguses sätestatud juhatuse liikme kohustus alakapitaliseeritud ühingu üldkoosoleku kokkukutsumiseks kaitseb võlausaldajate huve vaid kaudselt – eeldusel, et osanikud/aktsionärid otsustavad ühingu kapitali aktiivselt panustada või võtavad tarvitusele muud adekvaatsed meetmed. Kui osanikud/aktsionärid jäävad tegevusetuks, ei oma juhatuse liikme üldkoosoleku kokkukutsumise kohustuse täitmine/mitte täitmine ühingu kapitali ega võlausaldajate kaitse seisukohast mingit tähendust. Seetõttu on autori arvates põhjendatud Hispaania õiguse eeskujul alakapitaliseeritud ühingu juhatuse liikmele täiendava kohustuste sätestamine, mille kohaselt ta peab asuma ühingut likvideerima, kui üldkoosolek pole seaduses sätestatud tähtaja jooksul aset leidnud või kui üldkoosolek on võtnud vastu otsuse, mis ei ole ühingu alakapitaliseerituse ületamiseks piisav või kui üldkoosolek on võtnud vastu otsuse ühingu likvideerimiseks. Eesti õiguse näitel võiks kirjeldatud lisakohustus olla käsitletav kaitsenormina VÕS § 1045 lg 1 p 7 tähenduses, mille kaitse eesmärk oleks suunatud sarnaselt ÄS § 180 lg-ga 5^1 ühingu majandustegevuse lõpetamisele ja kapitali edasise vähenemise ärahoidmisele, selle erisusega, et juhatuse liikme vastutuse algusmoment nihkuks püsiva maksejõuetuse tekkimise hetkest ettepoole ühingu alakapitaliseerituse aega.

Juhatuse liikme seisukohast ei oleks selline rangem vastutus ootamatu. Juhatuse liikmel on niikuinii ühingu aruandluse pidamise kohustus ning ühingu alakapitaliseeritus ei saa tulla juhatuse liikme jaoks üllatusena. Alakapitaliseerituse ilmnemisel on juhatuse liikmel piisavalt aega ühingu saneerimisvõimaluste igakülgseks läbikaalumiseks ja selle otsustamiseks, kas ühingu netokapitali seaduse nõuetega vastavusse viimine on perspektiivne.

IV Vastutus tahtlikul valeinfo esitamisel

Kaitsmisele kuuluv väide:
Juhatuse liige ei vastuta igasuguse tahtliku valeinfo esitamise korral. Juhatuse liikme deliktilise vastutuse eeldusena peab avaldatud valeinfo omama kahjustatud poole tehingu tegemise otsustuse seisukohast määravat tähendust ning kahjustatud pool peab olema vastavale infole ka tuginenud. Juhatuse liikme vastutus tahtliku valeinfo avaldamise korral võib kaasneda nii aktiivse ja kui passiivse tegevusega.

Probleemi kirjeldus ja põhjendused:
VÕS § 1045 lg 1 p 8 kohaselt on kahju tekitamine õigusvastane, kui see on tekitatud tahtliku heade kommete vastase käitumisega. Tegu on universaalse normiga, mis rakendub kõikides olukordades, kui isik on käitunud tahtlikult ja heade kommete vastaselt.

Autor asus seisukohale, et tahtlik valeinfo esitamine võib olla käsitletav heade kommete vastase käitumisena, kuid juhatuse liige ei vastuta VÕS § 1045 lg 1 p 8 alusel siiski igasuguse valeandmete esitamise korral. Juhatuse liikme deliktilise vastutuse eelduseks valeandmete esitamisel on see, et esitatud infol on otsustav tähendus kahjustatud poole tehinguotsuse langetamisel ning kahjustatud pool on sellele infole ka tuginenud.

Kuigi võrdlusriikides on õigusdogmaatiline lähenemine antud küsimusele erinev, jõutakse kõigis riikides valeinfo tahtliku avaldamise korral sarnaste vastutuse eeldusteni. Küll on mõnevõrra erinev lähenemine küsimuses, kas lisaks aktiivsele valeinfo avaldamisele võib ka passiivne valeinfo avaldamine (s.o tõese info varjamine) olla juhatuse liikme vastutuse aluseks (nt Inglise õiguses on kahjunõude esitamise võimalused piiratud, kui juhatuse liikme rikkumine seisneb tõese info varjamises; seevastu Saksa kohtupraktikas on juhatuse liikme vastutust olulise info tahtliku varjamise eest jaatatud).

Kuigi eetiliselt on igasuguse valetamine lubamatu, ei saa juhatuse liikme deliktiline vastutus võlausaldajate ees kaasneda siiski igasuguse asjaolude ilustamise või liialduste korral. Vastutuse aluseks olev valeinfo peab olema kahjustatud isiku tehinguotsustuse seisukohast määrav ning loomulikult peab kahjustatud isik olema sellele ka tuginenud. Vastutuse aluseks olev valeandmete esitamine võib autori arvates seisneda nii aktiivses info väljastamises kui ka kannatanud poole jaoks äratuntavalt olulise info varjamises. Kannatanu jaoks olulise info tahtlik varjamine ei ole kuidagi kergem rikkumine, kui valeinfo aktiivne esitamine.

Autori arvates on juhatuse liikme deliktiline vastutus eelkirjeldatud eelduste esinemisel põhjendatud. Juhatuse liikme tahtluse tõendamine asetab võla-usaldajale kõrge tõendamiskoormise, mis hoiab juhatuse liikme vastutuse mõistlikes piirides ja väldib nõuete laviini vallandumist igasugu hooletu info kontrollimise-esitamise korral juhatuse liikme poolt. Pealegi saab juhatuse liige isikliku vastutuse tekkimist lihtsalt vältida, kui ta hoidub tahtlikust valetamisest.

V Vastutus valeinfo hooletul esitamisel (*culpa in contrahendo*)

Kaitsmisele kuuluv väide:
Juhatuse liikme kui ühingu seadusliku esindaja isiklik vastutus valeinfo hooletul esitamisel võib tõusetuda erilise usaldussuhte olemasolul juhatuse liikme ja tehingu teise poole vahel. Pelgalt juhatuse liikme isiklik majandushuvi ühingus ei tohiks valeinfo hooletu avaldamise korral olla tema vastutuse eelduseks. Üksnes juhul, kui tehing on küll formaalselt sõlmitud ühingu nimel, kuid selle tehingu majanduslik sisu teenib ainult juhatuse liikme erahuvi, võib juhatuse liikme majandushuvi olla aluseks tema isiklikule vastutusele.

Probleemi kirjeldus ja põhjendused:
Erandlikel juhtudel võib juhatuse liikme isiklik vastutus ka valeinfo hooletul esitamisel kõne alla tulla. VÕS § 14 sätestab nõude pidada lepingueelseid läbirääkimisi heas usus (*culpa in contrahendo* – c.i.c). Muuhulgas peavad lepingueelsete läbirääkimiste käigus teise poolele esitatavad andmed olema tõesed ning pool peab teatama teisele poolele kõigist asjaoludest, mille vastu teisel poolel on lepingu eesmärki arvestades äratuntav oluline huvi.

Kuigi VÕS §-s 14 sätestatud kohustused laienevad eelkõige läbirääkimiste poolele, ei välista nimetatud säte ka poole esindaja (juhatuse liikme) isiklikku vastutust c.i.c alusel. Juhatuse liikme kui äriühingu esindaja vastutus valeandmete esitamisega võlausaldajale tekitatud kahju eest c.i.c alusel on võimalik eelkõige juhul, kui kannatanu ja juhatuse liikme vahel on tekkinud eriline usaldussuhe, mis on lubanud kannatanul põhjendatult uskuda, et juhatuse liige on võtnud isikliku vastutuse esitatud andmete õigsuse eest.

Pelgalt juhatuse liikme isiklik majandushuvi äriühingus ei ole autori arvates aluseks tema vastutusele c.i.c alusel. Sõltuvalt asjaoludest võib siiski juhatuse liikme vastutust c.i.c alusel teatud juhtudel jaatada, kui tehing on sõlmitud formaalselt küll ühingu nimel, kuid majanduslikus mõttes puudutab konkreetne tehing üksnes juhatuse liikme erasfääri (tegutsemine *procurator in rem suam* põhimõttel).

Teistes võrdlusriikides tunnustatakse c.i.c põhimõtet Saksa õiguses (BGB § 280 ja § 311 lg 3) ning teatud määral ka Hispaanias (kuigi Hispaania tsiviilkoodeksis vastav regulatsioon puudub, on kohtupraktikas tuletatud c.i.c põhimõte deliktiõiguse üldregulatsioonist). Mõlemas riigis peetakse juhatuse liikme kui ühingu esindaja vastutust valeinfo esitamisel c.i.c alusel piiratud ulatuses võimalikuks.

Inglise õiguses c.i.c põhimõtet otseselt ei tunta, kuid nõude eelduste osas on sellele küllalt lähedane *negligent misrepresentation* kui eraldiseisev delikt, mis võimaldab erandlikel asjaoludel juhatuse liikme vastu kahjunõude esitamist. Juhatuse liige võib viidatud delikti alusel vastutada, kui ta on võtnud endale sisuliselt garandi rolli, tekitades tehingu teises pooles põhjendatud usalduse, et ta vastutab koos ühinguga avaldatud info õigsuse eest.

Autor on asunud kokkuvõtvalt seisukohale, et juhatuse liikme vastutus valeinfo hooletu avaldamise korral ei saa kindlasti olla võrdväärne poole (äriühingu) enda vastutusega, sest vastasel juhul muutuks juhatuse liikme vastutus ebamõistlikult rangeks, kui ta vastutaks igal hooletul valeinfo esitamise juhtumil solidaarselt ühinguga.

Juhatuse liige võib vastutada valeandmete hooletul esitamisel eelkõige juhul, kui tema ja tehingu teise poole vahel on tekkinud eriline usaldussuhe. Selle täpsem sisustamine on igal üksikjuhtumil kohtu otsustada, kuid peamise kriteeriumina on põhjust välja tuua, et eriline usaldussuhe ei saa mingil juhul võrduda tavapäraselt käibes rakendatava usaldusega. Erilisest usaldusest on põhjust rääkida, kui poolel on tekkinud juhatuse liikme suhtes põhjendatult oluliselt kõrgem usaldus, kui tal on teiste isikute suhtes samalaadsete tehingute sõlmimisel.

Isiklik majandushuvi ei tohiks autori arvates üldjuhul olla juhatuse liikme vastutuse aluseks valeinfo hooletu esitamise korral. Nt pelgalt ühingu osanikuks olek ei tohiks tekitada juhatuse liikmele vastutust kõnesoleval alusel. See oleks vastuolus ühingu piiratud vastutuse põhimõttega, sest sisuliselt tekitaks osanikuks oleku fakt juhatuse liikmele täiendava vastutuse ühingu kohustuste eest, samas kui osaniku vastutus on piiratud tema kapitaliosalusega ühingus. Ka muu lepinguline huvi ei tohiks iseenesest mõjutada juhatuse liikme vastutust, sest nõnda on oht jõuda tulemuseni, et juhatuse liikme isiklik vastutus võrdsustub äriühingu vastutusega. Autor peab võimalikuks juhatuse liikme vastutust valeinfo hooletul esitamisel üksnes erandlikel juhtudel, kui juhatuse liige on teinud tehingu küll ühingu nimel, kuid majanduslikus mõttes puudutab see tehing üksnes juhatuse liikme enda erahuvi (*procurator in rem suam*). Lisatingimusena peaks ka tehingu teine pool aru saama, et tehing puudutab juhatuse liikme erahuvi. Kui tehingu teine pool ei tea juhatuse liikme isiklikust huvist midagi, pole tal ka põhjust tehingu sõlmimisel eeldada, et lisaks ühingule vastutab tehingu täitmise eest veel keegi.

Juhatuse liikme isikliku vastutuse jaatamine valeinfo hooletu avaldamise korral ei laienda autori arvates ebamõislikult juhatuse liikme vastutuse piire, sest need juhtumid, kui juhatuse liikme vastutus kõnesoleval alusel saab üldse rakenduda, on väga erandlikud. Kuigi juhatuse liikme vastutus valeinfo hooletul avaldamisel võib olla võlausaldajate kaitse seisukohast marginaalse tähendusega, on selle vastutuse tunnustamine autori arvates siiski oluline, sest võimaldab kaitsta võlausaldajaid erilise usalduse kuritarvitamise eest.

PUBLICATIONS

CURRICULUM VITAE

Name: Leonid Tolstov
Date of birth: May 3, 1978
E-mail: Leonid.Tolstov@varul.com

Career

2011 to date	Partner, Attorney-at-Law, Law Firm VARUL
2010–2011	Partner, Attorney-at-Law, Varul Vilgerts Smaliukas
2009–2010	Senior Associate, Attorney-at-Law, Varul Vilgerts Smaliukas
2004–2009	Senior Associate, Attorney-at-Law, Advokaadibüroo Paul Varul
1999–2004	Associate, Advokaadibüroo Paul Varul

Education

2014 March–April,	academic research work at the University of Coimbra (Portugal)
2013 March–April,	academic research work at the University of Vienna (Austria)
2012 March–April,	academic research work at the University of Sevilla (Spain)
2011 to date,	University of Tartu, Faculty of Law, pursuing Ph.D.
2011 April,	academic research work at the University of Konstanz (Germany)
2000	University of Tartu, Faculty of Law, B.A.

Publications

1. Limitation of Personal Tort Liability of a Member of the Management Board of a Company. Perspective of Estonia. Published in *European Business Law Review* (Kluwer), Vol. 24 (2013), Issue 2.
2. Personal Liability of a Director in the Insolvency of a Company. Published in *International Insolvency Law Review* (Beck), 2013, Issue 3.
3. Protection of Foreign Investors from Local Takeover in Estonia. Published in *Ukrainian Journal of Business Law*, 2013, Issue 9.
4. The Company Director's Liability for Untrue Statements. Published in *Baltic Journal of Law and Politics*, 2014, Vol 7 Issue 1.
5. Personal Liability of a Director to Creditors in Case of Thin Capitalisation of a Company. Published in *Juridica International*, 2014, Vol 21.

ELULOOKIRJELDUS

Nimi: Leonid Tolstov
Sünniaeg: 3. mai 1978
E-mail: Leonid.Tolstov@varul.com

Töökogemus

2011 alates	partner, vandeadvokaat, Advokaadibüroo VARUL
2010–2011	partner, vandeadvokaat, Varul Vilgerts Smaliukas
2009–2010	vandeadvokaat, Varul Vilgerts Smaliukas
2004–2009	vandeadvokaat, Advokaadibüroo Paul Varul
1999–2004	jurist, vandeadvokaadi abi, Advokaadibüroo Paul Varul

Hariduskäik

2014 märts–aprill,	akadeemiline uurimistöö Coimbra Ülikoolis (Portugal)
2013 märts–aprill,	akadeemiline uurimistöö Viini Ülikoolis (Austria)
2012 märts–aprill,	akadeemiline uurimistöö Sevilla Ülikoolis (Hispaania)
2011 alates,	Tartu Ülikool, õigusteaduskond, doktorantuur
2011 aprill,	akadeemiline uurimistöö Konstanzi Ülikoolis (Saksamaa)
1996–2000	Tartu Ülikool, õigusteaduskond, bakalaureus

Publikatsioonid

1. Limitation of Personal Tort Liability of a Member of the Management Board of a Company. Perspective of Estonia. Published in *European Business Law Review* (Kluwer), Vol. 24 (2013), Issue 2.
2. Personal Liability of a Director in the Insolvency of a Company. Published in *International Insolvency Law Review* (Beck), 2013, Issue 3.
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5. Personal Liability of a Director to Creditors in Case of Thin Capitalisation of a Company. Published in *Juridica International*, 2014, Vol 21.

DISSERTATIONES IURIDICAE UNIVERSITATIS TARTUENSIS

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