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LAW AND SAFETY IN LIQUIDATION AND DISSOLUTION OF COMPANIES

The purpose of this article is to clarify the process of liquidation and dissolution of companies. The research below defines the rules that must be followed when approaching those procedures in the Kingdom of Spain and Republic of Austria. In those countries there are two types of liquidation. First of them is liquidation of company which is solvent, the second one is liquidation of company that cannot pay its debt. In both cases, there are specific duties which must be obeyed to dissolve the company in legal and safe way.

Key words: *law, safety, liquidation, dissolution of company, Kingdom of Spain, Republic of Austria, company law, insolvency law.*

Original article

INTRODUCTION. This article deals in more detail with the rules on the liquidation of companies in the Republic of Austria and the Kingdom of Spain, based on the rules of the Member States concerned. The individual chapters will provide instructions on how to abolish and liquidate a company in selected countries safely and legally.

The first part of this contribution is devoted to the liquidation of a company in the Kingdom of Spain, the approximation of the Spanish legal rules governing both companies as such and the liquidation of companies. The main role in this case is played by the consolidated version of the Spanish Company Law (*Ley de Sociedades de Capital*¹) approved by Royal Legislative Decree 1/2010 of 2 July 2010, Royal Decreto 1784/1996 of 19 July² approving the regulations of the Commercial Register and recast text of the Insolvency Act approved by Royal Legislative Decree 1/2020 of 5 May 2020 (*Refundido de la Ley Concursal*)³. Based on the information in those acts, we can differentiate two types of this procedure and that is voluntary and compulsory liquidation.

The final part is devoted to the liquidation in the territory of the Republic of Austria and its individual steps necessary for the safe and legal liq-

uidation of the company. The legal steps of liquidation procedure in Austria are guided by the Insolvency Act, which entered into force in 2010. This act contains the rules for both types of liquidation – solvent, which stands for situation when company can pay its debts, but reasons listed below decided to liquidate the company, and also insolvent liquidation, to which company must accede in case of over-indebtedness. The Insolvency Act also provides information about bankruptcy proceedings which are similar to insolvent liquidation but cannot be confused. Except the Insolvency Act, The Company Act also plays a big role. The Company Act in Austria is based on the Austrian Commercial Code, the Austrian Trade Law 1994, the New Companies Promotion Act, the Commercial Register Act and the Federal Law on Special Assistance for Small and Medium-sized Enterprises. All these texts of legislation regulate the incorporation, registration and running of a company in Austria.

In addition to the legislative acts, it is also company document called the Articles of Association that is playing a major role for company when closing their business. This document usually contains reasons for company to enter liquidation and dissolution procedure in case of voluntary or solvent liquidation.

Since the issue of liquidation and dissolution of company does not affect only company and insolvency law, but it also affects other areas of law (for example labor law in the event of redundancies the company's employees), it is essential to know how company can be liquidated and dissolved without breaking the law and risking the endangered the safe cessation of its business activities.

¹ Consolidated text of the Spanish Companies Act (*Ley de Sociedades de Capital*) approved by Royal Decree Legislative 1/2010, of 2 July 2010 (hereinafter as the LCS).

² Royal Decreto 1784/1996, de 19 de julio, por el que se aprueba el Reglamento del Registro Mercantil (hereinafter as RRM).

³ Royal Legislative Decree 1/2020 of 5 May 2020 (*Refundido de la Ley Concursal*) (hereinafter as RLC).

This all sums up the reason of choosing this topic and that is to show the importance of understanding the individual steps and relations between them in procedure of liquidation and dissolution of company. Although, the structure of liquidation can be seemed as similar within the countries, each state has its own specifics when winding up companies. When liquidating company in legal and safe way, it is necessary for us to follow all conditions stated in acts that regulate this area. Only after the fulfillment conditions listed below, we can talk about successful liquidation procedure which ends with dissolution of company.

PURPOSE AND OBJECTIVES OF THE RESEARCH. *Main goal* of this article is to acquaint the reader with the possibilities of legal and safe liquidation to protect the company as well as interested third parties. Therefore, it is necessary to analyze the procedure for specific types of liquidation and company dissolution in selected countries with aspect of closing business in a legal and secure way.

METHODOLOGY. The fundamental method used while writing this article was analysis of the law regulation governing the issue of liquidation of company. Under the conditions of Spanish law, it is the Spanish Company Law (LSC), Royal Legislative Decree 1/2010 of 2 July 2010, Royal Decree 1784/1996 of 19 July (RRM) approving the regulations of the Commercial Register and the Insolvency Act approved by Royal Legislative Decree 1/2020 of 5 May 2020 Refundido de la Ley Concursal (RLC). In matter of law order of Republic of Austria, it is The Company Act in Austria and the Insolvency Act. Since the liquidation and dissolution of company are law regulated procedure, it is necessary to be based on the individual provisions of the law. These legal acts obtain information such as the types of liquidation, reasons of why company must liquidate it selves, the amount of fees that must be paid, the course of liquidation, the role of the establish liquidator as well as the legal consequences of liquidation and dissolution of company.

Scientific articles in the field of law were also used as material for this article. The main purpose of using them was for better understanding of law. Legal norms are sometimes vague or incomprehensible. In situations like these, for better understanding it is therefore necessary to use the articles that contain their interpretation. Most of the used articles were written by the lawyers that have experience in closing the business. Thanks to their experience from legal practice, the articles obtained useful information that can help in an efficient liquidation process while maintaining

all the legal conditions. This can be helpful for simplifying the procedure of liquidation and dissolution of company. It is known that this procedure (mainly liquidation) may last for a long time. Therefore, it is good to get acquitted with information that can speed up this process.

All these sources and methods of their application were used to arrive an efficient way of liquidation a company regardless of type, so that the company could end its existence in accordance with the law and safety.

RESULTS AND DISCUSSION

1. Steps for liquidation of the company in the Kingdom of Spain

The most common type of company being wound up in Spain is a limited liability company (because it is the most common form of business registered in that country). The voluntary liquidation procedure can be carried out if the company in question does not have debts, but also if the objective of the company's activities on which the company was founded has been achieved. J. A. García-Cruces (2016) mentions, that the process of liquidation and liquidation of a company in Spain is very complex due to the protection of the interests of third parties and partners.

The dissolution of the company is based on the very premise of the dissolution decision – the dissolution of the company, which initiates the entire process leading to the dissolution of the company and the commencement of liquidation. As for the dissolution decision, it is coherent with the Slovak one. According to Article 371 par. 1 LSC, after the first phase of the dissolution process, i.e., dissolution, the company enters into a state of liquidation. On the other hand, the statutory body ceases to exist, which terminates their power to act on behalf of the company and their competence passes to the liquidator in accordance with the provisions of Article 374.1 and 375.1 LSC. The legislator stipulates that the dissolution decision or court resolution must be registered in the Commercial Register in accordance with the provisions of Article 369 LSC.

Information on the dissolution of the company and information on the appointment of the liquidator are data which, in accordance with Article 240 RRM are entered in the Commercial Register. Pursuant to the provisions of Article 243 RRM submits that information on the appointment of a liquidator may be registered in the commercial register in two ways, either simultaneously or later after the winding-up of the company. From the provisions of Article 371 par. 2 LSC *expressis verbis* shows that, even after its dissolution, the company retains its legal personality during the liquidation process, and it must be

emphasized that there is also a need to preserve the company's organs.

J. Gartner (1950, p. 29) mentions that in Spanish doctrine, we also encounter the question whether, after the dissolution of the company, the articles of association are still maintained, or, conversely, the decision to dissolve the company acts as a determining cause of its dissolution. The social contract retains its entire validity after the social termination due to its nature of the organizational contract and the existence of a legal entity. In addition, the legal text continues to have the effect submitted to it, as it is not only possible but also frequent for the articles of association to adopt specific agreements on various points in this matter (liquidation quota agreements, etc.). This is explicitly warned by Article 371.3 of the LSC. As already indicated, the demise of a company can be considered as a complex process that requires the previous basis or cause – decision – and which includes a complex of actions – or liquidation – up to its registration reflection “delamination”, for obvious reasons as something indisputable. Now, as in the establishment of a capital company, overcoming one of the stages that make up the company's demise process must have its consequences in relation to the previous situation.

It is also worth mentioning the cases which the Spanish legislation allows, which are cases in which a company ceases to exist without dissolution and liquidation. These are cases of merger, amalgamation or divisions of companies, the effects of such structural changes resulting in the termination of all established relationships between third parties and the company. The legal norms of the Kingdom of Spain governing the method of dissolution and liquidation of companies are mandatory and thus the autonomy of the shareholders' will, whether in the articles of association or the company's articles of association, cannot in any circumstances eliminate any of the reasons for company dissolution stated in the law.

However, the Spanish legislature allows the grounds for winding up of a company to be extended through Article 363 par. 1 letter h LSC, the condition is that the reasons are contained in the company's basic corporate document - in the articles of association or in the company's articles of association. According to Article 364 LSC requires the approval of a general meeting adopted by a qualified majority for the dissolution of a company. The constitutive requirement of dissolution is therefore a decision – a resolution of the General Meeting. However, it will be necessary to ask what should be the content of the resolution. As the J. Casado Abad mentions the text of the law requires a dual content in such a resolution of the

General Meeting. First, the statement that the general meeting takes note of the fact and reasons for which the company is dissolved, whether this reason falls within the scope of legal or social contract, respectively. the grounds for dissolution of the company. Secondly, it must also contain a statement of the general meeting's intention to dissolve the company. By the resolution of the General Meeting, the company is dissolved and enters into liquidation.

The procedure of voluntary liquidation can also be applied in the case of the so-called sleeping companies. Voluntary dissolution must be decided at the general meeting, and once the shareholders agree on a procedure, a liquidator will be appointed to oversee and carry out the liquidation. The liquidator has a duty to ensure that the debts are paid to the company's creditors. The rest of the assets or the amount of money will be distributed among the shareholders. The liquidator performs the function of the governing body of the company, which acts on behalf of the company in liquidation, which means that in this respect there is no fundamental difference between the function of the manager and the liquidator. Pursuant to Article 376 (2) 1 LCS is the liquidator who is the statutory of the company at the time of its dissolution and so in accordance with this provision we discuss the so-called. *Ex lege* conversion of the function of the statutory body of the company into a liquidator, which is absent in our Slovak legal system.

There are also circumstances when such a conversion of the company's statutory body into a liquidator can be prevented within the general meeting, which can appoint a new liquidator to the liquidator, but only in the case of the so-called acephaly company. In the absence of such an appointment by the general meeting, the Spanish legislation in Article 377 par. 2 The LSC provides that in such circumstances the liquidator of the company is appointed by the court.

Voluntary liquidation of the company begins with the company's executives, who have a set of legal obligations during this procedure. The managers must therefore organize a general meeting of shareholders, at which the company's shareholders will decide on the dissolution of the company.

If the shareholders do not reach a resolution during the general meeting of shareholders or if they fail to meet all the shareholders of the company for the purpose of organizing the general meeting, the managers can then go to court, where they can initiate liquidation of the company.

After successfully completing the initial phase of the forced liquidation process in Spain,

the managers lose the right to manage the company during this process, which will be under the supervision of the appointed liquidators. Some of the main responsibilities of liquidators include, for example assess the company's current assets and recover the company's debts, satisfy the claims of the company's creditors, and conclude the company's financial transactions, also enter into new financial transactions if they are entered into for the purpose of liquidating the company, the appointed liquidator is also responsible for drawing up the company's balance sheet.

The liquidator is appointed to the position of liquidator for an indefinite period. After the company enters into liquidation, the liquidator is obliged to compile a document, res. the financial statements as at the date of dissolution of the company, the content of which is the assets and liabilities of the company, within a period of three months. Based on this document, the situation in which the company finds itself can then be assessed and, thanks to it, the final liquidation balance can be predicted, which can be distributed among the company's residual creditors after satisfying all the company's creditors.

The entire liquidation process is in the hands of the liquidator, who performs the actions necessary to carry out the liquidation process (Article 384 LSC), loses the company's assets (Article 387 LSC) and satisfies the claims of the company's creditors (Article 385 LSC). The liquidator has an information obligation in favor of the shareholders and towards third parties. The general information obligation is enshrined in Article 388.1 LSC.

The procedure stipulates that when applying for voluntary liquidation, the company's representatives are required to submit a set of financial documents, such as the last three annual financial statements, tax and audit reports and, depending on the form of business, other necessary documents.

As a result of the economic and financial crisis in Spain, many companies have declared bankruptcy in recent years. The Spanish subsidiaries of solvent German parent companies appear to favor the legal possibility of liquidating the company.

An important characteristic of the company's liquidation is the termination of legal relations with third parties and, if necessary, the division of the company's assets among the partners to dissolve the company.

C. I. P. Serrano stated that LCS provides for cancellation, liquidation, and termination. In general, annulment is a decision of the general meeting to initiate the liquidation process. The reasons for dissolution stated in the LSC provisions include:

- failure to achieve the purpose of the company or its obvious impossibility, or the deadlock of the company's bodies at a standstill so that continuation is not possible;

- losses in which the company's assets are reduced to less than half of the company's share capital, unless the company's share capital is increased to such an extent that it is not necessary to apply for a declaration of insolvency;

- reduction of the company's share capital to an amount lower than the legally required minimum of € 3,000 for limited liability companies.

Notwithstanding the above, the company can also be dissolved by a simple decision of the General Meeting. The consequences of such a decision are, *inter alia*:

- the company immediately enters the liquidation process;

- the company's profitability is suspended;

- the administrative body resigns and is replaced by liquidators (usually the administrators themselves, who become liquidators).

Unlike liquidation, a simple legal act, liquidation is a process aimed at distributing the company's assets after all the company's obligations have been met. During this phase, the company retains its legal personality.

The liquidators are responsible for carrying out this process. As a result of the termination, the statutes lose the power to enter into new contracts and obligations and are replaced by liquidators, who take over the function of administrative body and the company's representative in the liquidation phase.

In short, the basic functions of liquidators are:

- preparation of inventory and opening balance sheet;

- account management and supervision;

- execution of pending business transactions;

- sale of company property;

- payments to creditors and partners of the company;

- representation of the company;

- preparation of the balance sheet and planned allocation of the company's assets.

As regards payments to creditors and shareholders, the LCS lays down the following rules for their implementation:

- liquidators cannot distribute the company's assets among the shareholders until all creditors have been paid or the payment orders against the company have been settled;

- the liquidators must first ensure that the payment calls are paid.

The purpose of these rules is to prevent any creditor from becoming injured because of a division of assets.

Creditors can challenge transactions that took place illegally during the allocation of assets. This action is directed against the company and its partners. The company ceases to exist when the liquidators submit the correct documents (decision on liquidation, appointment of the liquidator, acceptance of the liquidation balance, distribution of the company's assets, etc.), have them notarized and publish them in the Commercial Register. At the same time, the liquidators shall keep the books and deeds of the defunct community in this register.

Furthermore, all current contracts of the company (i.e., employment, rent, leasing, insurance, telephone, cleaning, banking, etc.) must be terminated for the liquidation and subsequent dissolution of the company.

1.1. Conclusion of the liquidation process

Pursuant to Article 390 LCS, at the end of the liquidation process, the liquidator is obliged to determine the value of the final liquidation balance and subsequently submit to the General Meeting a final report on the course of liquidation and a proposal for the distribution of the final liquidation balance among the company's shareholders.

The form of payment of the liquidation balance can be in monetary or non-monetary form. However, LCS also considered a situation where the shareholders decided to revoke their decision to liquidate the company. In this case, the so-called reactivation of a company in liquidation pursuant to Article 370 LSC, which may be decided by the General Meeting in accordance with the LCS. Such reactivation of the company in liquidation is possible only until the liquidation balance of the company is distributed. The actual demise of the company occurs only when the company is deleted from the Commercial Register, which is preceded by the deposit of all the company's books and documentation by the liquidator in the Commercial Register.

A specific, but not uncommon situation is when the assets or liabilities of a defunct and deleted company appear after the deletion of the company from the Commercial Register. If the assets of the defunct company appear, the liquidator monetizes them within six months and distributes them among the residual creditors with reference to Art. 398 and 399 LSC.

1.2. Compulsory liquidation

Under Spanish insolvency law, a creditor must apply for liquidation when the company can no longer repay its debts. The outstanding debt must be at least six months old in order to apply for compulsory cancellation. Compulsory liquidation begins as a court-ordered recovery procedure.

This type of liquidation may also be enforced in certain circumstances, for example if the company is in arrears and the debtor's assets are held as collateral for outstanding debts, the debtor has not paid taxes for at least three months or the debtor has sold his assets negligently.

The creditor must provide evidence proving one of the reasons for the forced liquidation when submitting the application for compulsory liquidation. Based on the evidence, the judge may issue a court order that the debtor appear in court no later than within five days. Based on the evidence provided by the plaintiff and the defendant, the Spanish court will rule in favor or against the liquidation. In the event of a decision to dissolve, a court clerk will be appointed to conduct the proceedings.

According to C. Engelhardt (2020, p. 13) the company's creditors are initiating the liquidation in accordance with the recast text of the Insolvency Act. The shareholders of the company or the members of the Board of Directors who are responsible for the relevant debts pursuant to Article 3.3 of the above-mentioned Act may also request the procedure.

2. Steps for liquidation of the company in the Republic of Austria

Liquidation under the Austrian legislation is defined as the winding-up of a business with the aim of orderly economic liquidation of the company and its deletion from the commercial register after the assumption that bankruptcy proceedings will not be initiated against the company's assets. The decision to dissolve the company must be reported to the Commercial Register. Liquidation is not a substitute for bankruptcy proceedings if the company has excessive debt.

The legal regulation of the liquidation of companies in Austrian law is contained in the Insolvency Act. Under Austrian law, the liquidation of a company is followed by its liquidation. However, disposal shall not take place if:

- the state becomes the acquirer of all shares in the company for the purpose of liquidating the company;

- the state will take over the assets of the defunct company by a contractual agreement, stating that it will take over all the company's liabilities, abandon the liquidation and subsequently carry out the discharge of the shareholders.

In the event of a liquidation of a company in liquidation, the law distinguishes between two types of liquidation:

- solvent disposal;
- insolvent liquidation.

Solvent liquidation is used in the following cases:

– the dissolution of the company occurs due to the expiration of the time for which the company was established;

– due to the shareholders' decision.

As the R. Friedrichs (1996, p. 74) stated the reasons for dissolution of corporations can be divided into general and special dissolution facts. The general grounds for dissolution are those facts which are applicable to all legal forms and are legally standardized.

Dissolution due to the passage of time according to § 84 (1) Z 1 GmbHG or § 203 (1) Z 1 AktG applies to GmbH and AG. The passage of time means that a company was founded for a specific (lifetime) period. In the case of a GmbH, the term of a company is regulated in the articles of association. The timing of a stock corporation is to be regulated in the articles of association. A specific time means either reaching a fixed date in the calendar or a predetermined and measurable period. A time limit is hardly ever used in practice. Insolvency liquidation is used in case of excessive indebtedness of the company. In this case, the liquidation is announced by the court based on the company's creditor proposal. The court shall appoint a liquidator from the list of trustees in bankruptcy.

According to B. Renner (2019), in the case of a public limited company, the person appointed as liquidator may be replaced by a committee of liquidators. In such a case, the committee will be composed of persons authorized to act on behalf of the company and their role will be to represent the interests of the company during the liquidation process.

Before the company is dissolved and liquidated, the following actions must be taken:

1) collect due accounts through which the company is entitled to withdraw money for delivered goods or services;

2) inform the parties concerned, including the company's creditors and their customers, in good time of the dissolution of the company;

3) terminate all leases;

4) announce the liquidation of the company to employees. The notification obligation towards employees should be carried out within a period of time within which employees have a period of notice;

5) settle tax returns, including the final tax return as well as social security obligations;

6) distribute the company's remaining assets.

The liquidator shall take all necessary measures to delete from the commercial register. He takes over the authority of the company's

manager. However, he may not use his powers for proceedings unrelated to the liquidation process. As part of his duties, he has the task of drawing up a balance sheet of the company's assets, auctioning the company's assets, and in the event of a lack of funds to cover debts, he is entitled to receive payments from the company's debtors. Subsequently, he is obliged to pay all creditors, as well as suppliers and employees of the company.

The decision on the dissolution of the company together with the data on the liquidator or the liquidators' committee shall be entered in the Commercial Register. As part of the liquidation process, the company is required to pay all taxes due.

The next step in the liquidation of the company is the revocation of the business license. Notification of the dissolution of the company and its subsequent liquidation must be sent to the social security authority. The fiscal authorities also need to be informed of the liquidation process. There is also an obligation for employees to apply to the regional health insurance company where they are registered.

According to R. Veil (2006), check the correctness after all receivables have been covered, a general meeting is convened, where a new updated balance sheet is submitted. Together with it, the liquidator must prepare a report on his activities and the manner of distribution of the remaining assets among the shareholders. The distribution among the shareholders is made according to their contribution to the share capital. The minutes of the meeting are then sent to the Commercial Register together with the request to delete the company from the register.

CONCLUSIONS. After analysis the individual procedures of liquidation in the Kingdom of Spain and Republic of Austria the basic structure of this process is alike. Both countries work with two types of liquidation. In the Kingdom of Spain it is compulsory and voluntary liquidation, while in the Republic of Austria it is solvent and insolvent. Even though liquidation procedures have different names in each legal order, in most cases the reasons to accede this process are very similar. For example, both Austrian insolvent liquidation and Spanish compulsory liquidation are process company must go through when there is occurrence of indebtedness.

When it comes to law and safety, for successful liquidation it is necessary to obey the rules and duties listed in the legislation acts. This can also help with quick and less demanding dissolution of company.

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СТРЕМИ Я. ЗАКОН И БЕЗОПАСНОСТЬ ПРИ ЛИКВИДАЦИИ И РОСПУСКЕ КОМПАНИЙ

Цель этой статьи – разъяснение процесса ликвидации и роспуска компаний. В исследовании, приведенном ниже, определены правила, которые необходимо соблюдать, обращаясь к этим процедурам в Королевстве Испания и Австрийской Республике. В этих странах существует два вида ликвидации. Первый – ликвидация платежеспособного предприятия, второй – ликвидация предприятия, которое не может уплатить свой долг. В обоих случаях существуют конкретные правила, которые необходимо соблюдать, чтобы ликвидировать компанию законным и безопасным способом.

Ключевые слова: закон, безопасность, ликвидация, роспуск компании, Королевство Испания, Австрийская Республика, корпоративное право, закон о неплатежеспособности.

СТРЕМІ Я. ЗАКОН І БЕЗПЕКА ПРИ ЛІКВІДАЦІЇ ТА РОЗПУСКУ КОМПАНІЙ

Тема цієї статті – закон і безпека, основне завдання – дослідження можливих шляхів ліквідації та розпуску компанії в умовах іспанського та австрійського правопорядку. При написанні статті було застосовано такий метод наукового пізнання, як аналіз законодавства. Проаналізоване законодавство – це нормативно-правові акти, які регулюють переважно законодавство про компанії, а також законодавство про банкрутство. Крім того, ще одним основним джерелом інформації на цю тему були наукові статті, присвячені питанням ліквідаційного провадження.

У результаті дослідження отримано інформацію, яка містить як юридичні обов'язки, так і права зацікавлених осіб. Це допомогло краще зрозуміти процес ліквідації компанії. В обох аналізованих країнах існує два види ліквідації. Кожен вид має свої специфічні правила, яких необхідно дотримуватися для законної та безпечної ліквідації компанії. У випадку з Королівством Іспанія ми говоримо про добровільну та примусову ліквідацію. Основна відмінність між ними полягає в тому, що примусова ліквідація – це процес, який призводить до ліквідації в ситуації, коли підприємство не в змозі сплатити свій борг. Тобто підприємство неплатоспроможне. З іншого боку, добровільна ліквідація – це спосіб ліквідації, коли підприємство не має боргів, але з якихось причин учасники погодилися закрити бізнес. Австрійський правопорядок розрізняє платоспроможну і неплатоспроможну ліквідацію. Ці процедури дуже схожі на іспанські, але мають деякі відмінності.

Ключові слова: закон, безпека, ліквідація, роспуск компанії, Королівство Іспанія, Австрійська Республіка, корпоративне право, закон про неплатоспроможність.

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