

ENERGY CRISIS AND DIRECTORS' LIABILITY

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The current energy crisis that is shaking European markets (and beyond) is also stimulating reflections on corporate governance and, in particular, the liability of directors.

"Director's discretion in the management of a company cannot be questioned; consequently, a company's economic failure is not cause for liability *per se*."

In the current situation directors of the companies in the energy and manufacturing sectors, try to renegotiate the ongoing agreements in order to cope with the radical change in contractual balances. As legal instruments that allow for the early termination of unsustainable contracts have become difficult to access, where renegotiation does not arrive at an appropriate solution for the two contracting parties, the alternative is often to jeopardise a company's financial situation or to terminate the contracts, both those of energy companies with their customers and of manufacturing companies with their end customers. This exposes the company to a high risk of claims for damages for breach of contract, a scenario that is becoming increasingly common.

WHAT ARE THE MAIN RISKS FOR DIRECTORS AND THE MINIMUM PRECAUTIONS TO BE TAKEN?

As is well known, directors are liable vis-à-vis the company, shareholders, and company's creditors, based on the rules set out in Articles 2392 ff. of the Italian Civil Code (2476 of the Italian Civil Code for limited liability companies). A director shall act with the due diligence required by the nature of their office and specific skills so as not to cause damage to the above-mentioned parties. However, a director's conduct will not be evaluated on the basis of the financial and economic performance of the company.

Indeed, jurisprudence has developed the so-called 'business judgment rule', according to which a director's discretion in the management of a company cannot be questioned; consequently, a company's economic failure is not cause for liability *per se*.

What is required, on the other hand, is for the director to make informed and thoughtful choices, following risk calculation rather than superficial and improvised decisions.

In the current economic climate, therefore, a director faced with contracts that have become excessively onerous, or even unsustainable, will be called upon – with the support of experts – to evaluate the choices available to them, whilst bearing in mind the relevant regulations and the parties to whom they answer to.

In making this assessment it is necessary to consider that, particularly in the case of a liability action by a company, that it is the director who will have to prove the non-attributability of the damaging event by providing evidence of the contested charges, the observance of duties and the fulfilment of the obligations of due diligence imposed (inter alia see decision Court of Milan n.4554/2022). It is therefore necessary for directors to keep track of any precautions taken (e.g. requesting expert opinions, conducting analyses, simulating possible harm to the company and other stakeholders).

A further reflection should be considered. In the current economic scenario, it is unfortunately likely that some companies will find themselves struggling.

In addition to the rules mentioned above, it will therefore be necessary to consider the provisions of Article 2086 of the Civil Code, following the recent amendments introduced by the Code of Business Crisis and Insolvency (which finally came into force on July 15, 2022, “CC.II”), whereby the administrative body *“has the duty to put in place an organisational, administrative and accounting structure appropriate to the nature and size of the enterprise, also with a view to the timely detection of the crisis of the enterprise and the loss of business continuity, as well as to take action without delay for the adoption and implementation of one of the instruments provided by the law for overcoming the crisis and the recovery of business continuity”*.

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To this end, Art. 3 CC.II. highlights some of the indices that must be evaluated to ensure the timely detection of crises such as delays on payment of payroll charges, the amount of liabilities to suppliers and exposures to the credit system.

A prudent director must, in an uncertain market environment, put in place tools for the timely detection of such signals, while at the same time taking care to prepare appropriate evidentiary support for their decisions.

The energy crisis is likely to give rise to particularly risky scenarios for directors who, therefore, must act with even greater awareness of the obligations imposed on them and of the possible consequences of the decisions they make.

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