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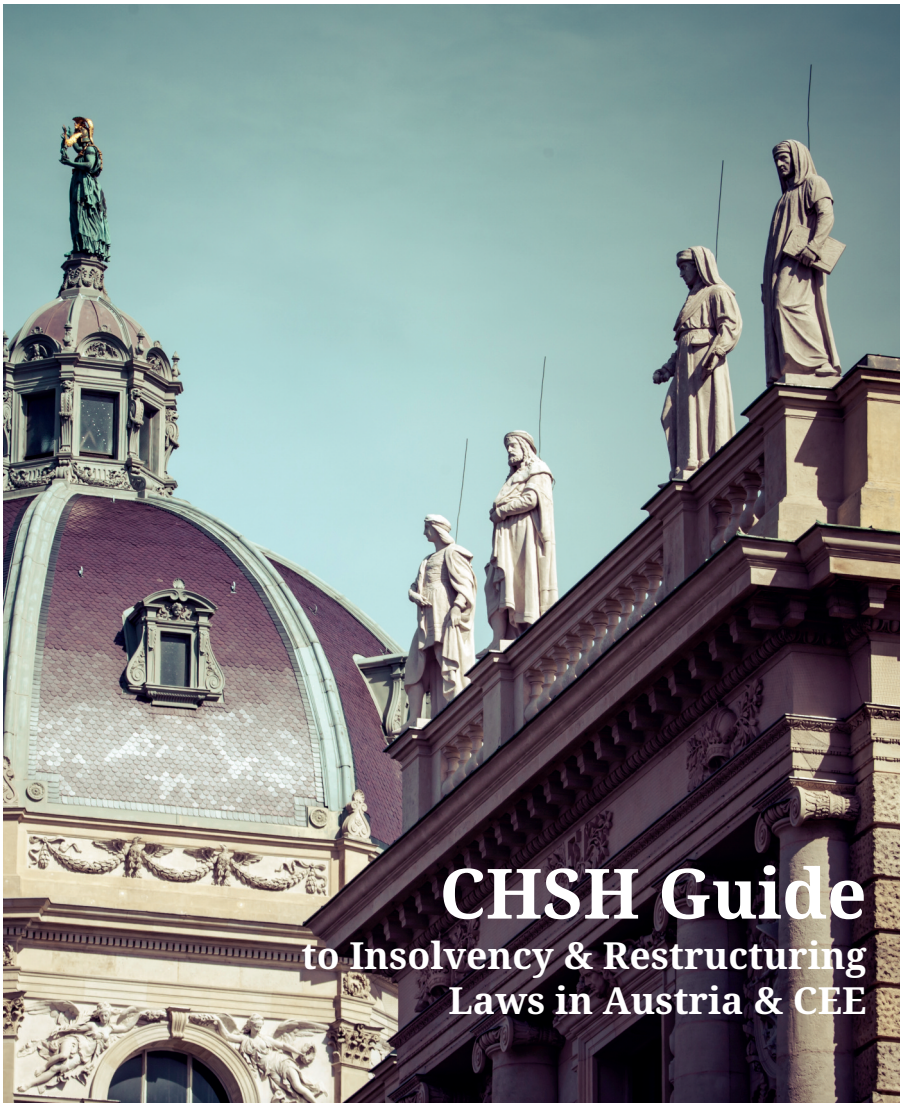

CHSH Guide

to Insolvency & Restructuring Laws in Austria & CEE

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About this Guide

This CHSH Guide to Insolvency & Restructuring laws in Austria and CEE is intended to give the reader a valuable insight into this field in select countries in Central and Eastern Europe where we have offices. This Guide provides a summary of the subject-matter covered, is of a general nature, neither purports to be comprehensive, conclusive nor up-to-date and must not be relied upon as legal advice. If you would like to receive specific legal advice please speak to your contact at CHSH or the key contacts referred to in this Guide. All liability for damages, direct or indirect, from the information provided is explicitly excluded. It is highly recommended that parties seek professional legal advice prior to conducting any business transactions involving insolvency and restructuring matters.

About CHSH

CHSH is one of Austria's leading law firms, with an integrated Central and Eastern European practice. With a team of over 170 lawyers, we offer our clients expertise and experience in all areas of business law in Austria and Central and Eastern Europe.

At CHSH, we have a dedicated team of experienced lawyers, all of whom have in-depth expertise coupled with a detailed understanding of the legal and business environments in which our clients operate. Each client is served by an integrated team of specialists drawing, where necessary, upon experts from other practice groups, such as Banking & Finance, Corporate M&A, Labour Law and Litigation.

The CHSH Insolvency & Restructuring team handles this multi-faceted area of law through every phase of a matter, ranging from pre-insolvency reorganization and refinancing, the protection of creditors' rights, advice to shareholders or management of companies in financial difficulty, distressed M&A to insolvency-related litigation.

This expertise – combined with our extensive experience in Central and Eastern Europe and our LEX MUNDI network – ensures that our clients receive high-quality, intellectually rigorous advice across disciplines and across borders.

Vienna, August 2016

COVERPAGE

On the frontpage of this Guide you can see a photograph of the Kunsthistorisches Museum, the Museum of Fine Arts in Vienna, Austria. Located at the Ringstraße and facing its identical twin, the Naturhistorisches Museum (Museum of Natural History), the museum took almost 20 years of completion and was opened in 1891 by Emperor Franz Joseph I of Austria-Hungary. Both buildings were built according to plans drawn up by Gottfried Semper and Karl Freiherr von Hasenauer. The museums were commissioned by the Emperor in order to find a suitable shelter for the Habsburgs' formidable (art) collections and to make them accessible to the general public.

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FORMAL INSOLVENCY PROCEEDINGS AND TESTS FOR INSOLVENCY

Main Insolvency Proceedings

The Austrian Insolvency Act (*Insolvenzordnung, "IO"*) provides for uniform insolvency proceedings. These are conducted either as so-called restructuring proceedings (*Sanierungsverfahren*) with the general aim of continuing the operation of the business of the debtor (*Schuldner*) during and after the proceedings, without liquidating the debtor, or as bankruptcy (i.e. liquidation) proceedings (*Konkursverfahren*) where the aim is to liquidate all assets and distribute the funds generated from liquidation to the debtor's creditors.

In restructuring proceedings, the debtor files for the opening of restructuring proceedings and simultaneously submits a restructuring plan (*Sanierungsplan*). Restructuring proceedings are either self-administrated (*mit Eigenverwaltung*) or administrated by a restructuring administrator (*ohne Eigenverwaltung*). Self-administration requires the debtor to file an application for self-administration supplemented by certain documents and a restructuring plan that provides a minimum debt repayment quota to the creditors of 30% of registered debt repayable within two years. In case of administration by a restructuring administrator, the debt repayment quota may be as low as 20% of the registered debt (repayable within two years).

If restructuring proceedings fail, they are transformed by court order into bankruptcy proceedings. The latter involves the liquidation of all available assets with the aim being to terminate the debtor and distribute all available funds to its creditors.

Of course, out-of-court restructuring efforts and negotiations are very common and usually made prior to the opening of (in-court) insolvency proceedings. In Austria, no hybrid court-administered restructuring proceedings or insolvency proceedings, such as the German "*Schutzschirmverfahren*" (i.e. special pre-insolvency, court-administered proceedings), are available.

TESTS FOR INSOLVENCY

Under the Austrian Insolvency Act, the opening of insolvency proceedings presupposes either the illiquidity (*Zahlungsunfähigkeit*) or over-indebtedness (*Überschuldung*) of the debtor. However, restructuring proceedings may already

be applied for in case of impending illiquidity.

While illiquidity is not specifically defined in the Austrian Insolvency Act, it may be presumed in case the debtor ceases to make its financial obligations. Case law qualifies illiquidity as a permanent lack of funds, which prevents the debtor from discharging its debts which have fallen due for repayment. Generally speaking however, a mere delay in payment (*Zahlungsstockung*), which refers to a short period of time only (approx. three months), does not qualify as illiquidity.

Over-indebtedness means that (i) the liabilities of a company exceed its assets, whereby the latter are assessed on the basis of their liquidation value, not on their going concern value, and (ii) the debtor has a negative going concern forecast (*negative Forstbestehensprognose*). Moreover, sufficient assets to cover the costs of the proceedings (*kostendeckendes Vermögen*) are required to open insolvency proceedings.

PROCEDURAL ASPECTS

In bankruptcy proceedings, the application might either be filed by the debtor himself or by a creditor. In contrast, an application for the opening of restructuring proceedings may only be made by the debtor.

The opening of insolvency proceedings is made public by an official notice (*Ediktsdatei*), either as bankruptcy or restructuring proceedings (with or without self-administration).

The official notice contains the most important information on the debtor, the name of the insolvency administrator (*Insolvenzverwalter*), the kind of proceedings being opened, the place and date of the meeting of creditors (*Gläubigerversammlung*), and the place and date of the examination hearing regarding the claims registered by the creditors (*Prüfungstagsatzung*).

The opening of insolvency proceedings is also published in other public registers, such as the land register and/or the companies register.

Additionally, for the publication of the official notice, each known creditor of the debtor, the representatives of the creditors and the Austrian National Bank have to be informed individually. There is also a duty to inform the debtor's bank, the employees of the debtor and the Austrian courier service. Importantly, after the opening of insolvency proceedings, mail is only submitted to the insolvency administrator (so-called *Postsperre*).

After the opening of proceedings, creditors are entitled to file their claims, which will be examined by the insolvency administrator at a later stage.

The first meeting of creditors usually takes place 14 days after the opening of insolvency proceedings and the general examination hearing 60 to 90 days after such opening. The period in which claims have to be filed ends, generally speaking, 14 days before the examination hearing is scheduled to take place. The report hearing (*Berichtstagsatzung*) is held 90 days after the opening of insolvency proceedings. The subject matter of the examination hearing is whether the company should be closed or not. Usually the examination and report hearings are combined into one hearing.

The opening of insolvency proceedings requires the existence of certain assets to cover the main costs for the insolvency proceedings. In practice, this means that assets in the amount of at least EUR 4,000 must be proven to exist by the debtor.

Pre-Insolvency Restructuring & Refinancing

The reorganization of companies in distress obviously requires a good understanding not only of the legal aspects, but also of the economic needs and expectations of all parties involved, whether debtors, creditors, such as banks, directors, or shareholders. There is a great variety of contractual freedom under Austrian law and common practice, in particular with banks as a major creditor group, to agree on a variety of measures with all stakeholders in a pre-insolvency scenario, but also still during the course of (in-court) restructuring proceedings (*Sanierungsverfahren*). In practice, in the latter case, the situation has often not changed dramatically compared to pre-insolvency negotiations, unless the debtor is now replaced and/or supervised by the insolvency administrator and the threat of bankruptcy, and therefore liquidation, is more imminent than before.

DISTRESSED M&A

In practice, in a pre-insolvency scenario, "pre-packaged deals" are very common. Prior to the opening of insolvency proceedings, negotiations are held with a purchaser regarding the sale of all or a portion of a company's business or assets, and then the insolvency administrator only effects the sale immediately on, or shortly after, his appointment. Austrian law does not provide special rules on pre-packaged deals, so creditors or third parties must primarily rely on voidance claims (*Anfechtung*), should they disagree with or

suspect irregularities in the sales process.

It should be noted that in the case of both pre-packaged deals and ordinary sales processes during the course of an insolvency proceeding the insolvency administrator (as seller) will not be willing to provide extensive representations and warranties, other than for ownership and the non-encumbrance of the assets sold. For M&A deals effected prior to the opening of insolvency proceedings, the general rules applicable to voidance claims (*Anfechtungsklagen*) need to be taken into consideration, but overall such transactions follow the standard procedures for M&A deals.

Creditors' Role

Generally, creditors, such as banks and other business partners as well as employees, play a key role in all insolvency proceedings in Austria. In practice, creditor unions (*Gläubigerschutzverbände*) representing the interests of creditors or groups of creditors, play an important role in all types of insolvency proceedings in Austria. There are, however, merely two classes of creditors - secured (or preferential) and unsecured creditors.

UNSECURED CREDITORS

Any creditor may file his claim, including for interest, until the opening of insolvency proceedings. The enforcement of a claim requires the filing of the claim (*Forderungsanmeldung*) as an insolvency claim with the insolvency court. The period in which the claim must be filed (*Anmeldefrist*) is published in the official notice. The insolvency administrator summarizes all claims in a special registration list (*Anmeldeverzeichnis*), which is then submitted to the court. In practice, all claims are first examined between the debtor and the insolvency administrator, and then again formally in the examination hearing in court. The insolvency administrator needs to declare whether he acknowledges or rejects a claim. In case the insolvency administrator acknowledges the claim and no other creditor objects, the claim is deemed to have been acknowledged and the creditor will be satisfied pro rata in the amount of the insolvency debt repayment quota (e.g. 10% or 15% in bankruptcy proceedings).

SECURED CREDITORS

Secured creditors usually have a claim of separation either to receive the asset (*Aussonderungsanspruch*) or its value after its sale (*Absonderungsanspruch*). Such separation claims are – subject to voidance claims (Anfechtung) – unaffected by the opening of insolvency proceedings.

Claims of separation are made against the insolvency administrator. Where the insolvency administrator does not release the asset, an action may be brought against the administrator. Claims of separation in order to receive the value of the asset resulting from collateral are claims for preferential satisfaction on certain secured assets in case they are sold by the insolvency administrator, above all pledges on movable and immovable assets.

In bankruptcy proceedings, typically the (encumbered) assets are sold, the amount received then serves as a pool of separate assets (Sondermasse) and the creditors of the separation claims are entitled to preferential satisfaction from the sales proceeds.
In restructuring proceedings, typically (encumbered) assets are not sold, but the business is kept running. Secured creditors of the debtor may generally enforce their claims. However, they are barred from doing so prior to the expiry of six months after the restructuring proceedings were opened if such enforcement might endanger the continuation of the debtor's business operations.

SET-OFF OF RESPECTIVE CLAIMS

Generally, a creditor may set off (*aufrechnen*) claims against counter-claims by the debtor after the opening of insolvency proceedings.
Pursuant to Austrian law, set-off is possible if the claims are due and uniform. Under the Austrian Insolvency Act, set-off is not excluded if the claim of the creditor is not due or the claim is not a monetary claim. As all claims of creditors become due and are converted to monetary claims at the time of the opening of insolvency proceedings, the claims are converted in any event. The prerequisites for set-off must exist at the time of the opening of insolvency proceedings. A claim which only comes into existence after the opening of insolvency proceedings can no longer be set off against a claim of the debtor.

Creditors whose claims are secured by collateral need to inform the insolvency administrator and, where the claim is not acknowledged by the administrator, file a lawsuit against the administrator in order to enforce their claims.

PRIORITY CLAIMS

Priority claims (*Masseforderungen*) are defined as claims against the insolvency estate that are satisfied prior to all other insolvency creditors. Priority claims are reduced to certain kinds of claims and include (i) costs of the proceedings, (ii) costs regarding administration, sustainment and supply of the insolvency

estate, (iii) claims of the employees for current salary, (iv) claims in connection with the termination of certain kinds of employees, (v) claims resulting from the fulfilment of certain contracts, (vi) claims based on transactions processed by the insolvency administrator, (vii) claims based on unjust enrichment of the insolvency estate, and (viii) compensation for the members of privileged associations for the protection of creditors' rights. Filing priority claims with the insolvency court separately is not required. These claims are filed directly with the insolvency administrator.

INSOLVENCY CLAIMS

As opposed to priority claims, insolvency claims (*Insolvenzforderungen*) have to be filed with the insolvency court by creditors whose claims are unsecured. The period within which their claims must be filed is set forth in the official notice and ends 14 days prior to the examination hearing. More complex insolvency proceedings with numerous creditors usually provide for multiple examination hearings. Claims can also be filed after the filing period has ended; however, in this case an additional fee of approx. EUR 70 has to be paid by the respective creditor.

There also are claims that are excluded from insolvency proceedings (*ausgeschlossene Forderungen*), such as (i) interest regarding insolvency claims that accrues after the opening of the proceedings, (ii) costs incurred by creditors due to their participation in insolvency proceedings, (iii) penalties for criminal acts, and (iv) claims against the debtor based upon services provided free of charge.

VOIDANCE CLAIMS AND CLAW-BACK

The Austrian Insolvency Act provides that such transactions that unduly decrease the assets of the debtor prior to the opening of insolvency proceedings may be contested, but only if certain prerequisites are met. In this regard, transactions entered into by the debtor and a third party which discriminate against other creditors may be contested. Formally, the transaction in question would need to be contested by the insolvency administrator (*Insolvenzverwalter*) appointed by the court.

The general principles for contesting transactions are as follows: (i) there is a transaction; (ii) the transaction is entered into prior to the opening of insolvency proceedings; (iii) the transaction unduly decreases the assets of the debtor; and (iv) the transaction discriminates other creditors; provided that (v) a specific contesting provision (Tatbestand) of the Austrian Insolvency Act is fulfilled.

The Austrian Insolvency Act provides for the following contesting provisions:
(i) Intent to discriminate (*Benachteiligungsabsicht*): This provision applies in the case of transactions concluded by the debtor to intentionally discriminate against certain creditors vis-à-vis the others within the past ten years prior to the opening of insolvency proceedings and the other contracting party knew of this intent. If the other contracting party should have known of such intent, the period in which to contest the transaction is reduced to two years. Regarding "familia suspecta" (related persons) a different provision provides for a reversal of the burden of proof;
(ii) Squandering of assets (*Vermögensverschleuderung*): A transaction falls under this provision if the other contracting party must or should have known that the transaction squanders the company's assets and the transaction was entered into within the last year prior to the opening of insolvency proceedings;
(iii) Dispositions free of charge (*Unentgeltliche Verfügungen*): Transactions that were made free of charge (gifts) and were entered into within the last two years prior to the opening of insolvency proceedings;
(iv) Preferential treatment of creditors (*Gläubigerbegünstigung*): This provision applies in case a transaction discriminates against one creditor vis-à-vis the others, or is intended to give preference to one creditor over the others; and
(v) Knowledge of illiquidity (*Kenntnis der Zahlungsunfähigkeit*): A transaction (after illiquidity has occurred or after insolvency proceedings have been commenced) may be challenged if the other contracting party knew or was negligent in not knowing of the debtor's illiquidity or the filing of the petition for opening insolvency proceedings, respectively.

All of the above provisions aim to secure the debtor's assets prior to the opening of proceedings. After the opening of insolvency proceedings and the appointment of the insolvency administrator, the insolvency administrator is the debtor's sole representative. This does not apply in case the insolvency proceedings were opened as restructuring proceedings with self-administration of the debtor (*Sanierungsverfahren mit Eigenverwaltung*). In specific circumstances, however, the consent of the insolvency administrator, the court or the meeting of creditors will be required to enter into transactions. Hence, any transaction or disposition of a debtor's asset can only be undertaken by the administrator, and, under certain circumstances, requires the consent of the court or the meeting of creditors.
The claim contesting a transaction must

be filed within one year of the opening of insolvency proceedings by claim or objection (*Einrede*) by the insolvency administrator. It must seek a declaration of ineffectiveness of the contested transaction.

Excursus: Austrian Capital Maintenance Rules

Under Austrian capital maintenance rules, an Austrian company (in the form of a so-called capital company, in particular a limited liability company) must not transfer funds or assets or corporate opportunities to its shareholders or to related parties of its shareholders, unless explicitly permitted under statutory law, such as in case of distribution of dividends covered by the balance sheet profit, a capital decrease or in liquidation proceedings. This "prohibition of repayments of equity" also extends to "hidden" repayments, meaning unlawful financial assistance, i.e. entering into any transaction with a shareholder or a shareholder's related party otherwise than at arm's length.

In practice, if companies violate the capital maintenance rules described above, the insolvency administrator may claim back the transferred funds or benefits from the recipients, in which case only the general limitation periods apply (i.e. usually 30 years). A “short” limitation period of five years only applies where the respective other party did not know of the unlawfulness of the repayment.

Management Liability

Directors of a company are obliged to file for the opening of insolvency proceedings without undue or culpable delay, but not later than 60 days after the insolvency criteria are met pursuant to the Austrian Insolvency Act. The violation of this provision generally triggers the liability of directors vis-à-vis all creditors for damages caused by delay in filing for the opening of insolvency proceedings, since the respective provision of the Austrian Insolvency Act qualifies as a so-called protective law (*Schutzgesetz*) to the benefit of the creditors. The protection only covers existing creditors (*Altgläubiger*); the latter are creditors whose claims existed prior to the opening of insolvency proceedings. Such creditors are entitled to claim for so-called quota damage (*Quotenschaden*), which is defined as the damage resulting from the late application for the opening of an insolvency proceeding. As for new creditors (who only become creditors after the opening of insolvency proceedings), the Austrian Supreme Court has ruled in several cases that only the negative interest (*Vertrauensschaden*) may be reimbursed.

Under the Austrian Act of Companies with Limited Liability (*GmbH-Gesetz*), the managing director of a company is liable vis-à-vis the company if he effects payments after being legally obliged to file for the opening of insolvency proceedings and hence the company is regarded as having suffered from damages resulting from the payment. The company is entitled to claim compensation from the respective managing director.

The Austrian Criminal Code (*Strafgesetzbuch*) also contains provisions on insolvency proceedings. The most important provisions are (i) grossly negligent interference with creditors' interests, (ii) fraudulent intervention with a creditor's claims, (iii) preferential treatment of creditors, and (iv) withholding of social security payments.

Running the Business

ROLE OF THE DEBTOR

When opening insolvency proceedings, the debtor generally loses its rights of administration and disposition. The debtor remains the owner of the assets, but the assets form the so-called insolvency estate to be used primarily to satisfy the claims of creditors. The right to administer and dispose of the assets generally passes to the insolvency administrator.

Any acts taken by the debtor after the opening of insolvency proceedings are legally void vis-à-vis the insolvency creditors.

ROLE OF THE INSOLVENCY ADMINISTRATOR

Generally, the insolvency administrator plays the key role in running or disposing of the business of the debtor, respectively. The administrator is called the bankruptcy administrator (*Masseverwalter*) in bankruptcy proceedings or restructuring administrator (*Sanierungsverwalter*) in restructuring proceedings.

In case restructuring proceedings with self-administration are opened, the debtor is generally entitled to keep on running the company and take steps and measures in the ordinary course of business, but the consent of the insolvency administrator and/or insolvency court is required for a number of other (extraordinary) measures. Certain actions – such as contesting transactions prior to the opening of insolvency proceedings – may only be taken by the insolvency administrator, whereas, for example, the discontinuation or closure of the company's business requires the approval of the insolvency court. As long as the company is continuing its business, the company may only be sold as a whole. If the company had been shuttered when insol-

vency proceedings were opened, its reopening is only admissible by court order and if no decrease in the debt repayment quota to the creditors is to be expected.

In all insolvency proceedings, the directors of the debtor are obliged to support the insolvency administrator as much as possible.

EFFECT ON WORK FORCE AND EMPLOYEES

According to the Austrian Insolvency Act, the insolvency administrator has the rights and obligations of the employer. This is the only direct impact on employees in connection with the opening of insolvency proceedings.

Further, the Austrian Insolvency Act provides special termination rights that make it possible to terminate certain employment contracts. Accordingly, the insolvency administrator has a privileged termination right (*Kündigungsrecht*). On the other hand, employees also have a special right of resignation (*Austrittsrecht*).

If the business is shut down, the insolvency administrator has the right to terminate the employment contract subject to giving notice in accordance with the statutory, collective bargaining agreement or the shorter notice period provided for under contract (but not a contractually agreed notice period that is longer than the one provided by statute). The termination has to be declared within one month of the publication of the court's resolution to shut down the business. In case a report hearing has not taken place and the continuation of the business was not published, the privileged termination still applies.
In case only parts of the company are closed, only those employment contracts that are affected by the shutdown can be terminated.

As regards restructuring proceedings with self-administration, a special termination right may be exercised within the first month of the opening of the restructuring proceedings. Within this time period, the debtor (with the consent of the insolvency administrator) may terminate the employment contracts of employees engaged in business units or parts of business units that have been closed. A further condition is that the maintenance of the corresponding employment contracts would endanger the conclusion of the restructuring plan or the continuation of the business. In contrast, in bankruptcy and restructuring proceedings without self-administration it is only possible to terminate employment contracts after the report hearing.

EFFECT ON CONTRACTS AND TERMINATION RIGHTS

The opening of insolvency proceedings has a different impact on contracts, depending on whether or not contractual obligations have already been fulfilled by the parties.

If a contracting party has entirely fulfilled its contractual obligations prior to the opening of insolvency proceedings, but has not received the entire consideration from the debtor, the contracting party may solely file an insolvency claim. On the other hand, if the debtor has already fulfilled its obligations, the other party is obliged to fully perform towards the insolvency estate.

Special provisions apply in case both sides have yet to fulfil each of their obligations in their entirety. In such a case, it is at the insolvency administrator's discretion whether to fulfil the contract (in which case the contracting party is also obliged to fulfil its respective contractual obligations) or to withdraw from the contract. In case of withdrawal, the contracting party may be entitled to claims in tort which would then be classified as insolvency claims.

The insolvency administrator may in principle decide freely as to whether to exercise his right to withdraw from the contract or to fulfil the contract, but upon application of the other contracting party the insolvency court will prescribe a (short) time period within which the insolvency administrator must decide.

An exemption from the general rule is applicable in case the debtor is obliged to provide performance other than in the form of monetary performance and is already in delay. In this case the insolvency administrator is obliged to give a declaration within 5 working days of the request of the contracting party; otherwise withdrawal from the contract is assumed.

Importantly, contractual partners of the debtor may only terminate their contracts in the first six months after the opening of insolvency proceedings for good cause if such termination could endanger the going concern of the debtor's business. In this regard, the deterioration of the debtor's economic situation is not deemed as being a good cause within the meaning of this provision. Where a contract contains clauses for termination relating to the opening of insolvency proceedings, such clauses are invalid.

Formal Restructuring Proceedings

REORGANIZATION ACT

The Austrian Reorganization Act (*Unternehmensreorganisationsgesetz – "URG"*)

contains certain provisions on restructuring a company which finds itself in an early stage of financial distress. In practice, however, the Austrian Reorganization Act is of rather minor significance and restructuring proceedings are typically conducted in accordance with the provisions of the Austrian Insolvency Act and in court, if out-of-court settlement is not successful.

RESTRUCTURING PROCEEDINGS

Pursuant to the Austrian Insolvency Act, it is generally possible to open restructuring proceedings instead of bankruptcy (i.e. liquidation) proceedings (*Sanierungsverfahren*). The proceedings can either be conducted by an administrator or by self-administration of the debtor. The main goal of restructuring proceedings is to adopt a restructuring plan (*Sanierungsplan*). In case of self-administration, the debt repayment quota provided for in the restructuring plan must amount to at least 30 % of the total claims registered, and in case of administration by the restructuring administrator, to at least 20 % of the total claims registered. For the acceptance of the restructuring plan, a double absolute majority (50 %) by the creditors is required, both in terms of amount of debt registered and head count.

NO DEBT/EQUITY SWAP

Austrian law makes no provision for a debt/equity swap in statutory restructuring proceedings. However, it is possible to agree on such a debt/equity swap on a contractual basis out of court, but in practice only if the number of shareholders and creditors is relatively low.

CRAM-DOWN OF DISSENTING CREDITORS

The resolution on the restructuring plan takes place in the restructuring plan hearing (*Sanierungsplantagsatzung*). Only the insolvency creditors whose claims are determined (*festgestellt*) have a voting right.

In order to adopt a restructuring plan, a double majority must be achieved: (i) more than half of the creditors present have to vote in favour of the restructuring plan and (ii) creditors holding more than 50% of the total amount of all current creditors' claims must consent. The restructuring plan is only adopted if both majorities are achieved; in such a case, dissenting creditors are overruled and have to accept the restructuring plan.
The proposal of the restructuring plan in the course of insolvency proceedings before court does not require the consent of other stakeholders, in particular not of the shareholders.

However, in out-of-court restructuring proceedings or restructuring proceedings with self-administration, the consent of the company's general assembly, i.e. the consent of its shareholders, may and in practice usually will be required.

Ending of Insolvency Proceedings

Both bankruptcy and restructuring proceedings are closed by a formal resolution of the insolvency court. Bankruptcy proceedings are closed following the distribution of all assets, i.e. the liquidation of the debtor.

Restructuring proceedings are formally closed after a restructuring plan is adopted by the creditors and all priority claims are settled. The debtor then has the duty to fulfil the restructuring plan at the time and within the period stipulated in the restructuring plan. If payments are not made at the time and within the period stipulated in the restructuring plan, insolvency proceedings will be reopened. If it becomes apparent during the insolvency proceedings that the assets are insufficient to cover the costs of the proceedings, the proceedings are terminated due to insufficient assets.

International Aspects

According to EC Regulation No 1346/2000, insolvency proceedings in other Member States of the European Union are recognized in Austria.

In case the EC Regulation is not applicable, the Austrian Insolvency Act contains provisions referring to the recognition of proceedings in third countries. Insolvency proceedings and their impact are generally recognized in Austria if (i) the main centre of interest of a debtor is located in another country, and (ii) the proceedings opened abroad are in their material aspects comparable overall to Austrian insolvency proceedings.

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FORMAL INSOLVENCY PROCEEDINGS AND TESTS FOR INSOLVENCY

Main Insolvency Proceedings

The principal legislation governing insolvency proceedings in Belarus is Act No. 415-Z dated 13 July 2012 "On Economic Insolvency (Bankruptcy)", last restated on 04.01.2014 (the *"Belarusian Insolvency Act"*). Insolvency proceedings involve several consecutive steps:

(i) discovery of impending illiquidity, pre-insolvency economic improvement. Under the Belarusian Insolvency Act, the debtor is obliged to control its financial condition to prevent insolvency. Moreover, to prevent insolvency the debtor is obliged to take different measures to improve its economic situation before filing any applications with the court and before initiating insolvency proceedings. The debtor's obligation for pre-trial improvement measures can be waived if the debtor provides grounds justifying the inexpediency of such measures (e.g. there is no longer a market for the debtor's products and/or no demand, which consequently means the pre-trial improvement measures would not have any influence on the debtor's financial standing).

(ii) filing an application with the court and initiating insolvency proceedings. If the pre-trial improvement measures that are taken fail, the debtor may file for the opening of insolvency proceedings with the court. In addition, a creditor may also submit such petition provided that certain criteria under the insolvency test are met. Based on such application, the court initiates proceedings and appoints a temporary insolvency administrator.

(iii) "protection period" (*защитный период*). The insolvency proceedings start with the "protection period", which is aimed at preventing the debtor's financial collapse and improving its economic situation under external control. In the course of this "protection period", the rights of the debtor's management bodies are partly restricted and are under the control of the temporary insolvency administrator. For example, no dividends may be paid and all transactions are made only with the written consent of the administrator. Upon expiry of this period, the court reassesses the financial and economic condition of the debtor. If its situation has not improved the insolvency proceedings are continued.

(iv) appointment of a permanent insolvency administrator and beginning of insolvency proceedings. Upon initiating

the insolvency proceedings, the court appoints a permanent insolvency administrator, who then has sole responsibility for overseeing the debtor's management. All other management bodies (including the sole shareholder and shareholders' meeting) lose their control over the debtor and its activity. In light of this, all creditors have the right to file their claims against the debtor with the administrator. The claims are assessed by the permanent insolvency administrator (whether they are valid or not) and are included in the list of claims. Each creditor listed has the right to participate and vote in creditors' meetings, in which the course of insolvency proceedings is defined.

(v) "reorganisation" (*санация*). If the permanent insolvency administrator can improve the financial condition of the debtor, it must draft a "reorganisation" plan and submit it to the creditors' meeting for approval. Otherwise liquidation proceedings begin.

(vi) liquidation proceedings (if it is impossible to improve the economic situation of the insolvent company). In case of liquidation proceedings, the permanent insolvency administrator drafts a liquidation plan which is submitted to the creditors' meeting for approval. In the course of the liquidation proceedings, the property of the debtor is sold, creditors receive monetary funds in proportion to their claims and according to their priority and CEOs and/or shareholders may face subsidiary liability if found guilty of causing or contributing to the debtor's insolvency. Upon completion of this step, the debtor is liquidated.

INSOLVENCY TESTS

Under the Belarusian Insolvency Act, there are three cases in which an application for the initiation of insolvency proceedings can be filed.

First, the debtor may submit an application to the court if its illiquidity has become permanent or will soon become permanent. The criteria for illiquidity are defined by Resolution No. 1672 of the Council of Ministers of the Republic of Belarus dated 12 December 2011 (as amended) and must be calculated based on the debtor's accounting books and records.

Second, the debtor must submit an application to the court if (i) payment of a debt to one creditor makes it impossible to fulfil obligations vis-à-vis other creditors, (ii) the shareholders' meeting (or the sole shareholder) decides to file a claim or (iii) the amount of the debtor's property is not sufficient to pay all creditors' claims in the course of liquidation.

Finally, an application may be filed by a creditor if the following criteria are met simultaneously: (i) the creditor obtains valid information that the debtor's illiquidity has become permanent or will soon become permanent and (ii) the debtor fails to pay all debts in the course of execution proceedings within three months (or the debtor does not have sufficient property to pay debts).

Procedural Aspects

In Belarus, an application for the initiation of insolvency proceedings may be filed either by the debtor itself or by any creditor. Moreover, it may also be submitted by a public attorney, an employees' representative or (if the debtor is a state-owned company or if the Republic of Belarus is a creditor) by the Department for Reorganization and Bankruptcy of the Ministry of Economics of the Republic of Belarus.

Upon receipt of the application, the court adopts a resolution on initiating the insolvency proceedings and appoints the temporary insolvency administrator (usually, the candidate is proposed by the person submitting the application) for the term of the initial "protection period". From this moment, all other court and executive proceedings against the debtor are suspended and the temporary insolvency administrator informs banks, tax authorities and other public authorities of the beginning of the insolvency proceedings. In addition, information on the beginning of the insolvency proceedings is also published in the media and in the Unified State Register on Bankruptcy (the *"USRB"*).

If the measures taken in the course of the "protection period" appear insufficient to prevent insolvency, the temporary insolvency administrator files a respective report with the court. The court then issues a resolution on the appointment of a permanent insolvency administrator and the initiation of insolvency proceedings. The resolution and information on the administrator are published in the media and the USRB. Within two months of publication, creditors have the right to file their claims with the permanent insolvency administrator who gathers together all claims and compiles a list of creditors. After this, but no later than 75 days from the day of the adoption of the resolution on initiating insolvency proceedings, the first creditors' meeting is held. In addition, creditors are required to appoint a creditors' committee which is entitled to convene creditors' meetings and approve material transactions of the debtor.

All other important steps adopted by the permanent insolvency administrator (including the report on completion of "reorganisation") have to be approved by the creditors' meeting and the court.

The initiation of insolvency proceedings is not expensive in Belarus. The relevant court fees amount to 10 basic units (Note: one basic unit is the specific amount in Belarusian rubles determined by the Belarusian Government for the purpose of calculating the amount of duties, fines, rent payments, etc.; as of 1 January 2016, 1 basic unit is equal to BYR 210,000 or approx. EUR 9.5). All other costs (including remuneration of the insolvency administrator) arising in the course of the proceedings are paid at the expense of the debtor's property prior to the reimbursement of creditors' claims.

Pre-Insolvency Measures & Refinancing

As mentioned above, the debtor is obliged to control its financial state to prevent insolvency and take different measures to improve its efficiency. The Belarusian Insolvency Act provides for a list of such measures. For example, the debtor is entitled to restructure itself or restructure its debts, to attract investments, to receive credits and loans as well as to take any other measure that does not contradict the law.

It should be noted that fulfillment of pre-insolvency measures is not a right but an obligation of the debtor. Thus, the court may even adopt a resolution forcing the debtor to take such measures.

Distressed M&A

In practice, distressed M&A deals are possible in Belarus if an amicable agreement is reached between the creditors' meeting and the debtor represented by the insolvency administrator. In that case, creditors' claims are exchanged for shares in the debtor's statutory fund, provided that the debtor is an open joint stock company. Moreover, this exchange may only take place if the debtor has reimbursed all claims of (i) individuals suffering health damage caused by the debtor and (ii) employees for all unpaid salaries and social security contributions.

In all other cases, the insolvency administrator – upon approval of the creditors' meeting – may sell part of the debtor's property as a complex of assets as a going concern to reimburse creditors' claims. However, such sale is impossible during the "protection period".

Creditors' Role

Generally, creditors, such as banks and other business partners as well as employees, play a key role in all insolvency proceedings in Belarus. Creditors are represented by the creditors' meeting and the creditors' committee. The creditors' meeting approves the most significant decisions of the insolvency administrator, whereas the creditors' committee only adopts resolutions on the convocation of the creditors' meeting and approves material transactions of the debtor.
Depending on the priority of their claims, all creditors are divided into five categories.

CATEGORIES OF CREDITORS

The first category of creditors are individuals who have suffered damage to their life and/or health caused by the debtor. They receive all their periodic payments in one installment.

The Belarusian Insolvency Act defines the debtor's employees as the second category of creditors. They have the right to receive their severance payment and all outstanding salaries. Moreover, they have the right to demand from the debtor payment of all relevant social security contributions that are usually paid by the employer.

Tax authorities, customs authorities and other public bodies entitled to collect taxes and other relevant fees are considered the third category of creditors. However, if a public body submits a claim that does not arise from its public functions (for example, the debtor was a party to a commercial contract with it), such claims are included in the fourth or fifth category (depending on their essence).

Creditors that do not fall into the previous categories, but whose claims are secured by a pledge, are considered as belonging to the fourth category. Nevertheless, they are not entitled to take the debtor's pledged property in possession. On the contrary, such pledged property forms part of the insolvency estate. However, fourth category creditors have the right to receive reimbursement for their claims prior to fifth category creditors, but only after the claims of first, second and third category creditors have been reimbursed in full.
Claims of all other creditors are included in the fifth category.

REIMBURSEMENT OF CREDITORS' CLAIMS

As a rule, in Belarus debtor's monetary funds (as well as funds received in the course of selling the debtor's property) are distributed among the creditors.

First, all monetary funds are used to reimburse in full the claims of first category creditors. Then, the remaining sum is used to reimburse in full the claims of second category creditors and so on. Creditors of the subsequent category may not receive any installments until all creditors of the previous category receive reimbursement of their claims in full. If the amount of monetary funds is insufficient to reimburse the claims of all creditors of any given category, the remaining money is distributed among them in proportion to their claims.

In practice, some creditors may be simultaneously considered creditors of two or more categories. In that case, each claim – depending on its legal basis – is reimbursed in the course of the satisfaction of claims of the relevant category of creditors.

Finally, if a creditor fails to submit a claim to the insolvency administrator within the period established by law, it has the right to satisfaction of the claim (irrespective of the legal basis of such claim) only upon satisfaction of all other creditors' claims.

SET-OFF OF RESPECTIVE CLAIMS

In Belarus, no set-off of debtor's claims against creditors' claims is possible upon expiry of the "protection period" and once insolvency proceedings have begun unless the liquidation or "reorganisation" plan approved by the court states otherwise.

Moreover, as insolvency proceedings in Belarus aim to satisfy the claims of all creditors, the insolvency administrator has the right to file claims with the court requesting due payment of all installments by a creditor even if such creditor could hypothetically set off such claim. The received monetary funds are then included in the insolvency estate and used for reimbursement of the claims of all creditors.

PRIORITY CLAIMS

The Belarusian Insolvency Act defines that certain claims against the insolvency estate have priority over ordinary creditors' claims and must be satisfied prior to all other insolvency creditors. Priority claims are certain sorts of claims that have arisen after insolvency proceedings were commenced and include (i) reimbursement of damage to individuals' health and life, (ii) payment of salaries and severance payments to employees that were working for the debtor during the insolvency proceedings, (iii) payment of taxes and other state fees including social security contributions paid by the employer, (iv) costs of the proceedings, (v) costs of the insolvency administration, and (vi) costs of publication of information on the insolvency proceedings.

INSOLVENCY CLAIMS

As opposed to priority claims, insolvency claims have to be filed with the insolvency administrator in the course of insolvency proceedings. These claims must be filed within two months of the date of publication of information on the termination of the "protection period" and the beginning of the bankruptcy proceedings in mass media. The insolvency administrator examines the claims and includes the creditors on the relevant list. Any resolution of the insolvency administrator on inclusion of a creditor on such a list or on rejection of a claim may be retried on merits by the court upon application of that creditor or other creditors requesting rejection of the claim.

Any claim submitted after termination of the two month period is also included on the list. However, such a claim will be satisfied only upon satisfaction of all other creditors' claims. Moreover, interest accrued on the amounts of insolvency claims submitted after the opening of the proceedings are fully excluded from the scope of the proceedings.

Voidance Transactions and Claw-back

The Belarusian Insolvency Act provides that transactions which unreasonably decrease the assets of the debtor may be contested. Transactions in question would have to be contested by the insolvency administrator in court.

The following types of transactions may be contested according to the Belarusian Insolvency Act:

(i) transactions concluded by the debtor to intentionally discriminate against certain creditors vis-à-vis the others within the last six months prior to the opening of insolvency proceedings;

(ii) gifts granted by the debtor within the last six months prior to the opening of insolvency proceedings, directly or indirectly resulting in the debtor's financial distress and regardless of the intent of the contracting parties;

(iii) debts paid by the debtor within the last six months prior to the opening of insolvency proceedings, if the debt was paid under circumstances contradicting the law or the underlying contract or if the amount paid results in the debtor's financial distress and is not an ordinary payment under routine circumstances;

(iv) pledge agreements concluded by the debtor within the last six months prior to the opening of insolvency proceedings;
(v) transactions concluded by the debtor to intentionally impair the creditors' po-

sitions within the last year prior to the opening of insolvency proceedings, if the other contracting party was aware of this intent;

(vi) transactions contradicting criminal law provisions and resulting in intentional distress for the debtor which are concluded within three years prior to the opening of insolvency proceedings, if the other contracting party was aware of this intent;

(vii) gifts granted by the debtor within the last year prior to the opening of insolvency proceedings, unless the parties prove that upon making the gift the debtor still had sufficient funds to satisfy claims of all relevant creditors;

(viii) debts paid by the debtor to a contracting party that was affiliated with the debtor (i.e. parent companies and subsidiaries, members of debtor's governing bodies, chief accountant, relatives of chief accountant and members of debtor's management bodies, hereinafter "Affiliate") within the last year prior to the opening of insolvency proceedings unless the parties prove that such payment did not result in the debtor's financial distress;

(ix) pledge agreements concluded by the debtor with an Affiliate within the last year prior to the opening of insolvency proceedings, unless the parties prove that such payment did not result in the debtor's financial distress;

(x) severance payments and salaries paid by the debtor within the last eighteen months prior to the opening of insolvency proceedings, if paid under circumstances contradicting the law or the underlying contract;

(xi) transactions concluded by the debtor with an Affiliate to intentionally impair the creditors' positions within three years prior to the opening of insolvency proceedings, if the Affiliate was aware of this intent;

(xii) gifts granted by the debtor to an Affiliate within three years prior to the opening of insolvency proceedings, unless the parties prove that upon making a gift the debtor still had sufficient funds to satisfy claims of all relevant creditors.

Termination of these transactions aims at securing the debtor's assets prior to the opening of proceedings. After the initiation of insolvency proceedings and the appointment of the insolvency administrator, the insolvency administrator is the sole representative of the debtor (with the exception of the "protection period").

In the course of the "protection period", only the temporary insolvency administrator may approve all debtor's transactions, while the debtor's management bodies resolve on all other issues. However, if the debtor's CEO prevents the insolvency administrator from fulfilling his duties, the temporary insolvency administrator may file an application with the court for dismissal of such CEO from his position.

The claims contesting a transaction can be filed within the duration of all insolvency proceedings both by the insolvency administrator and by any creditor.

Management Liability

Filing an application for opening insolvency proceedings without undue or culpable delay is an obligation of the debtor's governing bodies. In case of failure to file such application within one month upon discovery of impending illiquidity, the debtor's officials who are found guilty of such failure are jointly and severally liable for all unsettled creditors' claims. The permanent insolvency administrator may bring a relevant action to the court after initiating insolvency proceedings if the debtor's assets are not sufficient to settle all claims.

Moreover, if the debtor's insolvency was caused by its shareholders, members of its governing bodies or other individuals entitled to determine the course of the debtor's activity, such persons are jointly and severally liable for unsettled creditors' claims. Any creditor, public attorney or governmental body may bring an action against such an individual within ten years of the date of initiating the insolvency proceedings. Termination of shareholdings in a company or the granting of discharge to its governing bodies before initiation of the insolvency proceedings does not preclude the abovementioned liability.

The Code of the Republic of Belarus No. 194-Z dated 21.04.2003 "On Administrative Violations" also contains provisions with respect to insolvency proceedings. The most important provisions are (i) culpable negligence resulting in the company's insolvency; (ii) concealment, sale or destruction of property in order to impede satisfaction of creditors' claims; (iii) failure to file an application on insolvency by the debtor with the court; (iv) deliberate filing of an application on insolvency by the creditor containing false information; (v) proposition of persons for the position of insolvency administrators that do not satisfy legal requirements; (vi) illegal in-

fluence over the insolvency administrator; (vii) non-fulfillment of duties by the insolvency administrator; and (viii) other culpable non-fulfillment of legal requirements.

In addition, the Criminal Code of the Republic of Belarus No. 275-Z dated 09.07.1999 envisages liability in the following cases: (i) false insolvency; (ii) concealment of insolvency; and (iii) deliberate insolvency.

Running the Business

ROLE OF THE DEBTOR

The role of the debtor and its rights to administer its property vary in the course of insolvency proceedings. During the "protection period", the debtor may manage its assets and enter into any transaction, but only upon written approval of the temporary insolvency administrator.

However, upon the commencement of bankruptcy proceedings, the debtor loses its administration and disposition rights. All assets are included in the so-called insolvency estate that are primarily used to satisfy creditors. The right to administer and dispose over the assets generally passes to the insolvency administrator.

ROLE OF THE INSOLVENCY ADMINISTRATOR

Generally, the insolvency administrator is the key figure running the business of the debtor. There are two types of insolvency administrators in Belarus. The temporary insolvency administrator controls the debtor's activity in the course of the "protection period". If the measures undertaken in the course of this period fail and the debtor is still in financial distress, a permanent insolvency administrator is appointed by the court.

The temporary insolvency administrator is appointed by the court and controls the activity of the debtor, but does not define it. However, he is entitled to approve any transaction or payment of the debtor. Without such approval, the transaction could be found to be void. Nevertheless, the temporary insolvency administrator can gain full control over the debtor if the court finds the debtor's CEO guilty of hampering the insolvency proceedings.

If the measures undertaken in the course of the "protection period" fail to improve the debtor's financial situation, the court begins the insolvency proceedings and appoints the permanent insolvency administrator, who has full rights to manage the debtor and dispose of its assets instead of all management bodies of the

debtor (including CEOs, supervisory boards, shareholders' meetings, etc.).

EFFECT ON WORK FORCE AND EMPLOYEES

Under the Belarusian Insolvency Act, the insolvency administrator is required to ensure contracts with all of the debtor's employees are fulfilled. The insolvency administrator amends and terminates employment contracts and collective bargaining agreements on behalf of the debtor. However, he may hire new employees or enter into new employment contracts or collective bargaining agreements only upon the prior consent of the creditors' meeting (or the creditors' committee).

In any case, upon the commencement of the insolvency proceedings, the insolvency administrator should inform the debtor's employees of their pending layoff no later than two months in advance. In that case, every employee is entitled to receive a severance payment amounting to his/her three-month average salary.

To ensure the payment of all salaries and severance payments, employees elect a representative. Only such person has the right to participate in the insolvency proceedings as creditor acting on behalf of all employees. Employees have a preemptive right of satisfaction of their claims. The employees' claims are satisfied in full before all other creditors' claims (except for claims of individuals that have suffered damage to their life and health caused by the debtor).

EFFECT ON CONTRACTS AND TERMINATION RIGHTS

As a rule, in the course of the "protection period" the debtor should fulfil all its rights and obligations under all contracts. However, upon initiating the insolvency proceedings, the debtor suspends all payments to the creditors under all contracts. Creditors may only file an insolvency claim.

On the other hand, any contracting party should fulfil all its due obligations vis-à-vis the debtor, both monetary and in kind. The insolvency administrator – on behalf of the debtor – may request enforcement of a contract in court.

Special provisions apply in case both sides have not yet fulfilled their respective obligations partly or in full. In such case, the insolvency administrator may rescind the contract if (i) fulfillment of the contract will lead to damage exceeding damage arising in the course of fulfillment of similar contracts, or (ii) the contract is concluded for more than one year

and the debtor receives any positive results only upon expiration of this period or more, or (iii) fulfilment of the contract will lead to additional damage, or (iv) there are other circumstances that prevent the debtor from overcoming the insolvency.

If any of the aforementioned criteria is met, the insolvency administrator may rescind the contract by giving prior written notice to the contracting party within the period specified by the court. The contracting party has the right to compensation for real damage.

Formal Restructuring Proceedings

RESTRUCTURING PROCEEDING

The Belarusian Insolvency Act provides for the possibility to open restructuring proceedings instead of bankruptcy (i.e. liquidation) proceedings. This can be done via an amicable agreement concluded between the creditors and the debtor represented by the permanent insolvency administrator, but only upon reimbursement of all claims of (i) individuals who have suffered health damage caused by the debtor and (ii) employees for all unpaid salaries and social security contributions. Such restructuring can be implemented in different forms, for example, by delay of debtor's payments, assignment of debtor's rights or obligations under contracts, fulfilment of debtor's obligations by a third party, novation, waiving of debt, etc.
In any case, creditors and the permanent insolvency administrator are free to define the amount of claims to be reimbursed in the course of such restructuring proceedings. Thus, the amicable agreement may provide, for example, repayment ranging from 1% to 100% of all claims.

DEBT EQUITY SWAP

In case the debtor is an open joint stock company, the amicable agreement may provide for reimbursement of creditors' claims by means of exchange for shares in the debtor. As described above, such exchange may take place only upon payment of all claims of (i) individuals that have suffered health damage caused by the debtor and (ii) employees for all unpaid salaries and social security contributions. Thus, such creditors do not participate in the exchange and have no rights to receive shares.

CRAM-DOWN OF AMICABLE AGREEMENT

The creditors' resolution on entering into an amicable agreement is adopted in the creditors' meeting. The resolution may be adopted in case the following criteria are met simultaneously: (i) more than 50% of all creditors have voted in

favour of an amicable agreement; and (ii) all creditors whose claims are secured by a pledge have also voted in favour. The resolution on entering into an amicable agreement is adopted by the permanent insolvency administrator.

The executed amicable agreement that provides for the adoption of a restructuring plan is approved by the court. However, the court may reject the agreement if it contradicts the law or violates the rights of third parties. Nevertheless, this does not prevent parties from entering into a new amicable agreement later on.

Ending of Insolvency Proceedings

Insolvency proceedings are closed by a formal resolution of the court. Irrespective of the status of the proceedings, they are closed if any of the following criteria is met: (i) the insolvency has been prevented in the course of "reorganisation"; (ii) all parties to the insolvency proceedings have entered into an amicable agreement; (iii) all creditors' claims have been satisfied; (iv) the amount of debtor's assets is insufficient for satisfaction of all creditors' claims and the insolvency administrator has distributed them among the creditors of the relevant category.

International Aspects

As Belarus is not a member of the European Union, no relevant international agreements apply in the course of insolvency proceedings in Belarus.
Currently, no international act on insolvency proceedings has been adopted by the Eurasian Economic Union to which Belarus is a party.

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BULGARIA

FORMAL INSOLVENCY PROCEEDINGS AND TESTS FOR INSOLVENCY

Main Insolvency Proceedings

The Bulgarian Commerce Act (*Търговски закон*) provides for uniform insolvency proceedings. They either take the form of (i) so-called restructuring proceedings (*Оздравяване на предприятието*), where the general aim is to keep the business of the debtor running both during the proceedings and after they have ended, without the debtor being liquidated; or (ii) bankruptcy (i.e. liquidation) proceedings (*Несъстоятелност*), where the aim is to liquidate all assets and distribute the available funds to the creditors.

Restructuring proceedings are opened if a petition is filed by the debtor, the insolvency administrator, creditors, shareholders or employees. A restructuring plan (*План за оздравяване*) must be submitted together with the petition.

In case the restructuring proceedings fail, the proceedings are transformed into bankruptcy proceedings by a court order. Bankruptcy proceedings aim to wind up the debtor, realise its assets and distribute all available funds to the creditors.

Tests for Insolvency

Under the Commerce Act, the opening of insolvency proceedings requires either the illiquidity (*Неплатежоспособност*) or over-indebtedness (*Свръхзадълженост*) of the debtor.

According to the definition in the Commerce Act, a debtor is considered illiquid if the debtor is unable to meet its financial obligations under a commercial transaction or a public obligation towards the state or a municipality which is related to its commercial activity, or a private obligation towards the state. Illiquidity is presumed where the debtor stops paying its debts when they have fallen due.

Over-indebtedness is defined as a condition where the assets of a debtor are insufficient to cover its liabilities.
It is further required that the assets of the debtor are sufficient to cover the initial costs of the proceedings in order to initiate the insolvency proceedings. If this is not the case, insolvency proceedings can still be initiated if creditors cover the initial costs.

Procedural Aspects

A request for opening insolvency proceedings can be filed by the debtor, a credi-

tor or the National Revenue Agency in the case of obligations vis-à-vis the state/municipalities. Restructuring proceedings may be initiated upon an application being made by the debtor, the insolvency administrator, creditors, shareholders or employees of the debtor.

The initiation of insolvency proceedings is made public by an announcement of the court resolution in the commercial register. The court resolution for the initiation of insolvency proceedings declares the debtor to be illiquid/over-indebted and sets the initial date for the proceedings. In this resolution, the court also appoints an interim insolvency administrator, imposes security measures and schedules the date of the creditors' first meeting.

At the first meeting the creditors review the report of the interim administrator, appoint a permanent insolvency administrator (whose appointment still has to be confirmed by the court) and elect a creditor's committee.

After the initiation of the proceedings creditors are entitled to file their claims, which are then examined by the insolvency administrator. The claims must be filed within one month of the announcement of the initiation of insolvency proceedings in the commercial register. Creditors may still file claims after this period has expired; however, this can only be done for a period of two months following the end of the initial one month term. Such creditors are, however, not entitled to challenge claims which were already accepted or the distribution of funds already performed.

The insolvency administrator prepares a list of the filed claims and indicates for each claim whether it is accepted or not. All claims of employees, as well as enforceable public claims, are ex officio included by the insolvency administrator. The list of claims has to be approved by the insolvency court.

The initiation of insolvency proceedings requires the existence of certain assets which have to cover the initial costs. The initial costs are determined by the court on the basis of the remuneration of the interim insolvency administrator and other expected costs such as court fees, payments to employees in case the debtor's business is not shut down, and costs for managing, assessing and distributing the assets of the insolvency estate.

Out-of-Court Restructuring

Out-of-court restructuring efforts are usually made prior to the initiation of

insolvency proceedings. The parties involved (debtor and creditors) are free to apply various measures. Special pre-insolvency court-administered proceedings are not available under Bulgarian law.

The debtor and all creditors with accepted claims can reach a settlement agreement at any point during the insolvency proceedings. In such a case, the debtor acts independently and is not represented by the insolvency administrator.

Provided the executed agreement meets the statutory requirements, and on condition that there no court proceedings challenging accepted claims are pending, the court terminates the insolvency proceedings. As creditors with unaccepted claims are not party to the settlement agreement, they can only protect their rights by initiating regular court proceedings, which, however, do not prevent the settlement agreement from becoming effective and the insolvency proceedings from being terminated.

Should the debtor fail to perform its obligations under the settlement agreement, the creditors are entitled to request a renewal of the insolvency proceedings without once again having to prove the illiquidity/over-indebtedness of the debtor.

Distressed M&A

Bulgarian law does not provide special rules on pre-packaged insolvency. For M&A deals effected prior to or after the opening of insolvency proceedings, the general rules relating to voidance claims need to be taken into consideration.

Creditors' Role

Creditors play a key role in all insolvency proceedings. Creditors' meetings (*Събрание на кредиторите*) representing the interests of creditors or groups of creditors play an important role in all types of insolvency proceedings. There are two classes of creditors: secured (or privileged) and unsecured creditors.

UNSECURED CREDITORS

Creditors must file their claims in writing within one month of the announcement of the opening of the insolvency proceedings in the commercial register. Each creditor must indicate the grounds and amount of its claim and whether the claim is secured.

The debtor or a creditor may challenge a claim, regardless of whether it is accepted by the insolvency administrator, by submitting an objection to the insolvency court. The court resolves on any

such objection and approves the final list of claims accepted by the insolvency administrator. The court's ruling in this regard is announced in the commercial register. Creditors claims included in the list approved by the court are considered as acknowledged claims in the insolvency proceedings.

If the court does not respect an objection made by a debtor (against an acknowledged claim) or a creditor (against another creditor's acknowledged claims or against its own unacknowledged claim), the debtor or the creditor, respectively, may initiate regular court proceedings to be held in parallel to the insolvency proceedings. In such cases, the distribution of funds (or, respectively, the restructuring plan) must make provisions in order to cover the pending claims in case they will be respected.

SECURED CREDITORS

Secured creditors are entitled to receive the value of the assets sold. Such secured claims are – subject to voidance claims – unaffected by the opening of insolvency proceedings.

Secured claims are claims for preferential satisfaction on certain secured assets in case they are sold by the insolvency administrator. These are claims secured by a mortgage, pledge, injunction (*залог*), distraint (*възбрана*) or right of retention (*право на задържане*).

In bankruptcy proceedings, the assets serving as collateral are sold and the amount received serves as preferential satisfaction of the respective secured creditor(s).

In restructuring proceedings, all claims are reorganised in accordance with the restructuring plan approved by the creditors. Generally speaking, the secured claims remain preferential.

SET-OFF OF RESPECTIVE CLAIMS

Generally, a creditor may set off (*прихващане*) its claims against counterclaims of the debtor after the opening of insolvency proceedings.

A set-off is possible if both claims are uniform and the creditor's claim is due. Under Bulgarian law all claims of creditors are converted to monetary claims at the time of the opening of insolvency proceedings. Further, all claims of creditors become due by virtue of the court decision declaring the debtor bankrupt.

A set-off may be declared invalid with respect to other creditors if both the claim of the creditor and its obligation were acquired prior to the opening of insolvency proceedings, but the creditor

knew at the time of the acquisition of the claim or the obligation that the debtor was illiquid/over-indebted or that an application for the opening of insolvency proceedings had been filed.

PRIORITY ORDER OF CLAIMS

Creditors' claims are satisfied in the following order:

(a) Claims secured by a pledge, mortgage, distraint or prohibition – with respect to the funds received from the sale of the respective asset;
(b) Claims with regard to which the right of retention is exercised – with respect to the value of the respective asset;
(c) Costs of the insolvency proceedings;
(d) Claims of employees which arose before the opening of insolvency proceedings;
(e) Alimony obligations owed by the debtor to third persons by operation of law;
(f) Public claims of the state and municipalities, such as taxes, customs duties, fees, social security contributions and others, which arose before the opening of insolvency proceedings;
(g) Claims acquired after the opening of insolvency proceedings;
(h) Any remaining unsecured claims acquired before the opening of insolvency proceedings;
(i) Statutory or contractual interest accrued on unsecured claims, due after the opening of insolvency proceedings;
(j) Loans extended to the debtor by a shareholder;
(k) Dispositions free of charge (*безвъзмездни сделки*);
(l) Expenses incurred by the creditors in the course of insolvency proceedings.

VOIDANCE CLAIMS AND CLAW-BACK

The Commerce Act provides that certain transactions and actions that unduly decrease the assets of the debtor may be contested. The insolvency administrator and each creditor are entitled to contest such transactions within one year of the opening of insolvency proceedings.

The following transactions and actions can be contested:

(a) transactions/actions executed after the opening of insolvency proceedings, if they relate to:

- the performance of an obligation that occurred prior to the opening of insolvency proceedings.

- pledges or mortgages over real estate or movables included in the debtor's assets (insolvency estate).

- transactions regarding rights or property included in the insolvency estate.

(b) transactions/actions executed by the debtor after the initial date of illiquidity/over-indebtedness (determined by the court), if they relate to:

- the performance of a monetary obligation which is not due (within one year prior to the opening of insolvency proceedings; the term is two years if the creditor was aware of the illiquidity or over-indebtedness of the debtor).

- mortgages and pledges created by the debtor to secure claims which were not secured before (within one year prior to the opening of insolvency proceedings; the term is two years if the creditor was aware of the illiquidity or over-indebtedness of the debtor).

- the payment of due monetary obligations of the debtor (within six months prior to the opening of insolvency proceedings; the term is one year if the creditor was aware of the illiquidity or over-indebtedness of the debtor).

(c) transactions executed by the debtor prior to the date of the request for the opening of insolvency proceedings, if they relate to:

- dispositions free of charge, with the exception of ordinary donations (*обичайни дарения*), which were performed for the benefit of a party related to the debtor, executed within three years prior to the date of the request for the opening of insolvency proceedings.

- dispositions free of charge executed within two years prior to the date of the request for the opening of insolvency proceedings.

- transactions against consideration, where the items given exceed considerably in value the items received, executed within two years prior to the date of the request for opening insolvency proceedings and after the date of illiquidity/over-indebtedness.

- mortgages, pledges or personal collaterals (such as guarantees) securing obligations of third persons, executed within one year prior to the date of the request for opening insolvency proceedings and after the date of illiquidity/over-indebtedness.

- mortgages, pledges or personal collaterals securing obligations of third persons in favour of a creditor who is a related party to the debtor, executed

within two years prior to the date of the request for opening insolvency proceedings.

→ transactions through which creditors are damaged, executed with a party related to the debtor, effected within two years prior to the opening of insolvency proceedings.

Management Liability

Directors of a company are obliged to file for the opening of insolvency proceedings within 30 days after illiquidity/over-indebtedness occurs. Failure to comply with this obligation makes the directors liable vis-à-vis all creditors for damages caused by the delay in filing for the opening of insolvency proceedings.

The Bulgarian Criminal Code (*Наказателен кодекс*) also contains provisions in connection with insolvency proceedings. The most important provisions are (i) failure on behalf of the debtor (its directors) to file for the opening of insolvency proceedings within the required term; (ii) intentional bankruptcy (*умишлен банкрут*); and (iii) careless bankruptcy (*непредпазлив банкрут*).

Running the Business

ROLE OF THE DEBTOR

When opening insolvency proceedings the debtor generally loses its administration and disposition rights. The debtor remains the owner of its assets, but the assets form the so-called insolvency estate to be used to primarily satisfy the creditors. The right to administer and dispose of the assets generally passes on to the insolvency administrator.

Any acts taken by the debtor after the opening of insolvency proceedings require the prior consent of the insolvency administrator.

In case of restructuring proceedings, the debtor is generally entitled to keep on running the company and take steps and measures in the ordinary course of business. However, the restructuring plan can contain restrictions on the debtor's activities. The scope and duration of the creditors' control has to be regulated in the restructuring plan.

ROLE OF THE INSOLVENCY ADMINISTRATOR

The insolvency administrator (*синдик*) plays the key role in running or disposing of the business and assets of the debtor, respectively.

During insolvency proceedings the directors of the insolvent company are ob-

liged to support the insolvency administrator and provide the necessary information related to the property and the business of the company.

EFFECT ON WORK FORCE AND EMPLOYEES

As mentioned above, claims of employees are automatically included by the insolvency administrator in the list of acknowledged claims. The debtor's employees thus do not have to file their claims.

Employees have the possibility to propose a restructuring plan. This requires a quorum of twenty per cent of the total number of the debtor's employees. As creditors, its employees also participate in adopting the restructuring plan.

Further, the Bulgarian Labour Code provides special termination rights for both employees and the insolvency administrator. In case the business is shut down, employees have a right to resign. Respectively, the insolvency administrator has the right to terminate employment contracts by observing a one month notice period. If only parts of the company are closed, only those employment contracts affected by the shutdown can be terminated.
In case of restructuring proceedings, the restructuring plan has to define what kind of impact the restructuring will have on the workforce.

EFFECT ON CONTRACTS AND TERMINATION RIGHTS

The opening of insolvency proceedings has different impacts on contracts, depending on whether or not contractual obligations have already been fulfilled by the parties.

Where a contracting party has fulfilled its contractual obligations in full prior to the opening of insolvency proceedings, but has not received the full consideration due from the debtor, it should generally qualify as an insolvency creditor. If the debtor has already fulfilled its obligations, the receivable owed to the contracting party will be part of the insolvency estate and could be claimed by the insolvency administrator.

Where both sides have yet to fulfil their respective obligations, the contract can be terminated by the insolvency administrator by giving 15 days' notice. Upon the request of the contracting party, the insolvency administrator must inform the other party within 15 days of whether the contract remains in effect or is terminated. Should there be no response, the contract is considered to have been terminated. In the case of termination,

the contracting party may be entitled to claims in tort, which would then be classified as insolvency claims.

Formal Restructuring Proceedings

RESTRUCTURING PROCEEDING

Restructuring proceedings are initiated by proposing a restructuring plan (*План за оздравяване*). The following persons are entitled to propose a restructuring plan: the debtor, the insolvency administrator, creditors holding at least one-third of the secured claims, creditors holding at least one-third of the unsecured claims, shareholders holding at least one-third of the share capital of the debtor's company, an unlimited liability shareholder or twenty per cent of the total number of the debtor's employees.

A restructuring plan may be proposed not later than one month following the date of the announcement in the commercial register of the court's ruling on the approval of the list of acknowledged claims.

The restructuring plan may provide for a deferment or rescheduling of payments, a cancellation of the debts in full or in part, a restructuring of the debtor's company (e.g. a spin-off) or undertaking other acts or transactions, such as a sale of the going concern or a part of it. The plan may also propose the sale of the entire or a part of the debtor's enterprise, as well as a debt-equity swap.

The restructuring plan may provide for the appointment of a supervisory body to exercise control over the debtor's activity for the duration of the restructuring plan or for a shorter period. In case such supervisory body is installed, the debtor may make decisions only upon the approval of the supervisory body. This relates to matters such as: transformation of the company, winding down or transfer of the enterprise or of considerable parts thereof, property transactions beyond the customary actions or transactions related to the normal business operations of the debtor, any material change in the business activity and any material organisational change.

ADOPTION OF THE RESTRUCTURING PLAN. CRAMDOWN OF DISSENTING CREDITORS

The adoption of the restructuring plan takes place at the creditors' meeting. Only creditors whose claims are acknowledged (by both the insolvency administrator and the court) have a voting right. However, the court may also grant a specific voting right to a creditor whose claim is subject to pending litigation.

In order to adopt a restructuring plan, a double majority must be achieved: (i) each class of creditors (which has to vote separately) has to accept the plan by a majority exceeding 50% of the amount of the claims of the respective class; and (ii) creditors holding more than 50% of the total amount of all current creditors' claims must consent. The dissenting creditors are overruled and have to accept the restructuring plan.

The proposal of a restructuring plan in the course of pending insolvency proceedings does not require the consent of other stakeholders; in particular no consent of the shareholders is required. The consent of shareholders will, however, be required in an out-of-court restructuring.

Ending of Insolvency Proceedings

Both bankruptcy and restructuring proceedings are closed by a resolution of the insolvency court. Bankruptcy proceedings are closed after the distribution of all assets or once all claims have been settled. Restructuring proceedings are formally closed after a restructuring plan is adopted by the creditors and the court. The debtor then has the duty to fulfil the restructuring plan under the terms and conditions stipulated in the restructuring plan. If the debtor does not fulfil its obligations under the restructuring plan, insolvency proceedings will be reopened.

International Aspects

According to EC Regulation No. 1346/2000, insolvency proceedings in other Member States of the European Union are recognised in Bulgaria.

In those cases in which the EC Regulation is not applicable, the Bulgarian Commerce Act contains provisions on the recognition of proceedings in third countries. A foreign court ruling on the bankruptcy of the debtor is generally recognised in Bulgaria if it is issued by an authority of the state where the debtor has its seat.

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FORMAL INSOLVENCY PROCEEDINGS AND TESTS FOR INSOLVENCY

Main Insolvency Proceedings

In the Czech Republic, insolvency proceedings are governed by Act No. 182/2006 Coll. on insolvency proceedings, as amended ("Insolvency Act"). The purpose of insolvency proceedings is to overcome the insolvency (or impending insolvency) of the debtor by one of the lawfully prescribed means in a way that ensures the fair, proportional and highest possible satisfaction of creditors' claims. Furthermore, it also regulates the debtor's discharge of its debts.

Certain conditions have to be met in order to declare insolvency. According to the Insolvency Act, the debtor has to have (i) more than one creditor, (ii) more than one outstanding financial liability which is already overdue by more than 30 days and (iii) the debtor must be unable to pay these debts. In case of entrepreneurs (legal entities or natural persons), insolvency can also occur in the form of over-indebtedness. This is the case if the debtor (i) has more than one creditor and (ii) the total of its liabilities exceeds the value of its assets.

However, insolvency cannot be declared if the debtor has only one creditor, even if its debt is of significant value and already long overdue.

The Insolvency Act also covers situations in which the debtor is not yet insolvent, but given all the circumstances it can be assumed the debtor will not be able to duly and timely fulfil a substantial part of its obligations (i.e. imminent insolvency).

Initiation of Insolvency Proceedings

Insolvency proceedings can only be commenced on the basis of an insolvency petition. This petition can be filed by both the creditor and the debtor. However, if insolvency is only imminent, the petition can only be filed by the debtor.

In order for a petition to be valid, it has to meet certain criteria prescribed by statute. In brief, it has to include the basic information about the petitioner and the debtor (e.g. name/business name, residence address or the address of the registered office of the company, and where the debtor is an entrepreneur, its identification number). The petition must specify on what grounds it is seeking insolvency or imminent insolvency and

the petitioner has to attach all the relevant documentation in support of the alleged insolvency.

If the petition is filed by the debtor, the debtor is obliged to submit a list of its assets (including the receivables it has against its debtors), a list of all its creditors and their receivables, a list of its employees (if applicable) and all relevant documents that demonstrate its insolvency or imminent insolvency. Such information has to be submitted in order to prove that the conditions for insolvency are met. When submitting this documentation, the debtor is obliged to state explicitly that all of the information provided is both accurate and complete.

If the petition is filed by a creditor, the petition – in addition to the above mentioned requirements – must also include proof of the fact that it has an overdue receivable. The petition has to be filed by using a form that can be downloaded from the homepage of the Ministry of Justice of the Czech Republic. If more creditors have receivables that are overdue, they can also file a petition as the first petition does not constitute a lis pendens obstacle. The creditors can do so until the court's decision on the debtor's insolvency is published in the Insolvency Register.

Consequences of Filing a Petition for Insolvency

Once the petition for insolvency has been filed and delivered to the competent court (which is assigned based on the residence of the debtor), severe consequences will arise which affect both the debtor and its creditors.

The petition will first be published in the Insolvency Register. From this moment on, the insolvency proceedings are legally initiated and the debtor must refrain from any disposal of its assets which are outside the scope of its regular course of business (i.e. an act that would constitute major changes in the composition, use or determination of such assets or would lead to a significant reduction in its assets). Such acts are ineffective towards creditors, unless the debtor obtained the prior consent of the court.

The main consequence of the initiation of insolvency proceedings with regard to creditors is that they are only entitled to enforce their claims in the course of the insolvency proceedings. In other words, they are generally barred from filing an action against the debtor, enforcing a court ruling regarding their claim, and claiming or acquiring the right of satisfaction by secured receivables, nor can the

creditors' claims be settled by wage deductions of the debtor (in the case of a natural person) if the creditor is entitled to these deductions on the basis of an agreement with the debtor.

Moratorium

A moratorium is a specific legal instrument that can only be used by entrepreneurs as debtors in order to prevent the debtor from insolvency for a certain time period. It can only be declared by the court on the basis of a petition filed by the debtor, usually together with his insolvency petition. However, a court's decision on a moratorium can only be made if the debtor's respective request is submitted within a certain time period. The debtor can only file the proposal on a moratorium within seven days of its insolvency petition; if the petition was filed by a creditor, the proposal has to be submitted within 15 days from the receipt of the insolvency petition.

The main consequence of a moratorium is that the court cannot declare insolvency over the debtor. However, the above described consequences of the initiation of insolvency proceedings also apply in the case of a moratorium. A moratorium can only be used for a short period of time; the maximum period being three months. During this period, the debtor is entitled to prioritise its debts that accrued in the last 30 days prior to the moratorium being declared, the settlement of which are crucial for maintaining its business operations. It is at the sole discretion of the debtor to decide which of its debts will be settled, as long as they fulfil the abovementioned criteria. These debts can then be paid prior to all other overdue claims.

In order to keep the business of the debtor up and running, the supply of energy and commodities for the debtor is protected as well. Creditors cannot withdraw from such contracts due to payment delays that occurred before the declaration of the moratorium. Unless stated otherwise in a preliminary injunction, the debtor cannot set off its claims against the creditor.

As stated above, a moratorium is designed to protect the debtor from insolvency, which leads to certain disadvantages for creditors. Thus, the debtor is obliged to discuss the moratorium with its creditors, and at least a simple majority of its creditors has to agree and their consent must be attached to the proposal for the declaration of moratorium; otherwise, the proposal for a moratorium will be rejected by the Insolvency Court.

Creditors in Insolvency Proceedings

Creditors who exercise their rights against the debtor are one of the procedural bodies and, together with the debtor, the main participants in the insolvency proceedings under the Insolvency Act in the Czech Republic.

To organize the creditors and represent their interests, so-called creditors' bodies are established, i.e. the creditors' meeting, creditors' committee and/or the creditors' representative.

CREDITORS' MEETING

The creditors' meeting has the right to elect and remove members of the creditors' committee and its substitutes or representatives. The creditors' meeting may reserve any right or action that falls within the scope of the other creditors' institutions for itself. In the event that the creditors' committee or a creditors' representative have not been appointed, the creditors' meeting may assume such tasks as well.

The creditors' meeting is convened and governed by the Insolvency Court. It is convened on the court's own initiative or on the basis of a petition of the insolvency administrator, the creditors' committee or at least two creditors, whose total value of receivables exceeds one tenth of all filed receivables.

In the first creditors' meeting, the members of the creditors' committee are elected and the creditors vote on the method for resolving the insolvency or imminent insolvency of the debtor, respectively.

With regard to all subsequent meetings, a list with the matters that should be discussed has to be provided to the creditors beforehand. Matters not included on the list can only be heard if all creditors are represented at the meeting.

CREDITORS' COMMITTEE

The creditors' committee generally takes the role of the creditors' bodies with the exception of matters falling within the scope of the creditors' meeting or which the creditors' meeting reserved for itself. The three to seven obligatory members are elected by the creditors' meeting. They are elected out of all registered creditors. In case the debtor has more than 50 registered creditors, the establishment of the creditors' committee is even mandatory.

The main function of the creditors' committee is the supervision of all actions taken by the insolvency administrator. For this purpose, it is entitled to file mo-

tions with the Insolvency Court concerning the course of insolvency proceedings (i.e. it can convene creditors' meetings etc.).

CREDITORS' REPRESENTATIVE

If a creditors' committee is not established, the creditors' meeting may also elect a creditors' representative, who is entrusted with the same powers and has the same obligations as the creditors' committee would have.

DIFFERENT TYPES OF CLAIMS

In the context of insolvency proceedings several types of claims must be distinguished. On the basis of these types of claims, the creditors can be divided into several groups.

The most common receivables are those which were established before the initiation of the insolvency proceedings of the debtor, e.g. on the basis of a purchase agreement. Creditors can claim their receivables by filing an application for the insolvency proceedings in which they specify their receivables and the title out of which each arose. However, they can only submit their application during a certain time period which is set forth in the court's decision on insolvency (usually 30 days or two months from the day the decision on insolvency was issued).

Another very common type of receivables is those secured by the property of the debtor. Secured receivables also have to be claimed by the creditor via their respective application. The application has to specify the security, indicate the circumstances that certify it and security has to be proven by relevant documents. Secured receivables are generally settled via the sale of the secured property at anytime during the insolvency proceedings.

Furthermore, there are claims against the estate of the debtor (*pohledávky za majetkovou podstatou*). These debts can be paid in full at any time following the court's decision on insolvency. They are classified as follows:

a) claims against the estate incurred after the initiation of insolvency proceedings or after the declaration of a moratorium (e.g. reimbursement of cash expenses and remuneration of the interim insolvency administrator, of the liquidator of the debtor and the members of the creditors' committee, etc.);

b) claims against the estate which arose after the court's decision on insolvency (cash expenses and remuneration of the insolvency administrator, taxes, duties, etc.); and

c) receivables that are equivalent to claims against the estate (labor claims of the debtor's employees, creditors' claims on maintenance, etc.).

Some types of claims cannot be satisfied in the insolvency proceedings. These include inter alia interests, interests on late payments and fees for late payments connected to receivables of registered creditors as well as sanctions affecting the debtor's assets.

REVIEW OF APPLICATIONS

Applications filed by the creditors are first subjected to an examination by the insolvency administrator. They are reviewed on the basis of the submitted documents and accounts of the debtor or the registers kept under special legislation. Furthermore, the insolvency administrator will obtain the opinion of the debtor on registered receivables, i.e. whether it agrees with the receivable or denies it (especially with regard to the title out of which it arose, the alleged amount or the order of the claim).

The insolvency administrator shall then draw up a list of all submitted claims in which he should expressly state which debts are denied. Secured creditors shall be listed separately. This list shall be published in the insolvency register at least 15 days prior to the review hearing.

REVIEW HEARING

In order to review all registered receivables, a review hearing is scheduled by the insolvency court. The attendance of both, the insolvency administrator and the debtor is compulsory. During the review meeting, the insolvency administrator can change his opinion regarding the denial of certain claims. Creditors may also still change the amounts of their registered receivables via an application until the end of the review hearing or until the moment their claims are identified or effectively denied via decision of the court in interlocutory disputes.

If a receivable is denied by the insolvency administrator, the debtor or another creditor, the concerned creditor is no longer allowed to vote at the creditors' meeting as to the amount that was denied. If the creditor disagrees with the denial, it can object via interlocutory disputes by filing an action against the insolvency administrator. The decision is made by the same court that also leads the insolvency proceedings. Hence, the Insolvency Court is also competent to decide on disputes concerning the existence, amount or order of filed claims as well as disputes on the exclusion of things, rights, claims or other assets from the estate, disputes on the settlement of the joint property of the debtor and its

spouse, etc. The final judgment issued in interlocutory proceedings is binding for all parties and has to be regarded in the insolvency proceedings.

COURT DECISION ON INSOLVENCY

If the insolvency petition was filed properly and if it was established that the debtor is in fact insolvent or that insolvency is imminent, the court will issue a decision on the insolvency of the debtor. This decision usually contains (i) the appointment of insolvency administrator for this proceeding, (ii) a notice for the creditors to register their claims against debtor, (iii) information on where and when the creditors' meeting will take place and (iv) a notice for the debtor to submit a list of its assets and liabilities together with a list of its creditors and debtors. The court may issue a decision on the method of a resolution of the insolvency together with the decision on insolvency, if certain conditions are met.

The effects of the commencement of the insolvency proceedings continue. Hence, the debtor cannot dispose over its property. With the court's decision on insolvency of the debtor, the authorisation to dispose over the property of the debtor is transferred to the insolvency administrator. The most important aspect of this decision is that all court and arbitration disputes concerning creditors´ claims are suspended. All receivables have to be characterised in an application filed by the creditor and shall be submitted to the insolvency court.

Different Proceedings related to Insolvency

In the Czech Republic, the Insolvency Court can decide to solve insolvency of a debtor by the following methods:

BANKRUPTCY

Bankruptcy is the most frequent method of dealing with a debtor's insolvency in the Czech Republic. It usually ends with the winding-up of the debtor's business. Its main goal is the sale of the bankrupt's estate and the subsequent proportional distribution of the acquired assets among the (unsecured) creditors, while claims of certain creditors still keep their priority position (secured creditors).

The effects of bankruptcy proceedings come into force as soon as the decision on the declaration of bankruptcy is issued by the Insolvency Court and published in the Insolvency Register. Bankruptcy is used as a method on resolution of insolvency of the debtor in case the insolvency petitioner proposes so (either the debtor himself or the creditors), and also

in case the insolvency cannot be solved by any other method (because conditions as set forth for the reorganisation or debt relief are not met). The commencement of bankruptcy proceedings has a serious impact on the business activities of the debtor. Since the bankruptcy order is issued by the court, the insolvency administrator is entitled to dispose of the debtor's property, perform other rights and liabilities and run the debtor's business (if still possible).

In case the debtor is a natural person, a non-entrepreneur, or where the annual turnover of the debtor does not exceed 2 million CZK (approx. EUR 75,000) and provided that the debtor does not have more than 50 creditors, the court may decide to carry out a so-called minor bankruptcy, which is a shortened and simplified version of bankruptcy.

REORGANISATION

Reorganisation is a rather new and preferred method of dealing with a debtor's insolvency and may only be used to deal with the insolvency of entrepreneurial entities. The main purpose of reorganisation is to satisfy the creditors' by gradual fulfillment of their claims while maintaining the business of the debtor. This has to be done in accordance with the conditions set out in the reorganisation plan. In other words, unlike bankruptcy which aims at the liquidation of the debtor, reorganisation aims at the financial rehabilitation of the debtor.

In order to use reorganisation as the method of resolving insolvency, several legal criteria must be met. Only the debtor and registered creditors are entitled to file a motion for a decision on the permission of reorganisation with the court. Reorganisation requires the debtor to carry on its business activities for profit. Further, the debtor has to have either at least 50 employees or a turnover of at least CZK 50 million (approx. EUR 1,852,000) for the last accounting period. The requirements relating to a certain turnover or the number of employees are neglected if the debtor submits a reorganisation plan which has been approved by at least half of all secured creditors and half of all unsecured creditors or, alternatively, if the plan has been approved by at least 90 % of the creditors present at the creditors' meeting (quorum of the creditors is calculated based on the amount of their claims).

REORGANISATION PLAN

The reorganisation plan constitutes a very extensive and detailed document laying out the process of reorganisation and has to be approved by the Insolvency

Court. Its main aim is to organise the relationships between the debtor and its creditors. It includes the determination of the way of reorganisation, the identification of possible measures to implement the reorganisation plan, particularly in terms of dealing with the assets, information on whether the debtor's business or part of it is going to continue its operations and, if so, under which conditions this shall be done, information about the anticipated amount of obligations vis-à-vis creditors after the end of reorganisation and other information stated in the Insolvency Act.

Reorganisation may be terminated in three different ways: satisfaction of the reorganisation plan, transformation into bankruptcy or cancellation of the decision on the approval of the reorganisation plan, if the court finds that any of the creditors gained special benefits in connection with the reorganisation plan or that the approval of the plan was achieved fraudulently.

DEBT RELIEF

Debt Relief (or "personal bankruptcy") is an institute under which sociological aspects of debts are put before their economical aspects. It is supposed to enable the debtor to a "fresh start" and at the same time motivate it to actively repay its debts in an amount of at least 30 % (in case of unsecured creditors).

The institute of Debt Relief was primarily designed for natural persons, although it can be used for entrepreneurs as well. The Insolvency Act stipulates that Debt Relief is not an option for legal persons or for the coverage of debts which arose out of business activities of the debtor. Nevertheless, there are also situations in which Debt Relief can be used by a person who has debts from its business activities, e.g. if the creditors concerned agree; or in case the debt that arose out of debtor's business activities is secured.

The application for the approval of Debt Relief can only be submitted by the debtor itself by means of using a certain form alongside with the insolvency application. It must contain the following information:

- identification of the debtor and the persons authorised to act on its behalf;
- information on the expected income of the debtor in the next 5 years;
- information on the debtor's income in the last three years;
- proposal on how Debt Relief shall be carried out, or a statement that such a proposal is not given.

Together with the proposal, the debtor is obliged to enclose the following information:

- list of its assets and obligations;
- documentation on the income of the debtor during the last three years;
- written consent of unsecured creditors stating that less than 30 % of their claims will be satisfied.

The Insolvency Court will not allow to solve insolvency via Debt Relief if:

- the debtor pursues a dishonest intent;
- the debtor is proven to be an unreliable person;
- the amount of debt that would be covered in case of Debt Relief would be less than 30 %.

In case the Insolvency Court denies the suggested Debt Relief, it shall decide to solve the insolvency of the debtor by bankruptcy proceedings. In all other cases, the Insolvency Court will permit the Debt Relief and decide on the manner by means of which it is to be carried out. There are two possibilities: (i) sale of all assets of the debtor or (ii) creating a repayment schedule.

The sale of the debtor's assets solely relates to its current assets. Future income or income which is gained during insolvency proceedings but after the approval of Debt Relief is not affected.

The repayment schedule, however, also affects the debtor's future assets. For a period of five years, the debtor must give its creditors part of its income. As for that, the debtor is obligated to work and if it is unemployed, it must immediately and actively seek a suitable occupation. Twice a year the debtor must provide the Insolvency Court with a report on its income and shall honestly declare all its income during this period to the insolvency administrator.

In general, the debtor's debt, up to the date of the approval of the Debt Relief, ceases to exist. The insolvency proceedings formally end by a decision of the Insolvency Court.

International Aspects

On the basis of Council Regulation EC No. 1346/2000, insolvency proceedings in any other Member state of the EU are recognized in the Czech Republic as well. In this case, national law does not apply and all creditors, regardless of their seat, are entitled to submit their claims to the competent Insolvency Court.

In case the Regulation is not applicable, based on Act No. 91/2012 Coll., foreign judgments in insolvency matters from any other countries (outside of EU) are recognized in the Czech Republic on a reciprocal basis.

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HUNGARY

FORMAL INSOLVENCY PROCEEDINGS AND TESTS FOR INSOLVENCY

Formal Insolvency Proceedings

The Hungarian Restructuring and Insolvency Act (*Csődtörvény, "Cstv."*) regulates two types of insolvency proceedings: (i) the so-called restructuring proceeding (*csődeljárás*) with the general aim of keeping the business of the debtor (*adós*) running during and after the proceeding (without liquidating the debtor) by means of concluding an agreement with the creditors (*hitelezők*) on the settlement of the debts; and (ii) the compulsory liquidation proceeding (*felszámolási eljárás*) with the aim of dissolving the debtor without a legal successor, and selling and distributing all of its assets to the creditors.

A restructuring proceeding can be initiated only by the debtor and requires the prior approval of its main decision-making body (i.e. the approval of the general meeting in the case of a limited liability company). In a restructuring proceeding, the debtor is granted a moratorium and is allowed to reach a settlement agreement regarding its debts with the creditors in order to restore its solvency. Hungarian law does not stipulate any requirements regarding a minimum debt repayment quota; however, the settlement agreement must comply with the concept of exercising rights in good faith (*jóhiszemű joggyakorlás elve*).

If a restructuring proceeding fails, it is transformed by a court order into a compulsory liquidation proceeding. The main goal of the liquidation proceeding is to terminate the debtor and to distribute all of its available assets to the creditors.

Of course, out-of-court restructuring efforts and negotiations are very common and are usually made prior to the opening of (in-court) insolvency proceedings. In Hungary, there are no hybrid court-administered restructuring or insolvency proceedings, such as the German "*Schutzschirmverfahren*" (i.e. a special pre-insolvency, court administered proceeding) available.

In this article, the main aspects of compulsory liquidation proceedings will be discussed first, followed by a discussion of the main characteristics of restructuring proceedings (under the title "Formal Restructuring Proceedings").

Compulsory Liquidation Proceedings

TESTS FOR INSOLVENCY

Under the Hungarian Restructuring and Insolvency Act, the opening of compulsory liquidation proceedings requires the insolvency (*fizetésképtelenség*) of the debtor. In case of impending insolvency a company can only apply for a restructuring proceeding.

The cases in which a debtor is considered being insolvent are specifically defined in the Hungarian Restructuring and Insolvency Act. The most common case of insolvency is where a debtor fails to pay a debt that has incurred due to a contractual obligation (that was previously expressly acknowledged or not disputed by the debtor) within 20 days after the due date expires and remains unpaid despite a written notice given by the creditor. The court will also establish the debtor's insolvency if the debt collection procedure was unsuccessful or if the debtor failed to pay its debts within the deadline specified in a final and binding court decision.

A debtor is not required to have sufficient assets to cover the costs of the insolvency proceeding in order for it to be opened. However, in this case the compulsory liquidation procedure must be conducted as a simplified compulsory liquidation procedure (*egyszerűsített felszámolási eljárás*), in which the assets of the debtor are directly distributed to the creditors in an expedited procedure.

Procedural Aspects

A compulsory liquidation procedure can either be initiated by the debtor or by a creditor. Further, also other persons or entities such as the liquidator in a voluntary liquidation (*végelszámoló*) or the Court of Registration (*cégbíróság*) may petition for the opening of compulsory insolvency proceedings. A creditor can only request the opening of a compulsory liquidation proceeding if the amount of its (due) claim (excluding interest and taxes) exceeds HUF 200,000 (approx. EUR 645).

The effective date of a liquidation procedure is the day on which the court's final decision on commencing the liquidation procedure is published in the Company Gazette (*Cégközlöny*). The proceeding is conducted by a liquidator (called *felszámoló*). All of the debtor's liabilities become due and payable on the effective date of the liquidation, and from this date forward only the liquidator will be entitled to represent the debtor and to make decisions in connection with its as-

sets. The liquidator will be appointed by court using a random electronic selection process.

The Company Gazette will publish the most important information regarding the liquidation procedure: (i) the name of the court conducting the liquidation procedure, (ii) the case number, (iii) the name of the appointed liquidator and the debtor, and (iv) an invitation for the creditors to file their claims and to pay the registration fee within 40 days after the publication of the liquidation order in the Company Gazette. The fee currently amounts to 1% of the filed claim but is limited with a maximum of HUF 200,000 (approx. EUR 645). It is essential that creditors regularly check the Company Gazette since debtors are not obliged to inform their creditors individually about the opening of compulsory liquidation procedures.

If a creditor fails to report its claim in time, i.e. within 40 days after the opening of the procedure, it can still do so for up to 180 days following such date; however, the chances of such claims being satisfied will be significantly reduced, since such creditors can be satisfied only after the complete (i.e. 100%) satisfaction of "in-time" creditors. No more claims may be filed after the 180th day.

Claims involving debts that have incurred during the liquidation procedure must be announced within 40 days from the date when they become due and payable.

The National Tax Authority, the relevant local office of the Employment Agency, the competent Land Registry and the Court of Registration will be informed about the opening of the insolvency proceeding.

After the deadline for creditors to file their claims expires, the liquidator has 45 days to examine and register the claims. In case circumstances previously unknown to the liquidator require a modification of the registration, said registration can still be modified by the liquidator later on.

The first meeting of the creditors takes place within 75 days after the opening of the insolvency proceeding. All creditors whose claims were registered will be invited to the creditors' meeting by the liquidator. The main aim of the meeting is to elect a creditors' committee (*hitelezői választmány*) or a creditors' representative (*hitelezői képviselő*). Further, the creditors are given information about the debtor's assets which are available for distribution.

Pre-Insolvency Restructuring & Refinancing

There is a great variety of contractual freedom under Hungarian law and it is common practice, in particular with banks as a major creditor group, to agree on a variety of measures with all stakeholders in a pre-insolvency scenario. This is also still possible in the course of restructuring proceedings and compulsory liquidation proceedings. Hungarian law does not provide special rules on deals in pre-insolvency scenarios, so that creditors or third parties must primarily rely on voidance claims, in case they disagree with or suspect irregularities in the sales process.

Creditors' Role

Creditors, such as banks and other business partners as well as employees, should play a key role in all insolvency proceedings. In practice, however, compulsory liquidation proceedings are still largely dominated by the liquidators. Creditors can elect creditors' committees or creditors' representatives to represent their interests. Compared to individuals and ordinary creditors, creditors' committees and creditors' representatives have additional rights to request information from the liquidator and to control his activities. However, creditors still often fail to take advantage of this possibility.

There are two classes of creditors: secured (or preferential) and unsecured creditors.

UNSECURED CREDITORS

Any creditor may file its claim, including interest, within 40 days after the publication of the order on the proceeding in the Company Gazette. The enforcement of a claim requires the filing of the claim (*hitelezői igénybejelentés*) as an insolvency claim with the liquidator and the payment of the registration fee. The liquidator summarises all claims in a special registration list (*hitelezői jegyzék*). As mentioned before, all claims are examined and registered by the liquidator within 45 days from the expiry of the deadline for filing claims. After the examination of each claim, the liquidator decides whether it qualifies as a secured or an unsecured claim and how it must be ranked according to the priority ranking prescribed by the Hungarian Restructuring and Insolvency Act.

The liquidator must further declare whether a claim is confirmed or rejected. If the liquidator confirms a claim, other creditors (in certain cases) have the right to dispute the confirmation in court. If the liquidator disputes the legal basis

or the amount of a creditor's claim, he must discuss this with the creditor. If no agreement is achieved, he must submit the claim to the court, unless the legal basis for such claim is already being contested in a separate court proceeding. In this latter case the liquidator is not obliged to submit the claim to the court, because the claim qualifies *ex lege* as a contested claim.

SECURED CREDITORS

Secured creditors' claims are secured by a pledge. Under Hungarian law, 'pledge' is a general term for all types of securities, including pledges on movable assets (*ingózálog*), pledges over receivables (*követelészálog*), mortgages (ingatlan-jelzálog) and floating charges (vagyont terhelő or körülírással meghatározott zálog). If an asset was already seized in favour of a creditor in a previous debt collection procedure, the creditor is also treated as a pledgee in the compulsory liquidation procedure.

Creditors with a fix pledge are entitled to receive nearly the entire value of an asset after its sale (up to the amount of their claims). Creditors with a floating charge are entitled to receive nearly half of the value of the charged assets after their sale; they are entitled to the other half only after the liquidation costs have been paid from the debtor's assets (including the said proceeds).

In a liquidation proceeding, (encumbered) assets are typically sold and the respective secured creditors have a claim of separation to receive the asset's value after its sale.

On the other hand, in a restructuring proceeding, assets are generally not sold, as the business is kept running. In order to protect the debtor's assets, secured creditors are barred from enforcing pledges after the court decision on the start of the proceeding is published in the Company Gazette.

SET-OFF OF RESPECTIVE CLAIMS

In compulsory liquidation proceedings, a set-off is permitted if the creditor's claim is registered by the liquidator as a confirmed claim and the claim has not been assigned to another entity during the liquidation procedure. As a prerequisite for a set-off under Hungarian law, the creditor's claim must be due. This requirement is fulfilled ex lege in a compulsory liquidation proceeding as all creditors' claims become due with the opening of the insolvency proceeding. A claim based on a debt that has incurred after the opening of the insolvency proceeding can also be set off against a claim of the debtor.

PRIORITY CLAIMS

Priority claims are claims against the insolvency estate that are satisfied prior to all unsecured creditors. Priority claims mainly include (i) costs of the proceedings; (ii) costs regarding administration, sustainment and supply of the insolvency estate; (iii) claims of the debtor's employees for current salary; (iv) claims in connection with the termination of certain kind of employees; (v) claims resulting from the fulfilment of certain contracts; (vi) claims of private persons from non-professional activities; (vii) claims of small or micro enterprises; and (vii) taxes. It is not required to separately file certain priority claims (such as the costs of the liquidation proceedings) with the liquidator.

VOIDANCE CLAIMS AND CLAW-BACK

Hungarian law provides that certain transactions that unduly decrease the value of the debtor's assets prior to the start of a compulsory liquidation proceeding may be disputed. Avoidance is, however, subject to certain conditions and relates to transactions that were entered into by the debtor and a third party. Formally, such a transaction can be contested by the liquidator as well as by the creditors.

The conditions that must be met in order to dispute such transactions are as follows: (i) a transaction was concluded; (ii) the transaction was entered into prior to the start of the compulsory liquidation proceeding; (iii) the transaction unduly decreased the value of the debtor's assets; and (iv) one of the specific reasons for which the transaction can be disputed under the Hungarian Restructuring and Insolvency Act applies.

The Hungarian Restructuring and Insolvency Act lists the following specific reasons that allow creditors and liquidators to contest a transaction:

(i) Fraudulent transactions (*csalárd ügyletek*): This provision applies if a transaction was concluded by the debtor to intentionally deceive (certain) creditors within the last five years prior to (or after) the court's receipt of the request for opening the compulsory liquidation proceeding, provided that the other contracting party knew or should have known of the fraudulent intent. As for "*familia suspecta*" (related persons), a different provision provides for a reversal of the burden of proof;

(ii) Transfers free of charge (*ingyenes elidegenítés)* and undervalued transactions (*laesio enormis* or *feltűnően aránytalan értékkülönbözet*): Transactions that were conducted free of charge (gifts) or where

the difference between the value of the service, product or asset given differs from the consideration to a grossly unfair amount, if entered into within the last two years prior to (or after) the court's receipt of the request for the compulsory liquidation proceeding. As for *"familia suspecta"* (related persons) a different provision provides for a reversal of the burden of proof;

(iii) Preferential treatment of creditors (*hitelező előnyben részesítése*): This applies where a transaction discriminates against one creditor in favour of (an)other creditor(s), or is intended to prefer one creditor over (an)other creditor(s), if entered into within the last 90 days prior to (or after) the court's receipt of the request for the compulsory liquidation proceedings.

(iv) Claw-back (*visszakövetelés*): A service performed outside the ordinary course of business might be claimed back if it was performed within the last 60 days prior to (or after) the court's receipt of the application for the compulsory liquidation proceedings, if it resulted in the preferential treatment of a creditor vis-à-vis the others.

All of the above provisions aim at securing the debtor's assets prior to the opening of the proceeding. Once the insolvency proceeding is opened and the liquidator is appointed, the liquidator is the sole representative of the debtor. Hence, only the liquidator has the right to dispose of the debtor's assets. Such decisions require the consent of the creditors' committee in a limited number of cases only (for example, if the liquidator intends to continue the business activities of the debtor, this decision to continue the business requires consent of the creditors' committee, which is then valid for a year).

A claim disputing a transaction must be filed with the court within 90 days after the claimant acquired knowledge of it, but in no event later than one year after the publication of the court's order on the start of the proceedings in the Company Gazette. It must seek the declaration of invalidity of the contested transaction.

Excursus: Hungarian Capital Maintenance Rules

Under Hungarian capital maintenance rules, a company (in the form of a so-called capital company, in particular a limited liability company) must not transfer funds or assets to its shareholders on the basis of the shareholders' status, unless explicitly permitted under statutory law,

such as in case of distribution of dividends covered by the balance sheet profit, a capital decrease or in liquidation proceedings. Dividends are also not payable if the amount of equity has fallen or, as a result of the payment, would fall below the amount of the registered capital or if the payment would endanger the company's solvency.

The same rules apply if the payment is made on the basis of a contract between the shareholder and the company.

If companies violate the above described capital maintenance rules, the liquidator may claim back the transferred funds or benefits from the recipients, in which case only the general limitation periods apply (i.e. usually five years).

Management Liability

Under Hungarian law, there is no specific obligation for the directors of a company to request the opening of insolvency proceedings. However, if a company is threatened by insolvency, its managing director(s) must also consider the creditors' interests when managing the company's affairs. "Threatening insolvency" means a situation in which the managing director(s) can or should be able to foresee that the company will not be able to pay its liabilities when they fall due. A managing director who has taken all reasonable measures to reduce the creditors' losses and to convene the shareholders' meeting cannot be held liable. However, if the managing director has not filed and published the annual report in accordance with the relevant legislation, it will be presumed that the creditors' interests were violated.

If the liability of the managing director is stated by a court, any creditor whose claim remained unsatisfied in the compulsory liquidation process may bring an action against the managing director to seek payment of its claims.

The Hungarian Criminal Code (*Büntető Törvénykönyv*) also contains provisions in connection with insolvency proceedings. The most important provisions state that the following actions qualify as acts of crime: (i) the actual or feigned reduction of the value of company's assets in violation of the requirement of prudent business management at a time when the company is threatened by insolvency or is already insolvent and (ii) the preferential treatment of certain creditors after a compulsory liquidation procedure has been ordered.

Running the Business

ROLE OF THE DEBTOR

In compulsory liquidation proceedings, the debtor generally loses the right to manage its business. The debtor remains the owner of its assets, but the assets form the so-called insolvency estate to be used primarily to satisfy the creditors. The right to manage and dispose of assets therefore passes to the liquidator.

ROLE OF THE LIQUIDATOR

Generally, the liquidator plays a key role in running the debtor's business or selling its assets. The debtor loses control over the assets on the date when the liquidation proceeding starts; hence, only the liquidator is authorised to represent the debtor in connection with the assets forming the insolvency estate.

As mentioned before, creditors have 40 days from the date when the court's decision on ordering the liquidation is published in the Company Gazette to announce their claims to the liquidator. The claims will be registered and examined by the liquidator.

All debts owed by the debtor become due and payable on the effective date of the liquidation procedure. During the liquidation procedure, the liquidator collects the debtor's due receivables, enforces its claims against third parties and sells the debtor's assets in order to satisfy the creditors' claims. From the starting date of the liquidation proceeding onwards, any claim against the debtor can only be enforced in line with the rules applicable to the liquidation procedure.

The liquidator is responsible for the proper book keeping and for complying with the respective reporting obligations (preparing balance sheets, annual reports, tax returns etc.).

If the liquidator fails to comply with the law, the creditors and the debtor are entitled to file a formal objection against the liquidator's actions in court, provided that they suffered any damage or loss as a result of any action of the liquidator. Such an objection must be submitted to the court within eight days after acquiring knowledge about the unlawful action.

EFFECT ON EMPLOYEES

The Hungarian Restructuring and Insolvency Act states that once the liquidation procedure starts, the liquidator is entitled to exercise the rights and obligations normally held by the employer. Employment contracts will not be terminated automatically due to insolvency

proceedings; however, the liquidator has a privileged termination right with regard to certain employment contracts. If the debtor's assets do not cover all of the employees' claims which are statutorily entitled to privileged satisfaction, employees will receive payment from a special government fund known as the salary guarantee fund (bérgarancia alap).

EFFECT ON CONTRACTS AND TERMINATION RIGHTS

An insolvency proceeding can have different impact on a contract, depending on whether or not contractual obligations have already been fulfilled by the parties.

If a contracting party has fulfilled all of its contractual obligations prior to the start of the insolvency proceeding but has not received the entire consideration from the debtor, it may file an insolvency claim. On the other hand, if the debtor has already fulfilled its obligations, the other party is obliged to fully perform its obligations towards the debtor. However, the Hungarian Restructuring and Insolvency Act generally authorises the liquidator to terminate all contracts concluded by the debtor prior to the start of the liquidation procedure with immediate effect.

Special provisions apply if neither party has fulfilled its obligations in their entirety. In such a case, the decision on whether the debtor should fulfil the contract (in which case the contracting party is also obliged to fulfil its respective contractual obligations) or rescind it, is made by the liquidator at his own discretion. In case of rescission, the other contracting party is entitled to enforce its claims based on the rescission by announcing the claim in the liquidation proceeding.

Formal Restructuring Proceedings

The Hungarian Restructuring and Insolvency Act contains certain provisions that allow the restructuring of a company at an early stage of financial distress.

INITIATION OF RESTRUCTURING PROCEEDINGS AND MORATORIUM

Pursuant to the Hungarian Restructuring and Insolvency Act, it is possible to open a restructuring proceeding (*csődeljárás*) instead of a compulsory liquidation proceeding (*felszámolási eljárás*). The restructuring proceeding is conducted by a restructuring administrator (*vagyonfelügyelő*). The main goal of restructuring proceedings is to conclude a settlement agreement (*csődegyezség*) which is based on a restructuring plan (*reorganizációs terv*) prepared by the debtor.

As in the liquidation procedure, claims are examined and registered (i.e. confirmed or disputed and secured or unsecured claims) by the administrator.

A restructuring proceeding can only be initiated by the debtor and requires the prior approval of its main decision-making body (i.e. the approval of the general meeting of a limited liability company). The effective date of the restructuring procedure is the day on which the court's final decision on ordering the restructuring procedure is published in the Company Gazette. Besides the publication of the decision, each known creditor of the debtor has to be informed individually by the debtor. The Company Gazette contains the most important information regarding the restructuring procedure, such as the request to the creditors to file their claims with the administrator and to pay the registration fee within 30 days from the publication of the court's decision in the Company Gazette. The fee currently amounts to 1% of the filed claim, but is limited with a maximum of HUF 100,000 (approx. EUR 322). If a settlement agreement is concluded and approved by the court, creditors, who failed to file their claims may only enforce their claims in a subsequent liquidation procedure initiated by a third party.

In case of a restructuring proceeding, the debtor is granted a moratorium and has the chance to reach a settlement agreement with the creditors in order to restore its solvency. If the application meets the formal requirements prescribed by law, a temporary moratorium is immediately and automatically granted to the debtor upon its application for a restructuring proceeding. If the court decides to commence the restructuring procedure, the temporary moratorium will be replaced by a moratorium which lasts for 120 days from the date of the order onwards. The moratorium may be extended to 240 days (with a simple majority of each of, the secured and unsecured classes of creditors) or to 365 days (with a two-thirds majority of each of, the secured and unsecured classes of creditors).

The moratorium serves the protection of the debtor's assets. This means, in particular, that during the moratorium (i) set-offs against the debtor are not possible (however, a set-off claim may be enforced in ongoing lawsuits filed by the debtor if submitted before the start of the restructuring proceeding); (ii) in principle, payment orders may not be satisfied from the debtor's accounts or submitted against the debtor; (iii) the enforcement of money claims is suspended (with certain exceptions); and (iv) secured cre-

ditors are barred from enforcing their pledges.

In the case of a restructuring proceeding, the debtor does not lose the right to dispose of its assets. He is generally entitled it in the ordinary course of business. However, for assuming new obligations and paying debts, the consent of the administrator (*vagyonfelügyelő*) is required.

RESTRUCTURING PLAN HEARING

The first settlement conference (*csődegyezségi tárgyalás*) takes place within 60 days after the start of the restructuring proceeding. All registered creditors are invited by the administrator. However, only creditors whose claims have been confirmed by the administrator have the right to vote.

A settlement agreement will only qualify as adopted if a simple majority of each of the secured and unsecured classes of creditors vote in favour of it. In such case, dissenting creditors are overruled and bound by the settlement agreement (if it is also approved by the court).

The debtor and the creditors can freely determine the terms of the settlement agreement, including an agreement on the release of debts, payment relief arrangements, the establishment of securities, debt-equity swaps etc. A minimum debt repayment quota is not prescribed by law. However, the settlement agreement must be approved by the court. The court is obliged to deny its approval if the settlement agreement does not meet the concept of exercising right in good faith (*jóhiszemű joggyakorlás elve*).

Ending of Insolvency Proceedings

Both compulsory liquidation and restructuring proceedings are closed by a formal resolution of the court. Liquidation proceedings are closed after the distribution of all assets, i.e. the liquidation of the debtor.
Restructuring proceedings are formally closed after a settlement agreement – which is based on the restructuring plan – is adopted by the creditors and approved by the court. The debtor is then obliged to fulfil the terms of the agreement at the time and within the period stipulated in it. If payments are not made in such a timely manner, a compulsory liquidation procedure can be initiated.

If no settlement agreement is reached in the restructuring proceeding or if it is not approved by the court, the court closes the restructuring proceeding and orders the company's compulsory liquidation.

Special Rules for Insolvency Proceedings of Strategically Important Companies

The Hungarian government may issue a decree stating that a company is of strategic importance. A company can only be declared strategically important if (i) its operations are strategically important for the Hungarian economy; (ii) reorganisation is in the national interest; or (iii) its winding up in a swift, transparent and unified process is important for the national economy.

The Hungarian Restructuring and Insolvency Act includes special rules that apply to insolvency proceedings of strategically important companies. Most of these rules aim at (i) a swift process, therefore the general deadlines set forth in the Hungarian Restructuring and Insolvency Act are reduced; and (ii) the sale of the assets on a going concern basis. For a company of strategic importance, the Hungarian court will appoint a state liquidator to act as the supervisor with regard to the company's assets.

Further special rules apply if a company of strategic importance or its facilities are also under national security protection or provide public service of strategic significance. It is again the Hungarian government that can order the application of these further rules, provided that it is unlikely that the insolvency situation of the company can be rectified and a state or shareholder subsidy cannot be granted either, but it is in the public interest to sell the company's assets as a going concern.

International Aspects

According to EC Regulation No. 1346/2000, insolvency proceedings performed in other Member States of the European Union are recognized in Hungary.

If the EC Regulation is not applicable, an insolvency proceeding involving a foreign company and its outcome are generally recognised in Hungary, unless (i) the recognition of the relevant court orders would violate Hungarian public order; (ii) the debtor did not participate in the process; or (iii) the proceeding significantly violated the principles of Hungarian laws on due process.

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ROMA
NIA

FORMAL INSOLVENCY PROCEEDINGS AND TESTS FOR INSOLVENCY

Main Insolvency Proceedings

Insolvency proceeding are regulated by the Romanian Insolvency Act, No. 85/2014 on Insolvency Prevention and Proceedings, published in the Official Journal of Romania of 25 June 2014, subsequently amended and supplemented by Law No. 312/2015 on the Recovery and Resolution of Credit Institutions and Investment Companies as well as on amending and supplementing certain normative acts in the financial area (the *"Romanian Insolvency Act"*).

The changes implemented by the Romanian Insolvency Act are intended to bring together both the provisions on insolvency prevention and proper insolvency proceedings. Its main purpose is to create the conditions for the recovery of indebted companies.

The two proceedings provided by the Romanian Insolvency Act are: (i) judicial reorganization proceedings (*reoganizare judiciară*), which aim to give the debtor the chance to recover its business effectively and (ii) bankruptcy proceedings (*faliment*), which aim to liquidate all assets and satisfy creditors. General insolvency proceeding are complex proceedings, characterised by several specific stages. The first stage is the observation period (*perioada de observație*), which takes place prior to the opening of insolvency proceedings in front of the syndic judge (*judecător sindic*). The observation period is important due to the fact that within such period, the debtor takes business decisions in order to overcome the financial distress it is experiencing. Contracts and any other agreements concluded during the observation period have to be analysed by the syndic judge, who may decide whether or not such contracts and agreements may be effective.

After the observation period and provided that the business of the debtor can be carried on, the proceedings continue with the judicial reorganization phase. In case the business of the debtor cannot be continued, the rules relating to bankruptcy proceedings will apply.

Another classification made by the Romanian Insolvency Act stipulates that general insolvency proceedings, as provided above, and simplified insolvency proceedings, are applicable only to certain categories of professionals (natural or legal persons).

During simplified insolvency proceedings, the debtor is directly subjected to the bankruptcy proceedings (i.e. bankruptcy proceedings are commenced either immediately or after an observation period of 20 days).

JUDICIAL REORGANISATION AND REORGANISATION PLAN

In case the debtor's business is recoverable, the debtor may apply for judicial reorganization proceedings to be initiated. The syndic judge approves judicial reorganization proceedings for the business of the debtor based on a court decision.

Where the claim for judicial reorganization proceedings is approved, the debtor provides its creditors and the syndic judge with a reorganisation plan. The main purpose of the reorganisation plan is in displaying how the restructuring of the debtor's business should be effected. The reorganisation plan needs to be approved by the creditors and confirmed by the court.

The reorganisation plan may include the restructuring and continuation of the activity of the debtor or the liquidation of certain assets. In practice, the reorganisation plan contains both the restructuring and the liquidation of certain assets or activity sectors.

Under the Romanian Insolvency Act, it is generally possible to open restructuring instead of bankruptcy (i.e. liquidation) proceedings if the business of the debtor is recoverable. The proceedings can either be conducted by an administrator or by means of self-administration of the debtor. The latter is only possible if the syndic judge does not deny the right to self-administration.

If the reorganization proceedings fail, the debtor becomes subject to bankruptcy proceedings.

BANKRUPTCY PROCEEDINGS

Bankruptcy proceedings apply in the following situations:

a) the debtor expresses its intention to undergo simplified proceedings;

b) the debtor did not express its intention to reorganise its activity or the reorganisation plan is invalid for not observing one of the mandatory legal provisions;

c) the debtor expresses its intention to reorganise its activity, however, the reorganisation plan is invalid for not observing one of the mandatory legal provisions;

d) the report of the insolvency administrator proposing the opening of bank-

ruptcy proceedings was approved by the syndic judge;

e) if an application for insolvency is filed by a creditor and relates to a debt amounting to at least RON 40,000.00 (approx. EUR 9,000.00) and which is older than 60 days.

TESTS FOR INSOLVENCY

Under the Romanian Insolvency Act, insolvency is the state of patrimony of the debtor characterised by insufficient funds to fulfil its payment obligations for cert (i.e. uncontested), liquid (i.e. determined and determinable) and due debt (*creanță certă, lichidăși exigibilă*) vis-à-vis its creditor(s), as follows:

(i) the debtor's insolvency can be presumed if, within 60 days of maturity, the debtor has not fulfilled its payment obligation(s) vis-à-vis its creditor(s). The presumption is relative (*prezumție relativă*);

(ii) the insolvency of the debtor is imminent when it can be proven that upon maturity, the debtor will not be able to fulfil its payment obligations vis-à-vis its creditor(s) with the funds available at maturity.

Insolvency/bankruptcy proceedings are opened by a decision of the syndic judge based on a motivated court decision.

All costs relating to the proceedings and as provided by the Romanian Insolvency Act, including all document communication costs, are borne by the debtor.

If there is a lack of funds in the account of the debtor or only limited funds are available, payments for insolvency proceedings are paid from a special liquidation account (c.f. Government Emergency Ordinance no. 86/2006 related to the activity of the insolvency practitioner).

Procedural Aspects

Insolvency proceedings start with a claim filed either by the debtor, by one or more of the creditors or by certain persons or institutions expressly stated by law.

A claim filed by the debtor itself has to be submitted within 30 days of insolvency occurring and must include an attachment that serves as proof that the competent fiscal authority has been notified of the intention to open insolvency proceedings.

If the claim is filed by a creditor, it must contain the amount and the basis of the debt and, if applicable, the existence of a right of preference established by the debtor or by law, existence of insurance measures on the debtor's goods, a declaration

of intent to participate in the debtor's reorganisation and, at least in principle, the way the creditor will participate in the reorganisation.

According to the provisions of the Romanian Insolvency Act, the minimum amount of debt required to file a claim for opening insolvency proceedings (either by the creditor or by the debtor) is RON 40,000.00 (approx. EUR 9,000.00) for debts other than salary debts. For employees, the minimum amount is six gross average salaries.

Summons, notifications and communications relating to procedural acts performed by the court and the insolvency administrator/liquidator as well as other acts which are mandatory as per the law, are published in the Insolvency Proceedings Bulletin, once the insolvency proceedings get under way.

Once the court has issued a final decision to initiate insolvency proceedings, all documents and correspondence issued by the debtor, the insolvency administrator or the liquidator will mandatorily include the wording *"în insolvență"*, *"in insolvency"*, *"en procedure collective"*, written in Romanian, English and French. After the beginning of the judicial reorganisation proceedings or the bankruptcy proceedings, documents and correspondence will include the wording *"in reorganizare judiciară"*, *"in judicial reorganization"*, *"en redressement"* or *"in faliment"*, *"in bankruptcy"*, *"en faillite"*. The same will apply in the case of simplified insolvency proceedings (i.e. *"in faliment"*, *"in bankruptcy"*, *"en faillite"*).

If the debtor owns or administers one or more internet pages, its representatives are obliged to publish on such internet pages information on the situation of the company as well as the number of the decision which initiated the proceedings, the date on which the decision was issued and the court which issued the decision. This has to be done within 24 hours from the communication date of the decision by means of which the insolvency proceedings were initiated.

The creditors' summons has to be published in the Insolvency Proceedings Bulletin at least five days prior to the meeting. It has to include the agenda of the meeting.

Pre-Insolvency Restructuring & Refinancing

The reorganisation of companies in distress obviously requires a good understanding not only of the legal aspects, but

also of the economic needs and expectations of all parties involved, such as debtors, creditors (e.g. banks), directors and shareholders. There is a great variety of contractual freedom under Romanian law and it is common practice, in particular with banks as a major creditor group, to agree on certain measures with all stakeholders in a pre-insolvency scenario.

Once the court opens insolvency proceedings, such proceedings will follow the course provided by the Romanian Insolvency Act. Thus, it is no longer possible to conclude an out-of-court agreement.

DISTRESSED M&A

Romanian law does not provide special rules on "*pre-packaged deals*" in a pre-insolvency scenario.

It should be noted that, in the event of insolvency, both the insolvency administrator and the creditors' assembly may submit claims for the annulment of fraudulent acts taken by the debtor, as well as such acts and operations that damaged the creditors.

M&A deals concluded prior to the opening of insolvency proceedings should not prejudice the creditors' rights. Hence, they may also be subject to avoidance.

Creditors' Role

The creditors have an important role in insolvency proceedings in Romania. They are acting through the creditors' assembly which may appoint a creditors' committee composed of three or five creditors during the first meeting. It has to be noted that only creditors with a voting right can be appointed.

The creditors' role is highlighted by the prerogatives given to the creditors' committee, such as analysing the report drafted by the insolvency administrator or liquidator, the possibility of challenging the report, requesting withdrawal of the debtor's right to manage its business, submitting claims regarding the annulment of the debtor's fraudulent acts and operations that damaged the creditors, if such claims were not already submitted by the insolvency administrator or the liquidator.

The creditors are divided into two categories: (i) secured or preferential creditors and (ii) unsecured creditors.

UNSECURED CREDITORS

Unsecured creditors (*creditori chirografari*) are creditors registered in the table of debts which are not entitled to preferential treatment. This category also includes secured creditors whose claims are,

however, not fully covered by the value of the privileges, mortgages or pledges.

After insolvency proceedings have been opened, the insolvency administrator will send a notification to all creditors included in the list submitted by the debtor as well as to the debtor and the Trade Registry Office, or, if applicable, to the Agricultural Registry of the Companies or any other registers in which the debtor is registered, in order to announce the commencement of the proceeding.

Any creditor may submit a claim for registration with the creditors' assembly within the period provided for notification, as mentioned above. The Romanian Insolvency Act, however, stipulates that this period may not exceed 45 days from the date of the opening of insolvency proceedings.

After verifying the claims, the insolvency administrator/liquidator will draft the preliminary table including all debts against the debtor's goods. This table then has to be submitted to the competent court. The preliminary table will be published in the Insolvency Proceedings Bulletin.

Upon publication of this preliminary table, the insolvency administrator/liquidator will send notifications to the creditors whose debts or preferential rights were partially included or not included in the table, where applicable giving reasons for their non-consideration.

SECURED CREDITORS

Secured debts are defined by the Romanian Insolvency Act as debts with a right of privilege and/or a right of mortgage and/or a right equivalent to a mortgage and/or a right of pledge over the debtor's goods.

Secured debts will be registered in the final table of creditors up to the market value of the assets established as guarantee (e.g. a pledge or mortgage). The respective evaluation is done by the insolvency administrator or the liquidator.

If assets linked to preferential rights are sold at a higher price than the amount registered in the final table of creditors, the difference will also benefit the secured creditor (even if the exceeding part of its debt had been registered as an unsecured debt. This procedure also applies in case the reorganisation plan fails and thus the debtor's goods are sold in the course of bankruptcy proceedings.

OPPOSITION TO THE OPENING OF INSOLVENCY PROCEEDINGS

Pursuant to the Romanian Insolvency Act, creditors can file an objection to the commencement of proceedings within 10 days of the receipt of the notification.

Any creditor unsatisfied by the opening of proceedings has the legal possibility to file such an objection.

PRIORITY CLAIMS

Priority claims are defined as claims against the insolvency estate that are satisfied prior to the claims of all other insolvency creditors. Priority claims are reduced to certain kinds of claims such as (i) certain liquid and due claims arising during insolvency proceedings and (ii) expenses related to insolvency proceedings.

INSOLVENCY CLAIMS

According to the Romanian Insolvency Act, an insolvency claim is defined as the possibility provided to any creditor to submit a claim for registration with the creditors' table within a period stipulated in the court's decision on the opening of insolvency proceedings.

Such insolvency claims may be submitted by any creditor irrespective of the category the creditor belongs to.

VOIDANCE CLAIMS

According to the Romanian Insolvency Act, the insolvency administrator/liquidator may submit to the syndic judge claims for the annulment of certain acts and transactions of the debtor that were undertaken in the two years prior to the opening of insolvency proceedings.

The following acts and operations may be subject to such claims:

(i) free of charge acts, except for humanitarian sponsorship;

(ii) operations where the debtor's performance clearly exceeds the consideration received, performed within 6 months prior to the opening of insolvency proceedings;

(iii) acts concluded within two years prior to the opening of insolvency proceedings with the intention of all parties involved to (a) withdraw goods from the creditors' control or (b) damage their rights in any other way;

(iv) property transfers to a creditor in order to settle a former debt or provide it with a benefit of any kind, performed within six months prior to the opening of proceedings if the amount that may be obtained by the creditor in case of

bankruptcy of the debtor is smaller than the value of the transfer;

(v) establishment of a preferential right for a claim that was an unsecured debt within six months prior to the opening of insolvency proceedings;

(vi) advance payments performed within six months prior to the opening of insolvency proceedings if their due date had been fixed for a date after the opening date of insolvency proceedings;

(vii) acts of transfer or undertaking obligations by the debtor within a period of two years prior to the opening of insolvency proceedings with the intention to hide or delay insolvency or commit fraud against a creditor.

A claim for the annulment of such a transaction must be filed within one year of the expiry date set for drafting the report on the causes and circumstances which led to insolvency of the debtor, however no later than 16 months from the date on which insolvency proceedings were opened.

Management Liability

According to the Romanian Companies Act, the administrative board of a company has the fundamental competence of filing the claim for the opening of the insolvency proceedings, which cannot be delegated to the executive.

It should be noted that the Romanian Insolvency Act provides the possibility of submitting claims against the members of the management, directors and auditors if they can be made responsible for the debtor's insolvency. It also establishes the possibility to notify the criminal investigation authorities in this regard.

Running the Business

ROLE OF THE DEBTOR

During the observation proceedings or the reorganisation period, the debtor's right of administration is exercised through a special administrator under direct supervision of the insolvency administrator. The right of self-administration is lost as a result of bankruptcy proceedings.

Any act performed by the debtor that violates the above is sanctioned with absolute nullity.

ROLE OF THE INSOLVENCY ADMINISTRATOR

The insolvency administrator plays an important role throughout the proceedings. Its main duties are to analyse the

economic situation of the debtor and all necessary documents, draft a report proposing either the commencement of simplified proceedings or continuation of the observation period within the general proceedings, draft the reorganisation plan and terminate certain contracts concluded by the debtor.

The insolvency administrator is obliged to notify the syndic judge in connection with any important matter related to the debtor company that should be solved by the syndic judge (e.g. submitting claims for the annulment of the debtor's fraudulent acts or operations concluded at the expense of the creditors' rights).

Also, it is mandatory for the insolvency administrator to submit a monthly report describing the fulfilment of its duties, justifying the expenses made in connection with the administration of the insolvency proceedings and, if necessary, the inventory status.

Once the syndic judge appoints a liquidator, the insolvency administrator's powers are passed to the liquidator, who then has administrative power over the debtor.

EFFECT ON WORK FORCE AND EMPLOYEES

According to the Romanian Insolvency Act, all active employment contracts stay in force during insolvency proceedings.

Nevertheless, an employer who is subject to insolvency proceedings is not prohibited from terminating employment contracts after the proceedings were opened. This management decision will be made either by the debtor itself if its administration right has not been withdrawn or by the insolvency administrator.

Thus, the Romanian Insolvency Act provides the possibility for the insolvency administrator/liquidator to terminate individual employment contracts. However, this requires prior notice to be given in accordance with the Romanian Labour Code.

Unless the administration right has been withdrawn from the debtor, the prior approval of the insolvency administrator is mandatory if restructuring measures or other changes are made with respect to collective employment contracts.

Please note that even though the insolvency administrator is obliged to observe the collective dismissal procedure, the terms provided by certain articles of

the Romanian Labour Code are reduced in the course of insolvency proceedings.

EFFECT ON CONTRACTS AND TERMINATION RIGHTS

The opening of insolvency proceedings has different impacts on contracts, depending on the type of the contract concluded.

If a contracting party has entirely fulfilled its contractual obligations and has not received the entire consideration from the debtor after the opening of insolvency proceedings, such contracting party, in its capacity as creditor, may file a claim for opening insolvency proceedings. If the debtor has already fulfilled its obligations, the other party is obliged to perform its obligations vis-à-vis the insolvency estate in full.

The Romanian Insolvency Act provides that ongoing contracts remain in force once insolvency proceedings are opened. Within three months of the date on which insolvency proceedings are opened, the insolvency administrator/liquidator may terminate any contract, unexpired lease contracts or other long-term contracts as long as these contracts were not entirely executed by all contractual parties. Should the insolvency administrator or liquidator deem it necessary to maintain the contract, it is obliged to report every three months on whether the debtor has the necessary funds to fulfil its contractual obligations.

It should also be noted that, under the Romanian Insolvency Act, service providers (such as electricity, natural gases, water, telephone services, etc.), have no right to change, refuse or temporarily interrupt the services they provide to the debtor or in connection with its property if the debtor has the quality of a captive consumer (consummator captiv) during the observation period or during the reorganisation period. The debtor is obliged to pay for such services within a payment term of 90 days.

Formal Restructuring Proceedings

The Romanian Insolvency Act contains certain provisions in relation to the restructuring of a company at an early stage of financial distress. In practice, however, the provisions for restructuring a company at an early stage of financial distress are of rather minor significance and restructuring proceedings are typically conducted in accordance with the legal provisions in court, if out-of-court settlement is not successful.

The Romanian Insolvency Act further provides insolvency prevention proceedings such as the ad hoc mandate (mandat ad-hoc) or the preventive arrangement (concordat preventiv); these are legal instruments that serve the purpose of avoiding typical insolvency proceeding before the syndic judge.

AD HOC MANDATE

The ad hoc mandate represents a confidential procedure initiated before the syndic judge upon the request of a debtor in financial distress. In this case, the court appoints an ad hoc trustee who negotiates with the creditors of the debtor in distress. The aim of the ad hoc mandate is to reach agreement so as to overcome such financial distress.

PREVENTIVE ARRANGEMENT

The preventive arrangement is a legal instrument by which a debtor in financial distress may ask the syndic judge to approve an agreement with its creditors representing more than 75% of the debt in order to obtain financial recovery.

ENDING OF INSOLVENCY PROCEEDINGS

Both bankruptcy and restructuring proceedings are closed by a formal resolution of the insolvency court. Bankruptcy proceedings are closed after the distribution of all assets, i.e. the liquidation of the debtor.

Restructuring proceedings are formally closed after the creditors adopt a restructuring plan. The debtor then has the duty to fulfil the restructuring plan at the dates and within the periods stipulated in the restructuring plan. If the payments are not performed in due time as stipulated in the restructuring plan, bankruptcy proceedings will apply.

International Aspects

According to EC Regulation No. 1346/2000, insolvency proceedings in other Member States of the European Union are recognised in Romania.

The Romanian Insolvency Act contains provisions with respect to the applicable procedural rules in private international relations as regards insolvency proceedings as well as provisions referring to the recognition of proceedings in third countries.

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SLOVAK
REPUBLIC

FORMAL INSOLVENCY PROCEEDINGS AND TESTS FOR INSOLVENCY

Introduction

Slovakian insolvency proceedings are regulated by Act No. 7/2005 Coll. on Bankruptcy and Restructuring (*Zákon o konkurze a reštrukturalizácii, "Insolvency Act*") which was significantly amended in 2015. The most recent amendment of the Insolvency Act established several new instruments which provide better protection for creditors and ensure higher proportional satisfaction of their claims, mainly by imposing more rigid obligations on debtors and trustees by adopting preventive and restrictive measures. On the other hand, the new regulation has also raised many questions regarding its interpretation as it suffers from several imperfections and is contradictory in some aspects. Most importantly, it changed the legal regime relating to restructuring proceedings that were started on the basis of the former regulation, which might be in contradiction with the legal principles of non-retroactivity and legal certainty.

In this guide we will provide a general overview of the most important aspects of the Slovakian insolvency regime.

MAIN INSOLVENCY PROCEEDINGS

The Insolvency Act provides for uniform insolvency proceedings. They are either carried out as so-called restructuring proceedings (*Rešrukturalizácia*) where the general aim is to keep on running the business of the debtor during and after the proceedings without the debtor being liquidated; or a bankruptcy proceeding (*Konkurzné konanie*) with the aim to liquidate all assets and distribute all funds available to the creditors.

In restructuring proceedings, the debtor files for the opening of proceedings and at the same time submits a restructuring plan (*Reštrukturalizačný plán*). Restructuring proceedings are administered by a restructuring administrator (*Reštrukturalizačný správca*).

If restructuring proceeding fails, they are transformed by court order into bankruptcy proceedings. The latter are liquidation proceedings related to all available assets. Its aim is to terminate the debtor and distribute all available funds to the creditors.

The debtor or its creditors may file for the opening of bankruptcy proceeding directly, i.e. without previously filing for

restructuring proceedings, if the statutory conditions are met.

TESTS FOR INSOLVENCY

Under the Insolvency Act, the opening of insolvency proceedings requires either illiquidity (*Platobná neschopnosť*) or over-indebtedness (*Predlženosť*) of the debtor. Restructuring proceedings, however, may already be applied for when insolvency is impending.

Illiquidity, as defined by the Insolvency Act, is the inability to fulfil (i) at least two monetary obligations, (ii) to more than one creditor, (iii) within 30 days of their due date. Illiquidity may be presumed (i) when enforcement of a monetary obligation against the debtor by means of an enforcement proceeding does not succeed; or (ii) when the debtor fails to fulfil certain obligations which apply if a creditor files a petition for the initiation of bankruptcy proceedings (i.e. as described below, the obligation to give a statement to the creditor's petition and the obligation to supply evidence of its solvency within a certain period).

Over-indebtedness only applies to debtors which are obliged to keep accounts (e.g. corporations). Over-indebtedness means that the debtor (i) has more than one creditor and (ii) the value of its obligations exceeds the value of its assets and property.

It should be noted that in order to open insolvency proceedings sufficient assets are required to cover the costs of the proceedings.

Bankruptcy Proceedings

Initiation of Bankruptcy Proceedings, Declaration of Bankruptcy and its Effects

The petition for opening bankruptcy proceedings might either be filed by the debtor himself or by a creditor.

The opening of bankruptcy proceedings, as well as other crucial acts during these proceedings, is made public by means of publishing the respective court's resolutions or acts of the administrator in the Commercial Bulletin (*Obchodný vestník*).

If the petition for bankruptcy is perfect, the court issues a resolution on the opening of the bankruptcy proceedings within 15 days of delivery of the petition. Such resolution must be published in the Commercial Bulletin without undue delay. Publication of this resolution means the bankruptcy proceedings are legally effective and the proceedings are officially initiated. The initiation of

bankruptcy proceeding has the following effects: (i) the debtor is only entitled to execute common legal acts; any other acts may be contested in bankruptcy; (ii) pending enforcement proceedings against the debtor are suspended and no new enforcement proceedings are initiated; (iii) the exercise of a security right may not be initiated or continued (however, there are certain statutory exemptions); (iv) proceedings on winding-up the debtor without liquidation are suspended; and (v) no resolutions on mergers or dissolutions of the debtor are passed or entered into the Commercial Register.

If the petition for bankruptcy proceedings was filed by the debtor, within 5 days the court either declares the debtor bankrupt (if there are no doubts about the insolvency of the debtor) or appoints a preliminary administrator (*Predbežný správca*) whose task is to investigate the debtor's insolvency status. In case the petition for bankruptcy was filed by a creditor, the court (also within 5 days of the initiation of the bankruptcy proceedings) sends a counterpart of the petition to the debtor, requesting its statement on the matter. The debtor then has the possibility to prove its solvency within 20 days of delivery of the request. Further, the court sets a date for a court hearing to which the debtor and the creditors specified in the petition must attend. If the debtor fails to prove its solvency or does not give its statement within the above mentioned period, the court declares bankruptcy. If there are any doubts as to the debtor's insolvency, the court will appoint a preliminary administrator before declaring bankruptcy.

In case the insolvency of the debtor is proved, the court declares bankruptcy of the debtor, provided that the debtor has sufficient assets to cover the costs of the bankruptcy. In Slovakia, there is a significant difference between the initiation of bankruptcy proceedings and the initiation of the bankruptcy (*Konkurz*), which is a certain stage, namely the main stage of bankruptcy proceedings. The initiation of each stage has different effects.

Bankruptcy is initiated upon publication of the resolution on the declaration of bankruptcy (*Vyhlásenie konkurzu*) in the Commercial Bulletin. In its resolution, the court (i) declares bankruptcy, (ii) appoints an administrator and (iii) calls for creditors to lodge their claims within the statutory period of 45 days from the declaration of bankruptcy.

The declaration of bankruptcy has the following main effects: (i) from now on, the debtor is defined as "the bankrupt"

(*Úpadca*); (ii) the right of disposition with regard to the bankruptcy assets (as defined below) is transferred to the administrator (*Správca*); (iii) any undue receivables and obligations of the bankrupt are deemed as being due; (iv) no security right may arise in relation to the bankruptcy assets, except for a lien relating to future property if it was established and duly registered before the declaration of bankruptcy; (v) termination of or withdrawal from an unfulfilled contract is governed by special rules; (vi) any receivables subject to bankruptcy shall be fulfilled by debtors to the administrator; (vii) the bankrupt's unilateral legal acts become extinct if they relate to bankruptcy assets; (viii) the possibility of offsetting receivables is limited by statutory conditions; (ix) contractual agreements prohibiting the assignment of receivables are ineffective; (x) authorisation to act on behalf of the bankrupt in employment relationships passes to the administrator; (xi) all court and other proceedings that relate to bankruptcy assets are suspended, save for certain statutory exceptions; (xii) court and other proceedings are initiated only upon a petition of the administrator or upon a petition filed against the administrator; (xiii) no enforcement proceedings may be initiated with respect to bankruptcy assets; (xiv) any pending enforcement proceedings are terminated; and (xv) the administrator must grant consent to any merger or dissolution of the bankrupt.

BANKRUPTCY ASSETS AND LIST OF PROPERTY

The term "bankruptcy assets" (*Konkurzná podstata*) defines the bankrupt's property which is subject to bankruptcy. They include (i) property that belonged to the bankrupt at the time of the declaration of bankruptcy; (ii) property acquired during bankruptcy; (iii) property that secures the bankrupt's obligations; and (iv) other property stipulated by law.

The bankruptcy assets are divided into general assets (*Všeobecná podstata*) and individual, separated assets of secured creditors (*Oddelená podstata*). Separated assets are assets securing a receivable of a secured creditor (*Zabezpečený veriteľ*) with the consequence that only this particular creditor may be satisfied from the proceeds of the separated asset. The general assets, however, are assets to which no creditor has any special rights. Unsecured creditors (*Nezabezpečení veritelia*) are satisfied from those general assets. Furthermore, secured creditors who were not fully satisfied from their separated assets receive payment from the proceeds of the general assets.

Moreover, the Insolvency Act stipulates that certain property cannot be subject to bankruptcy (e.g. property that may not be the subject of enforcement proceedings).

For the purpose of proper and complete conversion of the bankruptcy assets (*Speňažovanie*) into money as well as the highest possible satisfaction of the bankrupt's creditors, the administrator is obliged to ascertain the bankruptcy assets throughout the bankruptcy proceedings. The ascertainment (*Zisťovanie majetku*) is based particularly on the list of property submitted by the bankrupt, statements of the bankrupt and other parties and the administrator's own investigations.

The administrator prepares a list of the bankruptcy assets (*Súpis majetku*) which is a document entitling the administrator to convert the listed property into money. The administrator draws up separate lists for the general assets and for each separated asset. As soon as property is included in the list, no person other than the administrator may transfer this property, lease it long-term, establish the right of another over the property or otherwise reduce its value or liquidity. The list must be drawn up within 60 days of the declaration of bankruptcy and has to be published in the Commercial Bulletin without undue delay. Furthermore, the administrator is obliged to update the list on a regular basis. If property which is legally owned by someone else other than the bankrupt is included in the list, the rightful owner may file an action for the exclusion of said property (*Vylučovacia žaloba*) against the administrator.

ADMINISTRATION OF THE PROPERTY

The administration of the bankruptcy assets is vested in the administrator who is bound by instructions and recommendations of the creditors' committee (*Veriteľský výbor*), the secured creditors or the competent court and is required to administer the property with professional care.

CONVERSION OF BANKRUPTCY ASSETS INTO MONEY

After the bankruptcy assets are duly ascertained, the administrator attends to their conversion into money. This means that all bankruptcy assets are converted into funds in order to satisfy the creditors, securing the cash of the bankrupt, receiving fulfilment from the bankrupt's monetary receivables and payments related to the transfer of the bankrupt's enterprise or part(s) thereof. The purpose of the conversion of the bankruptcy assets into money is to maximise the proceeds in a short period of time and keep expenses low. The manner of conversion of property into money is sti-

pulated by the Insolvency Act and reads as follows: (i) public tender; (ii) authorization of an auctioneer to sell the property; (iii) authorization of a securities trader to sell the property; (iv) organising an auction, tendering procedure or other competition processes which lead to the sale of the property; and (v) other appropriate manners. While converting the property into money, the administrator is bound by the instructions of the creditors' committee, the secured creditors or the competent court and must proceed with professional care.

Creditors' Role

Generally, creditors such as banks and other business partners as well as employees play a key role in bankruptcy proceedings in Slovakia. There are, however, merely two classes of creditors: secured and unsecured.

UNSECURED CREDITORS

Unsecured creditors are creditors whose receivables against the bankrupt are not secured by any security right and do not belong to any other category of receivables within bankruptcy proceedings. Unsecured creditors are satisfied from the proceeds from the sale of general assets. Their claims are enforced in bankruptcy proceedings by means of lodging a claim.

SECURED CREDITORS

Secured creditors are creditors whose receivables against the bankrupt are secured by a security right. Their claims are settled (to the ascertained extent) from the proceeds from the conversion of the separated assets (after deducting priority claims against the separated assets). If a secured receivable is not fully satisfied, the remaining part is settled as an unsecured receivable. Secured creditors' receivables are enforced in bankruptcy proceedings by means of lodging a claim.

LODGING OF CLAIMS

A claim is lodged in one counterpart with the administrator and in one counterpart with the court within 45 days of the declaration of the stage of bankruptcy. If a creditor delivers the claim to the administrator after this deadline has expired, the claim is taken into account but the creditor may not exercise any voting right or other rights in connection with the lodged claim. However, the right to proportionate satisfaction of the creditor is not affected.

Where a secured receivable is concerned, the security right is also duly specified in a timely manner and described in the claim delivered to the administrator within a period of 45 days from the declaration of bankruptcy, otherwise it will expire.

A lodged receivable may be disputed (*Popretá pohľadávka*). The administrator or other creditors with lodged receivables may dispute another creditor's lodged claims on legal grounds or due to enforceability, amount, order, the existence of a security right or the order of the security right. Each creditor has the right to request determination of a disputed receivable by a court decision.

In case the administrator acknowledges the claim and no other creditor contests it, the claim is deemed acknowledged and the creditor will be satisfied pro rata in the amount of the bankruptcy debt repayment quota (this quota is usually rather low, e.g. 5 % or 8 % in bankruptcy proceedings).

CREDITORS' BODIES

Meetings of creditors (*Schôdza veritel'ov*) are convened during the bankruptcy in order to identify the opinion of creditors with lodged receivables, elect and remove members of the creditors' committee and replace the administrator. Creditors of acknowledged unsecured receivables elect the creditors' committee at such a meeting of creditors. The first meeting of creditors is convened by the administrator within 55 days after the declaration of bankruptcy. Other meetings of creditors are convened by the administrator on his own initiative or at the request of the court, the creditors' committee or one or more creditors whose voting rights constitute more than 10 % of all voting rights.

PRIORITY CLAIMS

Priority claims (Pohľadávky proti podstate) are receivables that arose after the declaration of bankruptcy and concern the administration of the bankruptcy assets, the conversion of the property into money and the running of the bankrupt's business.

Priority claims are enforced by the administrator and will be settled from either general assets or separated assets on a continual basis and in the order stipulated by the Insolvency Act. If the administrator is unable to settle receivables of the same order in full, he must settle them on a pro rata basis.

SATISFACTION OF CREDITORS

Claimed receivables are settled by the administrator on the basis of a distribution plan (*Rozvrh*).

Unsecured receivables are settled from the distribution of general assets, whereas secured receivables are settled from the distribution of separated assets. If a secured receivable cannot be settled fully,

the remaining part must be treated as an unsecured receivable. Unsecured receivables are settled on a pro rata basis according to their mutual amounts.

Priority claims are satisfied preferentially. Within 45 days of the expiry of the period for contesting priority claims, the administrator draws up a distribution plan which has to be submitted to the creditors' committee and the secured creditors for approval. If the competent body (creditors' committee and secured creditors) does not approve the distribution plan, the administrator subsequently has to submit the plan to the court for its approval.

Based on the approved distribution plan, the administrator releases that part of the proceeds that is not disputed to the creditors without undue delay. The part of the proceeds that is disputed is kept in custody by the administrator and may only be released to the creditors in accordance with the final decision of the court.

SET-OFF OF RESPECTIVE CLAIMS

Generally, a creditor may set off (*započítať*) claims against counter-claims of the bankrupt after the opening of bankruptcy proceedings.

Pursuant to Slovakian law, a set-off is possible if the claims are due and of the same kind.

However, the Insolvency Act also designates certain receivables that cannot be set off. For instance, a receivable of the bankrupt that arose after the declaration of bankruptcy may not be set off against a receivable of a creditor that arose before declaration of bankruptcy.

VOIDANCE CLAIMS AND CLAW-BACK

The Insolvency Act provides that transactions which unduly decrease the assets of the debtor prior to the opening of insolvency proceedings may be contested if certain prerequisites are met. In this regard, transactions which were entered into by the bankrupt and a third party and which discriminate against other creditors might be contested. Formally, the transaction in question would need to be contested by the administrator or by a creditor of a lodged receivable.

The general principles and prerequisites for contesting transactions are as follows: (i) there is a transaction; (ii) the transaction was entered into prior to the opening of the bankruptcy proceedings; (iii) the transaction unduly decreases the assets of the bankrupt; and (iv) the transaction discriminates other creditors;

provided however that (v) a specific contesting provision of the Insolvency Act is fulfilled.

The claim for contesting a transaction must be filed within one year of the declaration of bankruptcy against the liable party at court.

Management Liability

The insolvent debtor is obliged to file a petition on declaration of bankruptcy within 30 days of the ascertainment of its over-indebtedness. This obligation applies only in the case of over-indebtedness (however, the debtor may file a petition also in the case of illiquidity). The debtor's statutory body or its members, as well as the debtor's liquidator, also have to observe this obligation on behalf of the debtor. If they fail to meet this obligation, they have to pay a statutorily stipulated contractual penalty which amounts to half of the statutorily stipulated minimum registered capital of a public limited company. Any damage exceeding the amount of the contractual penalty can also be claimed from the debtor's statutory body, its members or the debtor's liquidator.

The Slovakian Criminal Code (*Trestný zákon*) also contains provisions in connection with bankruptcy proceedings. The most important provisions are: (i) damage to a creditor, (ii) favouring of a creditor, (iii) machinations in connection with the bankruptcy and restructuring proceedings, and (iv) obstruction of bankruptcy and restructuring proceedings.

Running the Business

ROLE OF THE DEBTOR

When bankruptcy proceedings are opened, the debtor generally loses its administration and disposition rights. The debtor remains the owner of the assets, but the assets form the so-called "bankruptcy assets" to be used to primarily satisfy the creditors. The right to administer and dispose of the bankruptcy assets generally passes to the administrator.

Any acts taken by the bankrupt after the opening of bankruptcy proceedings that reduce the bankruptcy assets are ineffective towards the creditors.

EFFECT ON WORK FORCE AND EMPLOYEES

According to the Insolvency Act, the insolvency administrator has the authorisation to act on behalf of the bankrupt in employment relationships once bankruptcy has been declared. This is the only direct impact on employees in con-

nection with the opening of insolvency proceedings.

Further, the Slovakian Act No. 311/2001 Coll. Labour Code, as amended, provides special termination rights that offer employers the possibility to terminate employment contracts in case the business is shut down. If only parts of the company are closed, solely employment contracts affected by the shutdown can be terminated.

Employees may claim receivables arising from their employment in bankruptcy proceedings. Claims of employees which have originated after the declaration of bankruptcy and during the month in which bankruptcy was declared are considered priority claims and are therefore subject to preferential treatment and satisfaction.

If an employer becomes insolvent and is not able to satisfy statutorily specified claims, such as wage compensation for holidays of its employees, employees are entitled to guaranteed insurance benefit paid by the Slovak Social Insurance Agency.

EFFECT ON CONTRACTS AND TERMINATION RIGHTS

The opening of bankruptcy proceedings has different impacts on contracts which depend on the status of their fulfilment.

In case a contracting party has entirely fulfilled its contractual obligations prior to the opening of bankruptcy proceedings, but has not received the entire consideration from the bankrupt, the contracting party may withdraw from the contract. However, entitlements resulting from the withdrawal of the other contracting party may solely be filed in the bankruptcy proceedings as a claim of a contingent receivable. On the other hand, in case the debtor has already fulfilled its obligations, the administrator may demand fulfilment of the contract by the other party or may withdraw from the contract.

Special provisions apply in case both sides have not yet fulfilled each of their obligations in their entirety. In such case, the administrator, as well as the other contractual party, is entitled to withdraw from the contract. Entitlements of the other contracting party which result from withdrawal may solely be filed in the bankruptcy proceeding as a claim relating to a contingent receivable.

If the bankrupt concluded a contract stipulating an obligation to perform a continuous or repeated activity or an obligation to refrain from a certain activity or tolerate a certain activity before the declaration of bankruptcy, the administrator

may terminate the contract by giving two months' notice, unless a shorter period is stipulated by law or under the respective contract.

If the other contracting party is obliged to provide fulfilment in advance under a contract concluded before bankruptcy is declared, it may withhold its fulfilment until mutual fulfilment is provided or secured.

Formal Restructuring Proceedings

Pursuant to the Insolvency Act, it is generally possible to open restructuring proceedings instead of bankruptcy proceedings. The proceedings are also conducted by an administrator. The main goal of restructuring proceedings is to adopt a restructuring plan, thus averting illiquidity or impending insolvency of a debtor by collective satisfaction of creditors in a manner agreed in the restructuring plan. It aims at keeping the debtor's business or at least part of the business alive. The debtor's business activity continues under the strict supervision of the administrator, the court and the creditors' bodies. For a successful restructuring, a higher satisfaction of creditors than in bankruptcy proceedings is expected and required. Contrary to bankruptcy proceedings, the debtor is only limited in its disposition rights regarding its business activities, but the disposition rights are not transferred to the administrator.

RESTRUCTURING OPINION, INITIATION OF RESTRUCTURING PROCEEDINGS AND ITS EFFECTS

In case a debtor is illiquid or if insolvency is impending, such debtor or its creditors may authorise an administrator to draft a restructuring opinion (*Reštrukturalizačný posudok*) for the purpose of determining whether the prerequisites of restructuring are met. The administrator subsequently inspects the financial and business situation of the debtor's business activity. In the restructuring opinion, the administrator has to give a recommendation on whether or not restructuring is feasible. Generally speaking, the administrator recommends the restructuring of a debtor if maintenance of a substantial part of the debtor's business is possible and if a higher satisfaction of creditors can be expected (compared to bankruptcy proceedings).

The petition for opening restructuring proceedings may be filed either by the debtor itself or by a creditor. However, the creditor's filing for opening of restructuring proceedings requires the debtor's consent which must be attached to

the petition. The petition must be filed with the competent court. Together with the petition, a restructuring opinion has to be submitted which recommends a restructuring of the debtor. The opinion may not be older than 30 days.

Should the filed petition be perfect, the court issues a resolution on the initiation of restructuring proceedings within 15 days of delivery of the petition. The resolution is published in the Commercial Bulletin without undue delay. By publishing the resolution in the Commercial Bulletin, the restructuring proceeding is initiated.

The initiation of restructuring proceedings has the following effects: (i) the debtor is obliged to limit the performance of its activity to common legal acts; other acts are subject to the consent of the administrator who drew up the opinion; (ii) no enforcement proceedings over property belonging to the debtor may be initiated in respect of receivables that could be claimed in the restructuring and any pending enforcement proceedings are suspended; (iii) any exercise of a security right over property belonging to the debtor may not be initiated or continued in respect of a secured receivable that could be enforced in the restructuring; (iv) contracting parties may not terminate contracts concluded with the debtor on the grounds that the debtor defaulted in the performance of its obligations under contracts concluded before restructuring proceedings were initiated; (v) contractual agreements allowing the other contractual party to terminate the contract concluded with the debtor or withdraw from such contract on the grounds of restructuring proceedings or bankruptcy proceedings are ineffective; (vi) a receivable that could be claimed during restructuring may not be set off; and (vii) no decision on a merger or dissolution of the debtor may be made or entered into the Commercial Register. The effects of the initiation of restructuring proceedings listed under (ii) to (vi) above form the so-called "debtor's temporary protection against creditors".

RESTRUCTURING PERMIT AND ITS EFFECTS

The competent court decides on whether to grant permission for restructuring within 30 days of the initiation of restructuring proceedings.

The court permits the restructuring if restructuring is recommended in the restructuring opinion and if such opinion is drawn up in accordance with statutory provisions and all conditions for the recommendation of restructuring are met.

Permission is granted by the court in the form of a resolution published in the Commercial Bulletin and by means of which the restructuring, as the main stage of restructuring proceedings, is initiated.

In its resolution, the court (i) appoints an administrator (the administrator who drew up the restructuring opinion); (ii) calls for creditors to submit their claims for receivables within the statutory period of 30 days, and (iii) determines the scope of legal acts that are to be subject to the administrator's consent in the course of the restructuring.

The initiation of restructuring has the following effects: (i) the debtor may perform legal acts stipulated in the court's resolution only with the administrator's consent; (ii) enforcement proceedings over property belonging to the debtor which have been suspended are terminated; and (iii) court and arbitration proceedings on receivables that could be claimed in the restructuring are suspended. Receivables which are not claimed in restructuring are not forfeit; however, they cannot be judicially enforced.

LODGING OF CLAIMS FOR RECEIVABLES AND RIGHTS OF CREDITORS

Claims have to be lodged in one counterpart with the administrator within 30 days of the day on which restructuring was permitted. Any claim lodged after this may not be taken into account.

Lodged claims may be disputed solely by the administrator within 30 days of the lapse of the period for lodging the claims. However, the debtor or creditors with lodged claims are entitled to suggest to the administrator that a claimed receivable should be disputed. The administrator has to inform the respective creditors of the fact that their claims have been contested. Within 30 days of the end of the period for disputing receivables, the creditor of a contested receivable may demand the approval of its claim from the court by filing a respective action.

Creditors who claimed their receivables in the restructuring can exercise their rights through creditors' bodies, i.e. meeting of creditors (*Schôdza veriteľov*) and the creditors' committee (*Veriteľský výbor*).

The purpose of the meeting of creditors is to ascertain the opinion of the creditors and elect a creditors' committee. It is convened and presided over by the administrator who is further supervised by the court. The administrator convenes the meeting by publishing an invitation in the Commercial Bulletin within 30 days of the restructuring permit. All cre-

ditors who lodged their receivables in the restructuring are entitled to participate in the meeting of creditors.

The creditors' committee has three or five members, comprising both secured and unsecured creditors.

SUPERVISION BY THE ADMINISTRATOR AND THE COURT DURING RESTRUCTURING

The administrator supervises the debtor's business activity during restructuring so that the debtor does not reduce the value of its property and does not obstruct the successful completion of the restructuring. On the other hand, the court supervises the administrator as well as the debtor and creditor's bodies.

RESTRUCTURING PLAN

The restructuring plan is a document stipulating the creation, change and expiry of the rights and obligations of the parties stated therein as well as the extent and manner of satisfaction of the creditors of claimed receivables or shareholders of the debtor.

It is drawn up by the debtor (if the petition for restructuring permit was filed by the debtor) or by the administrator (if the petition was filed by a creditor). The plan is divided into a descriptive part (*Opisná časť*) and a binding part (*Záväzná časť*).

The binding part of the plan shall specify all rights and obligations that – according to the plan – are to arise, change or expire with regard to the participants of the plan (*Účastníci plánu*). For the purpose of voting on the adoption of the plan, the binding part shall contain a separation of creditors into several groups: (i) a group for secured receivables; (ii) a group for unsecured receivables; (iii) a group for proprietary rights of the debtor's shareholders (if the plan assumes a change in the proprietary rights of debtor's shareholders, the transfer of the debtor's enterprise or a merger or dissolution of the debtor); and (iv) a group for receivables not affected by the plan.

Receivables and proprietary rights of the debtor's shareholders which are classified in the same group shall be settled to the same degree and in the same manner.

The final draft of the restructuring plan shall be submitted within 90 days from the issuing of the restructuring permit.

PLAN APPROVAL

The restructuring plan shall be approved on two stages: (i) preliminary approval by the creditors' committee; and (ii) ap-

proval by the approval meeting (*Schval'ovacia schôdza*).

If the creditors' committee rejects the submitted draft of the plan or does not approve within statutory periods, the administrator shall petition the court to declare bankruptcy. If, however, the creditors' committee approves the plan, the administrator has to convene the approval meeting.

The approval meeting is presided over by the administrator who is supervised by the court.

The adoption of the plan by the approval meeting requires that (i) each group for secured receivables votes for the adoption of the plan; (ii) in each group for unsecured receivables, an absolute majority of voting creditors votes for the adoption of the plan; (iii) in each group for the proprietary rights of shareholders, an absolute majority of shareholders votes for the adoption of the plan; and (iv) an absolute majority of votes of the creditors present votes for the adoption of the plan. The group of receivables which are not affected by the plan shall be deemed to consent to the plan.

CONFIRMATION OF THE PLAN BY THE COURT

The approved plan shall be subsequently confirmed by resolution of the court. If the required majority is not reached in one or more of the groups, the plan submitter may demand that the court substitutes the approval within such group, provided that the conditions stipulated by the Insolvency Act are fulfilled. Since April 2015, approval of the group for unsecured receivables cannot be substituted by court if the creditors of this group are satisfied within a period exceeding 5 years.

If there are no reasons to reject the plan, the court must confirm the submitted plan by resolution. In this resolution, the court also decides on the completion of restructuring. The resolution is published without undue delay in the Commercial Bulletin.

By publishing the resolution, (i) the plan becomes effective in relation to all participants, including creditors who did not vote for its approval; (ii) the effects of the restructuring are terminated; (iii) the suspended court and arbitration proceedings are terminated; and (iv) creditors of receivables not claimed in the restructuring within the statutory period cannot judicially enforce their receivables.

RECENT AMENDMENT OF THE SLOVAK INSOLVENCY ACT RELATING TO RESTRUCTURING

In April 2015, an important amendment to the Insolvency Act was adopted. The most important changes are two new regimes relating to creditors' claims and the prohibition of distribution of profit and own funds. Following the publication of the court's decision on the completion of restructuring, the debtor may not distribute its profit or own funds to its members before all submitted and acknowledged claims of unsecured creditors are satisfied. In other words, it may only distribute them in case of full (i.e. 100 %) satisfaction of all submitted and acknowledged claims. In this regard, the amendment has introduced two regimes relating to claims.

At least 50 % of the amount of submitted and acknowledged claims must be maintained in full and can be enforced by the creditor by means of a standard enforcement procedure directly after due and complete fulfilment of the restructuring plan. This means that in case the restructuring plan provides for a quota lower than 50 % (e.g. 30 %), the residual amount of the claim up to 50 % (i.e. 20 %) can be enforced directly after fulfilment of the restructuring plan. Until such time as or until the court's ruling on the ineffectiveness of the plan, this residual amount of the claim is unenforceable. The legal title for such enforcement procedure is an excerpt from the list of submitted and acknowledged claims deposited with the restructuring court.

According to the new regulation, the other 50 % of a submitted and acknowledged claim should be considered as another proprietary right. In case the restructured debtor generates profits which exceeds the amount needed for maintaining the operation (of major parts) of its enterprise, the other proprietary right, as stated in the previous sentence, should be satisfied before the profits are distributed to a shareholder. Similar to the residual amount of the claim up to 50 %, the other proprietary right is also unenforceable until complete fulfilment of the plan or until the court ruling on the ineffectiveness of the plan. The main difference between the residual amount of 50 % of the claim and the other proprietary right is that the latter can only be satisfied from future profits of the restructured debtor, whereas the first half of the claim can be satisfied from any property of the restructured debtor.

In case a debtor infringes the prohibition of distribution of profits and own funds before satisfaction of all claims, the restructuring plan becomes ineffective ex lege. Creditors are entitled to file a petition for declaring the infringement of the prohibition of distribution of profits and funds. If the restructured debtor generates profit, but does not distribute it to its members, the creditors are entitled to file a petition seeking additional satisfaction of their claims from the profit stipulated in the debtor's financial statements (except for the part of the profit that the debtor needs to maintain the operation [of major parts] of its enterprise).

DEBT EQUITY SWAP

Pursuant to the recent amendment of the Insolvency Act, the possibility of a swap of unsecured creditors' receivables for equity participation in the debtor is a mandatory part of the restructuring plan.

INEFFECTIVENESS OF THE PLAN

A participant of the plan who voted against the adoption of the plan and further also raised a justified objection against the plan has the right to demand that the court determines the plan as being ineffective in relation to this creditor if certain conditions stipulated by the Slovakian Insolvency Act are fulfilled.

If the court determines the plan ineffective in relation to the creditor, the debtor is obliged to settle the original receivable of the creditor to the extent to which the receivable was claimed and ascertained within the original maturity.

If the plan is ineffective towards a shareholder of the debtor, then the debtor is obliged to pay the shareholder the value of the performance that would correspond to their participation in the liquidation balance of the debtor at the time the plan was confirmed by the court.

SUPERVISORY ADMINISTRATION

After restructuring is complete, a supervisory administration may be imposed in the binding part of the restructuring plan. The supervisory administration is optional and is performed by a supervisory administrator until the complete fulfilment of the plan.

Ending of Insolvency Proceedings

Both bankruptcy and restructuring proceedings are terminated by a formal resolution of the insolvency court. Bankruptcy proceedings are terminated after the distribution of all assets, i.e. the liquidation of the debtor.

Restructuring proceedings are formally closed after the restructuring plan is adopted by the creditors and confirmed by the court. The debtor then has the duty to fulfil the restructuring plan within the time and period stipulated in the restructuring plan. If payments are not made on time, the insolvency proceedings will be reopened.

If it becomes apparent during insolvency proceedings that the assets are not sufficient to cover the costs of the proceedings, the proceedings are terminated due to insufficient assets.

International Aspects

According to the EC Regulation No. 1346/2000, insolvency proceedings in other Member States of the European Union are recognised in Slovakia.

In case the EC Regulation is not applicable, the Slovakian Insolvency Act contains provisions referring to the recognition of proceedings in third countries. Insolvency proceedings and their impact are generally recognised in Slovakia in those cases where (i) the main centre of interest of a debtor is located in another country, and (ii) the proceedings opened abroad are overall comparable in their material aspects to Slovakian insolvency proceedings.

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