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BANKRUPTCY, INSOLVENCY & REHABILITATION PROCEEDINGS: AN INTERNATIONAL GUIDE

ILN RESTRUCTURING & INSOLVENCY GROUP

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Bankruptcy, Insolvency & Rehabilitation Proceedings in Australia

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KEY FACTS OF BANKRUPTCY, INSOLVENCY & REHABILITATION PROCEEDINGS UNDER AUSTRALIAN LAW

Companies

Corporate insolvency in Australia mostly involves a company being placed in liquidation or administration.

Companies can be placed in liquidation by:

1. The directors, or
2. A creditor applying to the court, or
3. An oppressed minority shareholder applying to the Court, or
4. The shareholders, or
5. After an administration process, if a scheme of arrangement is not entered into by the company with its creditors.

A liquidator is appointed to control the affairs of the company to recover funds for creditors.

The liquidator will be a private practitioner who will charge fees for his and his firm's work. Those fees are a priority payment before unsecured creditors are paid.

The liquidator needs to be independent. Liquidators that have had a prior association with the company or its directors can be removed.

The voluntary administration process requires the directors to appoint an Administrator to investigate if the company can be saved, most commonly by a sale of assets or a scheme of arrangement with creditors.

When a company is in administration, there is a moratorium that prevents, among other things, the winding-up of the company, secured parties enforcing security interests, landlords taking possession of leased property, and court action cannot commence or proceed.

A scheme of arrangement usually involves shareholders agreeing to provide funds to pay an amount to creditors to avoid the company being placed in liquidation. There is a limited time for a scheme of arrangement to be proposed.

For example, shareholders might advance funds equal to say 50% of amounts owing to creditors.

A scheme of arrangement requires 75% of the value of the creditors, and a majority in number, to agree. Creditors need to be satisfied that the Scheme of arrangement would create a better return than if the company was placed in liquidation.

The Administrator would usually recommend the scheme of arrangement to creditors if that was the case.

Otherwise, the company will go into liquidation.

The Administrator then becomes the Liquidator.

Liquidators will then take such steps as they can to recover funds for creditors. Those steps often include:

- Asking creditors (including the taxation office) who were paid in the 6 months prior to the liquidation to repay the funds to the liquidator;
- Selling assets;
- Collecting debts, including debts owing by directors or shareholders;
- Recovering uncommercial transactions entered into to defeat the interests of the creditors.

Traps for directors

Liquidators can pursue bad corporate behaviour by directors.

Directors of a company that goes into liquidation can then have a poor credit rating. Banks may then be reluctant to lend to the director or to

any new company, and creditors may be reluctant to extend credit.

If a person is a director of 2 or more companies that have gone into liquidation, and if the return to creditors was less than 50%, the director can be banned from being a director of a company for 5 years.

If the company was trading and incurring debts when the directors ought to have known the company was insolvent, the directors can be held personally liable for any such debts.

Individuals

Personal insolvency is called bankruptcy in Australia.

A person who is unable to pay his or her debts, can declare themselves bankrupt, or a creditor can apply to the Court to bankrupt an individual, if they have a judgment against them for at least $5,000.

Bankruptcy releases a person from unsecured debts and allow them to make a fresh start.

Bankruptcy normally lasts for 3 years and 1 day. It can be extended for up to 8 years most commonly if a person's bankruptcy Trustee has reason to believe that the person has not been truthful about their affairs.

When a person becomes bankrupt a Trustee is appointed. A Trustee is a person who manages your bankruptcy.

A bankrupt person must provide details of their debts, income, and assets to their Trustee.

Your Trustee notifies creditors that you are bankrupt - this prevents unsecured creditors from pursuing the debt.

The trustee can sell certain assets to help pay debts.

A bankrupt may need to make compulsory payments if their income exceeds a set amount.

Bankruptcy is an option, but a person may also try to enter into a personal insolvency agreement, requiring 75% of creditors to agree.

Bankruptcy may have serious consequences and prejudice a person's ability to obtain credit, travel overseas or gain certain employment.

Certain types of professions may be in jeopardy such as a lawyer or a builder.

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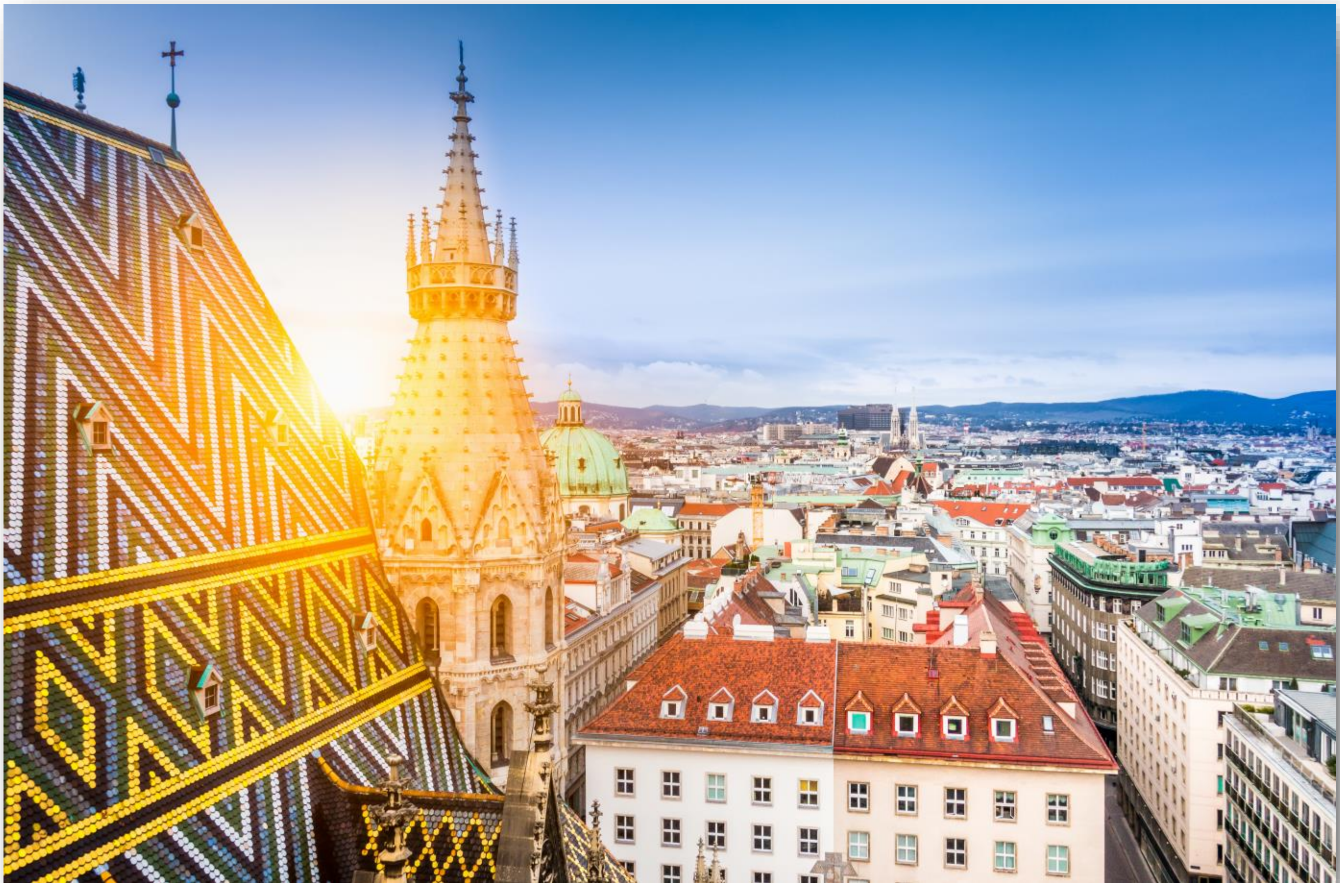

BRAUNEIS KLAUSER PRÄNDL

Bankruptcy, Insolvency & Rehabilitation Proceedings in Austria

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KEY FACTS OF BANKRUPTCY, INSOLVENCY & REHABILITATION PROCEEDINGS UNDER AUSTRIAN LAW

1. Introductory Remarks on Austria's Legal System

Austria has a **civil law system**, as opposed to the common law system of e.g., the United States or the United Kingdom. Practically all Austrian law is codified in statutes. The most important statutes in the fields of civil and commercial law are the Austrian General Civil Code and the Austrian Code of Commerce.

Austria is **part of the EU**. The EU currently consists of 27 member states. They have 27 distinct and often very different insolvency laws, i.e., the core of each insolvency law is different from country to country.

Austrian insolvency law is primarily codified in the Austrian **Insolvency Act ("*Insolvenzordnung*").**[1]

As of July 2021, Austria will enact an additional statute on insolvency proceedings and preventive measures in order to implement the EU Restructuring Directive (Directive EU 2019/1023, see below). The title of this statute will be **Restructuring Act ("*Restrukturierungsordnung*")**.

Apart from the Insolvency Act and the Restructuring Act, there exists also a statute called **Business Reorganization Act** ("***Unternehmensreorganisationsgesetz***"). It contains provisions for the restructuring of a non-insolvent debtor's business. It does not affect creditors' rights (no stay of proceedings, no preferential conditions for voiding contracts) and, in spite of its title, is not an insolvency statute in the strict sense.

Insolvency related provisions are also found in the **Criminal Code**, in the **Act on the Protection of Wages in Insolvencies**, and in the **Equity Replacement Act**.

Cross-border insolvencies in regard of insolvencies vis-à-vis all EU countries except Denmark are regulated in the **European Regulation on insolvency proceedings**. Cross-border insolvency issues vis-à-vis third countries are regulated the Austrian **Insolvency Act** and in bilateral treaties.

Austria so far has not ratified the **UNCITRAL Model Law on Cross Border Insolvencies.**

COVID-19 related measures in insolvency law:

Austria has extended all its insolvency application deadlines during the COVID-19 crisis. Austria also temporarily changed some of the insolvency benchmarks. Thus, there currently occurred fewer insolvency cases in Austria than in the years before COVID-19.

2. Different types of insolvency proceedings under Austrian law and their main characteristics

Austrian insolvency law is still primarily creditor oriented. The Austrian Insolvency Act provides for different types of insolvency proceedings.

a) Liquidation oriented proceedings

The classic insolvency proceedings are **liquidation or winding-up-proceedings.** In these kinds of proceedings, the debtor's assets are sold, and the proceeds of such sale are subsequently distributed among the creditors.

b) Reorganization oriented proceedings

Austrian insolvency law, however, also provides for a **court-controlled reorganization proceeding**

[1] Insolvency-related provisions are also to be found in other statutes (e.g. regarding banks, insurance companies).

("*Sanierungsverfahren*"). Its goal is to rescue the insolvent debtor's business by enabling the debtor to continue his business activities and, eventually, to be discharged from a part of its debts.

The conditions for a discharge are quite strict. If the **debtor wants to remain in possession** ("*Sanierungsverfahren mit Eigenverwaltung*"), there is a **minimum dividend** requirement payable to unsecured creditors, of at least **30 percent within a maximum period of two years**. If a debtor stays in possession, a reorganization administrator is appointed. The scope of his duties is more limited than a general administrator (more of a supervisory role).

If a **debtor** does **not insist** to stay **in possession** ("*Sanierungsverfahren ohne Eigenverwaltung*") a regular insolvency administrator is appointed. This insolvency administrator then acts on behalf of the insolvency estate. This kind of reorganization proceeding is possible with a **minimum dividend**, payable to unsecured creditors, **of 20 percent over a maximum period of two years**.

In both cases the acceptance of the reorganization plan ("*Sanierungsplan*") requires that the majority of the creditors vote in favor of the reorganization plan (double majority i.e., both by headcount and by value of debt).

c) New type of reorganization proceedings under the Reorganization Act

A new type of reorganization proceeding will be available under the Reorganization Act, which will implement the EU Restructuring Directive in Austria as of July 2021. The present draft bill provides, among other features, for debtor in possession, no minimum dividends, and cram-downs.

d) Consumer bankruptcy

The Austrian Insolvency Act also **provides for a specific consumer insolvency proceeding**. It enables natural persons to achieve, under certain circumstances, an eventual discharge of debts (usually within five years or earlier).

e) Out of court reorganizations

Out-of-court reorganizations of insolvent businesses (informal work-outs) are possible in principle but difficult to achieve in practice. The main obstacles are the need for a unanimous solution and tight statutory deadlines to file for court insolvency proceedings.

Under Austrian insolvency law, a corporation (such as a GmbH) is deemed to be insolvent (as defined in the Austrian insolvency act) if it is either illiquid or over-indebted.

3. Obligation to file for Insolvency

1. Illiquidity

Under Austrian insolvency law, a debtor is deemed insolvent if it is unable to meet due claims as they fall due ("illiquidity"). This is also the case if the creditors do not press for payments. In some borderline-cases the concept of a mere delay in payment ("*Zahlungsstockung*") might be applicable. The company is seen as illiquid if it cannot pay more than approx. 5 % of all due debts.[2]

A debtor is considered to be insolvent if:

- a debtor is not able to pay (all) his debts as they fall due for to a lack of ready means of payment, and

[2] Austrian Supreme Court ("Oberster Gerichtshof"), short: OGH; decision 3 Ob 99/10w.

- if the debtor cannot obtain the necessary means of payment immediately.

2. Over-indebtedness

In case of corporations (such as a GmbH), not only illiquidity constitutes "insolvency" in the sense of the Austrian Insolvency Act, but also a state of over-indebtedness.

Please note that under Austrian insolvency law, a company is over-indebted if it has a negative asset status at break-up values (balance sheet over-indebtedness at break-up values).

Even if a company is over-indebted according to the applicable (very strict) standard, it might not be deemed to be insolvent under Austrian law if a prognosis (forecast) of its continued viability (henceforth short: "continuation forecast") demonstrates a positive result: As part of a continuation forecast, the probability of the company's future is to be examined with the aid of careful analysis of the causes of losses, a financing plan and the company's future prospects. Planned restructuring measures can be included in these considerations.

The prognosis of the continued existence thus constitutes a possibility to avoid "insolvency" in the sense of Austrian insolvency law (with all associated legal consequences) in spite of balance sheet over-indebtedness.

The subject of the prognosis for the continued existence of the company is the assessment of

- the future solvency of the company within the primary planning period (primary forecast)
- and the company's ability to survive beyond this (secondary forecast).

The future solvency and viability of a company are the two decisive criteria for the survival prognosis.

The prognosis of the company's continued existence must result in a well-founded statement as to whether the company will predominantly be able to continue its business activities in the future in compliance with its payment obligations. The forecast must be prepared on the basis of suitable planning instruments under various aspects. The scope of a forecast of the company's continued existence depends above all on the size and special features of the company in question.

3. Legal obligation under Austrian law to file for formal, court-controlled insolvency proceedings if the corporation is illiquid or over-indebted (in the sense of Austrian insolvency law), risks of personal liability of directors

An application for the initiation of court-controlled insolvency proceedings must be filed as soon as possible ("without culpable delay"), if a corporation is either illiquid or over-indebted (in the sense of Austrian insolvency law). The maximum period of 60 days may only be used in justified exceptional cases (expedient and probably successful restructuring negotiations) and, important to note, creditors must also be treated equally within this period. Please note that these and some of the below mentioned deadlines were temporarily extended due to COVID-19.

In the event of insolvency (in the sense of Austrian insolvency law), the managing director(s) are obliged to apply for the opening of insolvency proceedings without culpable hesitation (maximum being sixty days after the occurrence of the insolvency). This 60-day period may only be used if management makes appropriate efforts to avert the insolvency and only if this undertaking is not to be seen as futile from the outset.

If management does not apply for the opening of insolvency proceedings in due time and creditors suffer damages as a result, management may be held personally liable for

the damages which creditors suffer as a result of the late filing and which would not have arisen if the insolvency proceedings had been opened in due time. Regarding "old creditors", i.e., creditors whose claims had arisen before the material insolvency (illiquidity or over-indebtedness), management will be liable for any deterioration in the insolvency dividend (so-called quota damage) if a managing director fails to file for insolvency in good time. Regarding "new creditors", i.e., creditors whose claims only arose after the material insolvency occurred, management can be held liable in the event of late filing for insolvency for the entire possible losses.

Furthermore, the following rules must be observed in a situation of insolvency (under Austrian insolvency law):

- The debtor must not incur any new debts.
- The debtor must not pay any old debts (as this would lead to a preferential treatment of creditors).
- Any goods or services needed to uphold the basic operation may only be purchased if payment for such goods or services is rendered immediately.

4. Protection granted to the debtor against its creditors

The Austrian Insolvency Act provides for an **automatic stay of proceedings** as soon as insolvency proceedings have been opened over the insolvent's estate. This is true for reorganization and liquidation-oriented proceedings („*Konkursverfahren*" and „*Sanierungsverfahren mit/ohne Eigenverwaltung*").

There are **special rules and regulations for rights of segregation and separation** (they are generally speaking not affected by the opening of insolvency proceedings; certain exceptions might apply). Also, there are special rules on rent agreements regarding business premises, etc. In order for some of those exceptions to be applicable a court decision might be necessary.

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Bankruptcy, Insolvency & Rehabilitation Proceedings in Canada

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KEY FACTS OF BANKRUPTCY, INSOLVENCY & REHABILITATION PROCEEDINGS UNDER CANADIAN LAW

1. Canada's Political and Legal System

Canada has a Federal constitution that was significantly overhauled in the early 1980's, which has had modifications since, including the creation and implementation of the 1982 Canadian Charter of Rights and Freedoms. Canada places a high value on 'rule of law' concepts in Anglo-American legal traditions. It has both a Federal and Provincial political and legal system, subject to common in various jurisdictions, and civil law in Quebec. The Canadian Parliament is responsible for Federal laws, and various provincial Legislatures enact local legislation in their jurisdictions. The Province of Quebec implements its Civil Code, largely derived from the French Napoleonic Code origins, and amended over time, in its legislature, called Assemblée nationale du Québec. There are courts with both Federal and Provincial jurisdiction who make rulings within their jurisdiction, resulting in a general body of common law (with civil law in Quebec), in either official language: English or French, or sometimes in both. The legal principle of 'paramountcy' is applied, whereby Federal statutes are intended to prevail over Provincial statutes when their terms and applications conflict.

2. Canadian Insolvency Regime

Insolvency and bankruptcy laws are generally in the federal domain. Provincial and regional laws are used to implement and interpret issues falling within this domain. There is no single law or statute governing corporate, commercial, or institutional restructuring, bankruptcy or insolvency. Insolvency professionals with standing in insolvency proceedings in Canadian courts are usually either licensed lawyers or accounting professionals, with appropriate accreditation.

There are multiple applicable Canadian insolvency and restructuring statutes, listed below. The first two (BIA and CCAA are collectively called the "**Acts**") comprise the main statutory framework for individual and corporate insolvencies, restructuring, and bankruptcies in Canada. Stays of proceedings are implemented to allow re-organisations, restructuring, or liquidations to occur in the best interests of stakeholders in an orderly fashion. The Acts are regulated by the federally regulated Office of the Superintendent of Bankruptcy, to whom provincial Official Receivers submit their report.

Applicable statutes in Canada:

i. The *Bankruptcy and Insolvency Act* (Canada) ("**BIA**"); This is the main federal statute for personal or 'consumer' bankruptcies. It also has a broader section for both higher net-worth personal bankruptcies and larger corporate and commercial bankruptcy or restructuring opportunities. BIA contains rules for both liquidations or debtor-centric restructuring and reorganisation (generally called 'proposals'), with both creditor remedies (including receiverships), and 'debtor in possession' ("**DIP**") remedies. A statutory priority waterfall for claims against the estate of an insolvent person or entity exists for secured and preferred creditors, thereby implementing rules for dealing with those priority claims in multiple scenarios. DIP proceedings generally occur in situations in which the debts of the debtor are below CAD5,000,000. It is analogous to Chapter 7 of the U.S.A. *Bankruptcy Code* (the "**Code**"), but has many differences beyond the scope covered here.

ii. *Companies' Creditors Arrangement Act* (Canada) ("**CCAA**"); This is the principal federal restructuring and recovery insolvency statute for DIP debtors. It is tremendously flexible in

scope and application. CCAA evolved from a largely unused and very brief statute conceived the 1930's, but has been extensively used and changed since that time. It is currently used mainly for the restructuring of large commercial enterprises with aggregate debt owing in excess of CAD5,000,000. While analogous to Chapter 11 of the Code, CCAA differs in many material respects, not the least of which are the generally increased speed and lower costs in most scenarios. CCAA remains as a very brief as a statute, and all aspects in play have not been codified. It allows wide powers of judicial discretion used for quickly changing fact scenarios. Cases coming within its wide scope have received a considerable display of jurisprudential flexibility and expediency in many cases, due to the lack of codified rules and procedures.

iii. Personal Property Security Act/Civil Code in each Province (collectively, "**PPSA**"); Each province outside Quebec have enacted statutes relating to property rights in assets and security, to partially replace a pre-existing patchwork of common law that preceded them. They also allow for the appointment of receivers both in and out of court. PPSA contain attachment, perfection, and priority rules in collateral that were initially modelled on the *Uniform Commercial Code* used in US States (collectively, "**UCC**"), but do nevertheless have significant differences. For instance, the PPSAs are mainly notice registry systems, not title based. There are also differences in UCC Article 9 procedures and accommodation for security interests in cash collateral, and other

iv. Rules of Court/Rules of Practice ("**Rules**"); These apply in all provinces other than Quebec, and have direct and indirect influences on judgements and rulings regarding enforcement and interpretations of under applicable statutes. For instance, where it is found to be 'just or convenient', courts may appoint receivers for interests including secured creditors.

v. The *Winding Up and Restructuring Act* ("**WURA**"); This has been used infrequently, and is for the restructuring and reorganisation or liquidation of certain entities, mainly banks and insurance or trust companies. Most recently it was used for a Canadian owned German regulated Bank called *Maple Bank*. Under most recent financial upheaval in financial markets in Canada and abroad, it will likely assume a more prominent role than has unfolded in its recent past.

vi. Corporate Statutes; These include multiple statutes in both the federal and provincial domains, such as the *Canada Business Corporations Act* ("**CBCA**") and the various provincial counterparts. These are significant because they allow courts to authorise fundamental changes in corporate structure in distressed scenarios. They contribute to balance sheet refreshments through such arrangements where debt can be converted to equity including through implementation of distress preferred share arrangements as may be approved in Canadian insolvency proceedings.

3. The Acts: Basics

BIA

Applications for bankruptcy orders filed by the debtor, or by creditors. When filed by creditors, there can be proceedings contesting the filing, to be heard by the bankruptcy courts. Otherwise, liquidations ensue once the trustee in bankruptcy is appointed under a bankruptcy order, and that person is usually an accredited accounting professional. That trustee in bankruptcy acts in the estate, effectively on behalf of secured and preferred creditors. Secured creditors holding perfected security interests take outside of the bankruptcy estate to the extent of the value of their collateral held, and will file claims in the estate for unpaid

residual amounts of debt not recovered from realization of their specific collateral held.

To avoid bankruptcy, proposals may be filed by debtors under notices of intention ("**NOI**"). These are not initially bankruptcy filings. An accountant is engaged as "Proposal Trustee" to oversee and review the affairs of the debtor, and to report to the court in all proceedings. On filing the NOI, the time starts ticking. Initially, a 30 day stay is granted, and can be extended up to a maximum of six months by the court, to enable the debtor to file a Plan. Time is granted to compose a Plan, which is distributed to creditors for a vote. There is a 'double majority' vote that occurs with approved creditors, in which a majority of both numbers and total of outstanding debt thresholds must be met to pass the vote. If the vote of creditors approves the Plan, court approval is thereafter required. If timelines are not met, or a Plan is neither presented nor approved by creditor vote and court approval, then there is an automatic deemed bankruptcy. At that point, the proposal trustee becomes the trustee in bankruptcy, and liquidation ensues.

All assets bankruptcy estates are subject to a 5% levy, payable to the Superintendent in Bankruptcy.

CCAA

Qualified applicants are usually applicants being corporate entities who are insolvent, or who have committed an act of bankruptcy under the BIA. Total claims against that debtor must exceed CAD5,000,000 before that debtor may commence a CCAA filing. Proceeding are initiated by court applications. Filings for 'first day orders' are done by application of the debtor to the applicable court. There may be an initial order implementing a statutory stay of proceedings, but it is granted for a very short period of time on restricted terms and conditions (colloquially called the 'skinny order'), in effect for no more than ten days. The applicants must return to court within that time period with another application for the full form of court orders giving broader protections to the Applicant.

Monitors are deemed to be officers of the Court, and as such are the eyes and ears of the Court in the proceedings. The debtors auditors are excluded from being appointed as Monitor. They are ideally positioned to act in the 'best interests of the general body of creditors'. Their views and recommendations are submitted to the courts in formal reports, which are generally given a high degree of factual and professional deference. Once appointed to oversee the CCAA estate in the first day orders, Monitors coordinate multiple roles. Those include the review of financial information, filing of statutory reports, review of debtor forecasts and plans, implementation of a sale process, and assisting in the drafting of a Plan of Reorganisation. Plans, once approved by creditors in a double majority vote, must also be sanctioned by a Canadian court.

Plans of Reorganisation can include sale processes, such as 'stalking horse' bidding procedures for all or part of the business, assets and operations of the debtor, or a broader group of companies and partnership entities connected to the debtor. They may also include full or partial liquidations of their assets, termination of contracts, key employee retention plans, settlement of debts and charges amounting to a balance sheet restructuring. Monitors interact with officers, directors, and management of the debtor and their counsel. They are also responsible to conducting all statutory proceedings, including any votes of creditors or other stakeholders, outside of the court proceedings.

Assets disposed of in CCAA proceedings are not subject to any bankruptcy levies.

Stays of Proceedings

Under the BIA, statutory stays of proceedings are initiated on issuance and filing an order for bankruptcy, or and NOI. Under CCAA, statutory stays are initiated by the courts in first day orders, and continue under the directions of the court. Stays of proceedings can be implemented for groups of companies domestically, within the ambit of the Canadian courts. For cross border groups, the continuing cooperation of foreign courts is required, with varying results from case to case.

Cross Border Proceedings

Coordination of cross-border proceedings with foreign courts is encouraged and implemented on a regular basis. Canada adopted the UNCITRAL model law on cross border insolvency in 1997, with changes specific to Canada at and after that time. This is done under Part IV of the CCAA and Part XIII of the BIA, for both recognition of foreign proceedings in Canada, and for recognition of the orders of Canadian courts in foreign proceedings. Canadian courts can exercise jurisdiction over non-Canadian entities and assets if the 'centre of main interest', known as COMI is in Canada. These are always questions of fact, and can be hotly contested at the outset of proceedings. Cross border cooperation of foreign courts with Canadian courts has occurred in multiple cases, including under Chapter 15 proceedings under the Code.

Officers and Directors

Generally, directors and officers of corporations have statutory duties to act honestly and in good faith with a view to the best interests of the corporation (including under the CBCA). Directors of an entity entering proceedings under the Acts must continue to generally act in the general best interests of that debtor. They must exercise the care, diligence, and skill that a reasonably prudent person would exercise in comparable circumstances. Officers have similar duties including remittance obligations to government authorities. While there are duties to 'stakeholders', such as government entities, creditors and employees, there is no specific duty on directors or officers to look after the interests of shareholders. Unlike other jurisdictions, such as Australia, Germany, and France, there are no 'trading while insolvent' liabilities or exposures while the debtor is undergoing a restructuring while also operating its business. Remedies sought for breach of such duties, in the absence of fraud, are generally fact based proceedings, within these general principles.

4. The Acts: Recent Changes November 2019

On November 1, 2019, the Acts were amended to achieve better accountability and transparency in Canadian insolvency proceedings.

Disclosure of Economic Interests

The CCAA was amended to allow interested persons to apply for a court order requiring a person to disclose any "economic interest" in the debtor company. An "economic interest" includes a claim, eligible financial contract, an option, a mortgage, charge, lien, other security interest, the consideration paid for any right or interest, or any other prescribed right or interest. The court must consider whether the information sought would enhance the prospects of a compromise or arrangement for the debtor company and whether any interested person would be materially prejudiced by the disclosure.

The purpose of this may be aimed at leveling the playing field in the administration of estates. Possible scenarios where disclosure might be particularly important are (i) where claims are traded at discount values to purchase blocking votes or (ii) where related parties or parties with

undisclosed collateral interests bid on assets of the insolvent estate.

Pension Funding and Obligations

To protect the interests of retirees and pensioners, the Acts were amended to require that funds earmarked for registered disability savings plans be added to funds in RRIF plans and RRSP so that they are exempt from seizure under the BIA. The CBCA was simultaneously amended to require that directors take into account the financial interests of retirees and pensioners in board deliberations of CBCA companies on the eve of insolvency. Provincial business corporations statutes are expected to be similarly amended.

Director and Officer Compensation Clawbacks

The amendments expose directors to more scrutiny on the eve of insolvency. The courts may "look back" into payments (including termination pay, severance pay, incentive and other benefits) made to directors, officers, and other managing personnel in the year preceding the initial bankruptcy event. If the payments were made when the corporation was insolvent or rendered the corporation insolvent, exceeded the fair market value of the consideration received by the corporation, or were outside the ordinary course of business, the court may issue judgements against the directors personally, as may be appropriate.

Procedural Changes

Stays of proceedings will be granted if "reasonably necessary" for the continued operations of the debtor companies. The initial stay period is reduced from 30 days to 10 days. As well initial relief in first day orders will only be granted if "reasonably necessary". These amendments will help ensure that orders granted at the commencement of insolvency do not over-reach, and are fair to other creditor interests. Certain relief like new funding (DIP financing orders) and pre-baked solicitation proceedings for the sale of assets, which may prejudice stakeholders who had no notice of insolvency proceedings, may now be challenged earlier.

Intellectual Property Rights

Intellectual property ("**IP**") licensees in Canada can now maintain their use of IP during and following the commencement of insolvency proceedings. This will include protection of such rights when IP is sold in an insolvency proceeding. The IP affected is not specifically defined in the Acts, so other Canadian caselaw and statutes will fill that need.

Duty of Good Faith

In *Bhasin v Hrynew*, the Supreme Court recognized a general duty of honest performance in contractual dealings which has been broadly applied. Canadian courts must now consider good faith and disclosure of economic interests to enhance their jurisdiction in restructuring matters. Parliamentary debates preceding the amendments suggest that they were intended to protect the public from the effects of high-profile corporate bankruptcies like *Nortel* and *Sears* where many Canadian employees lost their pensions. A statutory duty to act in good faith will now apply to all participants in Canadian insolvency proceedings. Although debtors previously had a duty to act in good faith, the statutory duty now applies to all parties. This amendment is consistent with developments in the common law. In *Century Services Inc v Canada (Attorney General)* the Supreme Court of Canada stated that "the requirements of appropriateness, good faith and due diligence are baseline considerations that a court should always bear in mind when exercising CCAA authority". A statutory duty of good faith is also consistent with British and American insolvency statutes and will therefore be useful in cross-border proceedings.

Bad Corporate Behaviour

As a significant actor on the global insolvency stage, Canada's legislation must resonate with concerns about unfairness by or to stakeholders in Canadian proceedings. For example, the Code includes a "hidden interest" provision which requires a trustee seeking to employ a bankruptcy professional or consultant to disclose all of the consultant's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.

The statutory duty of good faith together with enhanced powers given to our courts to require creditors to disclose their real economic interests will create a more transparent and accountable insolvency process for the benefit of interested parties, including the goals of Parliament to better protect Canadian wage earners and pensioners.

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INTERNATIONAL LAWYERS NETWORK

A&K METAXOPOULOS AND PARTNERS

Bankruptcy, Insolvency & Rehabilitation Proceedings in Greece

ILN RESTRUCTURING & INSOLVENCY GROUP

KEY FACTS OF BANKRUPTCY, INSOLVENCY & REHABILITATION PROCEEDINGS UNDER GREEK LAW

Introduction

In the Greek law there are several types of proceedings addressing the inability of a merchant debtor (either a natural person or a legal entity) to pay its debts. On one hand, there is Bankruptcy, which is focused mainly on the payment of its debts to its creditors, mainly by liquidation of the debtor's assets. On the other hand, there are the so-called pre-bankruptcy proceedings whose main purpose is to maintain the debtor's undertaking by a restructuring of its debts. The pre-bankruptcy proceedings are the Rehabilitation Proceedings and the Out of Court Workout.

Before and during the above-mentioned bankruptcy and pre-bankruptcy proceedings, a protection of the debtor's assets may be provided for the purposes of each procedure. As a result, there are restrictions for the debtor regarding the freedom of administration or transfer of its assets and for the creditors regarding the enforcement of their claims on the debtor's assets.

It must be noted that the new law 4738/2020 "Restructuring of debts and provision of a second chance and other provisions" has been issued, which abolishes the Bankruptcy Code and the other relevant legislation.

I. The Pre-Bankruptcy Proceedings

A. Rehabilitation

1. The Procedure

The rehabilitation proceedings of art. 31-64 of the L. 4738/2020 have a different purpose than bankruptcy, which is to reach a settlement/ rehabilitation agreement between the debtor and its creditors, so that the undertaking of the debtor will become viable again. Thus, the target of rehabilitation is not the liquidation of the assets, as it is in bankruptcy (the settlement agreement does not necessarily include liquidation).

The goal of the rehabilitation proceedings is to achieve a rehabilitation agreement between the debtor and a minimum required number of its creditors and to submit it to the competent court, along with a business plan. Subsequently, the rehabilitation agreement is validated by the court. So, there is no formal procedure opening of the negotiations with the creditors, only a "pre-packed" agreement between the creditors and the debtor that is submitted to the court for validation. Also, under several conditions the creditors may also agree a rehabilitation agreement even without the debtor's participation.

2. The Protection Granted to the Debtor's Assets in Rehabilitation proceedings

A protection may be granted to the debtor's assets during three different stages: **a)** before concluding the rehabilitation agreement, i.e., during the negotiation between the debtor and its creditors; **b)** at the time that the rehabilitation agreement has been concluded and submitted to the court, but it is not validated yet and **c)** after the validation of the rehabilitation agreement from the court. More specifically:

2.1 The protection before concluding the rehabilitation agreement

2.1.1 The Procedure

Before concluding the rehabilitation agreement and during the negotiation between the debtor and its creditors, no protection is granted to the debtor automatically by the law. However, anyone who has a legitimate interest (e.g., the debtor, a co-debtor, a creditor, a guarantor) may apply, only once, to the competent court for protection of the debtor's assets by ordering

Provisional Measures, as an injunction. The provisional measures cover the period of the negotiations between the debtor and its creditors in order to achieve a rehabilitation agreement and their purpose is, on one hand, to maintain the undertaking in the view of its rehabilitation and, on the other hand, to achieve "serenity" during the negotiations.

In addition, until the hearing and the issuance of the injunction, the one who has a legitimate interest (as above) may apply to the court for a Provisional Order (the provisional order is a "fast track" procedure which takes place usually within a couple of days and there is not a formal hearing. The Judge examines the application, and it is at his/her discretion to order the provisional measures, until the hearing or until the issuance of the injunctions decision). When the hearing of the injunctions takes place, the court may keep the provisional order valid, or it can modify it, or it may revoke it as well.

The provisional measures are valid until submitting to the court the rehabilitation agreement and cannot exceed 4 months from the decision or the provisional order. After that time limit, the provisional measures are void (under some conditions the above period may be extended, however the total period must not exceed the 6 months).

The competent court may revoke or modify the provisional measures at any time following a relevant application by anyone who has a legitimate interest.

2.1.2 The Provisional Measures-the Type of the Protection

The court is not bound by any measures that are mentioned in the application. It has a wide range of options, such as ordering some of the measures asked or even ordering completely different measures at its discretion.

The provisional measures may, indicatively, include the suspension of any enforcement of creditor's claims against the debtor (e.g., by seizure of assets), the prohibition of submitting any civil action against the debtor, the ban of proceeding with injunction against the debtor, the ban of transferring of the real estate property and the business equipment on behalf of the debtor, appointing a sequestrator, banning any termination of contracts, ordering the prolongation of contracts that are to be expired, maintenance of the current jobs in the company etc.

Moreover, for serious reason the court can also decide to apply the protection to the guarantors of the debtor or other co-debtors as well.

The court may also appoint a Special Receiver with the power to undertake the management of the debtor partially or totally (even without the consent of the debtor in some cases)

The above-mentioned protection may bind all or several of the creditors (depending on the court's decision), also including the State (for taxes etc.). It must be noted that any action on behalf of any person who is bound by the provisional measures (e.g., a creditor), that is in breach of the provisional measures granted, it is void.

Furthermore, the provisional measures do not apply regarding some specific types of claims such as the termination of a lease agreement, if the debtor owes at least six-month rents, the financial security agreements of the L. 3301/2004 or when an "important social reason" occur (e.g., to pay to a creditor an amount which is essential for his and his family survival). The claims of the employees for their wages are not, in principle, affected by the measures, unless the court decides that there is an important reason.

2.2 The protection at the time that the rehabilitation agreement has been concluded and submitted to the Court

2.2.1 The Procedure

At the time that the rehabilitation agreement has been submitted to the court for validation, there are two types of provisional protection. First of all, there is a provisional protection granted to the debtor automatically (i.e., the protection is granted directly by the law and no court decision is required) and it is limited to the measures that are listed on article 50 of the law 4738/2020 (see below par. 2.2.2). Secondly, an additional, parallel protection may be granted as an injunction with a court decision (and a provisional order), exactly as the above mentioned protection granted before the conclusion of the rehabilitation agreement (see above paras 2.1.1-2.1.2)

The purpose of the provisional protection at this stage is on one hand to keep the business of the debtor running and on the other hand to maintain its property.

2.2.2 The Type of the Protection

The automatic provisional protection granted at this stage, according to article 50 of the law 4738/2020, includes the suspension of any enforcement of creditor’s claims against the debtor (e.g., by seizure of assets), the ban of proceeding with injunction against the debtor and the ban of transferring of the real estate property and the business equipment on behalf of the debtor. Furthermore, the time limits regarding creditors’ claims and rights against the debtor and the guarantors/co-debtors are sustained and any set-off regarding claims born before the submission to the court is restricted.

The above, automatic protection does not affect, inter alia, the rights of the creditors to file lawsuits against the debtor, the right of the debtor to file an application for bankruptcy, the payments on behalf of the debtor to third parties in order to keep its business running and any enforcement of claims for debts that were born after submitting the rehabilitation agreement to the court.

The above-mentioned protection is granted only once, and it cannot exceed the 4 months. After the expiration of the 4-month period it is at the court’s discretion to provide further protection according to the procedure and the type of protection above mentioned *in paras 2.1.1-2.1.2, or to revoke, modify or prolong the above-mentioned protection (total duration of protection may not exceed 12 months).*

The automatic protection does not apply to the debtor's guarantors. A provisional protection may apply to them only by a court decision in the procedures mentioned above (paras 2.1.1-2.1.2).

For any additional protection to the debtor that may be ordered by a court, see above, par. 2.1.2.

2.3 The protection after the validation of the rehabilitation agreement from the Court

After the validation of the rehabilitation agreement by the court, the agreement binds both the debtor and, in principle, all of its creditors, whose claims are regulated by the agreement, even those who were not part of the agreement or voted for the agreement. However, the creditors whose claims were born after the validation of the agreement are not bound.

The content of the rehabilitation agreement can be open to the parties, which may include, inter alia, reduction of the debtor’s liabilities against its creditors and/or modification of the liabilities of the debtor (such as the time of payment or substitution with an agreement to take part to the debtor’s profits) and/or capitalization of liabilities with the issuance of e.g., shares and/or transfer of the debtor’s undertaking etc.

It must be noted that the claim of a creditor against the co-debtors and the guarantors are in principle limited to the amount that the liability of the debtor has been reduced, according to the validated rehabilitation agreement, unless the creditor does not consent on that (in the latter case, the liabilities of the co-debtors and the guarantors remain intact against the creditor).

B. The Out of Court Workout

1. The Procedure

The Out of Court Workout is a new procedure, established by the L. 4738/2020 (art. 6 et seq). The law excludes some debtors from the eligibility for these proceedings (e.g., financial institutions, insurance companies, debtors whose 90% of their debt is to one financial institution or whose debt does not exceed €10,000 etc.).

The Out of Court Workout is a procedure done electronically via a special, public electronic platform. The procedure commences when the debtor or some types of creditors (financial institutions, the State, social security funds) file an on-line application via the above platform to the competent Authority appointed by the law, the Special Secretariat for the Administration of Private Debt. With the application the debtor submits several data and documents including a list of its creditors, its assets etc. Subsequently, the creditors who participate may submit a proposal for the restructuring of the debts.

If a restructuring agreement is not concluded within 2 months from the application, or from the time that the creditors declare that they do not wish to submit a restructuring proposal, the procedure is considered as fruitless.

2. The Protection

First of all, the filling of the application does not constitute a serious reason for the termination of contracts in force.

Furthermore, from the filling of the application and until the end of the Out of Court Workout, any measure of enforcement of claims on the debtor’s movable and immovable assets and claims is sustained automatically by the law. Any relevant action that commences during the above period is void. Any auction scheduled to take place within 3 months from the application and any preparatory action of auction (including the confiscation) by a secured creditor, are not affected.

After the conclusion of the restructuring agreement, the creditors which are bound by it may not proceed with any enforcement proceedings against the debtor and all the pending or not measures of enforcement (either individually or collectively) are sustained during the period of the agreement and under the condition of its performance

II. Bankruptcy

The Bankruptcy is focused on the payment of the debtor’s debts to the creditors by the debtor’s assets, either by liquidation of them by a public auction or by selling the debtor’s undertaking as a whole or partially.

When a debtor is in a constant and general inability of payment of its debts, the debtor, or a creditor or, in some instances, the district attorney may apply before the competent court, so that the latter, will order the bankruptcy of the debtor. A foreseeable inability of payments can also be sufficient, only when the debtor applies for bankruptcy.

The court examines the case, and it may order for the bankruptcy of the debtor. However, the court may dismiss the application (e.g., when it

is submitted in bad faith, e.g., when a creditor submits it for reasons irrelevant with the bankruptcy or when the debtor wants to avoid paying its debts).

If the court accepts the application, it appoints a) a Supervising Judge b) a Bankruptcy Trustee and it orders the debtor's property sealing.

1. Protection after the application for bankruptcy and until the court decision that orders the bankruptcy

After the application for bankruptcy has been submitted, whoever has a legitimate interest may submit before the competent court an application for Provisional Measures. The president of the court may order as an injunction whatever provisional measure he/she estimates as adequate for the maintenance of the assets of the debtor. The purpose of these measures is not to avoid the bankruptcy (as in the pre-bankruptcy proceedings), but it is to avoid any reduction of the assets or of their value, so that the claims of the creditors may be satisfied by the bankruptcy proceedings, when and if the bankruptcy will be decided by the court.

Any ordered provisional measure stops automatically, when the decision of the court that orders the bankruptcy (or dismisses the application) is issued and registered in the Electronic Registry of Solvency.

The Provisional Measures may indicatively include the suspension of any enforcement of creditor's claims against the debtor (e.g. by seizure of assets), the prohibition of submitting any civil action against the debtor, the ban of proceeding with injunction against the debtor, the ban of transferring of the real estate property and the business equipment on behalf of the debtor, appointing a sequistrator, banning any termination of contracts, ordering the prolongation of contracts that are to be expired, maintenance of the current jobs in the company etc.

The above-mentioned suspension of any enforcement of creditor's claims against the debtor does not affect in principle the secured creditors from satisfy their claim from the liquidation of the security (e.g., mortgaged or pledged assets).

Furthermore, the provisional measures do not apply regarding some specific types of claims such as the termination of a lease agreement, if the debtor owes at least six-month rents, the financial security agreements of the L. 3301/2004 or the rights of the assignee in case of an assignment of a claim.

2. Protection after the court declares the bankruptcy

The "protection" mentioned in the present paragraph constitutes consequences of the declaration of bankruptcy for the debtor and the creditors. Some of the consequences are the following:

- After the decision of the court that declares the bankruptcy, the debtor may not in principle administrate or transfer its property/assets- Bankruptcy Estate- (this does not include any property/assets acquired by the debtor, after the bankruptcy is declared, unless it is interest and other periodic benefits, as well as ancillary claims or rights, even if they are born or developed after the declaration of bankruptcy, if they come from a contract or right existing before the bankruptcy was declared). The administration passes to the Bankruptcy Trustee.
- -The creditors may seek to be paid off in principle only through the Bankruptcy Estate. From the declaration of bankruptcy, any measures such as

enforcement of creditor's claims against the debtor, any civil action against the debtor, any appeal, are banned to commence or it they already took place they are suspended automatically.

However, the creditors, whose claims are secured by an asset of the debtor (e.g., a mortgage), they are paid by the liquidation of this specific asset (unless they resign from the security, so they may be able to be satisfied by the whole of the bankruptcy estate, with the rest of the creditors). The above-mentioned suspension of measures of enforcement, in principle, does not apply to the secured creditors regarding these specific assets for a period of 9 months from the declaration of bankruptcy . There are some exceptions, such as when the asset is an important for the debtor's undertaking if the undertaking or a sector of it is to be sold as a whole.

- -The pending contracts in principle, after the declaration of bankruptcy they are terminated. However, the Bankruptcy Trustee may elect to continue the pending contracts. The other party of these contracts, within 30 days from the declaration of bankruptcy may impose a reasonable deadline to the Bankruptcy Trustee in order to elect whether to continue the pending contracts or not. If the Bankruptcy Trustee does not respond timely or he refuses to perform, the other party is entitled a) to withdraw from the contract and b) to a claim for a compensation for non-performance, satisfied as a bankruptcy creditor.
- -In principle, the declaration of bankruptcy does not affect the right of a creditor to a set off against the debtor, if the prerequisites for a set off were born before the declaration of the bankruptcy.
- -Anyone who has a right over an asset, which is not owned by the debtor, may ask from the Bankruptcy Trustee its separation from the bankruptcy estate.
- -Anyone who delivered goods to the debtor, under specific circumstances, may ask from the Bankruptcy Trustee to return them.
- -The Bankruptcy Trustee, under several circumstances, is entitled to revoke acts of the debtor, which took place from the time that the debtor stop making payments and until the declaration of the bankruptcy and they are harmful for the interests of the creditors.

Conclusion

As a final remark, the present constitutes only a brief, general outline of the proceedings and the protection of the assets and it is not a legal advice. Obviously, it may not cover all the detailed provisions of the law, as the bankruptcy and pre-bankruptcy proceedings are quite complicated, with many exceptions, and they are constantly amended, so, many special exceptions and provisions are not covered. For any specific situation, a creditor must seek specific legal advice from a qualified lawyer.

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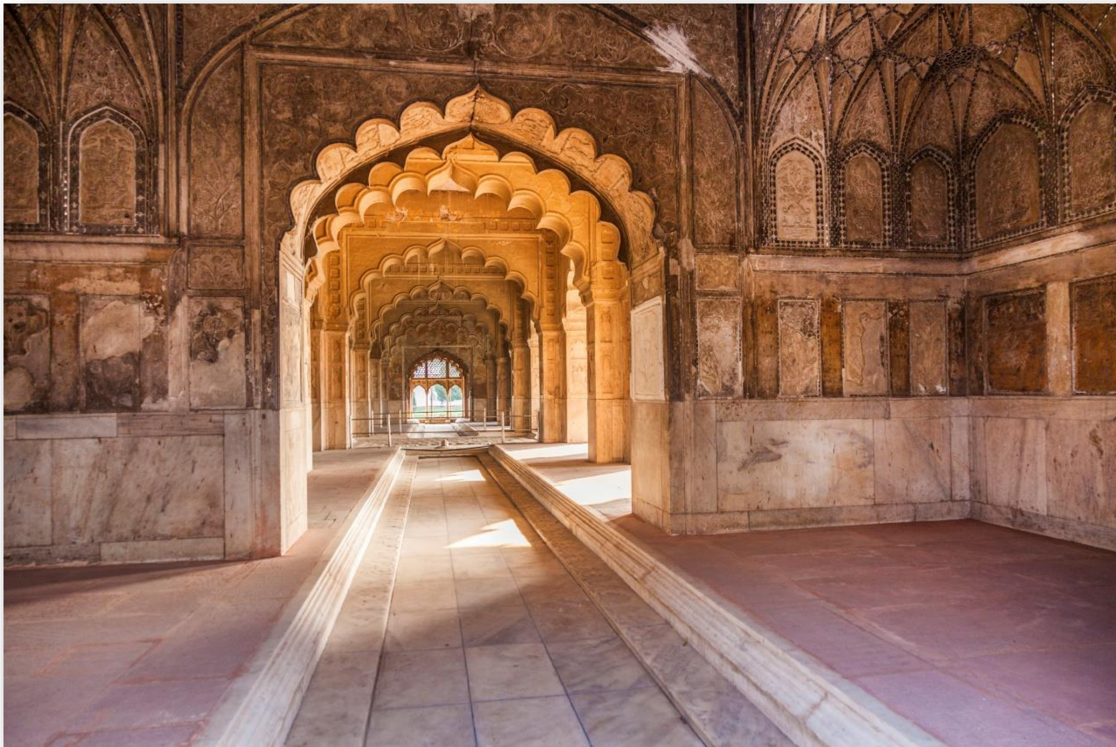
INTERNATIONAL LAWYERS NETWORK



LEXCOUNSEL LAW OFFICES

Bankruptcy, Insolvency & Rehabilitation Proceedings in India

ILN RESTRUCTURING & INSOLVENCY GROUP

KEY FACTS OF BANKRUPTCY, INSOLVENCY & REHABILITATION PROCEEDINGS UNDER INDIAN LAW

The Code:

Introduction of a comprehensive insolvency and bankruptcy law in India is a recent event, with introduction of the Insolvency and Bankruptcy Code, 2016 ("**the Code**") in the year 2016. The Code is oriented to be the umbrella legislation in India for laws relating to insolvency and bankruptcy. At present the Code only governs rehabilitation and liquidation of companies and extends to guarantors. However, its scope would eventually include individuals and others forms of legal entities as well.

The Code is administered through the newly formed National Company Law Tribunals ("**NCLT**") across India, with an appellate tribunal based in New Delhi, and the Supreme Court of India having the final jurisdiction.

The Code seeks to introduce many fresh legal concepts as also modify the pre-existing ones. Upon admission of a case against a company under the Code, it prescribes for a mandatory Corporate Insolvency Resolution Process ("**CIRP**") for such company (corporate debtor) within which period all efforts are to be made to revive/rehabilitate the corporate debtor. If the revival efforts fail, the corporate debtor can be put into liquidation, where the available assets are distributed against liability claims, as per the priority specified by the Code, with payments being effected to the Insolvency Resolution Professional ("**IRP**"), the secured and unsecured creditors, workmen, Government, shareholders, etc.

The CIRP can be commenced by the NCLT, upon admission by it of any application presented by any applicant (financial or operational creditor) or the corporate debtor itself with evidence of default by the corporate debtor in relation to a debt of INR 10,000,000 (USD 132,000) or above. In addition:

- if an operational creditor approaches the NCLT – it must have already served a 10-day demand notice onto the corporate debtor and the corporate debtor must have failed to either pay the amount or to disclose a pre-existing bona-fide dispute; or
- if a corporate debtor itself approaches the NCLT – its shareholders must have passed a resolution in such regard with 75% majority.

THE CIRP AND LIQUIDATION

Once the NCLT is satisfied that a financial default has been committed by the corporate debtor, it directs commencement therewith of the CIRP, i.e., a 180 days' resolution window for revival of the corporate debtor while confirming appointment of an IRP. Within this 180 days' window (extendable by 90 days), the creditors may either with 66% majority decide to revive the company, as per the resolution plan to be subsequently approved by the NCLT or decide to liquidate the corporate debtor. Failure of the creditors to take a decision also leads to liquidation of the corporate debtor.

With commencement of the CIRP, the powers of management of affairs of the corporate debtor moves to the hands of the IRP, who reports to the committee of creditors, and is also entitled to take all steps to ensure that the business of the corporate debtor continues as a going concern. The Code also contains provisions governing penalties and punishments for extortionate and improper transactions, both prior to and during the insolvency process and proceedings.

In the process of liquidation, the timelines would depend upon facts and circumstances of each case such as complexity in sale of assets of the company, finalization of liabilities and any disputes related to rejection of any party's claims by the liquidator, any pending legal

proceedings, tax disputes, appeals, realization of receivables, etc.

PROTECTION GRANTED TO THE DEBTOR:

The foremost protection that the Code accords to the corporate debtors is the "moratorium" which commences with commencement of the CIRP. The NCLT, while admitting an application of a creditor against a company or an application by the company itself, declares "moratorium."

The "moratorium" continues through the CIRP and puts an embargo on institution or continuation of suits including execution of any judgment, decree, or order of any court of law, arbitration panel or any other authority. In addition to this, the moratorium also restricts the transfer, alienation, or disposal of any assets or legal right or beneficial interest of the corporate debtor. Also, no action can be taken during the moratorium period to foreclose, recover or enforce any security interest created by the corporate debtor.

The moratorium seeks to provide an atmosphere for revival of the corporate debtor.

The protection under moratorium is granted only qua the property, rights, and obligations of the corporate debtor. Irrespective of the moratorium, fresh criminal prosecutions can be lodged, and those lodged earlier can continue, against the corporate debtor as also against its directors/promoters, etc., for any criminal offences.

The benefit of moratorium under the Code is also not available to the guarantors and sureties of the corporate debtor. After the initial conflicts in interpretation, and subsequent observations by the Supreme Court of India, the Code was amended in June 2018 to clarify that no moratorium would apply to the legal actions of recovery against the surety and guarantors of a corporate debtor.

Moratorium also does not apply to the writs as also on the constitutional powers of the Supreme Court and the High Courts. The IRP is expected to appear in, and contest in the best interest of the corporate debtor, all matters which do not fall under moratorium, as also to ensure compliance with all the applicable laws during the CIRP period.

End to Suspension Period Imposed by the Indian Government due to the Coronavirus: The COVID – 19 pandemic had a severe impact on the various industries and different economies around the world. In 2020, the Indian Government after rounds of discussion and deliberations, assessed the adversity that may be caused due to the Coronavirus on Indian economy. Thereafter the Indian Government considered and imposed a suspension on the IBC proceedings to curtail the devastating impact of the Coronavirus and increased the threshold limit of a default to drag a defaulting company to the insolvency tribunal to INR 10 million, from the earlier threshold of INR 0.1 million.

The aforesaid suspension for initiation of IBC cases finally came to an end on March 24, 2021, vide an Ordinance dated April 24, 2021, but the increased threshold is unlikely to be reduced to the original limits.

Pre-Packaged Insolvency Resolution Process (PPIRCP):

The Insolvency and Bankruptcy (Amendment) Ordinance, 2021 has introduced a new concept of PPIRCP. PPRICP is a framework provided for resolution of stress of corporate MSMEs (as covered under MSME Act, 2006). Unlike Corporate Insolvency Resolution Process, PPRICP is available to defaults where the default is at least INR 1 million arising between March 25, 2020, to March 24, 2021.

The PRICP is a hybrid process, where pre-initiation phase is largely informal and post-

initiation stage is formal. The informality at pre-initiation stage offers flexibility for the corporate debtors and its creditors to swiftly explore and negotiate the best possible outcome to resolve stress in the business, while the post-initiation is focused on maximization of value and bestows the resolution plan with the statutory protection.

Conclusion: The Code has arguably tilted the debtor-creditor balance in favour of the creditor, as one of the consequences of admission of proceedings under the Code is that the erstwhile management of the company is ousted, even if the company is rehabilitated. In cases of small and medium enterprises, the promoters can still lay reclaim the ownership and control of their company, provided they are not declared willful defaulters by the financial institution(s). The pre-packaged insolvency may provide the much-needed respite to the genuine promoters.

Within a short span since its implementation, and despite Coronavirus given business adversities, the Code is proving to be a more effective tool for rehabilitation and liquidation as compared to the winding up provisions of the (Indian) Companies Act and the Sick Industrial Companies Act, 1985, it repealed and replaced.

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INTERNATIONAL LAWYERS NETWORK

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Bankruptcy, Insolvency & Rehabilitation Proceedings in Israel

ILN RESTRUCTURING & INSOLVENCY GROUP

KEY FACTS OF BANKRUPTCY, INSOLVENCY & REHABILITATION PROCEEDINGS UNDER ISRAELI LAW

The Israeli Parliament (Knesset) passed a new statute regarding insolvency law, which is named the Insolvency and Rehabilitation Law-2018 (the "**Law**"). The Law was enacted on March 5, 2018 and came into force on September 15, 2019. The Law offers a comprehensive reform and provides Israel with modern insolvency legislation dealing with both corporate and individual insolvency.

The Law has three primary objectives:

1. to promote the debtor's economic rehabilitation;
2. to maximize the debt repayment to creditors and to divide the debtor's pool of assets in a more equitable manner between the secured and unsecured creditors;
3. to increase the certainty and stability by streamlining processes and reducing the bureaucratic burden.

The key principles of the Law are as follows:

1. *A clear and simple definition of insolvency*

An entity shall be deemed insolvent if it cannot actively pay its debts. According to the Law, a creditor is entitled to file an application for a court order to open insolvency proceedings only when a debt has not been paid to a said creditor on time and therefore, creditors cannot file applications preemptively as was previously the case.

2. *Reducing the bureaucratic burden and streamlining the process*

The jurisdiction to conduct insolvency proceedings in relation to corporations is the district court. However, a significant share of the proceedings being conducted will be decided by administrative authorities and thus will not require court rulings. The Law empowers the Official Receiver or, under its new name, the "Administrator in Charge of Insolvency Proceedings and Economic Rehabilitation" with the administrative powers of insolvency proceedings.

3. *Uniformity in the opening of proceedings*

The Law establishes a uniform and orderly procedure for opening proceedings against a corporation facing insolvency. The Law prescribes that the court shall decide whether a corporation is insolvent and, only subsequently, determine the most appropriate procedure for handling that corporation on the basis of data submitted to the court. The main procedures for corporations are Liquidation processes and Recovery procedures.

4. *Creditors' debt repayment order and distribution of funds*

According to the Law, some of the debt repayments will be carved out from the sums owed to the strong secured creditors (i.e., banks and tax authorities). They will then be distributed among the general unsecured creditors holding no collateral whatsoever. In the majority of cases, these general creditors (usually suppliers, customers, and employees) receive only a tiny portion, if any, of the debtor's pool of assets. To counter this to a degree, the Law prescribes, inter alia, that 25% of the assets pledged under a floating charge (to differentiate from a fixed charge on a specific asset) be carved out in favor of the debtor's general unsecured creditors. It further determines that the volume of assets used to repay the holder of the floating charge be reduced.

The Law also reduces the preferential right given to the tax authorities when dividing up the debtor's assets. Under the former law, the tax authority was entitled to be treated as a

preferred creditor in respect of one tax year of its choice. The new Insolvency Law restricts the preference of the tax authority only to debts pursuant to voluntary debt settlements with the debtor regarding tax arrears. The preference for such debts is restricted to a maximum of three tax years.

5. *Minimizing damages*

The Law imposes an obligation on the board of directors of the debtor corporation to take all reasonable measures to minimize the extent of the insolvency during the period prior to the opening of insolvency proceedings.

6. *Raising new debt*

Section 65 of the new Insolvency Law provides the ability to raise new debt secured by existing pledged assets or using such assets in another manner, as required for the corporate operation or imposing obligations on certain essential suppliers and third parties to continue providing services, or to abstain from cancelling contracts due to the insolvency even if they are contractually entitled to do so.

Proceedings for corporations

A creditor or a debtor wishing to initiate insolvency proceedings must file a standard application to obtain a commencement of insolvency proceedings order. The court will determine whether to channel the corporate entity into a course of rehabilitation or winding up. This decision depends on the economic condition of the entity and is independent of the manner in which the application has been drafted.

Upon issue of the order by the court for the initiation of insolvency proceedings, an automatic stay of proceedings will apply. The court may choose to manage the corporate entity with a view to achieving its economic rehabilitation. In such a case, a stay of proceedings will apply against the secured creditors, subject to adequate protection in order to safeguard the value of their security.

Simultaneously with the issue of the order, the court will appoint a trustee to be entrusted with full control of the corporate assets.

The Law creates a new mechanism of “protective negotiations”. This is a temporary provision to be in effect for four years. This mechanism allows a public company to initiate out-of-court protective negotiations with its creditors while allowing it to remain active and without appointment of a trustee. During the period of the protective negotiations, a complete stay of proceedings shall not apply but the creditors may not file an application for a commencement of insolvency proceedings order against the corporation and may not call for the immediate repayment of debt. If the temporary provision will show positive results in practice, there are good chances it will be prolonged.

Prior to the enactment of the Law, Israeli courts generally did not allow a debtor to terminate agreements simply because a receiver believed that it could receive a better return within an alternative commercial framework. While the prior statutory framework permitted courts in insolvency proceedings to terminate "burdensome" or "unprofitable" executory contracts, courts generally did not allow licensors to terminate agreements that were moderately profitable.

Section 70(d) of the new Insolvency Law provides that a court may allow for the cancellation of all or part of an executory contract if the court determines that such cancellation is either "required for the economic rehabilitation" of the debtor or alternatively will "increase the proportion of the debt that will be repaid to the creditors". The court may approve the cancellation of the contract after giving the other party to the contract the opportunity to

voice its position, and may, at the request of the other party, order the cancellation of only part of the contract, if it is found to be sufficient for economic restoration or to reduce such debt rate.

If an existing contract is revoked under this section, all of the corporation's rights and obligations under the contract will cease but will not be revoked to prejudice another person's rights and obligations but to the extent necessary to release the corporation and its assets.

Proceedings for individuals

Under the new Law, a substantial part of the administration of insolvency proceedings related individuals has been moved from the court to administrative authorities.

Insolvency proceedings below NIS150,000 will be administered entirely by the Enforcement and Collection Authority. Insolvency proceedings above NIS150,000 will be conducted before the official receiver (the Insolvency Commissioner) and, if relevant, before the court with respect to further, more specific matters.

At the end of this audit by the Collection Authority/Insolvency Commissioner a payment plan is established, at the end of which the debtor will receive a discharge. The default scenario is a payment period of three years. The court reserves the right to increase or decrease the period depending upon the circumstances of the case.

If the debtor has no proven financial ability to pay the creditors, he may be granted an immediate discharge.

According to the new law a person who is in bankruptcy proceedings, and who owns an apartment registered with the Israel Lands Administration or the Land Registry - may find himself in a particularly problematic situation. This is because the current legislation abolishes the protection afforded by the Tenant Protection Act to the debtor and his family members residing in the property he owns.

Hence in some cases it does not necessarily pay off for debtors to resort to insolvency proceedings, e.g., when the debtor owns a real estate property whose value according to the appraiser's assessment is significantly higher than the debtor's debts. If the value of the apartment allows a person to repay his debts in full by selling it and leaves him with a sufficient amount to purchase another residential property or pay rent, then there is no point in going into insolvency proceedings, which endanger the debtor in losing the property.

In cases where the value of the property is not significantly higher than the amount of its debts listed in the debtor's execution, and he chooses to go into insolvency proceedings, it is important to know that the court is not necessarily in a hurry to put any residential apartment up for sale, preferring to exhaust all other alternatives. There is still the possibility of receiving the protection of the debtor's residential apartment in certain circumstances.

Order of Repayment

Under Israeli law, the order of repayment in insolvency proceedings is as follows:

1. Creditors secured by a fixed charge
2. Expenses of insolvency proceedings
3. Preferred creditors
4. Creditors with a floating charge
5. Ordinary creditors
6. Deferred creditors and shareholders

Directors' and CEO's liabilities

The Law allows the court to impose personal liability on a director or general manager that knew, or ought to have known, that the

corporate entity was insolvent and did not take reasonable steps to reduce the potential impact of the insolvency.

However, the Law creates a presumption that a director or general manager took reasonable steps to reduce the extent of the insolvency, if measures were taken to evaluate the economic position of the corporation and acted to ensure that the corporation take one of the following measures:

1. Receipt of assistance from a corporate rehabilitation specialist
2. Negotiations for debt settlement
3. Commencement of insolvency proceedings
4. Additional measures may be derived from existing case law and practice, such as in cases of distressed companies, the officers of the corporate are required to act in favor of the corporate creditors, and to take all precautionary measures for that purpose.

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Bankruptcy, Insolvency & Rehabilitation Proceedings in Italy

ILN RESTRUCTURING & INSOLVENCY GROUP

KEY FACTS OF BANKRUPTCY, INSOLVENCY & REHABILITATION PROCEEDINGS UNDER ITALIAN LAW

1. Presentation of the judicial liquidation/ insolvency/ rehabilitation proceedings in Italy and their main characteristics.

The current legislation for judicial liquidation, insolvency and rehabilitation proceedings has recently been reformed on February 14, 2019. On this date the New Code of Business Crisis and Insolvency has been published in the Official Gazette (Legislative Decree 12 January 2019 No. 14), replacing the Royal Decree n° 267/1942.

This reform which was initially to enter into force in its entirety on August 15, 2020, and then due to the current emergency situation, the Law Decree 23 of April 8, 2020, containing *"Urgent provisions to support companies' liquidity and export"* delayed the entry into force, as stated in article 6, to September 1, 2021, has once again been amended. In fact, according to the Law Decree no. 118 - converted into the Law of 21 October 2021 n. 147,- has established the postponement to May 16, 2022, the entry into force of the Company Crisis and Insolvency Code (Legislative Decree no. 14/2019);

According to the law, the procedures available to debtor and /or to creditors are:

- Judicial liquidation;
- Composition with creditors,
- Restructuring agreements,
- Rescue plans.

The main differences which allow to classify the procedures mentioned above in two macro groups reflect the purpose to which they are directed.

On the one hand, in fact, there are procedures aiming to reorganize the company such as rescue plans, restructuring agreements and composition with creditors where the business continuity is envisaged. They can be used by the entrepreneur in a state of crisis or the phase of a company's business life that puts the prospect of the continuation of the business at risk, if however, the rehabilitation is still possible.

On the other hand, there are procedures aimed at the liquidation of the company's assets such as judicial liquidation and the composition with creditors for liquidation purposes, for the company in a state of insolvency or no longer able to regularly meet its obligations.

Therefore, the procedures respond to different needs depending on the financial condition the debtor intends to use them.

In addition to this difference, it is possible to find others always within the two macro-categories.

In particular, the rescue plan, the restructuring agreements, and the composition with creditors with business continuity differ regarding the treatment of creditors. In fact, while an agreement with creditors is not required in the rescue plan, in the restructuring agreements it is foreseen that the non-participating creditors must be paid in full and in the composition with creditors the approval of the proposal submitted by the debtor by so many creditors which are the majority of the credits admitted to the vote is required.

Furthermore, while in the framework of debt restructuring agreements and the composition with creditors there is the possibility of entering into a so-called tax settlement, i.e., an agreement with qualified creditors for the payment, partial or even deferred, of taxes and related accessories. This possibility is excluded in the rescue plan.

Another difference concerns the control of the judicial authority. In fact, while in the rescue plan there is no provision for judicial review, both in the composition with creditors and in the restructuring agreements, there is the

intervention of the judicial authority and in particular , in the restructuring agreements there are minimal procedural aspects and the Court's control but not in the executive phase; in the composition with creditors there is, instead, a keen control of the judicial authority in every phase.

On the other hand, with reference to judicial liquidation and to composition with creditors for liquidation purposes, the most important difference is that while with the composition with creditors, the entrepreneur keeps the administration of his assets and the business under the supervision of the judicial commissioner, with the judicial liquidation the debtor loses the management of the company that is deferred to the insolvency practitioner appointed by the competent Court.

2. The protection granted to the debtor against its creditors.

From this point of view, it is possible to carry out a joint analysis of the procedures, since the protections put in favor of the debtor towards the creditors are almost applicable to all the procedures.

2.1. Irrevocability of deeds, payments and guarantees.

First of all, the provision for which, in the event of subsequent judicial liquidation, the deeds, payments and guarantees put in place in execution of i) rescue plan, ii) restructuring agreement, iii) composition with creditors cannot be subject to claw back action.

Article 67 letter d) and f) of the Royal Decree, in force until September 2021, in fact establishes that are not subject to the claw back action: *“the deeds, payments and guarantees granted on the debtor's assets if implemented in execution of a plan that appears suitable to allow the reorganization of the debt exposure of the company [...] "and the deeds, payments and guarantees put in place in execution of the composition with creditors [...], as well as the approved agreement pursuant to article 182bis, as well as the deeds, the payments and guarantees legally put in place after the filing of the appeal pursuant to article 161 ”*.

2.2. Prohibition to continue or initiate precautionary and executive actions on the debtor's assets.

As a guarantee for the debtor, it is forbidden to continue or to start exercising individual precautionary and executive actions on the debtor's assets.

Preliminarily, it is necessary to clarify what is meant by "*debtor's assets*" and to which creditors the above-mentioned prohibition refers.

With reference to the first aspect, it can be stated that "*debtor's assets*" means the assets and credits of the entrepreneur admitted to the insolvency proceedings acquired to insolvency estate. Otherwise, assets and rights of a strictly personal nature, maintenance payments, salaries, pensions, wages and what the debtor earns with his/her activity within the limits of what is needed for him/her and his/her family, things that cannot by law be foreclosed, etc.

The property owned by third parties, co-affiliated or with guarantors, directed in some way to guarantee the bankrupt's obligations are also excluded from the application of the prohibition.

With regard instead to the individuals to whom this prohibition refers, it is specified by the rules that the recipients are not only creditors who have accrued pre-judicial liquidation credits, but also creditors who become creditors during the judicial liquidation proceedings and this prohibition does not find the same application in

all procedures and does not apply to rescue plans.

In relation to the other proceedings, the effectiveness of this prohibition is regulated differently depending on the procedures and in particular:

i) With reference to restructuring agreements, the suspension of the precautionary and executive actions on the debtor's assets is valid for sixty days from its publication in the Registry of companies;

ii) Regarding composition with creditors, both for liquidation and conservative purposes, this prohibition applies from the date of publication of the appeal in the Registry of companies and until the time the decree approving the composition with creditors becomes final;

iii) Finally, in the event of judicial liquidation, the provision applies from the day of the declaration of judicial liquidation for the entire duration of the judicial liquidation procedure.

2.3. Contracts pending in the composition with creditors.

With reference only to the proceeding of the composition with creditors, the legislator for the debtor’s protection has provided the possibility for him/her to ask the Court the authorization to terminate contractual relations if they are still in force, (i.e., not yet fully executed nor by one, or by the other contractor) on the date of submission of the appeal for admission to the composition with creditors. This rule also applies against the will of the performing contractor.

The authorization to the Court can be requested and granted when the suspension or winding up appear necessary or perhaps even only convenient to execute the composition with creditors plan.

As an alternative to winding up, the debtor can also request the possibility of suspending the contract for a period of sixty days, which can be extended only once.

This is the current situation, that, as said above, will be modified because of the introduction of the new provisions.

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INTERNATIONAL LAWYERS NETWORK

MARTÍNEZ, ALGABA, DE HARO & CURIEL, S.C.

Bankruptcy, Insolvency & Rehabilitation Proceedings in Mexico

ILN RESTRUCTURING & INSOLVENCY GROUP

KEY FACTS OF BANKRUPTCY, INSOLVENCY & REHABILITATION PROCEEDINGS UNDER MEXICAN LAW

Preface

On 12 May 2000, the Commercial Insolvency Law (the "**CIL**") was published in the Federal Official Gazette, and it entered into full force and effect the next day. This law replaced the 1943 Law governing the Suspension of Payments and Bankruptcy, and all other legal provisions that opposed the provisions of the new CIL.

Pursuant to its preface, the CIL has the principal purpose of creating a modern regulatory framework that allows the conservation of companies undergoing a financial and economic crisis. To this end, the figure of 'conciliation' was created to make sure that the merchant and its creditors reach an agreement for the payment of the merchant's liabilities over a reasonable period. If reaching a reorganization agreement is unfeasible, the CIL establishes a procedure for the orderly liquidation of the merchant's assets and rights while attempting to maximize the proceeds of the sale, applying the funds obtained therefrom to the payment of the merchant's liabilities, following a fair order and preference regarding the differences between the relevant creditors.

The CIL maintains the federal judge as the central body and rector of the commercial insolvency proceeding; however, as previously stated, it recognizes that she or he must be aided in the performance of his or her functions by specialists in administrative, commercial, industrial, economic and financial aspects, so that the judge may focus efforts on strictly legal tasks. As a result, the CIL created the Federal Institute of Commercial Insolvency Specialists (widely known for its initials in Spanish as "**IFECOM**"). According to the indications of the CIL and the General Rules issued to this effect by this Institute, specialists are appointed by means of a random procedure.

In 2007, the CIL underwent several reforms, most importantly, the addition of a pre-packed reorganization proceeding and once again in 2014, the government issued the Financial Reform, by which, among other legislation, the CIL was reformed.

One of the main purposes of this reform was to eliminate the existing legal gaps in the CIL that permitted the courts to interpret the regulation broadly according to each case. For example, in the bankruptcy proceeding of Compañía Mexicana de Aviación, the judge illegally determined to extend the conciliatory term for over four years to procure a reorganization agreement, notwithstanding that, by law, this phase has a maximum duration of one year.

Furthermore, this reform also introduced certain provisions that regulate intercompany debts to determine if the merchant is to be declared commercially insolvent or for the approval of the reorganization agreement between the merchant and its creditors.

On 9 August 2019, the CIL was amended to incorporate provisions that would allow majority state-owned companies to request to be declared commercially insolvent or in bankruptcy.

Members of the house of representatives are planning to propose a legislative reform to the CIL to introduce a special proceeding for fortuitous or unexpected events, such as the coronavirus outbreak. This reform is still being discussed and has not yet been submitted for legislative approval.

We consider that there is still a need to reform the CIL, given that there are matters that are not properly regulated, such as the application and duration of injunctive measures, or conditions that do not adjust to current market practices. This lack of regulation has led to merchants taking advantage to the detriment of creditors'

rights.

Having stated the foregoing, we hereby give a brief presentation of key aspects of the commercial insolvency proceeding, as regulated by the CIL, and the protections granted by the CIL to debtors who are declared insolvent.

1.- Merchants - Insolvency Conditions.

Individuals or legal entities that are Merchants pursuant to the provisions of the Commercial Code may be subject to the commercial insolvency proceeding [3]. All commercial insolvency proceedings are conducted before Federal District Judges (the "**Insolvency Courts**"), located across the Country, and which are appointed based on the corporate domicile of the relevant Merchant. In the event such a domicile is 'unreal', then it shall be deemed to be the place where the entity has its main place of business.

The necessary condition for a Merchant to be declared commercially insolvent is that it can be demonstrated that the Merchant has defaulted in the payment of its obligations in a general manner. In order to prove this condition of general non-performance, a payment default to two or more different creditors should exist, and one of the two following conditions should exist if the insolvency petition is filed by the Merchant, or both conditions if the insolvency petition is filed by the creditors: (i) that of its matured obligations, those that are at least thirty (30) days overdue represent thirty-five percent (35%) or more of all the obligations of the Merchant to the date on which the insolvency petition is filed; and/or (ii) the Merchant has insufficient assets, of those listed below, in order to satisfy at least eighty percent (80%) of its matured obligations on the date the petition is filed. The assets that should be considered for the effects established in this paragraph are: (i) cash on hand and on-sight deposits; (ii) deposits and investments with a term less than ninety (90) calendar days following the date of the petition; (iii) clients and accounts receivable whose maturity does not exceed ninety (90) calendar days following the date of the petition; and (iv) securities for which purchase-sale transactions are regularly conducted in the respective markets, which may be sold in a maximum term of thirty (30) banking days, and whose value is known to the date on which the petition is filed.

2.- Verification Visit.

To determine whether a Merchant is found within the premises contemplated by the CIL to be declared commercially insolvent, there is a preliminary stage within the insolvency proceeding named the "Visit", in which an inspection is made of the financial and economic status of the Merchant (the "**Verification Visit**") by a specialist called the "Visitor", who is appointed by the IFECOM.

The CIL stipulates that the Verification Visit will have a duration of 15 calendar days, which, under the request of the Visitor, may be extended by the Insolvency Court up to an additional 15 days. Based on the opinion submitted by the Visitor and considering the contents of the petition for the declaration of commercial insolvency, the Insolvency Court will determine whether the Merchant is declared commercially insolvent or not, by means of a ruling passed to this effect.

[3] According to the CIL, the following persons may be subject to a commercial insolvency proceeding: (i) Individuals whose normal occupation is commerce; (ii) Business corporations, including state-owned companies created as corporations and companies with majority state participation, when they initiate processes of disincorporation or extinction; and (iii) branches of foreign companies that perform acts of commerce in Mexico; however, in this case, the declaration of commercial insolvency will only encompass the assets and rights that are located and enforceable in Mexico, and the creditors related to transactions entered into with such branches.

3.- Conciliatory Stage.

If the Merchant is declared commercially insolvent by the Insolvency Court, the conciliatory stage will commence in order for the Merchant and its acknowledged creditors to be in a position to reach an agreement regarding the terms and conditions according to which the Merchant will repay its debts (the "**Reorganization Agreement**"). As indicated by the CIL, the initial term that the parties have to reach a Reorganization Agreement is 185 calendar days, which, under certain circumstances, may be extended by the Insolvency Court up to an additional 180 calendar days.

The task of procuring that the Merchant and its acknowledged creditors agree on the terms of, and execute the Reorganization Agreement, is commissioned to a specialist called the "Conciliator", who is appointed by the IFECOM; however, the CIL stipulates that a majority of creditors, with the Merchant´s consent, can appoint the Conciliator.

During this stage, the Conciliator must prepare the list of creditors of the Merchant, and determine the amount, order, and level of preference of their respective credits. During the conciliatory stage, the Merchant (except in specific cases) will continue to manage its company and business under the supervision and, in some cases, requiring the explicit authorization of the Conciliator.

4.- Bankruptcy Stage.

To the extent that the Merchant and its acknowledged creditors are unable to execute the Reorganization Agreement during the maximum conciliatory term of one year established by the CIL or, if the Merchant or its creditors file a bankruptcy petition and its accepted by the Insolvency Court, the Merchant will be declared in bankruptcy.

At such time, the objective of this stage shall become to sell all of the assets and rights of the Merchant, in order to apply the proceeds thereof to the payment of the Merchant's debts, in the order and preference established by the CIL.

In contrast to the conciliatory stage, upon declaration of bankruptcy of the Merchant, management is handed over to a specialist, called the "Receiver", who is also appointed by the IFECOM, whose main objective, as set forth above, is to sell all of the Merchant´s assets to repay its debts, whereas the Conciliator´s objective is to reach a Reorganization Agreement.

5.- Prepackage Plan.

Pursuant to article 339 of the CIL, the Merchant and the majority of his creditors may file for a pre-packaged reorganization proceeding, in which a pre-accorded Reorganization Agreement is accompanied with the insolvency petition, so that once the Merchant is declared commercially insolvent, such Reorganization Agreement is submitted for the Court´s approval.

In a pre-packaged proceeding the Insolvency Court decides whether to declare the Merchant as commercially insolvent, based on the information provided by the Merchant and the majority of his creditors, without the need to perform the Verification Visit. Once the commercial insolvency ruling is issued by the Insolvency Court, the insolvency procedure will be conducted as any other ordinary insolvency procedure.

6.- Protections during Verification Visit.

The Merchant, the Visitor, or any demanding creditor, if such is the case, may request the Insolvency Court during the visit to adopt, alter or lift injunctive measures for the purposes of protecting the Merchant´s Estate and the rights of the creditors. The determination of the

application of the injunctive measures will be left to the discretion of the Insolvency Court, who may also adopt them by operation of law. In any case, the injunctive measures that are issued will be in force until the date on which the Merchant is declared insolvent by the Insolvency Court; however, such measures will be substituted by the injunctive measures set forth in Section 7 below.

These injunctive measures may consist of the following: (i) the prohibition of the Merchant to make payments of obligations due prior to the date of admittance of the petition of commercial insolvency; (ii) the suspension of any enforcement procedure against the assets and rights of the Merchant; (iii) the prohibition of the Merchant to perform sales or transfers or encumbrances of the principal assets of its enterprise; (iv) the prohibition of the any attachment of property; (v) the intervention of the Merchant´s treasury; (vi) the prohibition of the Merchant to perform transfers of funds or securities in favor of third parties; (vii) the placing of a house arrest order on the Merchant, for the sole purpose of not allowing it to leave its place of residence without leaving an attorney-in-fact with sufficient instructions and funds; and (viii) any others of a similar nature.

Notwithstanding the foregoing, it has become a common practice for the Insolvency Courts to extend the beforementioned injunctive measures to the subsidiaries or related companies of the Merchant, no matter whether such entities are subject to a commercial insolvency proceeding. We consider this practice to be against the purposes of the CIL, giving grounds to any affected party to challenge such measures.

7.- <u>Protections after the Insolvency Ruling</u>.

The declaration of commercial insolvency of a Merchant by means of a ruling issued by the Insolvency Court (the "**<u>Insolvency Ruling</u>**"), as well as the opening of the conciliatory stage, produces diverse effects, granting the Merchant primarily the following protections:

(a) Suspension of Payments. Suspension of payments of the debts contracted prior to the date on which the Insolvency Ruling enters into effect, except for those that are indispensable for the day-to-day operation of the company, regarding which the Merchant should in due time inform the Insolvency Court.

Notwithstanding the foregoing, the declaration of commercial insolvency will not be grounds for interrupting the payment of labor, tax, or social security obligations, which should continue to be paid in due course.

(b) Stay of Attachments and Foreclosures. From the moment the Commercial Insolvency Ruling is passed and until the end of the conciliatory stage, no enforcement, attachment or foreclosure order may be executed against the assets and rights of the Merchant, except for those practiced securing or paying, as applicable, accrued wages and labor compensation for the period of two (2) years prior to the date of the Insolvency Ruling.

As of the Insolvency Ruling and until the conclusion of the term for the conciliatory stage, administrative enforcement proceedings of tax credits will also be suspended. Notwithstanding the foregoing, the competent tax authorities may continue the necessary acts for the determination and securing tax credits against the Merchant. We consider that the power given to the tax authorities to "secure" property after the Insolvency Ruling, violates the principles of fairness that should exist between creditors, and that any "securing" performed by the tax authorities to guarantee any credit, cannot give them any privilege over the "secured" asset.

(c) Property Separation. The assets in the possession of the Merchant that can be identified, and whose ownership has not been

transferred thereto by any definitive and irrevocable legal means, may be separated by their legitimate owners.

In terms of the CIL, the following assets may be separated, as an example: (i) the real-estate sold to the Merchant, but not paid, to the extent the relevant deed has not been duly recorded in the corresponding public registry; (ii) the chattels purchased and payable in cash, if the Merchant has not paid the full price at the moment of the Insolvency Ruling; and (iii) the chattels or real-estate acquired on credit, if a breach of payment resolution clause has been recorded in the corresponding public registry.

(d) Contracts and Obligations. With the exceptions established by the CIL, the contracts entered into by the Merchant, and any other obligations assumed thereby, continue to be valid in their terms, except when the Conciliator challenges them for being in the best interests of the Estate.

Anyone who contracted with the Merchant, will be entitled to request that the Conciliator indicates whether he opposes the performance of the relevant contract, and if the Conciliator express that he will not oppose it, the Merchant will have to perform or guarantee its performance, and if the Conciliator manifests that he will oppose it, or does not give a reply within a term of 20 days, the party contracting with the Merchant may at any time terminate the contract, by notice to the Conciliator.

Once the Insolvency Ruling is issued, the injunctive measures ordered by the Insolvency Court during the visit stage are substituted by the protections granted by such Ruling; provided that: (i) once the Reorganization Agreement is approved pursuant to the provisions stated in the CIL, any protection granted by the Insolvency Court is lifted as the Merchant is no longer considered as commercially insolvent; and (ii) if the Merchant is declared in bankruptcy, then injunctive measures subsist until the Court orders their lift.

8.- Foreign Proceedings.

The CIL contemplates several provisions that regulate assistance and interaction between Mexican courts and foreign courts in connection with procedures involving insolvency that are brought in respect of a Mexican merchant that has an establishment, place of business or assets abroad, and of a foreign merchant that has an establishment, place of business or assets in Mexico.

Our interpretation of the CIL concludes that there are two classes of foreign procedures in these type of insolvency or bankruptcy procedures: (1) a principal foreign procedure, which is defined as that brought against a merchant, in a foreign state, who has its principal place of business in that foreign state, and (2) a non-principal foreign procedure, defined as one brought against a Merchant that has its principal place of business in Mexico but also has an establishment abroad.

The provisions of the CIL are clear and congruent in the matter of the acknowledgement of a foreign procedure in respect of a Mexican merchant that has an establishment abroad. For this case, there are provisions that permit the Mexican judge to work in a coordinated manner with the foreign Court to have the proper measures adopted with respect to the assets that the merchant has and the activities that the Mexican merchant performs abroad.

In the case of the acknowledgement of a foreign procedure in respect of a foreign merchant that has an establishment in Mexico, the CIL states that the rules regarding the verification visit have to be observed to determine if the foreign merchant is in effect found to be within the requisite premises of the law to be declared commercially insolvent and that, if such conditions are present, the Mexican judge will

issue a ruling to declare such foreign Merchant in commercial insolvency, and the procedure of commercial insolvency will be followed in accordance with the provisions that are stated in the CIL; provided that the effects of this declaration of commercial insolvency are to be limited to the establishment of the foreign merchant in Mexico.

For a foreign procedure to be recognized by the Mexican courts, a petition must be brought before the court for the recognition thereof by the foreign representative, who is the person defined by the CIL as the person or body, including someone designated in a provisional manner, who shall have been empowered in the foreign procedure to manage the reorganization or liquidation of the assets or business of the merchant or to act as the representative of the foreign procedure. The appearance of the foreign representative before the Mexican courts does not imply the submission of the foreign representative nor that of the assets and businesses of the merchant brought to the jurisdiction of the Mexican courts.

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Bankruptcy, Insolvency & Rehabilitation Proceedings in the Netherlands

ILN RESTRUCTURING & INSOLVENCY GROUP

KEY FACTS OF BANKRUPTCY, INSOLVENCY & REHABILITATION PROCEEDINGS UNDER DUTCH LAW

I. Insolvency proceedings in The Netherlands

There are four law-regulated insolvency proceedings in The Netherlands: bankruptcy (*faillissement* [4]), suspensions of payment (*surseance van betaling*[5]), debt adjustment for natural persons (*schuldsanering natuurlijke personen*[6]) and the confirmation of private plans (*homologatie onderhands akkoord (WHOA)* [7]). Since the scope of this paper focusses on corporate entities, the debt adjustment for natural persons will not be discussed here.

A bankruptcy is generally described as a liquidation of all the debtor's assets whereas a suspension of payments should – theoretically – seek continuation of the activities of the debtor after a period of moratorium. In theory the suspension of payment should be ended after restructuring, after which the debtor can commence his business as usual. In practice a suspension of payments often ends in a bankruptcy after which reorganization will proceed under bankruptcy. The reason for this lies with the absence of certain restructuring rules regarding employees (especially with regard to the transfer of a going concern business) in bankruptcy. Obviously it should be noted that under Dutch law pursuing a bankruptcy with the sole object to get rid of employees, results in abuse of (bankruptcy)law.

Both bankruptcy and suspension of payment are proceedings in which the debtor loses its power of disposition and capacity in relation to its assets.

On 1 January 2021 the Act on Confirmation of Private Restructuring Plans (*Wet homologatie onderhands akkoord ("WHOA")*) came into force. The WHOA gives effect to the EU Restructuring Directive (EU 2019/1023). The WHOA is a pre-insolvency procedure and allows a debtor to restructure its debts outside of the above-mentioned formal insolvency procedures. The WHOA is a debtor in possession-procedure. It is similar to the American Chapter 11-procedure and the UK Scheme and is therefore often referred to as the Dutch Scheme.

Both bankruptcy, suspension of payments and the WHOA are opened by a district court. Bankruptcy can be filed either by the debtor itself or requested by a creditor. Suspension of payments can only be filed by the debtor. A WHOA-procedure can be filed by the debtor, a creditor, a shareholder, the debtor's work council or the debtor's workplace representation.

I. Insolvency officers

When opening a bankruptcy, the district court appoints one or more insolvency administrators (*curator*). These administrators are generally speaking attorneys at law, but there is no legal requirement for this capacity. One sees that the district court will sometimes co-appoint a banker, an accountant, or a real estate agent as an administrator with an attorney.

When opening a suspension of payments, the district court appoints one or more insolvency administrators (*bewindvoerder*). Alongside these insolvency administrators, the district court always appoints a supervisory judge (*rechter-commissaris*) who is in charge of supervising the insolvency proceeding and the administrator. The aforementioned insolvency officials in a suspension of payment (*bewindvoerder* and *rechter-commissaris*) almost always serve as an insolvency official in

[4] Article 1 – 213kk Dutch Bankruptcy Code (*Faillissementswet*)

[5] Article 214-283 Dutch Bankruptcy Code

[6] Article 284-362 Dutch Bankruptcy Code

[7] Article 369 – 387 Dutch Bankruptcy Code

bankruptcy (*curator* and *rechter-commissaris)* if a suspension of payments is converted into a bankruptcy.

In a WHOA-procedure, the debtor can propose a private plan to its creditors and shareholders of it can request the appointment of a restructuring expert (*herstructureringsdeskundige*), who can propose such a plan. If the private plan is proposed by the debtor itself, the district court has the possibility to appoint an observer (*observator*) When the WHO-procedure was filed by a creditor, a shareholder, the debtor's work council or the debtor's workplace representation the court will always appoint a restructuring expert who then is entitled to propose the plan to the exclusion of the debtor.

II. Bankruptcy

A bankruptcy can be filed when the debtor is in a situation where he has stopped paying its due and demandable debts.

In bankruptcy the debtor loses its power of disposition and capacity in relation to its assets as of 0:00 hours of the day on which the court opens a bankruptcy procedure. During the course of the bankruptcy this right lies exclusively with the administrator. It is also described as a general attachment on the assets of the debtor in favor of its creditors to be settled by the administrator. As a result, by law creditors can only enforce claims on the debtor by lodging their claim with the administrator and have to await the claim verification procedure. Creditors are prohibited from enforcing actions against the debtor's assets and seizures made prior to opening of the bankruptcy cease to exist.

Excluded from this prohibition are secured creditors who either have a right of pledge or a right of mortgage. They are allowed to act as if the bankruptcy does not exist and can enforce those rights against the debtor's secured assets.

Also excluded are creditors to the bankruptcy estate (*boedelcrediteuren*). They can enforce their rights on the bankrupt estate.

The supervisory judge, however, can issue a stay period (*afkoelingsperiode*) stipulating that for a stay period not exceeding two months, each right of third parties, including secured creditors and creditors to the bankruptcy estate, to enforce against the debtor's assets or to claim assets under the control of the bankruptcy, can only be exercised with his authorization.

Pending lawsuits instituted against the debtor before the opening of the bankruptcy that procure the performance of an obligation from the debtor are suspended by operation of law and will only continue if the obligation is disputed in the verification process.

III. Suspension of payment

The debtor who expects that he will be unable to continue paying its debts, can be granted a suspension of (moratorium on) payment.

During the suspension of payment, only unsecured and non-preferential creditors are prohibited from enforcing their claim against the debtor's assets. Creditors of secured claims (holders of right of pledge of mortgage) or preferential creditors (such as the Dutch Tax Authority, employees or other creditors whose claim is preferential by law) can enforce their rights as if the proceeding has not been opened.

As a result of the granting of suspension of payment, as of 0:00 hours of the day on which the court grants suspension of payment, the debtor can only exercise its power of disposition and capacity in relation to its assets with the cooperation or authorization of the administrator. This is where the suspension of payments differs from a debtor in possession proceeding.

Creditors of unsecured and non-preferential claims are prohibited from enforcing actions

against the debtor's assets and seizures made prior to the opening of the suspension of payments cease to exist. Additionally, the district court (and not the supervisory judge, as in bankruptcy) can issue a written order (*afkoelingsperiode*) stipulating that, for a stay period not exceeding two months, each right of third parties, including secured and preferential creditors and creditors to the suspension of payment estate, to enforce against the debtor's assets or to claim assets under the control of the bankruptcy can only be exercised with his authorization.

In contrast to a bankruptcy proceeding, pending lawsuits are not automatically suspended.

IV. WHOA

The WHOA is a fast and informal pre-insolvency procedure meant for companies that are in core profitable but have come into dire straits due to issues of over indebtedness and/or recurring costs. The companies are enabled by means of debt and/or cost restructuring to enforce a private on their creditors and/or shareholders to prevent the loss in value that occurs in bankruptcy.

The WHOA is quick, flexible, and free of form. It is a debtor-in-possession procedure and has minimum of judicial involvement. The WHOA has the possibility of enforcing a private plan on dissenting creditors or shareholders (cram down).

The WHOA is applicable for companies that are in a situation where it is to be expected that they cannot continue to pay their debts. It can be filed by the debtor itself or by a creditor, a shareholder, the debtor's work council or the debtor's workplace representation. In the latter case, a restructuring expert is appointed by the District Court. Upon filing one can choose between a public or a confident variant of the procedure. The debtor or – if appointed – the restructuring expert proposes a private restructuring plan to (all or a subset of all) providers of capital, i.e., creditors and shareholders.

The WHAO provides for a lot of supportive measures to enable restructuring. During the WHOA-procedure the debtor has access to different supportive measures, such as a stay period, a protection of security for new funding and the possibility to end or alter contracts. Contrary to bankruptcy, but similarly to suspension of payments, the rights of employees are protected, and employment contracts cannot be effected by the plan. The district court can be asked to lift pre- and post judgement attachments. The Court can also be asked for binding decisions regarding difficult issues (such as voting, class placements, etc.) in a very early stage to avoid uncertainties or fort any other necessary tailor-made measures.

Creditors are categorized (by either the debtor or the restructuring expert) in classes of similarity and vote within this on the acceptance of the plan. The plan is accepted by a class if 2/3rd-majority of the amount of claims or issued capital of the actual voters have voted in favor of the plan.

No dissenting creditor may receive less value then they would have in a bankruptcy situation (best interest of creditors test). The court can be asked for confirmation of the plan if at least one in-the-money class has accepted the plan.

Consent of the debtor is required in case of a small or medium enterprise-debtor. Dissenting classes can be bound (cross class cram down) unless (i) the plan is in breach of the absolute priority rule, (ii) creditors that are small or medium enterprise are not offered an amount in cash that equals 20% of their claim and (iii) the plan lacks a cash exit-possibility for creditors (professional lender excluded).

The voting can take place eight days after the restructuring plan has been offered and electronic voting is allowed. The restructuring plan becomes binding to the debtor and all creditors who were entitled to vote, after confirmation by the court. A confirmation decision by the court takes place within eight to fourteen days after acceptance of the plan and the confirmation cannot be appealed. In theory, the procedure could be completed within a period of three to five weeks.

In its short existence, The WHOA already has proved to be a quick, flexible and (therefor) very effective tool of reorganization of debts and costs.

V. Asset protection

Both in bankruptcy and suspension of payments the debtor loses (some sort of) power of disposition and capacity in relation to its assets. Either it loses it completely (bankruptcy) or can only exercise it with authorization of the administrator. The debtor's assets are protected against all unsecured creditors (bankruptcy) or only against non-preferential creditors (suspension of payment). Secured creditors, such as holder of a right of pledge of mortgage, can enforce their right as if no insolvency proceeding (neither bankruptcy nor suspension of payment) has been opened.

In a WHOA-procedure, the debtor remains in full possession. Attachments can be lifted during the WHOA in order to realize a restructuring. A restructuring plan cannot be enforced against the will of a small business and entrepreneur-debtor.

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Bankruptcy, Insolvency & Rehabilitation Proceedings in Portugal

ILN RESTRUCTURING & INSOLVENCY GROUP

KEY FACTS OF BANKRUPTCY, INSOLVENCY & REHABILITATION PROCEEDINGS UNDER PORTUGUESE LAW

I. INTRODUCTION – KEY ASPECTS OF PORTUGUESE LAW - DEFINITION OF INSOLVENCY AND LEGAL FRAMEWORK

Insolvency proceedings consist of a universal enforcement process, with the objective of satisfying creditors in the best possible way in an bankruptcy scenario, either by an insolvency plan based on the recovery of the company via the insolvency assets, or, when this is not possible, by liquidating the debtor's assets and sharing its result among the creditors.

Insolvency proceedings in Portugal are only triggered in the case of a debtor's insolvency, which is defined, in general, as the inability of the debtor to fulfill its obligations as they fall due (cash flow criteria). Aside from this, and in the case of legal entities, the debtor is also considered to be in an insolvency situation when, according to accounting criteria, the liabilities of the debtor clearly exceed its assets (balance sheet criteria).

Under Portuguese Law, the most relevant laws and statutory regimes that apply to the financial restructuring, reorganizations, liquidations, and insolvencies are the following:

- Insolvency and Recovery Code ("*Código da Insolvência e da Recuperação de Empresas*" – hereinafter "CIRE"), approved by the Decree-Law No. 53/2004, dated 18.03.2004 and last amended at 28.06.2019, on recovery and insolvency judicial proceedings, including the Special Revitalization Proceedings ("*Processo Especial de Revitalização* – hereinafter "PER";
- Civil Code ("*Código Civil*") approved by the Decree-Law No. 47344, dated 25.11.1966 and last amended on 03.09.2019;
- Commercial Companies Code ("*Código das Sociedades Comerciais*"), approved by the Decree-Law No. 262/86, dated 02.09.1986 and last amended on 14.08.2018, on dissolution and liquidation of commercial companies;
- Extra-Judicial Regime for Corporate Recovery ("RERE"), approved by Law no. 8/2018, of March 2nd, providing a specific legal regime for out-of-court recovery agreements;
- Statute of the Insolvency Administrator ("*Estatuto do Administrador de Insolvência*"), approved by the Law No. 22/2013, dated on 26.02.2013 and last amended at 17.04.2019 by the Decree-Law No. 52/2019;
- Law of the Companies of Insolvency Administrators ("*Regime Jurídico das Sociedades de Administradores da Insolvência*"), approved by the Decree-Law No. 54/2004, dated 18.03.2004;
- Directive (EU) 2019/1023 of the European Parliament and of the Council, of June 20th, 2019, on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency, and discharge of debt;
- Regulation (EU) 2015/848 of the European Parliament and of the Council, of May 20th, 2015, on insolvency proceedings.

The insolvency proceeding governed by the CIRE may be voluntary or involuntary, as it may be commenced on the debtor's initiative or on any creditor's initiative. In addition to the insolvency procedure itself, CIRE also provides for two special procedures. The first one is the PER (a voluntary procedure which only applies to companies), considering that only the debtor may submit the request to the court, pursuant to

article 17-A of the CIRE. Such request must include a written statement of the debtor and at least one of its creditors, expressing the intention to engage in negotiations leading to its revitalization through the approval of a recovery plan. The second special procedure is the special payment agreement procedure (which may apply to any debtor other than a company). The RERE is also a voluntary proceeding commenced by the debtor's initiative.

II. 1.STATUTORY INSOLVENCY AND LIQUIDATION PROCEEDING

A debtor must request a declaration of insolvency within 30 days after the date of becoming aware of such insolvency, or on the date when he should have been aware thereof. The application must contain a series of mandatory elements and meet several requirements. However, in several periods of time during the COVID-19 pandemic, this timeframe has been extended.

Natural persons who are not owners of a company on the date of insolvency are exempted from the duty to declare insolvency.

When the debtor is the owner of a company, Portuguese law presumes that awareness of the insolvency occurs three months after the general failure to meet debts regarding taxes and social security payment and contributions; debts arising from an employment contract or from the breach or termination of such contract; or rentals for any type of hire, including financial leases; or instalments of the purchase price or loan repayments secured by a mortgage on the debtor's business premises, head office or residence.

Moreover, the declaration of insolvency of a debtor may be requested by the person legally responsible for the debts, by any creditor, even if conditional and whatever the nature of the claim, or by the Public Prosecutor's Office, representing the entities whose interests are legally entrusted to it, when any of the following occur:

1. General suspension of payment of due obligations;
2. Non-compliance with one or more obligations which, due to the sum involved or the circumstances of the non-compliance, demonstrate the debtor's incapacity to promptly satisfy most of its obligations;
3. Abscondment of the owner of the company or the debtor's directors or desertion of the company's registered office or place of main business, related to the debtor's lack of creditworthiness and in the absence of the appointment of a substitute of good standing;
4. Dispersal, abandonment, hurried or destructive liquidation of assets and fictitious constitution of credits;
5. Insufficiency of seizable assets to pay the respective claim in enforcement proceedings brought against the debtor;
6. Non-compliance with obligations set out in an insolvency or payment plan;
7. General non-compliance, in the previous six months, with debts of any of the following types: **i)** tax; **ii)** social security contributions and dues; **iii)** debts arising from an employment contract, or breach or termination of such contract; **iv)** payments for any type of lease, including financial leases, payments of the purchase price or of a loan guaranteed by a mortgage, with respect to the place where the debtor carries out his activity or has his registered office or residence;
8. Should the debtor be a legal person, where it has greater liabilities than assets as shown on the last approved balance sheet or is

behind by more than nine months in the approval and filing of accounts, if legally required to do so.

The application submitted by a creditor must include information regarding the nature and amount of the credit, the identification of the debtor's managers (both of fact and law) and its five biggest creditors (not including the applicant), and the debtor's commercial registry certificate. If the applicant is the debtor, then it is important to indicate whether the company's situation of insolvency is current or imminent, and to include documents, such as a list of all known creditors and a clear explanation of the company's activity over the last three years.

The judicial ruling which then declares the insolvency of the debtor grants creditors – as well as the Public Prosecutor Department – a fixed time limit (maximum 30 days) to claim their credits (including conditional credits) before the Insolvency Administrator (filed online). Creditors must lodge their claim accompanied by various documents and elements that legitimize and ground the claim, such as the origin of the credit and its legal classification (e.g., guaranteed or privileged), and its due date, amount and accrued interest. Creditors who have had their credit acknowledged by a previous judicial decision are not exempt from the duty of claiming it in the insolvency proceeding if they wish to obtain payment within said insolvency proceeding. After said time limited has expired, the Insolvency Administrator will assess whether the credits are to be acknowledged.

Within 15 days of the termination of the time limit for credit claims, the Insolvency Administrator prepares a list of the credits that were legally acknowledged (which is published), as well as the respective terms and conditions of each one (e.g., the identification of the creditor, the nature of the credit, the amount and accrued interests, and the existence of personal or real guarantees, amongst others). In parallel, another list comprising the credits that were not acknowledged, and the respective grounds of justification, must also be drafted and published.

Within ten days of the deadline for the Insolvency Administrator to present these lists, any person with a legal interest can challenge the acknowledged creditors list. The court will then issue a ruling, in which it decides on the existence and correct classification of the credits.

Despite this, a creditor may still have other claims acknowledged after this period, and may request the separation or restitution of assets, to be considered in the insolvency proceeding, by means of a judicial application against the insolvent estate. The request for the separation or restitution of assets can be filed at any time until the end of the insolvency proceeding. However, the claim for the acknowledgement of credits can only be filed within six months of the judgment declaring the insolvency becoming final.

These credits may be traded amongst creditors and with third parties prior to, or even throughout, the insolvency proceedings, as the only impact that this action has on the claim is the identification of the creditor.

All pending judicial proceedings regarding the insolvency estate assets filed against the debtor or even third parties, which may determine variations in the value of the insolvency estate, and all judicial proceedings with exclusive patrimonial nature filed by the debtor are to be attached to the insolvency proceeding if the Insolvency Administrator so requests. Enforcement proceedings or other measures requested by the insolvency creditors that affect the insolvency estate, as well as arbitration disputes, shall be suspended.

Furthermore, one of the consequences of the declaration of insolvency is the immediate removal of the (debtor) managers' powers of

administration over the assets of the insolvency estate and their subsequent transfer to the Insolvency Administrator, who is authorized by law to carry out all transactions in the ordinary course of business of the debtor.

As a rule of thumb, under article 102 of the CIRE, contracts that have been entered between the debtor and a creditor, and that have not yet been completely performed, are suspended until the Insolvency Administrator determines on their performance or non-performance. In these cases, the respective creditor is given the opportunity to set a reasonable date before which the Insolvency Administrator must issue a decision. If no decision is made by said date, then Portuguese law presumes that the Insolvency Administrator has decided not to perform the contract.

II. 2. AGGRAVATED/CULPABLE INSOLVENCY

Once a court makes a declaration of insolvency, the insolvency may be deemed to be fortuitous or aggravated/culpable (where insolvency is a result of a willful or gross negligence action of the debtor's or of it's in legal directors within the three years prior to the beginning of insolvency proceeding). The law provides for circumstances where **(i)** insolvency is automatically classified as negligent; and **(ii)** where fraud or gross negligence is presumed.

II.3. EFFECTS ON DEBTORS

A declaration of insolvency transfers the power to run a company from its directors to an Insolvency Administrator, who becomes the representative of the debtor for all purposes. Management bodies of a debtor may continue to operate (when requested by the debtor, if the insolvency is voluntary, or with the agreement of the creditors), but actions that might be carried out by the debtor that breach any required supervision of the Insolvency Administrator may be declared null and void. A declaration of insolvency implies that all debts of the insolvent become immediately due. Any judicial proceedings involving patrimonial matters, where the final result may affect the value of the insolvent company's estate, are attached to the insolvency proceeding provided that the Insolvency Administrator requests it. A declaration of insolvency stays (and may then terminate) any pending enforcement proceedings and creditors cannot initiate new enforcement proceedings against the debtor.

II.4. EFFECTS ON NATURAL PERSONS

If the debtor is a natural person, at the debtor's request, he may be granted exoneration from insolvency claims which are not fully paid during the insolvency proceedings or in the five years following closure, as provided for in Articles 235 to 248 of CIRE.

The exoneration of a natural person's liabilities, if allowed, will require the disposable income earned by a debtor to be assigned to a trustee chosen by the court for the five years following the closure of the insolvency proceedings (assignment period). At the end of each year during the assignment period, the trustee uses the sums received: **a)** to pay outstanding costs of the insolvency proceedings; **b)** to reimburse the body responsible for the financial and property management of the Ministry of Justice for the remuneration and expenses of the insolvency practitioner and the trustee as incurred by that body; **c)** to pay his own remuneration and expenses; **d)** to distribute the remainder among the insolvency creditors pursuant to the provisions laid down on payment to creditors in insolvency proceedings.

When the assignment period has ended, the exoneration of the debtor may be granted by the court and in such a case, all insolvency claims which still remain at the date exoneration is granted will be cancelled, including those which have not been lodged or verified. However, the exoneration does not include **a)** maintenance

claims; **b)** compensation due for unlawful acts by the debtor which have been claimed as such; **c)** claims for fines and other monetary penalties for crimes or administrative offences; **d)** tax clams.

II. 5. EFFECTS ON CREDITORS

Insolvency proceedings are dynamic and, as a result, there is a lot of information that is constantly being analyzed and put forward to all parties involved – the creditors' right to be provided with a report prepared by the Insolvency Administrator should be noted. This report will be presented at the creditors' general meeting, which will focus on discussing and deciding whether to close or maintain the activity of the establishments comprising the insolvency estate and can empower the Insolvency Administrator to prepare an insolvency plan and determine the suspension of liquidation of the insolvency estate.

To a certain extent, the CIRE is flexible in allowing creditors to opt for the restructuring and maintenance of the company. If the creditors do not approve an insolvency plan or request the Insolvency Administrator to prepare a plan through which the company is to be maintained and the creditors paid, then the proceeding follows in the view of liquidation and the assets of the insolvency estate will be sold in this framework.

One of the keystones of the CIRE is that creditors must receive equal treatment. There are few exceptions to this rule and those permitted by law abide by the rule that "ordinary credits" are considered equal. On this basis, a distinction is made between guaranteed, privileged, ordinary and subordinated credits:

• Guaranteed credits are those secured by a guarantee in rem. They are paid out of the proceeds of the sale of the secured asset once sale expenses and any amount allocated to credits over the insolvency estate are deducted. If the secured assets are insufficient to pay all debts owed to guaranteed creditors, any remaining debt is included in the common credits.

• Privileged credits are those benefiting from general creditor's privilege (e.g., credits arising from an employment contract) over assets comprised in the insolvent estate. Due to their nature, these credits are paid in a pro rata basis with the proceeds of the unsecured assets and according to its inner ranking. In fact, there are several types of privileged creditors that are ranked differently.

• Common creditors can only be paid after creditors who rank in priority to them are paid in full. They are paid in a pro rata basis if the proceeds of the insolvency estate are insufficient to fully satisfy the debt.

• Subordinated creditors rank below common creditors. They follow the same pro rata rules applicable to common creditors. Holders of such credits are not entitled to vote at the General Meeting of Creditors save for approving an insolvency plan.

• In addition, there is another special and prioritized category, known as credits against the insolvency estate, which generally arise after the declaration of insolvency (e.g., court fees, the Insolvency Administrator's fees, the costs and expenses of administration, and claims resulting from obligations incurred under contracts entered by the Insolvency Administrator after the judgment opening insolvency proceeding or that the administrator chooses to perform). These credits are not subject to ranking or acknowledgement and, in principle, must be paid by the Insolvency Administrator when they fall due.

Once the judgment declaring the insolvency has become final and the creditors' meeting for the assessment report has been held, the Insolvency Administrator promptly proceeds with the negotiation and sale of the assets. The

purchasers acquire the assets *f*ree and clear of claims and liabilities. However, the CIRE establishes a set of rights for guaranteed creditors:

• The guaranteed creditor shall be heard regarding the sale's mode and shall also be informed about the initial base value or price of the proposed sale to a certain entity. However, the Insolvency Administrator is not bound to accept the secured creditor's position;

• The guaranteed creditor may propose to purchase the asset, either directly or through a third party, for a price higher than the projected sale price or the initial base value. If such proposal is not accepted by the Insolvency Administrator and the asset is sold at a lower price, the Insolvency Administrator is required to guarantee that the guaranteed creditor is in the situation he would be in if the asset had been sold at the proposed price;

• The proceeds of the sale of assets shall revert immediately to the guaranteed creditors before any payment is made to any other creditor.

Once insolvency proceedings have commenced, transactions that unfairly favor one creditor over the others or any acts that reduce, make it more difficult or impossible, jeopardize or delay payment to the creditors can be set aside by the insolvency administrator. Two requirements must be fulfilled: the acts must have been carried out in bad faith (with the knowledge of the debtor's insolvency or of the damage that act could cause) and within the two years prior to the initiation of the insolvency proceedings. The insolvency administrator can terminate contracts that fulfil these criteria by means of a registered letter within six months as of the knowledge of their existence. The termination has retroactive effects. The insolvent debtor or the third party which received the communication of termination can challenge it, filling a judicial action within three months after receiving the communication.

III. STATUTORY RESTRUCTING, REHABILITATIONS AND REORGANISATIONS

The PER (“*Processo Especial de Revitalização*”) is a special revitalisation proceeding for companies facing a situation of imminent insolvency or economic distress and is not to be used as a substitute for insolvency proceedings. The PER is initiated by a written request subscribed to by the debtor and creditors representing at least 10% of non-subordinated credits (or a lower percentage in certain limited cases), which includes the following:

• A declaration by the company of its ability to recover;

• A joint declaration of the debtor and the abovementioned percentage of creditors expressing the will to engage in negotiations;

• A declaration by a certified accountant attesting that the company is not insolvent;

• Auxiliary documents required in insolvency proceedings (e.g., a list of creditors, pending lawsuits, shareholders, assets, and employees; a description of the debtor's activities; and annual accounts, management and audit reports and legal certification for the last three years); and

• A proposal of recovery plan, with a description of the company's situation in terms of assets, financing, and revenue cash flows.

Upon the receipt of said request, the judge appoints a provisory judicial administrator (“PA”). The court's order is published, formally initiating the PER. Subsequently, within 20 days of said publication, the creditors make their credit claims to the PA. Within five days, the PA drafts a provisional creditors list, which is published and may be contested in court on the next five business days. Oppositions are decided

by the court within the same term, and the definitive list is defined.

Once the definitive list is determined, negotiations between creditors and the debtor shall start and be concluded within a term of two months, which may be extended once for one month.

Being a dejudicialized proceeding, negotiations are organised and supervised by the PA. The court's main role is to decide on the oppositions to the creditors list and to ratify (or refuse to ratify) the recovery plan approved by creditors. Non-ratification occurs if there is any infringement of non-neglectable procedural rules or infringement of material rules (notably, creditors shall be treated equally and creditors' positions shall not, without their consent, be less favourable to the positions they would have in a non-approval scenario). The recovery plan approved by the creditors and ratified by the court is binding for all parties, including creditors that have not claimed credits and creditors that did not participate in the negotiations or voted against the plan.

The plan's approval requires a vote of creditors representing at least 1/3 of the creditors list and a favourable vote of 2/3 of the issued votes, with more than ½ of such votes corresponding to non-subordinated credits; or a favourable vote of more than ½ of the issued votes, provided that more than ½ of said votes correspond to non-subordinated credits (*slow track*).

Alternatively, the PER may follow a shorter form, being initiated by the presentation of an extrajudicial recovery agreement (signed by the debtor and creditors representing the majority referred to above for the plan's approval), with all ancillary documents. In such cases, following the PA's appointment and the notification of non-subscriber creditors for oppositions to the provisional creditors list, the judge decides on the plan's ratification in the same terms described above. These shorter proceedings may be concluded (upon the final ratification decision) within two to four months on average. Regular proceedings last around six to eight months.

Ratification (or non-ratification) of the recovery plan may be contested through a single appeal to an appeal court (whose decision is final), based on formal or material grounds. Upon the ratification of the recovery plan, the debtor and all creditors (including non-voting, unknown creditors, creditors that have not claimed or have contingent claims regarding facts that occurred on or prior to the PA's appointment) are bound to its terms.

If the recovery plan is not approved, the PA shall communicate the end of negotiations and give an opinion on whether the company is insolvent. If the company is deemed to be insolvent by the PA, the PER is extinguished, and insolvency proceedings are initiated (three business days). If the PER is extinguished the debtor cannot initiate a new PER for the next two years.

These proceedings are not confidential, being available for consultation by interested parties. The main decisions regarding the proceedings are made public.

After the appointment of the PA, any pending enforcement proceedings filed against the debtor shall be suspended, and no further proceedings shall be filed after such date (automatic stay of claims). The company shall continue to operate its business, under the PA's supervision. The PA's prior written authorization is required for "acts of special importance", without that approval the transactions have no effect.

IV. OUT OF COURT RESTRUCTURINGS AND CONSENSUAL WORKOUTS

Creditors and debtors favor extrajudicial restructuring proceedings over statutory

proceedings because the latter are necessarily prejudicial to the company's image, harming the regular continuation of the business. Moreover, out-of-court proceedings secure greater value for creditors and maximize the recovery of credits. Out of court restructurings may occur within pure informal and dejudicialized negotiations and agreements, or within a proceeding following an Extrajudicial Company's Recovering Regime, set out in Law no. 8/2018 ("RERE"). If the debtor's restructuring inevitably entails the reduction of a debt, then insolvency proceedings or the PER (statutory in-court recovery proceedings) are chosen over out-of-court proceedings.

Simple restructurings are usually concluded within three to four months, and more complex restructurings in eight to 12 months. Creditors do not generally accept any compromise on the suspension or limitation of their rights (e.g., enforcement rights), but, in practice, they refrain from exercising such rights while negotiations are ongoing. Banks generally require full disclosure during negotiations (typically regarding accounts, assets, and the business of the debtor). In more complex restructurings, banks sometimes require an audit and a viability plan made by specialized entities. Restructuring agreements typically include solutions such as a restructuring of the payments schedule (periods of grace, extension of repayment dates, decrease of interest rates), a sale of assets, a reduction in activity, and increased compromise by the owners.

Out of court restructuring agreements only bind the signatory parties (they cannot be imposed on non-parties) and cannot modify any rights of non-subscriber creditors or owners. Only PER or insolvency proceedings are binding for all stakeholders, including creditors and owners.

V. MULTINATIONAL CASES

The effects of restructuring or insolvency proceedings opened in an EU Member State are automatically recognized in all other Member States, according to Regulation (EU) 2015/848 (Recast Insolvency Regulation).

However, the CIRE requires foreign judgments to comply with certain formalities before they can be recognized:

- Insolvency has been declared by a foreign court;
- Foreign court's decision is final and binding;
- Decision is adopted by the court where the debtor's center of main interests is located;
- Decision is not illegal under Portuguese law.

Portuguese courts must normally apply the principle of reciprocity when recognizing foreign insolvency decisions.

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Bankruptcy, Insolvency & Rehabilitation Proceedings in Romania

ILN RESTRUCTURING & INSOLVENCY GROUP

KEY FACTS OF BANKRUPTCY, INSOLVENCY & REHABILITATION PROCEEDINGS UNDER ROMANIAN LAW

1. A brief presentation of the bankruptcy/insolvency/rehabilitation proceedings of the country and their main differences.

Romanian legislation provides two main categories of such procedures:

I. **<u>Insolvency prevention procedures</u>**

I.1. **Ad-hoc mandate**

If the debtor faces financial difficulties, it can request the court to open the ad-hoc mandate procedure. The purpose of such procedure is for the debtor and its creditor(s) to reach an agreement, by reducing the debt or rescheduling due debts. Also, other measures may be decided, such as terminating certain agreements, reducing personnel, etc.

I.2. **Preventive agreement**

If the debtor faces financial difficulties, it can request the court to open the preventive agreement procedure. The court appoints an administrator, who drafts the preventive agreement project, which shall include a reorganization plan for the debtor. If the creditors approve the project, the debtor's activity shall be carried on in accordance with such project, for a period of 24 months, with the possibility of extending it for another 12 months.

II. **<u>Insolvency procedure</u>**

The insolvency procedure may be requested either by the debtor or by any creditor, if debts in the amount of a minimum of RON 50,000 (approximately EUR 10,000) are due for more than 60 days.

If the court approves the request, depending on the debtor's situation, the procedure may be started in one of the following forms:

II.1. **General procedure**

In such case, the debtor enters an observation period, in which the official receiver analyses if there are any chances for the company to be reorganized. Following this first step, the debtor may enter one of the following procedures:

(i) <u>Reorganization</u>, in which the debtor's activity is reorganized in accordance with a reorganization plan, approved by the creditors. The plan may provide various measures, such as reducing the debt or rescheduling one or more due debts. The execution on the plan is limited to a period of 3 years, with the possibility of extending it by an additional year. If the plan is successful, the debtor shall be reintegrated in the commercial circuit, and all debt reductions shall remain final. If the plan fails, the debtor enters the bankruptcy procedure (presented in point (ii) below), in which case the reduction of the debts is no longer valid, the creditors being entitled to recover their entire debt.

(ii) <u>Bankruptcy</u>, in which the debtor's assets are sold and all money obtained is distributed to creditors, in accordance with their priority rank, as indicated in

the creditors' list (e.g., secured creditors shall recover before unsecured ones).

II.2. **Simplified procedure**

If the conditions are met, the court approves the request and initiates the simplified procedure, in which case the debtor enters the bankruptcy procedure directly, without going through the observation period, as presented in point II.1 above.

2. (Depending on the type of the proceedings) The protection granted to the debtor against its creditors.

The following questions should be addressed for each proceeding, provided by the law of the country:

i) What kind of protection is granted? (e.g., the creditors may not enforce any court decision against the debtor's assets, etc.)

Ad-hoc mandate

The law does not provide any protection for the debtor, except for the measures negotiated with the creditors and expressly provided in the agreement.

Preventive agreement

If the preventive agreement procedure is initiated, all the enforcement procedures against the debtor are suspended. Also, for the entire duration of such procedure, the insolvency procedure cannot be started against the debtor.

Insolvency procedure

If the insolvency procedure (regardless of the form) is initiated, all the judicial and/or extrajudicial claims, as well as all enforcement procedures against the debtor are suspended. Moreover, creditors cannot start any new such claims or procedures.

Another protection granted to the debtor refers to the suspension of the penalties, interest and other expenses related to the debt

ii) What is the extent of the protection? (e.g., it includes all of the debtor's assets; is it limited to several assets for which the debtor may ask for protection? Is it at the court's discretion to include any asset? Etc.)

Preventive agreement

All the enforcement procedures started before the preventive agreement shall be suspended. However, creditors who obtain an enforceable title may start new enforcement procedures against the debtor.

The suspension includes all the debtor's assets that are being enforced at the date of the preventive agreement.

Contrary to the insolvency procedure, starting the preventive agreement procedure does not suspend the penalties, interest and other expenses related to the debt.

Insolvency procedure

If the insolvency procedure (regardless of the form) is initiated, all the judicial and/or extrajudicial claims, as well as all enforcement procedures against the debtor are suspended. Moreover, creditors cannot start any new such claims or procedures.

The suspension includes all the debtor's assets that are being enforced and all the judicial/extrajudicial claims filed against the debtor.

In respect to the suspension of the penalties, interest and other expenses related to the debt, from the moment the insolvency procedure is started and until it is finalized, no such expenses are incurred by the debtor.

iii) By whom it is granted? (e.g., by a court decision or by injunctions or directly by the law, etc.)

Preventive agreement

The suspension is granted *de iure* and is only mentioned in the decision

Insolvency procedure

The suspension is granted *de iure* and it is not necessary to be mentioned in any court decision.

iv) Does the protection include only the debtor, or may it cover other persons as well (e.g., guarantors)?

Preventive agreement

The suspension includes all the debtor's assets that are being enforced at the date of the preventive agreement. However, such protection is only granted to the debtor and shall not be extended to third parties, such as guarantors.

Insolvency procedure

The suspension includes all the debtor's assets that are being enforced and all the judicial/extrajudicial claims filed against the debtor. However, such protection is only granted to the debtor and shall not be extended to third parties, such as guarantors.

v) When is the protection granted? (e.g., in the rehabilitation proceeding in Greece, the debtor may apply before a court for protection of its assets before any agreement has been concluded with its creditors. After the agreement is concluded, different protection applies).

Preventive agreement

The protection is applicable from the acknowledgement of the court decision confirming the preventive agreement until the procedure is finalized. Nevertheless, the debtor may request temporary protection when filing the request for the preventive agreement procedure. If the request for temporary suspension is admitted, it shall be in effect until the court admits or rejects the main request for the preventive agreement procedure.

Insolvency procedure

The protection is applicable from the moment the insolvency procedure is started, until such procedure is finalized.

vi) For how long is the protection granted?

Preventive agreement

The protection is applicable from the acknowledgement of the court decision confirming the preventive agreement until the procedure is finalized.

Insolvency procedure

The protection is applicable from the moment the insolvency procedure is started, until such procedure is finalized.

vii) Which creditors are bound by the protection?

Ad-hoc mandate

The creditors who signed the ad-hoc mandate.

Preventive agreement

All creditors.

Insolvency procedure

All creditors.

viii) Any other particularities of the procedures of each country (if any).

N/A

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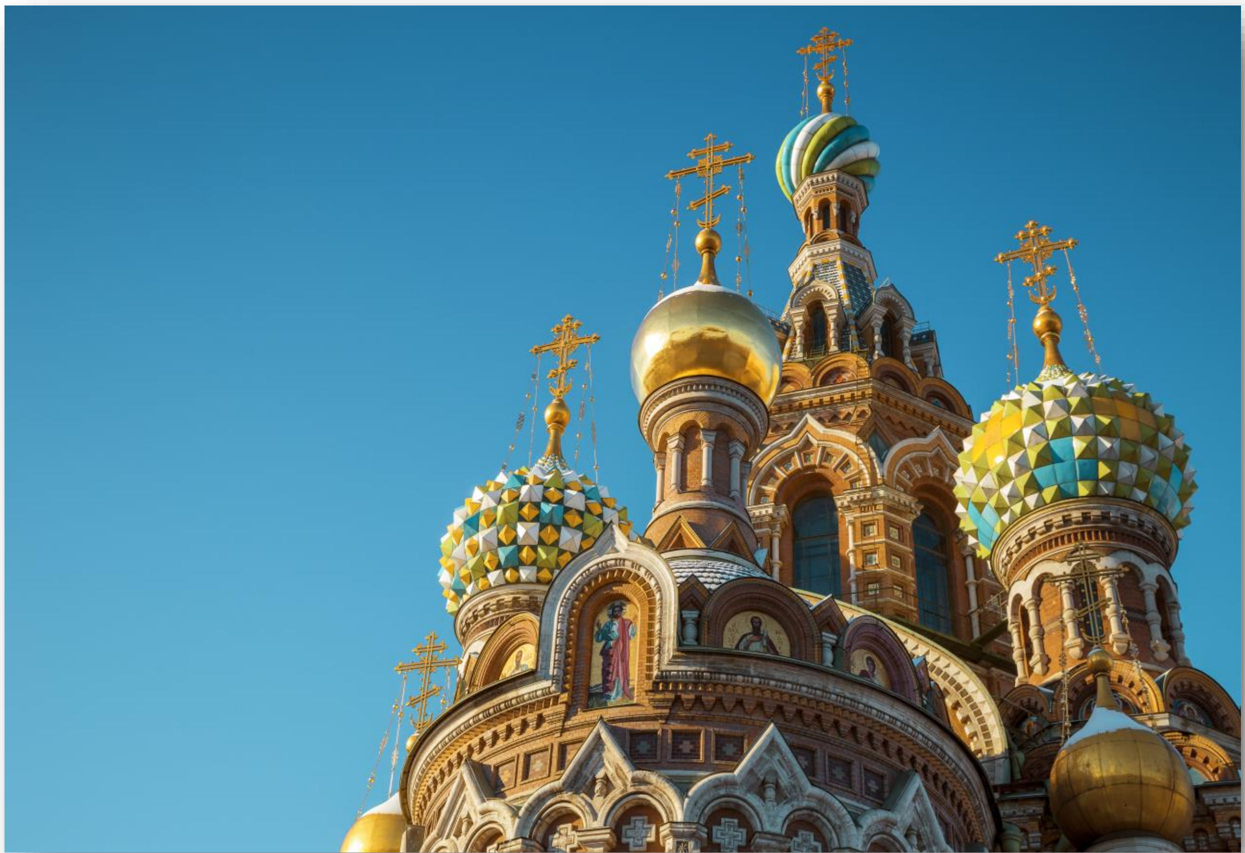

LML ALLIANCE

Bankruptcy, Insolvency & Rehabilitation Proceedings in Russia

ILN RESTRUCTURING & INSOLVENCY GROUP

KEY FACTS OF BANKRUPTCY, INSOLVENCY & REHABILITATION PROCEEDINGS UNDER RUSSIAN LAW

The main piece of the legislation that regulates the activities of parties in insolvency proceedings in the Russian Federation is the Federal Law dated October 26, 2002, No. 127-FZ titled *On Insolvency (Bankruptcy)* (referred to here as the **Insolvency Law**). Bankruptcy procedures are considered by the state commercial court at the place of the debtor's registration and can be initiated by the following persons:

- The creditor;
- An employee of former employee of the debtor, if they have claims for the payment of severance pay and/or wages;
- The competent state authority i.e., the Federal Tax Service;
- The debtor himself (filing a debtor's petition).

The following can be ruled as being insolvent or bankrupt:

- Individuals, including individual entrepreneurs;
- Legal entities (with the exception of state-owned enterprises, institutions, political parties, and religious organisations).

A legal entity must simultaneously meet three conditions to be recognized bankrupt:

- The debtor is unable to satisfy monetary claims of its creditors i.e., monetary amount arising from transactions, severance or wage payments, statutory payments;
- The indicated monetary claims are three months overdue;
- The amount of monetary claims is at least RUB 300,000.

Prior to filing a petition for recognizing the debtor bankrupt creditors and employees/former employees have to file a claim with the debtor for the debt recovery and obtain a favorable decision on such debt came into legal force. If the debt recovery claim was considered by an arbitration tribunal the creditor obtains the right to file the petition for bankruptcy if the writ of execution in relation to the decision of an arbitration tribunal is issued. Also, a preliminary notice of the intention to file a petition on recognizing the debtor as bankrupt should be published in the Unified Register of Information on the Activities of Legal Entities at least 15 days prior to the filing with a commercial court. The notification is valid for 30 days since it has been published.

Banks and state authorities do not fall under the requirement of obtaining prior court's decision in relation to the debtor's monetary debt and enjoy less formal procedure of submitting a notification.

The debtor may file for its own bankruptcy when he anticipates the conditions for bankruptcy to appear inevitably in the nearest future. In certain conditions the debtor is obliged to file a claim for its own bankruptcy.

The Insolvency Law stipulates the involvement of external bankruptcy administrator in all the stages of the consideration of the bankruptcy case. His goal is to protect the interests of the creditors and preserve the property of the debtor. The powers of the bankruptcy administrator vary depending on the procedure applied: starting with an analysis of the debtor's activities and drawing up a report on the possibility of restoring its solvency (supervision procedure), to executing management over the debtor (winding up (liquidation) procedure). The bankruptcy administrator must be an individual

with a higher education, managerial experience, who has passed a special exam and is a member of one of the self-regulating organisations of administrators.

The Insolvency Law provides special grounds and procedure for contesting debtor's transactions. Those grounds depend on the time period when the transaction was concluded calculated backwards from the date the bankruptcy petition is adopted for consideration. Transaction contesting is a very useful instrument for the creditors to return the debtor's assets into its bankruptcy estate if they were wrongfully alienated.

Additionally, creditors may bring the debtor's controlling persons to subsidiary liability. The following persons can be recognized as controlling:

- Director;
- Shareholders;
- Ultimate beneficiary owner (UBO);
- Any other person who is proved to have the right to determine the debtor's actions or influence it.

The controlling persons can be brought to subsidiary liability for their actions or omission led to debtor's inability to repay its creditors in full or for the failure to submit the petition for debtor's own bankruptcy when certain conditions are met.

The following stages of bankruptcy proceedings are generally applied:

- Supervision;
- Financial recovery;
- External administration;
- Winding up (liquidation);
- Amicable settlement agreement.

Bankruptcy stages mainly differ by the level of autonomy the debtor retains and can be divided into rehabilitation procedures: financial rehabilitation, external administration; and bankruptcy procedure – winding up. An amicable settlement agreement may be concluded at any stage between the debtor and its creditors and shall be approved by the court.

In general, the supervision stage is mandatory for legal entities, however it could be set aside if simplified procedures apply. If the debtor had adopted a decision on liquidation or ceased its operation and its location could not be established, supervision and other rehabilitation procedures are not applied, and the debtor can be declared bankrupt and winding up procedure can be introduced.

Russian bankruptcy proceedings are mainly aimed on the liquidation of the debtor, sale of its assets and actions against the debtor's ultimate beneficiary owners. Thus, is provides numerous mechanisms for the creditors while lacking sufficient protective mechanisms for the debtor. The Information on introduction of any bankruptcy procedure is subject to publishing in *Kommersant* newspaper [8] and in the Unified Federal Register of Insolvency Information[9].

1. Supervision

The purpose of the supervision procedure is to ensure the preservation of the debtor's property, to analyze its financial state, to draw up a schedule of creditors and to hold the first meeting of creditors. This procedure is followed after the court's ruling on the validity of the insolvency claim.

The duration of supervision procedure is stipulated in the Bankruptcy Act and cannot exceed 7 months from the date the bankruptcy

[8] https://bankruptcy.kommersant.ru

[9] https://bankrot.fedresurs.ru/?attempt=1

claim is received by the court but can be extended for three months in accordance with the Commercial Procedure Code.

The first claimant proposes, and the commercial court appoints the candidate for the bankruptcy administrator – provisional administrator, who has a significant amount of functions in legal, economic, and managerial spheres of the debtor. For example, powers of provisional administrator include the following:

- Conducting the analysis of the debtor's financial statements in order to evaluate whether the debtor's solvency can be restored and also whether the debtor owns sufficient assets to cover the expenses in the bankruptcy case. The financial analysis also includes the statement on the transactions of the debtor that can be contested on the grounds stipulated in the Bankruptcy Act.
- Filing objections on creditors' claims;
- Holding the first creditors' meeting;
- Adopting measures aimed at preserving the debtor's property.
- Monitoring the commercial activity of the debtor, including powers to request any information concerning the debtor's activities, accounting and other documents reflecting the debtor's economic activities for the past three years prior to the commencement of the bankruptcy.

Creditors can submit their claims to the debtor only within debtor's bankruptcy proceedings. Any claim submitted against the debtor after the commencement of supervision in ordinary proceedings shall be left without consideration. A creditor should file a petition with the commercial court for including its claims within a month since the information on introduction of supervision is published. Missed deadlines cannot be restored according to the Bankruptcy Act and the claims of the creditors with missed deadlines are to be considered only in subsequent bankruptcy proceedings.

The first meeting of the creditors decides on the next procedure to be applied in relation to the debtor, appoints the bankruptcy administrator for the further procedures and approves the report of the provisional administrator. Only creditors whose claims are included in the creditors' schedule are granted the right to vote on the creditors' meeting.

As a result of supervision procedure, the financial recovery or external administration can be introduced. Also, the debtor can be recognized bankrupt with the commencement of winding up procedure. Termination of bankruptcy proceedings can be an option if the solvency of the debtor is restored, an amicable agreement is concluded, or the parties refuse to finance the bankruptcy procedure.

1.1. Consequences of the introduction of supervision

Supervision implies certain limitations on the debtor, its executive bodies, and the creditors.

The debtor may enter into the following transactions only with the consent of provisional administrator:

- Transactions exceeding more than 5% of the debtor's assets value;
- Transactions are related to the receipt and issue of loans, sureties and guarantees, the assignment of right of claim, the transfer of debt.

The debtor obtains the following instruments of protection against its creditors. Enforcement proceedings against the debtor shall be suspended and debtor's property is released

from garnishment. No penalties and other financial sanctions are accrued for a default.

Also, the debtor cannot be discharged of an obligation by the means of offsetting a counterclaim. Debtor’s executive bodies are not allowed to adopt the decisions on the reorganization and liquidation of the debtor; the establishment of legal entities or on participation of the debtor in other legal entities; the payment of dividends or distribution of the debtor’s profits between shareholders and certain others.

As stated above, supervision is a procedure in which the financial condition of a debtor and the possibility for the debtor to pay off his debts are determined. It influences the follow-up procedure, which can be either rehabilitative or winding-up (liquidation).

Judicial statistics show that the number of cases for which rehabilitation procedures are introduced is extremely small. In the 4th quarter of 2018, rehabilitation procedures were introduced only in 1.5% of cases. This underscores that in Russia, insolvency procedures almost invariably lead to liquidation.

2. Financial recovery

Financial recovery is a rehabilitation procedure based on the rehabilitation plan which must include measures aimed at repayment of creditors’ claims in accordance with the payment schedule set out in the plan. In addition to the financial plan a security for the debtor’s payment in accordance with the proposed schedule should be provided. The financial rehabilitation plan shall be approved at the creditors’ meeting and the payment schedule must be approved by the court. Under the court’s ruling the financial recovery procedure is introduced for no more than two years and the bankruptcy administrator is appointed.

If the debtor violates the financial plan, creditors’ claims can be satisfied from the provided security.

As a general rule, the debtor is not barred from ordinary business activities with certain restrictions imposed in relation to assets alienation or providing them as security for obligations performance. As a result of financial recovery, bankruptcy administrator submits the results of the procedure for the creditors’ meeting which decides on the following procedures. In accordance with the decision of the creditors’ meeting, the following results can be achieved:

- If the debtor has no outstanding debts, the bankruptcy case shall be terminated;
- If there are outstanding debts, but the debtor’s solvency can be restored, external administration is introduced;
- If the debtor’s solvency cannot be restored, the debtor shall be recognized as bankrupt and the winding up procedures to be introduced.

2.1. Consequences of the introduction of financial recovery

Generally, the consequences of financial recovery are similar to those of supervision as the debtor’s executive bodies retain its powers with certain limitations stipulated in the Bankruptcy Act. Instruments of debtor’s protection against creditors (suspension of enforcement proceedings, and property release from garnishment) remain the same as in supervision procedure.

The debtor has to enter into the following transactions with the consent of creditor’s meeting:

- Transactions with interested parties;

- Transactions related to acquisition/alienation of property exceeding more than 5% of the debtor's assets value;
- Transactions on granting loans and credits, sureties and guarantees, the assignment of right of claim, the transfer of debt.

The debtor cannot conclude the following transactions without the consent of the bankruptcy administrator:

- Transactions which result to increase the amounts payable to the creditors by more than 5% of the amount of the creditor claims;
- Transactions related to direct or indirect alienation of the debtor's assets, excluding realization of the debtor's manufactured goods (work, services);
- Transactions related to assignment of rights of claim or debt transfers;
- Transactions related to receiving loans or credits.

Debtor's executive bodies cannot adopt the decisions on debtor's reorganization.

Creditors' claims may only be filed within debtor's bankruptcy proceedings. As in supervision, after introduction of financial recovery, enforcement proceedings against the debtor should be suspended and debtor's property is released from garnishment.

3. External administration

External administration can be ordered if there are reasons to assume that debtor's solvency can be restored. Unlike other rehabilitation procedures at external administration stage debtor's executive bodies are substituted with a third-party manager appointed by the creditors' meeting and approved by the court – external administrator. External administration is introduced for a period of 18 months, which can be extended for 6 months.

External administrator drafts and submits an external administration plan to the creditors' meeting for approval no later than one month after he is appointed by the court. An external administration plan should contain appropriate measures to restore the company's solvency, including, inter alia the measures such as:

- The sale of company's assets or part of the enterprise;
- The recovery of the accounts receivable;
- The increasement of the debtor's share capital;
- The performance of the debtor's obligations by its shareholders, participants or any third parties;
- The assignment of the debtor's rights of claim.

An external administration plan must also include the timeframe for restoring the debtor's solvency and reasoning as to whether such restoration is possible within the established timeframe.

External administrator manages the debtor's activities and, in particular has the following powers:

- To manage the debtor's assets including disposal in accordance with the external administration plan;
- To submit the claims on behalf of the creditor for contesting transactions and decisions of the debtor;
- To repudiate contracts and other transactions of the debtor with specifics introduced in the Bankruptcy Act;

- Other powers.

3.1 Consequences of the introduction of the external administration

As the external administration is introduced, the following consequences, including those aimed at the protection of the debtor from creditors, appear:

- A moratorium is introduced on satisfaction of the debtor's monetary obligations and statutory payments with the exception of current and certain other payments;
- Previously adopted measures aimed at securing creditors' claims are revoked;
- Major transactions and interested-party transactions are only concluded with the consent of the creditors;
- Transactions related to issue or receipt of loans, issue of sureties and guarantees, the assignment of rights of claim, the transfer of debt, the alienation or acquisition of shares, the interests of business partnerships are concluded by the external administrator with prior approval from the creditors;
- If the debtor's total monetary obligations arose after introduction of external administration exceed total claims of the scheduled creditors included in the schedule of the creditors by 20%, transactions resulting in new obligations for the debtor may only be concluded by the external administrator only with prior creditors' consent.

No penalties or other financial sanctions are accrued for the default.

4. Winding up procedure (liquidation)

If the debtor's solvency cannot be restored or rehabilitation procedures are ineffective, the debtor should be declared bankrupt and winding up procedure shall be introduced. This procedure is aimed at the fullest possible satisfaction of creditors' claims from the sale of the debtor's assets and its consequent liquidation. The sale of a debtor's property is carried out at an auction. Debtor's property that is subject to a charge and property held in escrow is considered separately and is subject to mandatory valuation.

Power of the debtor's executive bodies are passed to the bankruptcy manager.

After introduction of winding up procedure creditors' claim should be submitted to the commercial court considering the bankruptcy case within a two-month period which can not be restored in accordance with the Bankruptcy Act. Generally, claims filed outside stipulated timeframe are not included in the schedule of the creditors and are only satisfied after all of the claims included in the schedule of creditors are repaid.

Creditors with the amount of claims, exceeding 10 % of total claims, and bankruptcy manager obtain the right to contest the transactions concluded by the debtor in a 3-year period prior to initiation of bankruptcy proceedings on specific grounds emphasized in the Bankruptcy Act.

Time period for winding up procedure is 6 months, which can be extended repeatedly.

Bankruptcy manager in winding up procedure has the widest range of powers in comparison to other bankruptcy stages, which also include the following:

- To dismiss debtor's employees, including the managing director;
- To file claims with the court on contesting transactions and decisions concluded or executed by the debtor;

- To file claims against the debtor's counterparties for recovery of existing debts;
- To file claims against third parties, which in accordance with the Bankruptcy Act can be held liable for the debtor's obligations:
- Other powers.

Winding up procedure results in the distribution of debtor's assets between the creditors in the priority order stipulated in the Bankruptcy Act. If the debtor's assets are insufficient to satisfy the claims of the creditors, the money should be allocated between the creditors of corresponding order of priority proportionate to the amounts of their claims included in the creditor claims schedule. If any assets remain after the satisfaction of all claims, these assets should be distributed between the debtor's shareholders. Any unsatisfied claims are deemed extinguished.

After all settlements with the creditors are completed bankruptcy manager submits the report to the commercial court considering the bankruptcy case. After the court approves the report, the debtor is excluded from the state register of legal entities and winding up procedure is considered completed.

Exceptional cases may include restoration of the debtor's solvency and introduction of financial recovery and/or external administration if these procedures had not been introduced before or creditors may enter into an amicable settlement agreement with the debtor and terminate the bankruptcy case.

4.1. Consequences of the introduction of winding up proceedings

After the introduction of winding up proceedings the following consequences appear:

- All monetary obligations and statutory payments become due and payable;
- Creditors' claims with limited exceptions shall be submitted in winding up proceedings;
- Charter documents cease to be applied
- Paying out dividends or distribution of profit among debtor's founders (shareholders) is prohibited.

As a consequence of introduction of winding up procedure the debtor gains the following protection from the creditors:

- All enforcement proceedings are suspended, the previous attachments of the debtor's assets are lifted, and new ones cannot be imposed;
- Interest, penalties and other fines for non-performance or undue performance of monetary obligations and mandatory payments stop being accrued for a default;

Transactions related to alienation of the debtor's property are permissible only in accordance with specific regulations stipulated in the Bankruptcy Act.

4.2. The order of priority for satisfying claims

Claims of the creditors included in the schedule of creditors are categorized and satisfied in the following order:

- First order of priority – claims of individuals whose lives or health were impaired by the actions of the debtor (these claims are satisfied through the capitalization of corresponding periodical payments), claims for compensation of moral damage and claims for alimony payments;
- Second order of priority – claims related to the payment of severance pay and the

wages of individuals who work or worked under an employment contract, and claims for the payment of consideration under copyright contracts;

- Third order of priority – all other creditors (including claims arising out of the compulsory payment and claims by secured creditors).

Creditors with claims from current payments (the obligations emerged after the date of initiation of bankruptcy proceedings) are not included in the creditor schedule and are satisfied in chronological other before schedule creditors.

The Insolvency Law provides the specifics for the creditors' claims secured by the pledge of the debtor's assets. Their claims are satisfied from the value of the pledged item pursuant to a special procedure:

- 70% of the proceeds from the sale of pledged assets are allocated for the repayment of the claims of the creditor in respect of the obligation secured by the pledge of the debtor's assets;
- 20% is allocated for the repayment of the creditor's claims of the first and second priority, while the remaining 10% is allocated for the payment of expenses on the bankruptcy case and the payment of the fee to the bankruptcy administrator

5. Bankruptcy moratorium

The Russian government has the authority to introduce a moratorium on insolvency proceedings. A moratorium can be introduced to ensure economic stability under exceptional circumstances, for example, during a natural or man-made disaster, or in case of a significant change in the Rouble's exchange rate. The first moratorium was adopted in connection with the coronavirus pandemic.

The main goal for the moratorium is to protect the entities suffered from the consequences of the global pandemic. During the moratorium, enforcement proceedings on property foreclosures are suspended, penalties and other financial sanctions are not accrued, and bankruptcy proceedings cannot be initiated. On the other hand, the companies protected by moratorium are banned from paying the dividends or distributing profits and face other restrictions.

The person subject to the moratorium has the right to refuse to use it. In this case the listed restrictions will not apply. A settlement entered into in an insolvency case which was started within three months after the end of the moratorium may be approved in a simplified procedure.

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Bankruptcy, Insolvency & Rehabilitation Proceedings in Slovakia

ILN RESTRUCTURING & INSOLVENCY GROUP

KEY FACTS OF BANKRUPTCY, INSOLVENCY & REHABILITATION PROCEEDINGS UNDER SLOVAKIAN LAW

We present here the following answers to the questions mentioned in the ILN Restructuring & Insolvency Collaborative Paper which reflect the regulations in the Slovak Republic. We have dealt with proceedings related to a business company in the position of debtor.

Should you have any questions, or issues to discuss, please do not hesitate to contact us. We would gladly answer your questions and cooperate with you.

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1. Presentation of the bankruptcy/insolvency/rehabilitation proceedings in the Slovak Republic and their main differences.

Generally, under Slovak law, every subject is required to prevent bankruptcy, irrespective of whether it is a legal entity or a natural person, a businessperson, or a non-entrepreneur. If the debtor is in danger of defaulting, it is obliged to accept without undue delay proportional and appropriate measures to avert loss.

This preventive duty is causally specific in relation to Section 415 of the Slovak Civil Code No. 40/1964 Coll. as amended by later regulations, according to which every person is obliged to act, inter alia, in order not to damage property.

The provision on the precautionary obligation is of a general nature and does not include a penalty in its structure nor does it define precisely what is meant by the "*proportional and appropriate*" measures to be taken. The proportionality and appropriateness of the measures should be assessed in the context of the fulfilment of the basic fiduciary duties of the members of the statutory bodies. This is in particular the *duty of care*, but also the *duty of loyalty*.

Proportional and appropriate measures to prevent bankruptcy are in particular: convening a general meeting, increase of shareholders' equity (in particular increase of share capital), negotiation with creditors on deferral of liabilities, debt settlement or other debt restructuring (informal restructuring), restructuring process, optimization of the debtor's activities (e.g., termination of the loss-making business), etc.

With regard to the measures to be taken by the debtor to avert or resolve bankruptcy and the sequencing of these measures, the debtor should always be the first (in terms of diligence and direct relevance to the satisfaction of creditors) to attempt informal restructuring. If informal restructuring is unrealistic, formal restructuring should be attempted and, if the assumptions or formal restructuring are not fulfilled, the ultimate solution should be to choose bankruptcy.

In that regard, the legislation differentiates these following basic proceedings:

(1) Liquidation proceedings of the company

If the assets of the company being dissolved do not pass on to a new legal entity, a settlement of the assets shall be made in liquidation proceedings. These proceedings are connected with the entire set of legal and economic relations aimed at the final settlement of the property and other legal relations of the liquidated entity without a legal successor.

It should also be pointed out that not in all cases where the company ceases to exist without a legal successor, must it necessarily also be wound up. Exceptions to this rule can only be

determined by law upon which in the following cases no liquidation shall be required if:

- the claim for bankruptcy was dismissed for lack of property,
- bankruptcy has been cancelled for lack of property, or
- after cancellation of the company by the court, no advance payment was made for the payment of the liquidator's remuneration in the amount of euro 1,500

(2) Restructuring proceedings

If an entrepreneur has financial problems, but there is still a chance to maintain its business after recovering, it may decide for a formal restructuring.

Restructuring proceedings are a legally and strictly defined process regulated by the Slovak Bankruptcy and Restructuring Act No. 7/2005 Coll., which is aimed at rescuing a debtor, where the debtor agrees with all creditors to settle their claims and maintains the next operation of the debtor's business including employment, even after the restructuring has ended.

In contrast to bankruptcy proceedings, after restructuring the debtor's business is maintained and its next business activities after recovering the debts are expected.

If a debtor, that is, a company in financial and existence problems, faces a declining situation (failure, complete cessation of activity) or is in a declining situation, it may entrust the restructuring administrator with the preparation of a restructuring opinion to determine whether the restructuring requirements and conditions are fulfilled.

The restructuring administrator may recommend restructuring of the debtor in the restructuring opinion only if *inter alia*:

(i) the debtor's financial statements give a true and fair view of the facts which are the subject of the accounts and of the debtor's financial situation,

(ii) at least two years have elapsed since the end of the other restructuring of the debtor or its legal predecessor,

(iii) it is reasonable to assume that at least a substantial part of the business of the debtor's business is maintained, and

(iv) in the case of restructuring proceedings, it is reasonable to assume that the debtor's creditors are more satisfied than in the case of bankruptcy.

One of the basic purposes of restructuring proceedings is to satisfy the debtor's creditors to a greater extent than in bankruptcy proceedings. Protection of the debtor's business activities remains and, after restructuring, the debtor may continue in other business activities with its creditors.

The creditors' claims are satisfied in the agreed upon ratio written in the restructuring plan.

In Slovakia, restructuring proceedings used to be unsuccessful, generally many companies move to bankruptcy, mainly because of the late start of restructuring, that an unfavourable financial situation is worsening, or disapproval of the restructuring plan by the creditors’ committee or by the court.

(3) Bankruptcy proceedings

A bankruptcy is a distinctive type of civil procedure under the Slovak Bankruptcy and Restructuring Act No. 7/2005 Coll., the purpose of which is also to satisfy creditors' claims. In this case, however, receivables are satisfied collectively.

A debtor, who is unable to fulfil its obligations on time and is insolvent, is obliged to file a bankruptcy petition within 30 days, from when it learned or if it was able to learn about its situation. This obligation on behalf of the debtor is equally for a statutory body or a member of the statutory body of the debtor, the liquidator of the debtor and the legal representative of the debtor.

A penalty of 12,500 EUR must be enforced by the bankruptcy trustee against a person who has breached his/her obligation to file a bankruptcy petition on behalf of the bankrupt company in due time. Non-payment of this penalty leads to being listed in the Register for Disqualifications, which means that the breaching person cannot be appointed as a statutory body (or its member), member of a supervisory body, branch director or a proxy for a period of three years.

The creditor is also entitled to file a bankruptcy petition if it can reasonably assume the insolvency of its debtor. The insolvency of a debtor can be reasonably foreseen if the debtor is more than 30 days late in meeting at least 2 (two) financial obligations with more than one creditor and one of these creditors was formally summoned to pay. The creditor is obliged to prove his claim by:

a) the written acknowledgement of the debtor with the certified signature of the debtor,

b) an enforceable decision or some other document based on which it is possible to order the enforcement of a decision or to perform an execution,

c) confirmation of an auditor, administrator, or court-sworn expert that the petitioner keeps the receivable in their accounts in accordance with accounting regulations and, if it is a receivable acquired by transfer or passage, also by confirmation of an auditor, administrator or court-sworn expert that the receivable kept in the petitioner's accounts has the grounds of its origin documented, if they file a petition against a legal entity,

d) confirmation of the Ministry of Finance of the Slovak Republic on the existence of the State's receivable from a contribution provided to the debtor from the funds of the European Union, that was approved and accounted by a certification body, or

e) a written declaration with the officially certified signatures of at least five employees or former employees of the debtor who are not their related parties, that the receivables of such persons regarding wages, severance pay, or severance, which are 30 days overdue, have not been fulfilled; the petitioner in this case can only be an employee or former employee of the debtor who is not a party related to the debtor, and who is represented by a trade union, even if they are not its member.

If a petition in bankruptcy is filed by a creditor that has no residence, registered office or branch of an enterprise in the territory of the Slovak Republic, they are also obliged to state in the petition the representative to be served documents that has their residence, registered office or branch of an enterprise in the territory of the Slovak Republic; they are also obliged to attach to the petition any documents proving that the representative has accepted the authorisation to be served documents.

If the bankruptcy proceedings instituted on the basis of a bankruptcy petitioner's proposal terminate for the purpose of certifying the debtor's ability to pay, the creditor shall be liable

to the debtor as well as to other persons for the damage arising from the commencement of the bankruptcy proceedings, unless it proves that submitting a petition for bankruptcy proceeded with professional care.

2. Regulation of protection granted to the debtor against its creditors in restructuring and bankruptcy proceedings.

In the scope of the purpose of the ILN Restructuring & Insolvency Collaborative Paper which focus on the protections that may be granted by law or court decision/order to a debtor, who declares bankruptcy or negotiates a rehabilitation agreement (in restructuring proceedings) with its creditors, we may concentrate in the following part of this document on the restructuring and bankruptcy proceedings which reflect the regulations in the Slovak Republic.

Both formal proceedings **depend on court decisions**, by whom protection to the debtor against its creditors is granted.

In restructuring proceedings, if the restructuring administrator recommends the restructuring by its opinion, and other requirements for the start of restructuring are fulfilled, the court shall decide about *the beginning of the restructuring process*. The court decision is published in the Commercial Journal.

The beginning of the restructuring process has the following serious effects, which mainly protect the debtor from breaking relations with creditors because of such recovering:

(a) the debtor is obliged to restrict the exercise of its activity to ordinary legal acts; other legal acts of the debtor are subject to the consent of the restructuring administrator,

(b) for a claim which is enforceable in a restructuring application, no proceedings for the execution of a decision or enforcement proceedings for assets belonging to the debtor may be commenced; the proceedings for the enforcement of the decision or the execution proceedings are suspended,

(c) for a secured claim that is enforced in the restructuring by an application, the exercise of the securing right over the assets belonging to the debtor cannot be commenced or continued,

(d) the other contracting party may not terminate the contract concluded with the debtor or withdraw from it for the debtor's default in respect of the performance to which the other party has become entitled before the commencement of the restructuring operation; termination of the contract or withdrawal from the contract for this reason is ineffective,

(e) contractual arrangements allowing the other party to terminate a contract entered into or withdraw from the debtor by reason of a restructuring procedure are ineffective,

(f) a claim that is subject to restructuring under the terms of the application cannot be offset against the debtor,

(g) the amalgamation, merger or splitting-up of the debtor cannot be decided nor can any decision on the amalgamation, merger or splitting-up of the debtor be entered in the Commercial Register.

However, during the restructuring process the debtor (with its financial problems) is obliged to fulfil its obligations on time, meaning that the creditors who will continue to cooperate with the debtor must receive the goods delivered or the services paid in due and proper terms. The

debtor must be prepared to fulfil its obligations before its decision to engage in restructuring.

On the other hand, *the commencement of bankruptcy proceedings* by court decision on the proposal of the debtor or its creditors protects generally the assets of the debtor before decreasing its value, therefore:

(a) the debtor is obliged to restrict the exercise of its activities to ordinary legal acts only; if the debtor violates this obligation, the validity of the legal act is not affected, however, the legal act may be contested in the bankruptcy,

(b) the assets of the debtor may not be the subject of proceedings for enforcement or execution; the proceedings for the enforcement of the decision or the execution proceedings already initiated shall be suspended,

(c) the exercise of a security right may not be initiated or continued in respect of property belonging to the debtor on the grounds of the debtor's obligation secured by security right,

(d) the winding-up of a company without liquidation shall be suspended,

(e) the amalgamation, merger or splitting-up of the debtor cannot be decided nor can any decision on the amalgamation, merger or splitting-up of the debtor be entered in the Commercial Register.

If the debtor has failed to bring about its ability to pay, the court shall generally declare bankruptcy of the assets of the debtor in a court resolution which shall be published in the Commercial Bulletin (*bankruptcy declaration*). This act has, in general, very serious effects on the debtor's business relations, assets and position as follows:

1. All rights to dispose of assets subject to bankruptcy are transferred to the bankruptcy administrator. Legal acts of bankruptcy made during bankruptcy, if they liquidate assets subject to bankruptcy, are irrelevant to their creditors.

2. Until the bankruptcy is discontinued, the liquidation of the company is suspended.

3. If the debtor has entered into a contract of mutual fulfilment before a bankruptcy has been concluded, and the fulfilment has not yet been done or has been partially done, both the bankruptcy administrator and the other party may withdraw from the contract to the extent of the unfulfilled obligations.

4. Any unmatured receivables and obligations of the debtor that incurred before the declaration of bankruptcy, and which relate to assets subject to bankruptcy are considered mature until bankruptcy is revoked.

5. All legal and other proceedings relating to bankruptcy assets are suspended, except tax and customs proceedings, maintenance of juvenile delinquency and criminal proceedings, proceedings for the obligation to pay a contractual penalty for breached obligation to file a bankruptcy petition on behalf of the bankrupt company in due time.

6. Bankruptcy's assets may not be the subject of proceedings for enforcement of the decision or execution proceedings.

7. Bankruptcy's assets may not, during the bankruptcy proceedings, give rise to a security right, other than the lien which applies to future assets, if it has been established and registered in the Notarial Central Register of Liens, Real Estate Cadastre, or a special register, before the bankruptcy is declared and in addition to the lien established by the bankruptcy administrator.

8. Any company changes, i.e., an agreement on amalgamation, a merger or a bankruptcy's division project are subject to the bankruptcy administrator's consent.

The effects of the bankruptcy proceedings apply to all of the debtor’s assets, i.e., any property that belongs to the debtor at the time the bankruptcy is declared, the assets acquired by the debtor during the bankruptcy, and the asset which secures the debtor's obligations. The legal regulation excludes only the assets that cannot be affected by court or decision execution, customs collateral up to the amount of the customs debt, tax guarantee under a special regulation, and assets which are not subject to bankruptcy according to special regulations.

Otherwise, formal restructuring proceedings include all of the debtor’s assets.

The protection of the debtor in both proceedings **cover the debtor itself and its assets before all its creditors**. Each submitted claim shall be examined by the administrator and compared with the debtor's accounting and list of obligations.

If the administrator denies the claim, the creditor has *the right to apply to the court for the determination of the claim by an action*. In the action, the creditor may request the determination of the legal reason, the enforceability, the order and the amount of the receivable, the collateral security, or the ranking of the security right. The creditor can only claim the maximum of what it stated in the application for the submitted claim.

This right must be enforced in court on time, otherwise it shall cease to exist. In such situation in restructuring proceedings, the claim of the creditor shall no longer be considered in restructuring, and in the case of confirmation of the restructuring plan by the court, shall be reclaimed.

Other persons such as guarantors, pledgees, and banks are allowed to apply their claims in the proceedings. Their positions depend on the character of their submitted claims. An application may also be a future claim or contingent claim; in the event of a conditional claim, the creditor, especially guarantors, may exercise the rights associated with it only when the creditor establishes its origin.

In both proceedings, the protection of the debtor lasts **during the entire process till its ending by court decisions**.

In a restructuring proceeding, by publishing a court decision confirming *the restructuring plan* in the Commercial Journal, the right of creditors, who did not submit their claims and/or security rights relating to the debtor's assets, shall cease; this also applies to contingent claims which had to be enforced by a claim.

Therefore, a restructuring plan agreed by a court shall be deemed to be a legal act done in the form and manner required by special rules for the creation, modification or termination of rights or obligations contained in the plan. The plan shall not affect the rights of creditors to seek satisfaction of their original claims against the debtor's co-debtors and/or guarantors.

The debtor may also not be able to fulfil its obligation arising from the plan. In such situation, the plan becomes ineffective to such creditor in respect of the affected receivable.

By publishing a resolution of the court *on the termination of restructuring*, the effects of the initiation of the restructuring procedure will cease and all suspended proceedings will be terminated.

After *termination of bankruptcy* by court decision, it is still possible for creditors to file a petition for the enforcement or for the execution for the established receivable which

the debtor has not expressly objected to, unless the debtor ceases to exist.

As was mentioned above, both processes are strict and formal, which require the full cooperation of the debtor itself. For your information, the restructuring process lasts in Slovakia, in general, for one year; bankruptcy usually lasts even several years.

This overview is for information purposes only.

Under no account can it be considered as either a legal opinion or advice on how to proceed in particular cases or on how to assess them. If you need any further information on the issues covered by this overview, please contact Ms. Kristína Ňaňková (nankova@peterkapartners.sk) or Ms. Nicole Šrolová (srolova@peterkapartners.sk).

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Bankruptcy, Insolvency & Rehabilitation Proceedings in Thailand

ILN RESTRUCTURING & INSOLVENCY GROUP

KEY FACTS OF BANKRUPTCY, INSOLVENCY & REHABILITATION PROCEEDINGS UNDER THAI LAW

This paper has a goal to clarify the protections under Thai Bankruptcy Act, B.E.2483 (1940) and its amendments that may be granted by law or the court decision/order against the debtors, who declared that they are bankrupt or under the process of negotiation with creditor on an agreement on rehabilitation.

The law of Thailand regarding insolvency, bankruptcy and rehabilitation proceedings are stipulated and applied through only the Bankruptcy Act B.E. 2483 (1983) and its amendment No.10, B.E.2561 (2018).

The Comparison between the bankruptcy and rehabilitation under the Bankruptcy Act B.E. 2483 and its amendments

	Bankruptcy	Rehabilitation
The Person who is eligible to file the case/ petition with the Court	- Creditor - The debtor by its liquidator if after the completion of liquidation process, the assets of the company are less than the liabilities of the company.	- Creditor/Debtor
The conditions for filing the petition	- Debtor is insolvent - The debtor is an individual person/ or juristic person - The debt amount is not less than 1 million THB for individual person, or - The debt amount is not less than 2 million THB for Juristic Person	- The Debtor is insolvent - The debtor is a limited company/public company or any juristic which is specify in ministerial regulations - The debt amount is not less than 10 million THB - a reasonable cause and prospect for the reorganisation of the debtor's business (debtor must not be placed under absolute receivership) - Filing petition in good faith
The effect by the Court Order	Upon the Court issuing an absolute receivership order against the debtor, only the receiver has the authority to manage the business and collect all assets of the debtor for distribution to the eligible creditors who file their claims for repayment of debt within the time frame as specified by the law.	Upon the Court accepting the petition for rehabilitation, the automatic stay of the debtor under Section 90/ 12 shall be applied.
The operation when entering the process/ The effect by the Court Order	The debtor shall file proposal for a composition in satisfaction of debts in the creditors meeting If there is no Proposal or any Approval for a composition in the meetings, the official receiver must report to the Court and the Court shall have to order that the debtor is bankrupt.	In case of accepting the rehabilitation plan by the Court, the plan administrator shall operate the implementation of the plan which shall not exceed 5 years. The implementation of the plan shall be extended 2 times which shall not exceed 1 year per each extend. In the Case that the creditors meeting, and the Court rejects the plan, Court will

	After 3 years from the order's date, the order might be dismissed under some conditions specify by the law, for example, there is no further asset to be seized.	order to dismiss the rehabilitation order, or order the debtor in bankrupt.

The main difference between Bankruptcy and Rehabilitation is the existence of the business of the debtor and the repayment of debt to the creditors and the effect of the court's order including the protection granted under the law.

The protection granted to the debtor against its creditors:

What kind of protection is granted? (e.g., the creditors may not enforce any court decision against the debtor's assets etc.)

In case of bankruptcy, there is no protection for the debtor once the Court has the order to place the debtor under absolute receivership. According to the Bankruptcy Act B.E. 2483, only the receiver has the authority to manage the business or assets of the debtor for the purpose of collecting all the debtor's assets and selling in public auction in order to share the net amount after deducting expenses and fees for all eligible creditors who file their claim for repayment of debt within the time frame as stipulated in the Bankruptcy Act.

Regarding rehabilitation under the Bankruptcy Act B.E. 2483, the business of the debtors shall be existed, the Plan preparer has the duty to prepare the rehabilitation plan while the Plan Administrator has the duty to implement the rehabilitation plan. In addition, once the Court orders accepting the rehabilitation petition for further inquiry, there are several protections for the debtor under Section 90/12 of the Bankruptcy Act B.E. 2483.

Section 90/12 of Thai Bankruptcy Act, B.E.2483 (1940) provides that subject to section 90/13 and section 90/14, as from the date of the Court's order accepting the petition for consideration up to the date of the expiration of the period of time fixed for the implementation of the plan or the date of successful completion of the implementation of the plan or the date of the Court's order dismissing the petition or striking the action out of the case-list or cancelling the business reorganization order or cancelling the business reorganization or the absolute receivership against the debtor in accordance with the provisions of this Chapter, then:

(1) no action or application shall be brought before or filed with the Court for a judgment or an order dissolving the juristic person that is the debtor and the Court shall, if the action or application has been brought before it or filed with it, stay the trial of such case;

(2) the Registrar shall not issue an order dissolving or effecting registration of the dissolution of the juristic person that is the debtor and such juristic person shall not be dissolved by any other means;

(3) the Bank of Thailand, the Office of Securities and Exchange Commission, the Department of Insurance, or the State agency under section 90/4(6), as the case may be, shall not order revocation of a licence for the operation of business of the debtor or order the debtor to cease the operation of business, unless upon permission by the Court receiving the petition;

(4) no civil action shall be instituted against the debtor in connection with the debtor's property and no dispute in which the debtor may be liable or suffer loss shall be referred

to arbitration for a decision if the obligation arose before the date of the Court's order approving the plan, and no bankruptcy action shall be instituted against the debtor, in the case where an action has previously been instituted or a dispute has previously been referred to arbitration for decision, then a trial shall be stayed, unless the Court receiving the petition orders otherwise;

(5) a judgment creditor shall not have any execution undertaken against the debtor's property if the obligation to which the judgment relates arose before the date of the Court's order approving the plan. In the case where the execution has previously been undertaken, the Court shall stay such execution unless the Court receiving the petition orders otherwise or the execution has been completed before the Executing Officer became aware of the filing of the petition or the execution of the Court's judgment requiring the debtor's delivery of specific property has been completed prior to such date.

In the case where the property seized or attached is perishable or delay involves risks of loss or costs incurred will exceed the value of such property, the Executing Officer shall sell it by public auction or by any other reasonable means and set aside the proceeds. If the Court issues an order approving the plan, the Executing Officer shall deliver such proceeds to the plan administrator for expending them as expenses. If the Court issues an order dismissing the petition or striking the action out of the case-list or cancelling the business reorganization order or cancelling the business reorganization, the Executing Officer shall pay such proceeds to the judgment creditor. But, if the Court issues an absolute receivership order against the debtor and the proceeds remain, the same shall further be delivered to the Receiver;

(6) a secured creditor shall not exercise enforcement for payment of the debt against property given as security unless upon permission by the Court receiving the petition;

(7) a creditor legally entitled to exercise self-help enforcement for payment of the debt shall not seize or sell the debtor's property;

(8) an owner of the property which is essential for the operation of the debtor's business under a contract of hire-purchase, a contract of sale or any other contract carrying a condition or a time clause for a transfer of ownership or a contract of hire the agreed term of which has not yet expired shall not exercise the right to follow and recover the property in the possession of the debtor or any other person relying on the debtor's rights or institute an action for enforcement in connection with property and liabilities arising from such contract. If an action has previously been instituted, the Court shall stay its trial unless the Court receiving the petition orders otherwise or, after the date of the Court's business reorganization order, the debtor, the Receiver, the interim executive, the plan preparer, the plan administrator or the interim plan administrator, as the case may be, commits, on two successive occasions, a default on the payment of hire-purchase remuneration, a price, remuneration for the use of the property or rent under the contract or commits a breach of any material part of the contract;

(9) the debtor shall not make any disposal, distribution, or transfer, grant a lease, make repayment of debt, create debts, or perform any action having the effect of creating any encumbrance over the debtor's property

except that it is an action necessary for the continuance of normal operation of the debtor's business, unless otherwise ordered by the Court accepting the petition;

(10) with respect to orders issued by the Court as provisional measures for seizing or attaching the debtor's property or prohibiting any disposal, distribution or transfer thereof or putting the debtor's property into temporary receivership, being the property in existence prior to the date of the Court's order accepting the petition for consideration, the Court accepting such petition has the power to order suspension of the execution thereof or amendment or variation thereof in such manner as it deems appropriate. But, if the Court thereafter issues an order dismissing the petition or striking the action out of the case-list or cancelling the business reorganization, the Court shall issue an order in connection with such provision measures or temporary receivership order against the debtor as the Court deems appropriate;

(11) any provider of such public utilities as electricity, water or telephone shall not suspend services supplied to the debtor unless upon permission by the Court accepting the petition, or unless, after the date of the Court's business reorganization order, the debtor, the Receiver, the interim executive, the plan preparer, the plan administrator or the interim plan administrator, as the case may be, has failed to make two successive payments of charge accruing after the date of the Court's business reorganization order.

The provisions of paragraph one do not preclude operators of public utilities from filing with the Court accepting the petition an application for an order protecting the applicants'' interests as the Court deems appropriate.

Any judgment or order of the Court or any arbitral award which is contrary to or inconsistent with the provisions of any sub-section of paragraph one is not binding upon the debtor.

Any issuance of an order by the Registrar of Partnerships and Companies, the Registrar of any juristic person concerned or the person having the powers and duties in connection with the juristic person that is the debtor, any entry into a juristic act or any payment of debts which is done in a manner contrary to or inconsistent with the provisions of any sub-section of paragraph one is void.

In conclusion, to protect the debtor's business from any creditors' actions. no action or application shall be brought before or filed with the Court for a judgment or an order dissolving the juristic person that is the debtor and the Court shall, if the action or application has been brought before it or filed with it, stay the trial of such case, or a secured creditor shall not exercise enforcement for payment of the debt against property given as security unless upon permission by the Court receiving the petition or a creditor legally entitled to exercise self-help enforcement for payment of the debt shall not seize or sell the debtor's property and etc.

What is the extent of the protection? (e.g., it includes all the debtor's assets; Is it limited to several assets for which the debtor may ask for protection? Is it at the court's discretion to include any asset? etc.)

The extent of all debtors' asset protection is already prescribed by the law. There is no requirement for the debtor to ask the protection from the Court as there is an automatic stay under Section 90/12 as prescribed above, while

there is no protection against the debtor's assists granted by the Court if the debtor is already placed under absolute receivership order and/or bankruptcy judgment.

Does the protection include only the debtor, or may it cover other persons as well (e.g., guarantors)?

The protection shall be applied only the debtors, it does not cover to the guarantors in accordance with Section 90/60

> *"Section 90/60. The plan approved by the Court binds the creditors who may make applications for repayment of debt in the business reorganisation and the creditors who are entitled to repayment of debt in the business reorganisation, in accordance with section 90/27.*
>
> *The Court's order approving the plan does not have any effect of varying liabilities of persons who are the debtor's partners or bear joint liability together with the debtor or stand surety for or are in the same position as the surety for the debtor, in respect of the debts existing before the date of the Court's order approving the plan and does not have any effect of rendering such persons to be liable for the debts created under the plan as from the said date unless such persons, with evidence in writing, give consent thereto."*

For how long is the protection granted?

Until the Court has the order to dismiss rehabilitation order.

Which creditors are bound by the protection?

It is bound to all creditors who are the eligible creditors on the date the Court issues the rehabilitation order.

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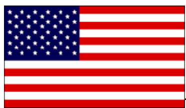

BANKRUPTCY PROCEEDINGS IN THE UNITED STATES

General Overview of the Primary Protection Granted to a Debtor Under the United States Bankruptcy Code

The United States Bankruptcy Code, through its various chapters, governs bankruptcy and reorganization for individuals, corporations, limited liability companies, partnerships, farmers and municipalities in the United States of America. The Bankruptcy Code is federal law and it applies in all States of the United States. There are no separate "bankruptcy" laws in the individual States. Most States have their own insolvency, receivership, and assignment-for-the-benefit-of-creditors laws, but they are not as widely used.

Upon the filing of a bankruptcy petition by or against a person or entity (the "Debtor"), section 362 of the Bankruptcy Code automatically creates an injunction ("Automatic Stay") that enjoins all creditors and other parties from commencing or continuing any actions against Debtor to enforce claims and obligations that arose prior to the filing of the bankruptcy petition. The Automatic Stay also enjoins action against property of the Debtor's estate.

The reach of the Automatic Stay is very broad, and violations of the Automatic Stay may subject the violator to sanctions by the Bankruptcy Court. However, with limited exceptions, the Automatic Stay does not protect persons or entities related to the Debtors who are not debtors themselves, unless the Bankruptcy Court, upon Motion, extends the Automatic Stay to apply to a specific non-Debtor person or entity. The Automatic Stay applies in all bankruptcy cases, unless modified or lifted by the Bankruptcy Court, upon Motion.