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**BANKRUPTCY, INSOLVENCY & REHABILITATION
PROCEEDINGS: AN INTERNATIONAL GUIDE**

ILN RESTRUCTURING & INSOLVENCY GROUP



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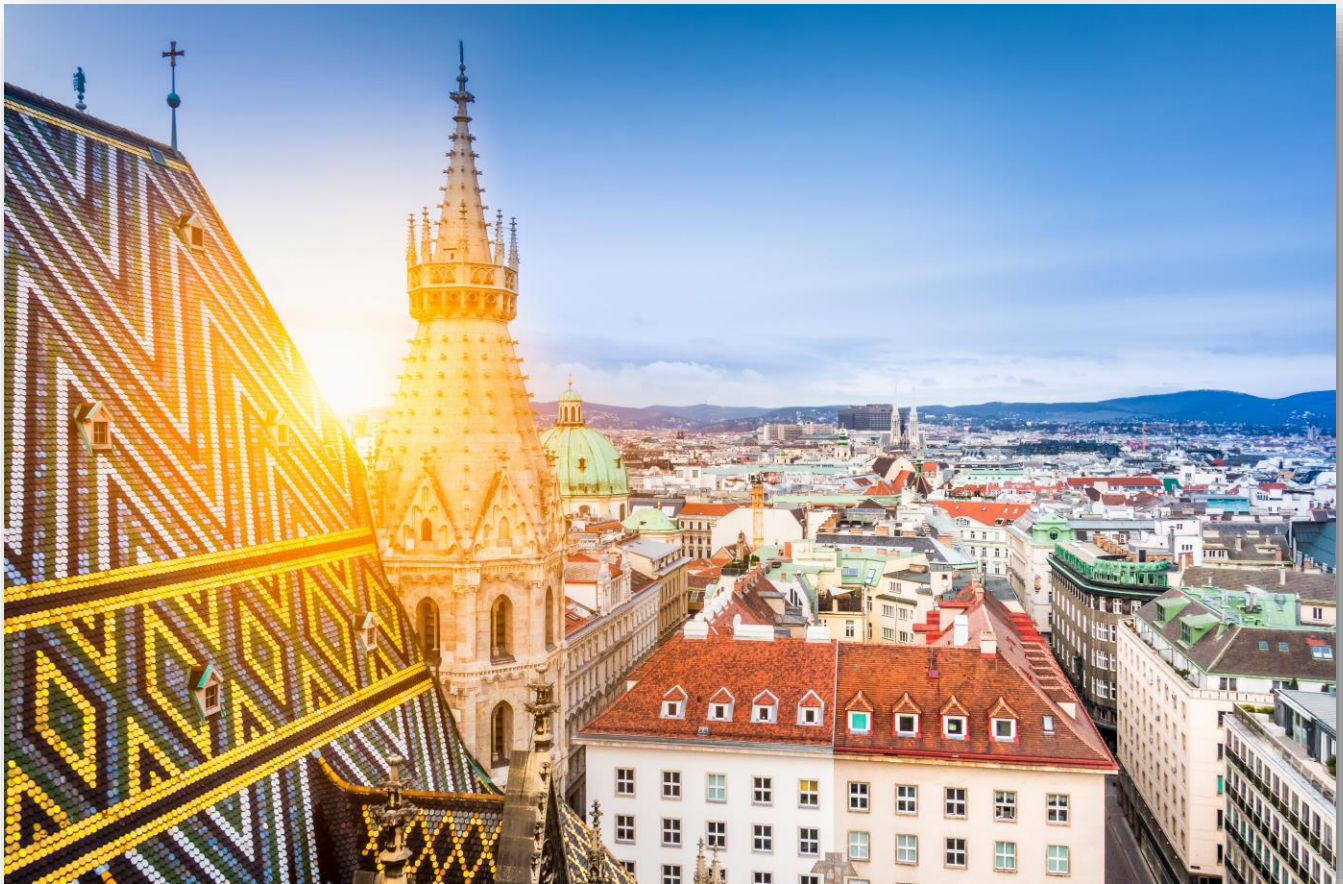
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Bankruptcy, Insolvency & Rehabilitation Proceedings in Austria

ILN RESTRUCTURING & INSOLVENCY GROUP

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 law is codified in statutes. The most important statute in the field of civil law is the Austrian General Civil Code and in the field of commercial law it is the Austrian Code of Commerce.

Austria is part of the EU. At this time there are still 28 member states of the EU. They have 28 distinct and often very different insolvency laws, i.e. the core of the insolvency law is still different from country to country.

Austrian insolvency law is primarily codified in **the Austrian Insolvency Act**.¹ There also is a Business Reorganization Act of 1997. This act 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 are regulated in the (revised) **European Regulation on insolvency proceedings** (applicable Vis-à-vis EU countries except Denmark), the **Austrian Insolvency Act** and bilateral treaties. **Austria did not ratify the UNCITRAL Model Law on Cross Border Insolvencies.**

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

The name of **EU regulation** („Regulation on insolvency proceedings“) is misleading because it **deals only with cross-border (CB) issues of insolvency, namely**

I: International jurisdiction, applicable law

II: Recognition of foreign insolvency proceedings

III: Secondary insolvency proceedings

IV: Information for creditors; lodgement of claims

V: Groups

VI: Data protection

VII: Final provisions

The substantive rules on insolvency and the rules on procedure still differ from country to country.

However, an EU preventive restructuring directive is expected to be published in the official Journal of the EU in June/July 2019. Member states will have 2/3 years to implement the directive. Under this directive, member states will be obliged to provide debtors with access to a preventive² restructuring framework that enables them to restructure, with a view to preventing insolvency and ensuring their viability.

Some key features of the planned EU restructuring directive include:

- The debtor will stay in control (in most cases).

² I.e. at a time where there is a likelihood of insolvency but where the debtor is not yet insolvent as defined by national law.

- The debtor will be able to apply for a time-limited moratorium against enforcement.
- Any mandatory insolvency **filing rules for directors will be suspended during the period of the stay.**
- New and interim financing as well as other transactions concluded in close connection with a restructuring plan are protected in a restructuring.

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 proceedings.

Austrian Insolvency law however also provides for a **court-controlled reorganization proceeding (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 quota** requirement of at least **30% 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 wish 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 quota of 20% over a maximum period of two years.

In both cases the acceptance of the submitted 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).

There also is a **classic liquidation or winding-up proceeding**. In this kind of proceeding the debtor's assets are realized and subsequently distributed to the creditors. However, bankruptcy proceedings also contain elements of debtor protection and rescue of the debtor's business.

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).

Out-of-court reorganizations of insolvent businesses (informal workouts) 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 company is insolvent if it is unable to meet due claims in as they fall due ("illiquidity"). This is also the case if the creditors don't 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.³ If a debtor is not able to pay (all) his debts as they fall due due to a lack of ready means of payment and if the debtor cannot obtain the necessary means of payment immediately, it is deemed to be insolvent.

2. Over-indebtedness

In case of a corporation (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) despite 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 based on 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

If a corporation is either illiquid or over-indebted (in the sense of Austrian insolvency law), an application for the initiation of court-controlled insolvency proceedings must be filed as soon as possible (“without culpable delay”). 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.

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

³ Austrian Supreme Court = “Oberstar Gerichtshof”, short: OGH, decision 3 Ob 99/10w.

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 both

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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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 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 are Bankruptcy and Special Administration, which are 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 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 Bankruptcy/Insolvency legislation in Greece is constantly amended, mainly due to the financial crisis of recent years, so the content of this chapter might be altered after its publication.

I. Pre-Bankruptcy Proceedings

A. Rehabilitation

1. Procedure

Although rehabilitation proceedings are included in the Greek Bankruptcy Code, they do not constitute bankruptcy proceedings.

The rehabilitation proceedings of art. 99 et seq of the Greek Bankruptcy Code 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 rehabilitation proceedings is to achieve a rehabilitation agreement between the debtor and a minimum required number of its creditors (60% of its creditors including the 40% of the secured 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 the negotiations with the creditors, only a "pre-packed" agreement between the creditors and the debtor that is submitted to the court for validation.

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

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 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 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 president of the court examines the application and it is at his/her discretion to order the provisional measures, until the hearing or until the issuance of the injunction's 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.

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, the court can also decide to apply the protection to the guarantors of the debtor as well.

The above-mentioned protection may bind all or several of the creditors

(depending on the court's decision), including also 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, 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-months' rent, 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 between the debtor and its creditors has been concluded and 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 106 of the Greek Bankruptcy Code (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 106 of the Greek Bankruptcy Code, 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.

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.

During the above-mentioned provisional protection, any time limit for bringing a claim is prolonged.

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 (if it is validated, as the Court can deny the validation for several reasons - e.g. it estimates if the business of the debtor will become viable, if the creditors who are not part of the agreement are in a worse position than if a bankruptcy took place, if the agreement is illegal or product of intentional misconduct or the parties are in bad faith etc.), 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 quite new procedure, established by the L. 4496/2017. The law imposes several prerequisites in order to be a debtor eligible for these proceedings (e.g. if until 31.12.2017 had a debt to a financial institution or the State, or court decision against it, a minimum total debt 20.000€ etc.). The procedure **does not include any debts created after 31.12.2017**. Furthermore, the creditors whose claims are considered rather small according to the very detailed provisions of the law are excluded by the procedure and are not bound by it.

The Out of Court Workout is a procedure done mainly electronically and the intervention of the court is very limited. The procedure commences when the eligible debtor (and, in principle, its co-debtors) files



an on-line application to the competent Authority appointed by the law, the Special Secretariat for the Administration of Private Debt. It can also be commenced by several types of creditors (the State, financial institutions etc.). With the application the debtor submits a list of its creditors, its assets and a business plan for the restructuring of its debts. Subsequently, a Coordinator is appointed by the Special Secretariat for the Administration of Private Debt, who coordinates the whole procedure for the restructuring (e.g. notifies the creditors and sends to them an extract of the debtor's application, transfers the propositions/business plan of the debtor to the participating creditors, receives the counter-proposals of the creditors), until a settlement is reached (or not).

The debtor or its creditors may also submit the settlement that was reached to the competent court for validation.

2. The Protection

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

From the time that extract of the debtor's application has been submitted to its creditors by the coordinator and for a 90-day period, any measure of enforcement of claims (either individually or by collective proceedings - e.g. bankruptcy, including in principle, any injunctions) freezes automatically by the law. Any relevant action that commences during the above period is void. The above period can be prolonged until the end of the procedure, if the procedure was delayed due to extensions granted to creditors in order to proceed with

some of the actions outlined in the law, regarding only these creditors.

The above 90-day period can also be prolonged by an application of the debtor before the competent court, for maximum 4 months and provided that there is consent of the majority of the creditors.

Moreover, any creditor may ask from the competent court to lift the protection granted, if it will have as a result his irrevocable damage.

In any case, the above automatic protection is lifted when the procedure of the settlement is not fruitful or if the majority of the creditors decide that.

It must be noted that the above freezing of the enforcement proceedings is followed by the restriction of the transfer etc. on behalf of the debtor of its assets (excluding any transfer that has to do with the day-today business).

From the time that the debtor or its creditors submit the settlement that was reached to the competent court for validation and until the validation of the restructuring agreement by the competent court, any measure of enforcement of claims (either individually or by collective proceedings-e.g. bankruptcy) freezes. This also includes the prohibition, in principle, of any injunction against the debtor.

If at the time of the filling of the application any enforcement procedure is pending, it freezes.

II. Special Administration

1. The Procedure

The Special Administration is a fast-track procedure for the liquidation of the debtor's undertaking either as a whole, or parts and it is regulated by articles 68 et seq of the L. 4307/2014. Its target is not the rehabilitation of the debtor or the restructuring of its debts, but it is focused on liquidation. If the debtor is in permanent and general inability of payments, any creditor(s) who represents the 40% of its total liabilities may apply to the competent court in order to appoint a Special Administrator who will proceed to the liquidation, within the tight time limits provided by the law. The special administrator substitutes the bodies of the company (if the debtor is a company) e.g. the General Assembly, the Board of Directors etc. He/ she proceeds with the liquidation of the undertaking by a public auction and the results of the auction are validated by the competent court. Subsequently, the special administrator distributes the price of the liquidation to the debtors who have announced their claims before him/ her. If the procedure does not bare fruits, the bankruptcy of the debtor follows.

2. The Protection Granted to the Debtor in Special Administration

A protection may be granted to the debtor during two different stages: **a)** before the special administrator is appointed by the court and **b)** after the special administrator is appointed. More specifically:

2.1 The protection before a special administrator is appointed

Before the appointment of a special administrator by the court, any person who has a legitimate interest (e.g. a creditor) may apply to the competent court asking for provisional measures. The court is not bound to order the provisional measures. The measures, which the court may grant, are the same with the ones in bankruptcy and rehabilitation proceedings (see above, par. 1.2 of the Rehabilitation Proceedings).

The protection granted covers automatically any co-debtor(s) (and according to an opinion the guarantors as well) and it includes (also automatically) the restriction to the debtor and any co-debtor(s) to transfer any real estate property or assets of the undertaking.

The application for special administration also freezes any pending rehabilitation or bankruptcy proceedings.

2.2 The protection after a special administrator is appointed

After the creditor's application for special administration has been accepted by the court and a special administrator is appointed, a protection against the undertaking's assets is granted automatically. The protection includes the suspension of the individual claims, including any enforcement of creditor's claims against the undertaking's assets (e.g. a seizure), any civil lawsuit against the debtor or any appeal on a pending lawsuit etc., including also any enforcement proceedings on behalf of the State and it extends for the whole duration of the special administration proceedings.



It must be noted that the special administration proceedings neither constitutes a serious reason for the termination of the contracts that are in force, nor a reason for the invoking of any administrative licenses.

III. Bankruptcy

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 or by reorganizing the debtor's undertaking.

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 probable insolvency can also be sufficient, when the debtor applies and simultaneously submits to the court a reorganization plan for its undertaking.

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 to 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 and it decides the date for the meeting of the creditors.

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 court may order as an injunction whatever provisional measure it 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.

The provisional measures can also be ordered by a provisional order by the president of the court, until the hearing of the application for provisional measures.

Any ordered provisional measure stops automatically, when the decision of the court that orders the bankruptcy (or dismisses the application) is issued.

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.



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 if 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), 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. There are some exceptions, such as when the asset is important for continuing the business of the debtor. The suspension does not include the assets of any guarantors, co-debtors or third parties or debtor’s assets that are not important for continuing its business.

Regarding the pending contracts the following must be noted:

Regarding the instant contracts, the Bankruptcy Trustee, after permission is granted by the Supervising Judge, may continue the pending contracts. If the Bankruptcy Trustee does not exercise the right to continue the pending contracts within ten (10) days of the submission of his report, the other party of the contract shall be entitled to ask from him to elect whether to continue or not, within a reasonable time. If the Bankruptcy Trustee does not respond in a timely manner or he refuses to perform, the other party is entitled a) to withdraw from the contract and b) to a claim for compensation for non-performance, satisfied as a bankruptcy creditor.

Regarding the contracts of a lasting nature, in principle, they remain in force. However, any right of termination by the law or a contract is not affected.

- 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 stops making payments and until the declaration of the bankruptcy and they are harmful for the interests of the creditors.

3. Reorganization Plan

Alternatively, to the liquidation of the debtor's assets, a reorganization plan can be agreed. It can be submitted either by the debtor or its creditors (under conditions) and it constitutes a pre-packaged plan.

The reorganization plan must include several issues, such as sufficient information about the financial situation of the debtor and a comparison of the satisfaction of the creditor's claims with the liquidation, a description of the reorganization measures (it is open to the parties, with some limitations) and the reorganization of the rights of parties (such as creditors, co-debtors, guarantors).

The competent court sets a time limit for the acceptance of the plan by the debtor and the creditors accordingly. A "special" assembly of the creditors votes and decide on the plan. Subsequently it is verified (or not, under conditions) by the competent court.

The reorganization plan, after it is verified, it binds, in principle, all the creditors, even those

who did not participate in the "special" assembly or voted against it.

Conclusion

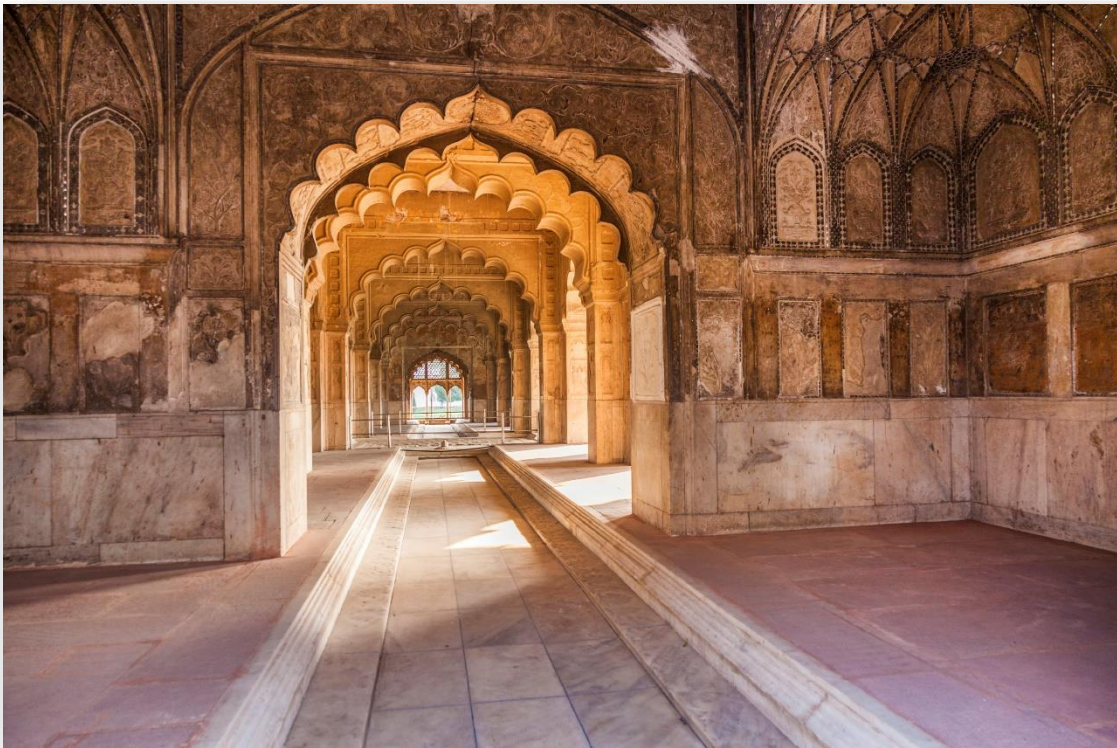
As a final remark, the present constitutes only a brief, general outline of the proceedings and the protection of the assets and it is not a legal advice. Obviously, it may not cover all the detailed provisions of the law, as the bankruptcy and pre-bankruptcy proceedings are quite complicated, with many 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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Bankruptcy, Insolvency & Rehabilitation Proceedings in India

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

The New Code:

Introduction of a comprehensive insolvency and bankruptcy law in India is a recent event, with the introduction of the Insolvency and Bankruptcy Code, 2016 (“**the Code**”) in 2016. The Code is oriented to be the umbrella legislation in India for laws relating to insolvency and bankruptcy. The Code is still in its early years, and as a result, the regulatory and judicial landscapes around it are frequently changing. At present, the Code only governs rehabilitation and liquidation of companies, but its scope will eventually include individuals and other 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, and 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 100,000 (USD 1,500) or above. In addition:

- if an operational creditor approaches the NCLT – it must have already served a 10-day demand notice to 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 IP, 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.

No outer timeline is prescribed by the Code to conclude the process of liquidation and 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 Hon'ble 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.

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.

As per the Indian Finance Minister, as on January 3, 2019 *"1322 cases have been admitted by NCLT. 4452 cases have been disposed at preadmission stage and 66 have been resolved after adjudication. 260 cases have been ordered for liquidation."*

Going by this data, the resolution/rehabilitation plan is approved in approximately 20% of the cases admitted by the NCLTs. With time, however the rehabilitation figures are expected to go up.

The NCLTs are also facing tremendous work pressures, resulting in the Government constantly increasing benches and strength of



the judges. The pressures would however reduce once the initial rush of cases (i.e. cases which were matured for insolvency years before but were languishing in absence of the Code) as also the legal processes and interpretations on various aspects of this new law settle down. The Code nevertheless 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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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 it will come 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 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. According to this, creditors may not file applications preemptively.

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 administrative aspects of insolvency proceedings to the Official Receiver or, under its new name, the "Administrator in Charge of Insolvency Proceedings and Economic Rehabilitation."

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.

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. Within this context, the Law prescribes, inter alia, that 25% of the assets pledged under a floating lien (to differentiate from a specific lien 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 lien be reduced. The Law also reduces the preferential right given to the tax authorities when dividing up the debtor's assets.



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.

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 status 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 operate the corporate entity in order to view to its economic rehabilitation. In such a case, 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 company's assets.

The Law creates a new mechanism entitled protective negotiations, which 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 an

initiation of insolvency proceedings order against the corporation and may not call for the immediate repayment of debt.

Proceedings for individuals

Under the new Law, a substantial part of the administration of insolvency proceedings relative to individuals passes 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 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.

Order of Repayment

Under Israeli law, generally speaking 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 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 potential impact.

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



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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 was published in the Official Gazette (Legislative Decree 12 January 2019 No. 14), replacing the Royal Decree n° 267/1942.

This is a reform with deferred efficacy, since it was partly entered into force on March 16, 2019 and partly will enter into force on August 15, 2020.

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

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

The main differences which allow the classification of the procedures mentioned above into 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 aforementioned 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 with regard to the treatment of creditors. In fact, while an agreement with the 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 August 2020, 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's protection of, 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 activity within the limits of what is needed for him and his 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 aforementioned 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) With regard to 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 protection of the debtor has provided the possibility to the debtor to ask the Court the authorization to terminate contractual relations if they are still in progress, (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 in order 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 in August 2020.



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Bankruptcy, Insolvency & Rehabilitation Proceedings in Mexico

ILN RESTRUCTURING & INSOLVENCY GROUP



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

Please find hereinbelow: (i) a brief presentation of key aspects of the commercial insolvency proceeding, as regulated by the Commercial Insolvency Law (the “CIL”); and (ii) 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 proceeding⁴. All commercial insolvency proceedings are conducted before Federal District Judges (the “Insolvency Courts”), located across the Country, and which are appointed based on the domicile of the relevant Merchant.

The necessary condition in order 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 the following 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 Federal Institute of Commercial Insolvency Specialists (widely known for its initials in Spanish as “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

⁴ 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 (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.



commercially insolvent or not, by means of a ruling passed to this effect.

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 execute the Reorganization Agreement is 180 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 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. Protections after Insolvency Ruling.

The declaration of commercial insolvency of a Merchant by means of a ruling issued by the Insolvency Court (the "**Insolvency Ruling**"), 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 to secure or pay, 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.



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INTERNATIONAL LAWYERS NETWORK



UDINKSCHEPEL ADVOCATEN

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 three law-regulated insolvency proceedings in The Netherlands: bankruptcy (*faillissement*⁵), suspensions of payment (*surseance van betaling*⁶) and debt adjustment for natural persons (*schuldsanering natuurlijke personen*⁷). Since the scope of this paper focusses on corporate entities, the latter 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) that don't apply in bankruptcy. Obviously, it should be noted that under Dutch law pursuing a bankruptcy with the only reason 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. The Netherlands do not have (yet) a debtor in possession-procedure like the American Chapter 11-procedure. However, a new law, the Act on Dutch court confirmation of extrajudicial restructuring plans to avert

bankruptcy (*Wet homologatie onderhands akkoord ter voorkoming van faillissement*) is in the making. If this law passes legislative process, this would enable debtor in possession-procedures in The Netherlands to be opened.

Both bankruptcy and suspension of payments 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.

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

⁵ Article 1 – 213kk Dutch Bankruptcy Code (*Faillissementswet*)

⁶ Article 214-283 Dutch Bankruptcy Code

⁷ Article 284-362 Dutch Bankruptcy Code

II. Protection granted to the debtor against its creditors

II.a. Bankruptcy

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 procedure⁸. During the course of the bankruptcy this right lies exclusively with the administrator⁹. It is also described as a general attachment on the assets of the debtor in favor of its creditors¹⁰ 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 administrator¹¹ and have to await the claim verification procedure¹². Creditors are prohibited from enforcing actions against the debtor's assets and seizures made prior to opening of the bankruptcy cease to exist¹³.

Excluded from this prohibition are secured creditors, who either have a right of pledge of a right of mortgage. They are allowed to act as if the bankruptcy does not exist and can enforce those rights against the secured debtor's 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 written order (*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 authorization¹⁴.

Pending law suits instituted against the debtor before opening of the bankruptcy that procure the performance of an obligation from the debtor are suspended by operation of law¹⁵ and will only continue if the obligation is disputed in the verification process.

II.b. Suspension of payment

During the suspension of payment, only unsecured and non-preferential creditors are prohibited to enforce their claim against the debtor's assets¹⁶. 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 payment¹⁷, the debtor can only exercise its power of disposition and capacity in relation to its assets with the cooperation or authorization of the administrator¹⁸. 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 opening of the suspension of payments cease to exist¹⁹ and the district court (and not the supervisory judge, as in bankruptcy) can

⁸ Article 23 Dutch Bankruptcy Code

⁹ Article 68 Dutch Bankruptcy Code

¹⁰ Article 20 Dutch Bankruptcy Code

¹¹ Article 26 Dutch Bankruptcy Code

¹² Article 110 Dutch Bankruptcy Code

¹³ Article 33 Dutch Bankruptcy Code

¹⁴ Article 63a Dutch Bankruptcy Code

¹⁵ Article 29 Dutch Bankruptcy Code

¹⁶ Article 232 Dutch Bankruptcy Code

¹⁷ Article 217 Dutch Bankruptcy Code

¹⁸ Article 228 Dutch Bankruptcy Code

¹⁹ Article 230 Dutch Bankruptcy Code

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 authorization²⁰.

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

III. Conclusion of Dutch insolvency proceedings

Both in bankruptcy, as in a suspension of payment, 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. A debtor in possession proceeding does not (yet) exist in The Netherlands. 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) have been opened.

²⁰ Article 241a Dutch Bankruptcy Code



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INTERNATIONAL LAWYERS NETWORK



PETERKA & PARTNERS

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. Insolvency prevention procedures

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

If the debtor faces financial difficulties, it can request the court to open ad-hoc mandate procedures. The purpose of such procedures 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 preventive agreement procedures. 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. Insolvency procedure

Insolvency procedures may be requested either by the debtor or by any creditor, if debts in the amount of a minimum of

RON 40,000 (approximately EUR 8,500) 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) Reorganization, 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) Bankruptcy, 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.

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.

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

If the preventive agreement procedure is initiated, all the enforcement procedures against the debtor are suspended. Thus, 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.

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

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.

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

Also, for the entire duration of such procedure, the insolvency procedure cannot be started against the debtor.

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

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.

Such suspension is granted *de iure* and it is not necessary to be mentioned in any court decision. The protection is applicable from the moment the insolvency procedure is started, until such procedure is finalized.

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.

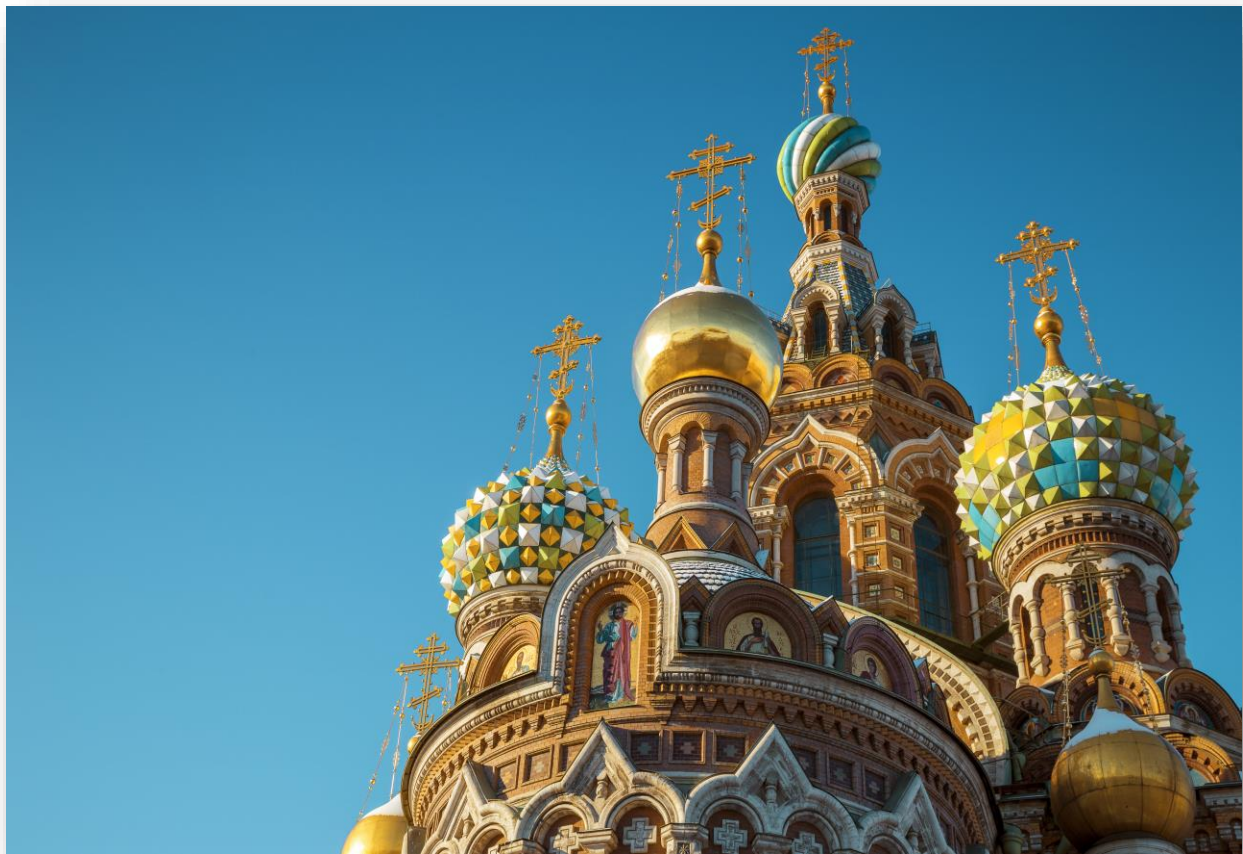
Another protection granted to the debtor refers to the suspension of the penalties, interest and other expenses related to the debt. Thus, from the moment the insolvency procedure is started and until it is finalized, no penalties, interest or other related expenses are incurred by the debtor. Such suspension is granted *de iure* and it is not necessary to be mentioned in any court decision.



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INTERNATIONAL LAWYERS NETWORK



MAXIMA LEGAL

Bankruptcy, Insolvency & Rehabilitation Proceedings in Russia

ILN RESTRUCTURING & INSOLVENCY GROUP



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

The main piece of legislation that regulates the activities of parties in insolvency proceedings in the Russian Federation is the Federal Law dated October 26, 2002 N 127-ФЗ titled *On Insolvency (Bankruptcy)* (referred to here as the **Insolvency Law**).

A right to petition a court to declare a debtor insolvent is held by the debtor himself, the creditor, the authorized bodies, as well as by employees, or former employees of the debtor, to whom the debtor is in arrears of severance payments and/or wages.

Insolvency cases are within the exclusive competence of commercial courts. An entity is insolvent only once the court has ruled as such.

The following can be ruled as being insolvent or bankrupt:

- 1) legal entities (with the exception of state-owned enterprises, institutions, political parties and religious organisations); and
- 2) individuals, including individual entrepreneurs.

Signs of insolvency of a legal entity include, a) an inability to satisfy the creditors' claims and/or to fulfil the obligations to make payments within three months from the date they should have been made and b) the debt is not be less than three hundred thousand roubles.

The Insolvency Law refers to signs of bankruptcy of an individual, a) the inability of the debtor to discharge his obligations to the creditor(s) and b) the value of the debt is more than five hundred thousand roubles.

The Insolvency Law provides for involvement in cases of an administrator. The administrator is designed to respect the interests of creditors and help preserve the property of the debtor.

The powers of the 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 (monitoring procedure), ending with full management of the debtor's activities (full insolvency proceedings). The 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 administrator.

Trends in the development of the law and judicial practice in insolvency cases in the Russian Federation are pro-creditor in nature. This is manifested in the establishment of numerous mechanisms to protect the rights of creditors, which provide them with the opportunity to obtain debts using the debtor's property. In turn, effective mechanisms that would protect the debtor are practically absent from the Insolvency Law.

Now to consider the procedures that are applied in insolvency cases.

1. Monitoring

The purpose of the monitoring procedure is to ensure the protection of a debtor's property, analyse its financial state, draw up a register of creditors' claims and hold a meeting of creditors. This procedure is followed after a court's decision as to the validity of an insolvency petition.

The general duration for monitoring is not established by law; however, the Insolvency Law states that this procedure must be completed taking into account the period for considering an insolvency case, which is seven months.

With the introduction of the monitoring procedure, the debtor's activities are limited.



The commercial court appoints an administrator who is entitled to monitor the debtor's business activities and influence it by legal means, for example, make demands to recognise transactions invalid, request removal of the debtor's management, coordinate transactions that may result in a reduction in the debtor's estate.

Information on the introduction of monitoring and on the introduction of any other procedure in an insolvency case is subject to publication in the *Kommersant* newspaper²¹ and is included in the Unified Federal Register of Insolvency Information²².

The debtor's creditors also hold the first meeting of creditors, which determines the further fate of the debtor, namely, it must be decided what procedure is to be next introduced, either of a rehabilitative nature (financial rehabilitation or external management) or dissolution (the opening of insolvency proceedings).

1.1. Implications of monitoring

1) the creditors' claims and obligatory payments (with the exception of current payments i.e. those that the debtor had before the creditors, after the date of the petition for insolvency), can be presented to the debtor only in accordance with the procedure set out in the Insolvency Law. Accordingly, creditors are entitled to submit their claims to the debtor within thirty calendar days from the date of publication of the notice of introduction of monitoring. If the creditor makes claims later, such claims will be subject to review by the court at the procedure that follows monitoring.

This occurs at the stage of monitoring and continues to apply throughout the insolvency proceedings.

1) At the request of the creditor, the proceedings on cases related to recovery of funds from the debtor are suspended, and the creditor in this case is entitled to submit his claims to the debtor in accordance with the procedure established by the Insolvency Law.

2) The performance of any dealings with property actions are suspended.

The basis for the suspension of the decision of the commercial court on the introduction of monitoring. This decision is sent to the bailiffs. The bailiff, having received the decision suspends the enforcement proceedings, and also makes decisions on the removal of arrests and other restrictions on the property of the debtor.

From the date of the introduction of the monitoring, the collection by the bailiff on the property, including out of court, is not allowed.

4) A claim from a shareholder or partner to allocate its share in the property of a debtor due to the withdrawal of the latter from the list of shareholders or partners is not allowed. Transactions that violate this prohibition are void.

5) A debtor's monetary obligations cannot be offset by a counterclaim if this violates the creditors' claims.

6) It is not allowed to pay dividends, as well as the distribution of profits between the shareholders and partners of the debtor.

7) Penalties and other financial sanctions for non-performance or improper performance of

²¹ <https://bankruptcy.kommersant.ru>

²² <https://bankrot.fedresurs.ru/?attempt=1>



monetary obligations and obligatory payments, except for current payments, cannot be charged.

A decision to make a company subject to monitoring is sent by the commercial court to banks with whom the debtor has a bank account, as well as to the court of general jurisdiction, the main bailiff at the location of the debtor and its branches and representative offices.

As above, monitoring is a procedure in which the financial condition of a debtor is determined, the possibilities for the debtor to pay off his debts and influences the follow-up procedure, which can be either rehabilitative or dissolution of the company.

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 almost invariably leads to liquidation.

Nevertheless, below we outline all other possible procedures that can follow a petition for insolvency.

2. Financial recovery

Financial recovery is a rehabilitation procedure aimed at overcoming financial difficulties of the debtor with the provision of certain guarantees to creditors. The introduction of this procedure allows the debtor to pay debts in accordance with an approved financial recovery plan.

Financial recovery is generally commenced by a commercial court on the basis of a decision of the meeting of creditors.

The total financial recovery period cannot exceed two years.

Generally, the managing bodies and the debtor's administrator are not barred from doing

business, but restrictions are imposed on transactions aimed at directly or indirectly reducing the assets of the debtor, its estate, and also providing them as security to others.

The financial recovery is completed either by deciding whether to discontinue the proceedings, or by introducing external management procedures, or declaring the debtor insolvent.

The implications of introducing a financial recovery procedure for the debtor are similar to those associated with introducing a monitoring procedure for the debtor.

2.1. Implications of financial recovery:

1) In respect of the requirements for mandatory payments, instead of accruing interest, interest is calculated based on the basic interest rate set by the Russian Central Bank on the day the procedure is introduced;

2) on obligations arising prior to the day of the introduction of the procedure of financial recovery, the accrual of financial sanctions (such as fines and penalties) are paused - they are not charged for the entire period during which the financial recovery procedure is in effect;

3) previously adopted measures to secure the claims of creditors are cancelled; arrests on the property of the debtor and other restrictions of the debtor regarding the transfer of the property may be imposed only during insolvency proceedings.

From the date of the introduction of the financial recovery procedure, the previously adopted measures to secure the claims of creditors are cancelled. When lifting an arrest on assets, the bailiff takes the necessary actions in the same manner that would have been used if the court had granted the claim for release of the property from the arrest.



In the financial recovery procedure, arrests on the debtor's property, including those provided for by the Law on Enforcement Proceedings, and other restrictions of the debtor regarding the transfer of property, can be imposed only by the decision of the court considering the insolvency case.

3. External management

This procedure is introduced in order to restore the debtor's solvency with the transfer of authority to manage the debtor to an administrator. External management is also a measure of rehabilitation.

External management is introduced for a period not exceeding 18 months and can be extended, but not more than 6 months.

The management of the debtor passes to the administrator, who has the right to transfer of the debtor's property in accordance with an external management plan, enter into a settlement agreement with creditors on behalf of the debtor, to refuse performance of contracts, to file with the commercial court on behalf of the debtor applications to invalidate transaction, and claims for recovery of damages.

With the introduction of external management, the consequences of the Insolvency Law in monitoring and financial recovery continue to operate.

In the procedure of external management, a moratorium is introduced on settling of creditors' claims. The moratorium extends to monetary obligations and obligatory payments, the deadlines for which were due before the introduction of external management.

With the introduction of the moratorium, the following occur:

- 1) certain powers are suspended.

In contrast to similar provisions provided for in monitoring and financial recovery, in this case only executive documents on decisions that entered into force before the introduction of external management and only for a number of reasons are subject to performance: on collecting payment arrears for intellectual property, the recovery of property from another's illegal possession, the reparation of harm caused to life or health and collecting debts on current payments.

- 2) penalties and other financial sanctions for non-performance or improper fulfilment of monetary obligations and obligatory payments, with the exception of current payments, are not charged.

By agreement of the creditors and the external manager, the interest on the debtor's monetary obligations may be reduced. This rule contributes to the restoration of the debtor's solvency.

4. Declaring a debtor insolvent

The sale of assets occurs when the debtor is ruled to be insolvent. In order to satisfy creditors' claims the debtor's assets can be sold.

The sale of a debtor's property is carried out at auction.

Debtor property that is subject to a charge and property held in escrow is separately considered and subject to mandatory valuation.

The sale of assets is introduced for a period of up to 6 months and may, in exceptional cases, be repeatedly extended.

Following a decision on declaring a debtor insolvency, the powers of the head of the debtor and other governing bodies are terminated, with all documents and necessary information passed to the administrator.



The administrator has the right to challenge the debtor's transactions, declare a waiver of contracts, file claims on behalf of the debtor, and dismiss employees in the manner prescribed by legislation.

4.1 Consequences of declaring a debtor insolvent

1) All claims of creditors, with limited exceptions, can be made only during insolvency proceedings.

In insolvency proceedings, claims of creditors may be filed before the closure of the register of creditors' claims. The register is closed two months after the date a debtor is ruled insolvent.

2) The deadline for the performance of obligations arising before the commencement of insolvency proceedings and the payment of obligatory payments to the debtor is considered to have passed.

3) Charter documents cease to apply.

4) The accrual of interest, penalties and other sanctions for non-fulfillment or improper fulfillment of obligations, except in cases specified in the Insolvency Law (referred to above), ceases.

5) The imposition of new arrests on the debtor's property and other restrictions on the transfer of the property is not allowed.

All previously imposed arrests on the debtor's property are removed on the basis of a court decision declaring the debtor insolvent and the commencement of insolvency proceedings.

At the same time, it is possible to impose arrests and other restrictions in connection with claims for disputes relating to the protection of possession or ownership of property, as well as in connection with demands to cease actions that violate exclusive rights to intellectual property.

4.2. The order of creditors' claims

Requirements for current payments are generally satisfied first with the claims satisfied in the order of calendar priority.

The requirements of creditors included in the register are satisfied in the following order:

1) Payments due to those that the debtor is responsible for causing harm and compensation for moral harm;

2) Payments due to individuals working for the debtor or working under an employment contract, and for payments due to the owners of intellectual property;

3) Payments due to other creditors. The claims of lenders for damages in the form of lost profits, recovery of penalties and other financial sanctions, including for non-performance or improper performance of an obligation, are recorded separately on the register of creditors and are subject to settlement after the principal amount is repaid debt and any interest due. The chances of such creditors receiving payment in full tends to be zero.

The claims of each subsequent group are only satisfied after the full satisfaction of the claims of the preceding group; if the property of the debtor is not enough to meet the requirements of one group, then the obligations are satisfied in proportion to the amounts of their claims to the debtor.

The Insolvency Law provides for the specifics of recording and settling the claims of third-stage creditors for debts secured by a charge on the debtor's property, namely, from the proceeds of the sale of the assets - 70% is used to repay the creditor's secured claims but no more than the principal amount of the debt and the interest due. The cash remaining from the amount received from the sale of the asset(s) is credited



to a special bank account – these funds must be used as follows:

- 20% of the amount received from the sale assets is to be used to repay the claims of the first and second group of creditors in that there is insufficient property to satisfy their claims in full; and
- the remaining funds are to be used for repayment of court costs and the administrator's expenses.

After settlements with creditors and all of the debtor's property has been disposed of, the administrator prepares a report which is provided to the commercial court. Following which the court concludes the proceedings by recording the dissolution of the debtor. It is from the date of making an entry on the Unified State Register of Legal Entities that insolvency proceedings are considered completed.

It is worth noting that the average duration of insolvency proceedings in Russia is 681 days with only around 5.2% of registered creditors' claims being satisfied.



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INTERNATIONAL LAWYERS NETWORK



PETERKA & PARTNERS

Bankruptcy, Insolvency & Rehabilitation Proceedings in Slovakia

ILN RESTRUCTURING & INSOLVENCY GROUP

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

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 company has no assets,
- the claim for bankruptcy was dismissed for lack of property,

- the bankruptcy has been cancelled on the grounds that the company's assets are insufficient to cover the expenses and remuneration of the bankruptcy administrator,
- bankruptcy proceedings have been suspended for lack of property,
- bankruptcy has been cancelled for lack of property, or
- no assets remain in the company after the bankruptcy proceedings have been completed.

By the way, the decision of the competent body of the company is not an irreversible process. Several changes may occur during the liquidation process, and the effect may also be that the shareholders eventually decide to cancel their original decision to wind up the company and bring it into liquidation.

(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, which 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,4a) 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.
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 taken into account 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 fulfill its obligation arising from the plan. In such a 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. Linda Beláková (belakova@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 (1940) under Thai Bankruptcy Act, B.E.2483 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	<ul style="list-style-type: none"> - 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. 	<ul style="list-style-type: none"> - Creditor/Debtor
The conditions for filing the petition	<ul style="list-style-type: none"> - Debtor is insolvent - The debtor is an individual person/ or juristic person - The debt amount is not less than <u>1 million THB for individual person</u>, or - The debt amount is not less than <u>2 million THB for Juristic Person</u> 	<ul style="list-style-type: none"> - 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 <u>10 million THB</u> - 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 has to report to the	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



	<p>Court and the Court shall have to order that the debtor is bankrupt. 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.</p>	<p>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 order to dismiss the rehabilitation order, or order the debtor in bankrupt.</p>
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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.

With regard to 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, in order 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 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.)

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 assets 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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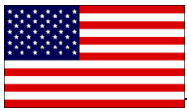


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BANKRUPTCY PROCEEDINGS IN THE UNITED STATES

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.