

The (new) Insolvency Act of Slovenia

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Overview

Act on financial operations, insolvency proceedings and involuntary liquidation proceedings (i.e. the Insolvency Act) has been enacted by the Law No. 6413/2007, published in Official Gazette No. 126 (31 December 2007). The Insolvency Act is in force from 15 January 2008.

Slovenia has initially introduced the German Bankruptcy Act and the Austrian Bankruptcy Act (German *Concurs-Ordnung* from 1898 and Austrian *Concurs-Ordnung* from 1914). Bankruptcy was regulated with Bankruptcy Act from 1993 (amended in 1997) that governed compulsory settlement, bankruptcy and liquidation. Bankruptcy's primary goal was the liquidation of bankrupt's property as a collective enforcement procedure aiming at the satisfaction of the creditors. Starting from 1999 the reorganization approach (based on Chapter 11 of the United States Bankruptcy Code) was adopted. The main purpose was to keep the debtor's enterprise as an ongoing business concern.

The Insolvency Act aims at the modern legislation, adapted to the provisions of *the Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings* and implementing *the Directive 2001/17/EC of the European Parliament and of the Council of 19 March 2001 on the reorganization and winding-up of insurance undertakings* and *the Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganization and winding-up of credit institutions* (Article 2 – EU Regulations), i.e. with the standards that enjoy priority in all European insolvency matters.

For all other cross-border cases the consequences are determined by provisions of the Insolvency Act adapted to *the UNCITRAL Legislative Guide on Insolvency Law* and *the UNCITRAL Model Law on Cross-Border Insolvency* (Chapter VIII – International Insolvency Proceedings). General rule (of multilateral conflict of laws) is that the law of the state opening the proceedings is pertinent for the insolvency proceedings and its effects (Article 479). Special (detailed) provisions refer to situations where a foreign court or a foreign trustee (insolvency administrator) seeks support in another state in connection with

insolvency proceedings or where parallel insolvency proceedings are pending or required at home or abroad.

Mean features

The Insolvency Act follows the principle of universality. Insolvency proceedings commenced in Slovenia include assets worldwide. Slovenian international insolvency law covers assets and parts of assets in Slovenia of foreign debtors in foreign insolvency proceedings (unless this infringes Slovenian public policy – Article 452).

Slovenian insolvency law requires certain conditions related to the financial status of the business of the debtor to be met before insolvency proceedings can be opened. These conditions (i.e. valid reasons for insolvency) are defined as »illiquidity«. They include a longer-term inability of the debtor to meet all of his existing obligations to pay in that (longer) period on the date of their maturity (Article 14.1.1 in connection with Article 11.1) and a permanent inability of the debtor to meet all of his matured obligations to pay (Article 14.1.2 in connection with Article 11.2).

Claims are classified as non-monetary, secured and unsecured claims (Article 20) or as privileged, subordinated and ordinary claims (Article 21). Employees are considered to be privileged creditors in the insolvency proceedings. Their unsecured claims are privileged (Article 21.1). Privileged are also unsecured claims of tax authorities originated in the last year prior to the commencement of the bankruptcy proceedings (Article 21.2).

The Insolvency Act distinguishes between the right of separation (Article 22) and the right to separate satisfaction (Article 19). The treatment of the rights of separation is governed by the procedures that also apply outside the insolvency proceedings. In this respect they are not influenced by the insolvency proceedings (Article 279.2). The rights to separate satisfaction entitle the creditors to the preferential satisfaction from the realization of the separated objects (security collateral). In this respect these rights are not influenced by the insolvency proceedings (Article 279.1) with the exception of the rights to separate satisfaction acquired by execution based on the court order or order of the another state body in the period beginning two months prior to the filing of application for commencement of the bankruptcy proceedings and terminating with commencement of the bankruptcy proceedings (Article 280.1).

The registration of claims is obligatory. The delayed registrations will be rejected. The registration of secured claims also includes the registration of the right of separation or of the right to separate satisfaction. The legal consequence

of delayed registration of the creditor's right to separate satisfaction is a cancellation of that right (Article 298.5). This is not the legal consequence in the case of delayed registration of the right of separation (Article 299.4).

Financial operations

Following operations are defined as financial operations: providing finances, management of finances and their sources, allocation of financial sources with purpose to ensure the conditions for commercial and other business activities (Article 13).

Financial restructuring is defined as complexity of measures aimed at short-term and long-term liquidity of the debtor (Article 15).

Special provisions refer to the general obligations of management and supervisory board in the cases of company's insolvency (the essential principle is the obligation of equal treatment of the creditors – Article 34) and to the special obligations of management in the cases of compulsory settlement. For example: the management is under the obligation to immediately (i.e. in three working days) file the application for commencement of the insolvency proceedings as soon as it comes to a conclusion that there is less than 50 % possibility for successful financial restructuring of the insolvent company (Article 38.1.1. in connection with Article 35.2.3) or for successful compulsory settlement (Article 38.1.2. in connection with Article 35.3.4).

Special provisions also refer to the liability of the members of management and supervisory board against the creditors.

Insolvency proceedings

Insolvency proceedings include compulsory settlements (i.e. reorganization proceedings) and bankruptcy proceedings (Article 5.1). Bankruptcy proceedings include legal person's bankruptcy, personal (consumer's) bankruptcy and bankruptcy of the legacy (Article 5.2).

The Insolvency Act created a new and uniform law. In this respect »bankruptcy« has been kept as an general legal term, due to reasons of tradition and also because its main purpose is the collective satisfaction of the creditors by realization of the assets of the debtor or by a reorganization plan especially by the maintenance of the business of the debtor.

The main objectives of the Insolvency Act are the joint satisfaction of the creditors from the debtor's assets and the equitable distribution. The main

principles are the equal treatment of the creditors (Article 46), maximization of value of the assets of the debtor (Article 47) and quick proceedings (Article 48).

The insolvency proceedings is structured as preliminary insolvency proceedings (whose objective is to determine the existence of the conditions for commencement of the main insolvency proceedings) and as main insolvency proceedings (Article 49.1). The (exclusive) jurisdiction for insolvency proceedings lies with the circuit (Article 51.1) or with the district court (Article 51.2). This jurisdiction is passed to the sole-judge (Article 53).

The essential duty of the judge is analysis of the case during the preliminary insolvency proceedings, often relying on an expert report. The analysis involves reviewing whether valid reasons exist for the insolvency and if the costs of the proceedings are covered. With respect to the main insolvency proceedings the duty of legal supervision (on the proceedings and on the trustees) still lies with the judge while the duty of administrative supervision on the trustees lies with the Ministry of Justice (Article 106.1).

The role of the trustee (insolvency administrator) in the proceedings is essential. He is designing the realization process and the restructuring measures. So, the special provisions refer to the obligations and the liability of trustees. Special (very detailed) provisions refer to licensing procedure and appointment of trustees in single cases. For example: individual trustee is obliged to select from (at the least) one to (at the most) five (of eleven) circuit courts in the Republic of Slovenia where he is willing to serve as trustee (Article 111.1). There is the list of trustees for individual circuit court, presented by the Ministry of Justice (Article 111.5.1). The trustee is appointed in every insolvency proceedings by the court. The trustee is appointed as a natural person (Article 117.1).

Special provisions refer to the participation of a creditor as a party in the main insolvency proceedings (Articles 57 and 58). Creditors eligible to that status are those who had timely registered their claims in the main insolvency proceedings (Article 57.1). Otherwise, the representative body of the creditors is the creditors committee (formed by the court – Article 80).

In order to meet the reality of our time and to make the insolvency proceedings more effective a special provisions (of Article 122) refer to use of internet. Namely, there is a special website for publication in individual insolvency proceedings. In order to make creditors more informed a special provisions (of Articles 133 and 134) refer to entries related to individual insolvency proceedings in court or business register.

In order to prevent the misuse of the institute of compulsory settlement (in connection with avoiding powers in bankruptcy, in particular with provisions related to suspected period) the Insolvency Act provide a special provision (presumption) that the application for commencement of compulsory settlement includes subordinate application for commencement of bankruptcy. So, if the application for commencement of compulsory settlement is rejected or refused, the court would decide about application for commencement of bankruptcy (Article 141.3). And, if the application for commencement of compulsory settlement is withdrawn, the court would in principle commence the bankruptcy proceedings (Article 149.2). But the withdrawal of the application for commencement of compulsory settlement doesn't include the withdrawal of the subordinated application for commencement of bankruptcy (Article 149.1).

The survival of the debtor's business is based on the financial restructuring plan (i.e. reorganization plan) proposed by the debtor or a personally liable member of the debtor. Reorganization plan is accepted through compulsory settlement by creditors whose claims all together present at least 6/10 of a value of confirmed and probably proved claims of all creditors in compulsory settlement (Article 205 in connection with Article 201.3) calculated with use of different factors (Article 201.2).

The main principles of bankruptcy proceedings are concentration (Article 227) and limitation of risks (Article 228).

The Insolvency Act developed institute of avoiding powers in a way to be more objective and predictable. For example: »ordinary course of business« fulfillment of obligation is not any more object of avoidance actions. The institute of avoiding powers is based on presumptions, presumptions about existence of conditions for avoidance, objective (Articles 272.1. in connection with Article 271.1.1) and subjective (Article 272.3. in connection with Article 271.1.2). Subjective criteria is not any more »reasonable cause to believe that the debtor's economic and financial situation was bad (at the time of the transfer)« but »reasonable cause to believe that the debtor was insolvent (at the time of the transfer)«. Suspected period is extended from the time point of 12 months prior to the commencement of the bankruptcy proceedings to the time point of 12 months prior to the filling of application for commencement of the bankruptcy proceedings.

Special (detailed) provisions refer to distribution of general bankruptcy estate and special bankruptcy estates. The assets of general bankruptcy estate minus its costs and minus the estate liabilities (Article 226.2) are distributed to all creditors at an equal basis while the assets of separate bankruptcy estate minus

its costs (Articles 226.3 and 226.4) are distributed to the secured creditors in the order of their ranking.

The provisions related to legal person's bankruptcy proceedings are also used in personal (consumer's) bankruptcy proceedings unless otherwise determined (Article 383.1).

Debtors eligible to personal (consumer's) bankruptcy proceedings are natural persons (Article 381.1). These debtors are natural persons aiming at an economic (commercial) goal (Article 7.2) or at a private goal (Article 7.7) who lose their status of business or private person upon commencement of the personal bankruptcy proceedings (Article 387.1). These debtors are also consumers (Article 7.8).

The main objectives of personal (consumer's) bankruptcy are the repayment of the debts (but not through the repayment plan) and the discharge of the debts. Honest debtors who are natural persons (individuals) have the possibility of being discharged from debts after the insolvency proceedings has been terminated. The discharge has been designed to avoid debtors being bounded by their creditors for the rest of their lives and to give debtors possibility for fresh start (new options of earning money legally). The probation period for the discharge of the debts is from two to five years (Article 400.5). The next (new) discharge of the debts is allowed after expiration of ten years period (Article 399.3).

Involuntary (Compulsory) Liquidation Proceedings

Besides the joint satisfaction of the creditors from the debtor's assets terminating the existence of the debtor or saving its existence and restructuring its finances the Insolvency Act also regulates the erasure from the court register without liquidation and involuntary (compulsory) liquidation (Article 6).

Special provisions refer to the involuntary liquidation i.e. liquidation of legal persons based on the statutory provision that the liquidation proceedings is conducted by the court (Article 419).

Special provisions refer to the erasure from the court register without conducting the liquidation proceedings. The Insolvency Act provides this possibility for legal persons in the case of termination of its business, absence of any assets and fulfillment of all obligations (Article 427.1.1) or in the case of existence of other statutory reasons for erasure without liquidation (Article 427.1.2).

Perspective

The Slovenian Insolvency Act aims at the modern insolvency law. But now it is left to the time to prove its quality and efficiency (i.e. how it is adapted to economic and social reality). In the case of eventual gaps it is left to the courts to find solutions and provide interpretations that will treat all creditors with as much equality as possible.