The Insolvency Review

Fourth Edition

Editor
Donald S Bernstein

Law Business Research

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EDITOR'S PREFACE

This fourth edition of *The Insolvency Review* once again offers an in-depth review of market conditions and insolvency case developments in key countries around the world. As always, a debt of gratitude is owed to the outstanding professionals in geographically diverse locales who have contributed to this book. Their contributions reflect diverse viewpoints and approaches, which in turn reflect the diversity of their respective national commercial cultures and laws.

The preface to a previous edition of this book touched upon the challenges faced by large multinational enterprises attempting to restructure under these diverse and potentially conflicting insolvency regimes. These challenges have traditionally been particularly acute in large corporate insolvencies because neither UNCITRAL's Model Law on Cross-Border Insolvency nor other enactments, such as the European Union's Regulation on Insolvency,[1] have provided the tools necessary for consolidated administration of insolvencies involving multiple legal entities in a corporate group, with operations, assets and stakeholders under different corporate umbrellas in different jurisdictions. Insolvent corporate groups have therefore often been obliged to cobble together consensual restructurings with local stakeholders in key jurisdictions or to initiate separate plenary insolvency proceedings for individual companies under multiple local insolvency regimes (as illustrated in the cases of *Nortel* and *Lehman Brothers*, among others), with added costs, disbursed control, legal conflicts and inconsistent judgments.

When we last addressed this issue in these pages, UNCITRAL's Working Group V was continuing its work on cross-border insolvency of multinational enterprise groups,[2] and the

1 Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings, 2000 O.J. (L 160) 1, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:160:0001:0018:en:PDF.

2 See United Nations Commission on International Trade Law, Report of Working Group V (Insolvency Law) on the Work of its Forty-Fifth Session (New York, 21–25 April 2014), U.N. Doc. A/CN.9/803 (May 6, 2014), available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/V14/028/64/PDF/V1402864.pdf?OpenElement.

European Commission was likewise considering amending the European Union Regulation on Insolvency to better encompass enterprise groups.[3] Publication of the 2016 edition of this book provides an occasion to mark the progress made in these efforts over the last two years.

On 20 May 2015, the European Parliament and Counsel published the Recast Regulation on Insolvency 2015/848, which will apply to insolvency proceedings initiated after 26 June 2017.[4] The Recast Regulation acknowledges the fact that it would not be practical to introduce an insolvency regime with 'universal scope' throughout the European Union in light of the diversity of local insolvency laws.[5] Chapter V of the Recast does, however, specifically address insolvency proceedings of members of a group of companies in different jurisdictions. Section 1 of Chapter V (Articles 56–60) addresses 'cooperation and communication' between such proceedings, while section 2 (Articles 61–77) creates a new concept of a 'group coordination proceeding' under the auspices of a 'coordinator'.

Section 1 generally provides that insolvency practitioners (which are defined broadly in the Recast Regulation and include, e.g., liquidators, administrators and trustees) appointed in group members' proceedings and courts presiding over such proceedings 'shall' cooperate with one another so long as cooperation is not incompatible with the rules applicable to such proceedings and does not entail any conflict of interest.[6] In addition, Article 60 of the Recast Regulation grants an insolvency practitioner appointed in the insolvency proceeding of one member of a corporate group the power to be heard in the proceedings of any other member and the power to seek a stay with respect to the realisation on assets in such other proceeding in certain circumstances if such a stay, among other things, is necessary to implement a restructuring plan and is in the best interest of creditors in the proceedings in which the stay is requested.[7]

Section 2 sets forth a framework for voluntary, court-supervised 'group coordination proceedings'.[8] Group coordination proceedings may be requested before any court having jurisdiction over any group member,[9] and the details of the coordination plan would be proposed by the insolvency practitioner appointed to act as 'coordinator'.[10] The coordinator has a number of rights, including the right to participate in proceedings opened in respect of any group member, the right to mediate disputes between members, the right to present the group coordination plan to parties in interest, the right to request information from insolvency practitioners appointed in any member's proceedings, and the right to seek a stay of up to six months in the proceedings of any group member if necessary to implement

3 See European Commission, Proposal for a Regulation of the European Parliament and of the Counsel Amending Council Regulation (EC) No 1346/2000 on Insolvency Proceedings (2012), available at www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com%282012%290744_/com_com%282012%290744_en.pdf.

4 Regulation (EU) No. 2015/848 of 20 May 2015 on insolvency proceedings (recast), 2015 O.J. (L 141), available at http://eur-lex.europa.eu/eli/reg/2015/848/oj.

5 Id. at Rec. 22.

6 Id. at Articles 56-58.

7 Id. at Article 60.

8 Id. at Articles 61-72.

9 Id. at Article 61.

10 Id. at Article 72.

a plan that benefits creditors in that proceeding.[11] Participation in the group coordination proceedings is voluntary, though insolvency practitioners appointed to act in respect of each member 'shall' consider the coordinator's recommendations.[12]

In addition to the provisions addressing corporate groups in Chapter V, the Recast Regulation also recognises that '[s]econdary insolvency proceedings may also hamper the efficient administration of the insolvency estate'.[13] Accordingly, the Recast Regulation confers upon the insolvency practitioner in main insolvency proceedings the possibility of distributing to local creditors what they would have received had secondary local proceedings been initiated and empowers courts to refuse to initiate secondary proceedings if these so-called 'synthetic' or 'virtual' proceedings are proposed.[14] These provisions may help facilitate synthetic group restructurings of the sort employed in the *Collins & Aikman* case.[15]

UNCITRAL Working Group V, meanwhile, has continued to develop an addendum to the Model Law to facilitate the effective treatment of cross-border insolvencies of multinational enterprise groups. The Working Group has identified eight key principles of a regime to address insolvency in the context of enterprise groups, which themselves are subject to two fundamental underpinning principles. Those foundational principles are, first, that the jurisdiction of the courts in the state in which the centre of main interest (COMI) of an enterprise group member is located will remain unaffected by a group insolvency solution, and, second, the eight identified principles do not replace or interfere with any process or procedure required by the jurisdiction in which the COMI of a group member is located in respect of that group member's participation in a group insolvency solution.[16] Against that backdrop, the eight key principles can be summarised as follows:[17]

a There is no obligation to commence insolvency proceedings for individual members of an enterprise group.

b When a group enterprise solution is proposed, that solution will require coordination between group members and may be developed through a coordinating proceeding.

11 Id.

12 Id. at 70.

13 Id. at Recital 41.

14 Id. at Recital 42; Article 36.

15 *In re Collins & Aikman Europe S.A.*, [2006] EW HC (CH) 1343. Indeed, the European Commission specifically referenced the Collins & Aikman case in its proposal for what became the Recast. See Proposal for a Regulation of the European Parliament and of the Counsel Amending Council Regulation (EC) No. 1346/2000 on Insolvency Proceedings (2012), *supra* note 3, at 7.

16 See United Nations Commission on International Trade Law, Report of Working Group V (Insolvency Law) on the Work of its Forty-Eighth Session (Vienna, 14–18 December 2015), U.N. Doc. A/CN.9/864 (8 January 2016), available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/V16/000/83/PDF/V1600083.pdf?OpenElement.

17 United Nations Commission on International Trade Law, Facilitating the Cross-Border Insolvency of Multinational Enterprise Groups: Key Principles, U.N. Doc. A/CN.9/WG.V/WP.133 (28 September 2015), available at https://documents-dds-ny.un.org/doc/UNDOC/LTD/V15/068/39/PDF/V1506839.pdf?OpenElement.

c Group members might designate one member's proceeding to function as the coordinating proceeding, the role of which would be procedural. A proviso might be that such proceeding take place in a state that is the COMI of at least one group member that is a necessary and integral part of the enterprise group solution.

d The court located in the COMI of a group member participating in a group insolvency solution can authorise the insolvency representative appointed in proceedings taking place in the COMI to seek (1) to participate in a planning proceeding taking place in another jurisdiction and (2) recognition by the court of the proceeding in the COMI jurisdiction.

e Participation in the coordination process for group members whose COMI is located outside of the jurisdiction of the coordinating proceeding is voluntary. For members whose COMI is located in the same jurisdiction as the coordinating proceeding, the recommendations of part three of the Legislative Guide on Insolvency Law with respect to joint application and procedural coordination could apply.

f Creditors and stakeholders of group members participating in a group solution would vote in their own jurisdictions on the treatment they are to receive according to applicable domestic law.

g Following approval of a group reorganisation plan by creditors and stakeholders, each COMI court would have jurisdiction to implement the plan in accordance with domestic law.

h The insolvency representative appointed in the coordinating proceeding should have a right of access to the proceedings in each COMI court to be heard on issues related to implementation of the group reorganisation plan.

These eight principles are largely consistent with the Recast Regulation's approach to resolution of enterprise groups within the European Union. Like the Recast Regulation, the UNCITRAL proposal contemplates a voluntary coordination framework that allows for a group solution (including, by not requiring proceedings for all members, a 'synthetic' solution) and allows representatives of the group members' proceedings to participate in the proceedings of other members to facilitate such a solution, but one that ultimately does not attempt to alter the substantive insolvency law in individual jurisdictions. Notably, in commentary to the second principle, the Working Group allows that another approach to coordination between member insolvencies is the approach taken in the Recast Regulation.[18]

The Recast Regulation will have just come into effect when the next edition of this book is published, and there has been no indication regarding when Working Group V will be in a position to put forward final proposals, whether along the lines described above or otherwise. It therefore remains to be seen how these measures will function in practice, and also whether the voluntary nature of the proposed regimes will limit their utility. It is also possible that there will be resistance in some jurisdictions to ceding sovereignty over local insolvency law even to the limited degree contemplated by the Recast Regulation and the Working Group V principles.

I, once again, want to thank each of the contributors to this book for their efforts to make *The Insolvency Review* a valuable resource. As each of our authors, both old and new, knows, this book is a significant undertaking because of the current coverage of developments

18 Id.

we seek to provide. As in prior years, my hope is that this year's volume will help all of us, authors and readers alike, reflect on the larger picture, keeping our eye on likely, as well as necessary developments, both on the near and distant horizons.

Donald S Bernstein
Davis Polk & Wardwell LLP
New York
October 2016

Chapter 25

SLOVENIA

Grega Peljhan, Blaž Hrastnik and Urh Šuštar[1]

I INSOLVENCY LAW, POLICY AND PROCEDURE

i Statutory framework and substantive law

The consequences and effects of insolvency and general rules of insolvency proceedings are governed by the Insolvency Act (Financial Operations, Insolvency Proceedings and Compulsory Winding-up Act) (the Insolvency Act),[2] which sets forth the fundamental legal framework of insolvency proceedings in Slovenia. Apart from the Insolvency Act, several acts regulate sector-specific insolvency regimes in case of insolvency of a bank, an insurance company, a payment system, a broker dealer or a clearing company and an investment fund manager.

Pursuant to the Insolvency Act, the first phase of the proceedings are preliminary insolvency proceedings that are initiated with the filing of a motion for initiation of the procedure. Such motion can generally be filed by the insolvent debtor, an unlimitedly liable shareholder of the debtor, a creditor (who demonstrates its claim against the insolvent debtor with payment of which the insolvent debtor is in default for more than two months) or, in some cases, the Public Guarantee, Maintenance and Disability Fund. The proposing party has to demonstrate that the prerequisites for commencement of insolvency proceedings have been met. The main prerequisite, as set forth by the Insolvency Act, is that the debtor is actually insolvent. Insolvency is a situation in which the debtor: is not able to settle all its liabilities within a longer period of time, which fall due within such a period of time (continuous cash-flow insolvency); or becomes long-term balance-sheet insolvent.

1 Grega Peljhan is managing partner, Blaž Hrastnik is a senior associate and Urh Šuštar is a junior associate with Rojs, Peljhan, Prelesnik & partners o.p., d.o.o.

2 Official Gazette of the Republic of Slovenia, No. 13/14 – official consolidated text, 10/15 – corr., 27/16, 31/16 – dec. US and 38/16 – dec. US.

The initiation of insolvency proceedings gives rise to certain legal consequences for the insolvent debtor and its creditors, which somewhat vary as to the type of insolvency that was initiated.

Both in a compulsory settlement and bankruptcy proceeding there are various rules as to how the claims are effected by official initiation of the proceeding, for example, generally (with certain limitations) there is automatic set-off of claims of individual creditors against the insolvent debtor and counterclaims of the insolvent debtor against such individual creditors; non-monetary claims are converted to monetary claims; conversion of claims with occasional duties into lump-sum claims; conversion of claims expressed in foreign currency to claims expressed in euros; change of the interest rate in the bankruptcy proceeding, etc.

In regard to the creditors' claims, the Insolvency Act also provides for distributional priorities to the benefit of the debtors with certain types of claim or certain debtors. First, the Insolvency Act recognises secured claims, which are secured with the right to separate settlement from sale of certain assets, and secondly, unsecured claims, which are repaid from the general bankruptcy estate (which is not subject to the right of a separate settlement). Certain unsecured claims, however, are assigned a priority repayment right. The Insolvency Act recognises eight classes of unsecured priority claims, all of which are related either to employee claims or taxes and other duties or restructuring loans, which are backed by a state guarantee.

Clawback actions

The right of creditors to challenge the legal acts of their debtors under general civil law rules[3] is, upon the commencement of bankruptcy proceedings, replaced by their right to challenge legal acts of the insolvent debtor in accordance with the provisions of the Insolvency Act.

Pursuant to the Insolvency Act, all legal acts and actions of the insolvent party (the same also applies to omissions), including, for example, conclusion of agreements, payments, deliveries made to the other party, etc., concluded or performed in the 'suspect period' of 12 months preceding the filing of the petition for commencement of bankruptcy proceedings until commencement of such proceedings may be challenged in bankruptcy proceedings by other creditors or the bankruptcy administrator. The right to challenge those acts is subject to a statute of limitations and has to be exercised within six months after the commencement of bankruptcy proceedings (with some exceptions).

The bankruptcy administrator or other creditors may challenge any legal act or action of the debtor that it concluded or performed in the suspect period if (the same applies *mutatis mutandis* for omissions) it resulted either in reducing the net value of the assets of the insolvent debtor so that, as a consequence, other creditors' claims may be satisfied in a proportionally smaller share; and the person to the benefit of which the act was performed, was aware or should have been aware of the debtor's insolvency.

If the legal act of the insolvent debtor is successfully challenged, the person to the benefit of which the voidable legal act was performed is obliged to return what it received on the basis of such act or, if this is not possible, the value of what it received.

3 Articles 255–260 Code of Obligations, Official Gazette of the Republic of Slovenia No. 97/07 – officially consolidated text.

Liability of the management

The Insolvency Act, among other things, prescribes obligations of the company and its management and supervisory board in the event of insolvency (and also prescribes very strict deadlines for each action to be performed). Failure to comply with such duties generally leads to joint and several liability of the members of the management[4] towards the creditors for any damages arising as a result of breach of their obligations provided for in the Insolvency Act.

ii Policy

The Insolvency Act, particularly after the 2013 and 2016 amendments, provides for precautionary restructuring, as well as for compulsory settlement, and encourages greater restructuring and deleveraging, compared to the winding up of an insolvent debtor. However, in spite of the fact that the legislator has provided sufficient options to avoid bankruptcy, the implementation of such options is, in practice, often complicated for several reasons, including lengthy and inefficient proceedings and a lack of judicial capacity owing to the high number of insolvency cases as a result of the financial crisis of 2009.

iii Insolvency procedures

Generally speaking, there are two types of insolvency proceeding provided for in the Insolvency Act with regard to an insolvent company. The first is the bankruptcy proceeding, the purpose of which is typically management and sale of assets of the bankrupt debtor, division of proceeds (bankruptcy estate) to ordinary, priority and secured creditors of the insolvent company, payment of costs of the proceeding and finally winding up of the company. The bankruptcy administrator is appointed by the court and acts as manager and legal representative of the bankrupt debtor. A creditors' committee may be appointed to supervise the bankruptcy proceeding, which is also supervised by the court, all to the extent provided for in the Insolvency Act.

The other form of insolvency proceeding is compulsory settlement proceeding. The main difference is that compulsory settlement is a way to restructure the debt of the company without termination of the company as a legal entity. In compulsory settlement, a compulsory settlement administrator is appointed by the court (in case of creditors' proposal for compulsory settlement the administrator may be appointed based on their proposal), but he or she does not take a role of manager of the company (the previous management of the company typically retains their role as management; however, their powers and the general business operations of the insolvent company are limited).

Apart from the two above-mentioned types of insolvency procedure, the Insolvency Act, since 2013, also provides for a procedure of precautionary restructuring. Such proceeding is intended for situations where it is likely that the debtor shall (in a period of one year) become insolvent.

4 Applies also to the members of the supervisory board.

Bankruptcy procedure

The main difference between bankruptcy and compulsory settlement proceedings is that the bankruptcy proceeding finishes with termination of the company as the legal entity. In general, the main activities within the bankruptcy proceeding are:

a preliminary proceedings: where the court decides if the formal prerequisites for initiation of the proceeding are met and officially initiates bankruptcy;

b registration and verification of claims, which may, in practice, take a few months. Each creditor may register its claim (and rights to separate settlement and separation rights) in the bankruptcy proceeding within three months after a notice on commencement of the proceeding is published. The consequence of non-registration or incorrect registration of claims and the rights to separate settlement is usually loss of claims and separation rights;

c management and sale of the assets of the bankruptcy debtor: the assets are sold in accordance with specific rules of the Insolvency Act; and

d distribution of the bankruptcy estate: the estate is divided in different phases in accordance with specific rules of the Insolvency Act.

Compulsory settlement

Generally, the high-level outline of the compulsory settlement procedure is in phases of preliminary procedure and registration and verification of claims similar to the bankruptcy. After the final list of recognised claims is issued it is followed by:

a A process with an objection against the conducting of compulsory settlement if either the administrator or any of the creditors file an objection that the prerequisites for compulsory settlement proceeding are not fulfilled. If the court agrees with the objection against the compulsory settlement and finds that the substantial prerequisites are not fulfilled, the court may commence bankruptcy proceedings against the insolvent debtor.

b The process of voting for or against compulsory settlement and confirmation of compulsory settlement by the court (if there is no founded objection filed against compulsory settlement and if (in a typical compulsory settlement proceeding) at least 60 per cent of the all votes are cast for the confirmation of compulsory settlement). If compulsory settlement is not confirmed, bankruptcy proceedings should be commenced.

As a rule (in case of a compulsory settlement proceeding concernign a small, medium-seized or large enterprise), two different types of compulsory settlement proposals may be made. First, restructuring of ordinary claims (haircut or deferral of maturity of ordinary claims or both), while secured claims remain unaffected. In this case, a haircut or prolongation of maturity of all ordinary claims (both financial and non-financial claims) may be proposed or, alternatively, this may be limited to financial ordinary claims (i.e., financial claims are affected in such a case, while other ordinary claims remain unaffected). If a secured claim is not paid in whole from the value of the collateral, the compulsory settlement applies to the unpaid amount of the claim. Secondly, restructuring of secured claims (in addition to restructuring of ordinary claims). As a rule, the position of secured creditors in a compulsory settlement is stronger than the position of ordinary creditors. For secured claims (to the extent that such claims are actually secured) a haircut or reduction of the amount of the

principal may not be proposed, but only prolongation of maturity and reduction of interest. If restructuring of secured claims is proposed, the compulsory settlement has to be voted for by sufficient majority of both ordinary and of secured creditors.

The simplified compulsory settlement

The simplified compulsory settlement is intended for smaller (micro) companies and private entrepreneurs because the normal compulsory settlement would otherwise be too expensive for them. In case they could not afford to carry out the normal compulsory settlement, they would be forced into the bankruptcy proceeding. The simplified compulsory settlement is cheaper, as in this proceeding, a compulsory settlement administrator in not nominated, nor is an auditor or appraiser. Other main characteristics of this procedure include that registration of the claims of the creditors is not needed, therefore the claims are not tested (so there is not list of registered claims) and that a creditors' committee is not formed. Otherwise, the provisions of the normal compulsory settlement apply *mutatis mutandis*.

Precautionary restructuring

The 2013 amendment of the Insolvency Act established a new pre-insolvency form of proceeding (i.e., a procedure of pre-emptive restructuring). Such proceeding is intended for a situation where it is likely that the debtor shall, in a period of one year, become insolvent.

The motion for initiation of such a preventive restructuring proceeding can be filed only by the debtor itself and has to include a list of all financial claims against the debtor and the auditor's report encompassing a review of the basic list of financial claims, in which the auditor has given its audit opinion without reservation, and a notarised statement of consent of creditors having at least 30 per cent of ordinary claims that they submit before proceedings commence. The effect of commencement of the proceeding is a 'standstill' for secured and unsecured financial claims.

If an agreement between the debtor and creditors having three-quarters of unsecured financial claims and (if the proposal applies to secured claims) secured creditors having three-quarters of secured financial claims is reached, the court should issue a resolution on confirmation of the agreement. This agreement has effect for all the creditors who consented to the conclusion of the agreement and for other creditors with unsecured financial claims (haircut or postponing of maturity or both) or for those with secured financial claims (change of interest rate or postponing of maturity or both).

Slovenian law also recognises secondary insolvency proceedings, which will be described in more detail in subsection vii, *infra*.

iv Starting proceedings

The motion for initiation of the bankruptcy proceeding is typically filed either by the debtor or the creditor. The creditor has to prove with a degree of probability its claim vis-à-vis the debtor (against which it is proposed that bankruptcy proceedings should be commenced) and that the debtor has been in default (delay of payment) of that claim for more than two months.

Alternatively, the compulsory settlement procedure can generally be initiated only on the motion of the debtor or personally liable shareholder. However, the compulsory settlement for small, medium and large companies (but not micro companies) can be initiated upon

motion of the creditors, which jointly have one-fifth of all financial claims. Such creditors are, for example, banks, which have all the necessary information and infrastructure, and can prepare an adequate restructuring plan later on.

The simplified compulsory settlement is initiated upon motion of a debtor or a personally liable shareholder of the debtor and the precautionary restructuring upon the motion of a debtor.

v Control of insolvency proceedings

The final decision-making in insolvency proceedings is conferred upon the competent district court, more precisely, a district court judge. The court supervises the process and gives consent to all major decisions of the insolvency administrator (and in some cases also creditors). The Higher Court in Ljubljana has the exclusive appellate jurisdiction for the territory of Slovenia.

The compulsory settlement procedure is supervised and the bankruptcy procedure is managed by the administrator who is, as a rule, named by the court. The administrator's role is managing the estate or performing other roles, predominantly aimed at safeguarding and executing creditors' interests.

In the compulsory settlement procedure, the administrator supervises the business activities of the debtor. The insolvent debtor has to grant the administrator access to all the information necessary for effective supervision and enable inspection of all documentation and business records. On the other hand, in the bankruptcy procedure, the administrator manages the business of the insolvent debtor and represents the insolvent debtor, if necessary. Its functions include all necessary acts in connection with testing of claims, clawback and damages actions, all acts required for realisation of the bankruptcy estate and other acts and transitions, as may be required from time to time.

vi Special regimes

Slovenian law provides for several sector-specific insolvency regimes, namely in case of insolvency of a bank, an insurance company, a payment system, a broker dealer or a clearing company and an investment fund manager. The specifics of such insolvency proceedings are governed by sector-specific legislation and not by the Insolvency Act. However, there are very few cases of special sector-specific insolvency procedures in Slovenia and there is essentially no established practice.

vii Cross-border issues

Secondary insolvency proceedings in Slovenia are to be distinguished with regards to the country of plenary insolvency proceedings. Namely, if the plenary insolvency proceedings are pending in an EU Member State, the secondary insolvency proceedings are governed by EU law,[5] and if the plenary insolvency proceedings are pending in a third country, the secondary insolvency proceedings are governed by the Insolvency Act.

5 Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings, Official Journal L 160, 30 June 2000, pp. 1–18.

II INSOLVENCY METRICS

In the first quarter of 2016, GDP growth continued as a result of a notable strengthening of exports. GDP was 0.5 per cent higher than in the last quarter of 2015 and 2.5 per cent higher than in the same period of 2015. The GDP growth can be attributed mainly to the growth in exports, boosted by rising foreign demand and a competitive tradable sector. The labour market situation continues to improve compared to the years 2014 and 2015. The number of registered unemployed declined significantly in the first quartile of 2016. A total of 102,289 people were registered as unemployed as of mid-2016; a drop of 9 per cent compared with the previous year.

The decline in domestic non-banking sector loans, which has been a trend for a few years, is slowing predominantly because of the increased borrowing of the corporate sector abroad. In 2015, company performance improved significantly for the second consecutive year, and the indebtedness and overindebtedness of the corporate sector declined further. In addition, the corporate sector has undergone intense deleveraging since 2013. The ability of companies to repay their debts has improved significantly in the last three years.[6]

In the first half of 2016, four compulsory settlement procedures, 70 simplified compulsory settlement procedures and 109 bankruptcy procedures were commenced. The number of opened insolvency proceedings has continued to decline since 2013.

III PLENARY INSOLVENCY PROCEEDINGS

i T–2

T–2 d.o.o. is one of the leading Slovenian telecommunication companies with the third-largest market shares in the Slovenian market of broadband internet services, IP telephony and IP TV.[7] T–2 underwent a compulsory settlement proceeding that was initiated in January 2011[8] because the company was overindebted and therefore insolvent. As a consequence, a compulsory settlement procedure was commenced and also concluded in 2012.[9] The restructuring plan of T–2 envisaged haircut of the unsecured creditors' claims to 44 per cent and deferment of their payment to the year 2021 (with no fixed payment schedule). The restructuring plan also explicitly indicated that the company had to promptly service the debt to the secured creditors (also those with pledges on the telecommunication network of the debtor) until the sale of the network by the end of 2014. Furthermore, the restructuring plan envisaged business restructuring with fixed milestones in the business plan that included measurable objective goals, like the number of clients, market shares, etc., as

6 Slovenian Economic Mirror, No. 4 / Vol. XXII / 2016, IMAD, Ljubljana, available at: www.umar.gov.si/fileadmin/user_upload/publikacije/eo/2016/SEM0416-splet.pdf.

7 IP telephony (17.5 per cent), mobile communications (2.8 per cent), broadband internet services (18.4 per cent) and IP TV (33.9 per cent).

8 The decision of the Maribor District Court, No. St 29/2011 of 13 January 2011.

9 The decisions of the Maribor District Court, No. St 29/2011 of 28 November 2011 and the Higher Court in Ljubljana No. Cst 22/2012 of 16 February 2012.

well as financial goals. Since a part of the financial plan was also prompt service of the secured claims until the sale of the pledged property, the debtor had to generate enough income to meet the financial goals as well.[10]

During the compulsory settlement, a (minor) debt-to-equity swap was executed, and a second debt-to-equity swap was performed in 2012, when the claims in the amount of €17.7 million were converted. The result of the debt-to-equity swap was that the former shareholders lost their shares and new shareholders entered into the shareholders structure of T–2.

After the compulsory settlement, T–2 failed to service the outstanding debt (loans) of the secured creditors and also failed to achieve both the financial and non-financial goals provided for in the restructuring plan. The secured creditors (four commercial banks) consequently induced pressure on T–2 in order to force the company to promptly service the financial debt (in the amount of approximately €107 million); however, the debtor argued that the generated income of the company cannot serve as source for payment of the secured creditors. Under T–2's view the only source for their repayment can be the proceeds from the pledged property, while the unsecured part of their claims can be repaid as unsecured claims (i.e., until 2021).

In early 2013 the banks first attempted a civil execution proceeding against the debtor; however, since T–2 filed an objection against the decision of the court (that is still pending), the civil execution procedure was, in principle, blocked. Furthermore, the debtor filed a lawsuit against the bank, in which it had been claiming that the established security interest was null and void.

In mid-2014, the secured creditors filed a motion to initiate bankruptcy proceedings against T–2 because of continuous insolvency. The motion was, *inter alia*, based on refutable assumptions on the debtor's insolvency that were introduced with the amendment of the Insolvency Act in 2013. On 16 September 2014, the District Court in Ljubljana initiated bankruptcy proceedings against T–2[11] because of permanent illiquidity. T–2 and its shareholders filed appeals against the first instance court decision and on 29 October 2014 the Higher Court in Ljubljana[12] reversed this decision and remanded the case. The reasoning of the court was that, in this case, the secured creditors could only be paid from the collected collateral, not from the generated income. On 22 June 2015, the District Court in Ljubljana[13] rejected the motion to initiate bankruptcy proceedings against T–2 (with the same reasoning that arose from the second instance court decision).

The creditors filed an appeal and on 7 August 2015 the Higher Court in Ljubljana[14] initiated bankruptcy proceedings against T–2 on the grounds of continuous insolvency. The court based its decision on the new refutable assumptions of insolvency introduced with the amendment of the Insolvency Act in 2013. The court explained that the debtor should fulfil its obligations to the secured creditors until the collateral is collected and that failure to do so

10 The restructuring plan is publicly available at www.ajpes.si/eObjave/objava.asp?s=51&id=878989.

11 The decision of the Ljubljana District Court, No. St 2340/2014 of 16 September 2014.

12 The decision of the Higher Court in Ljubljana, No. Cst 485/2014 of 29 October 2014.

13 The decision of the Ljubljana District Court, No. St 2340/2014 of 22 June 2015.

14 The decision of the Higher Court in Ljubljana no. Cst 456/2015 of 5 August 2015.

could constitute a reason for bankruptcy. The court also established that the debtor had failed to meet its obligations from the restructuring plan in the compulsory settlement, which also constitutes a reason for bankruptcy.

One of the shareholders of T–2 subsequently filed a constitutional appeal against the decision of the Higher Court in Ljubljana. The Constitutional Court first suspended the bankruptcy proceeding[15] until the decision of the court. On 5 November 2015, the Constitutional Court reversed the decision of the Higher Court in Ljubljana on initiation of bankruptcy on the grounds that the shareholders of T–2 were deprived of their right to be heard in the proceeding, since an appeal of the creditors was not served to them and they were therefore unable to file a reply.[16]

The District Court in Ljubljana and the Higher Court in Ljubljana then followed the reasoning of the Constitutional Court, served an appeal of the creditors to the shareholders for reply and upon receipt of the replies, the Higher Court in Ljubljana on 4 March 2016 reinitiated the bankruptcy proceeding against T–2 with essentially the same reasoning as the last time.[17] The shareholders of T–2 again filed a constitutional appeal and the Constitutional Court again suspended the bankruptcy proceeding until it has made a final decision.[18] The decision is pending.

The Constitutional Court will have to determine whether the Insolvency Act was used in accordance with the Constitution, especially if the refutable assumptions of insolvency, introduced on 15 June 2013 that relate to performance of the debtors under concluded compulsory settlement proceedings, are also applicable in cases where the compulsory settlement was concluded before 15 June 2013, and new motions for insolvency proceedings filed after 15 June 2013.

The *T–2* case reveals the consequences of frequent changes to the legislation that are notorious in the Slovenian legal system and highlights that the role of the Supreme Court (the highest instance court) in the insolvency proceedings should be strengthened. One of the main consequences is that, because of limited access to the Supreme Court in the insolvency proceeding, the role of the Constitutional Court is more prominent, which means it is often regarded as an appellate court.

ii Sava

Sava, d.d. (Sava) is a large holding company with considerable stakes in the tourism sector (approximately 30 per cent of the market share) and financial sector (approximately 44 per cent ownership of the eighth-largest Slovenian bank and approximately 40 per cent ownership of the mutual fund Alpen SI).

The main reason for Sava's insolvency was an impairment of assets as a result of the global financial crisis. Consequently, Sava was permanently illiquid and overindebted, since the liabilities of the company were lower than its assets.[19] In 2013, Sava concluded a master

15 The decision of the Constitutional Court, No. Up-653/15-9 of 22 September 2015.

16 The decision of the Constitutional Court, No. Up-653/15-176 of 5 November 2015.

17 The decision of the Higher Court in Ljubljana, No. III Cpg 1756/2015 (St 2340/2014) of 4 March 2016.

18 The decision of the Constitutional Court, No. Up-280/16-9, Up-350/16-7 of 10 May 2016.

19 The equity of the company was approximately €40 million, with the total debt of approximately €240 million.

restructuring agreement (MRA) with the financial creditor that lapsed in November 2014. Since Sava was unable to repay the entire financial debt when it was due, pursuant to the MRA, a preventive restructuring proceeding was initiated. During this proceeding Sava drafted a restructuring plan that proposed significant haircut of the claims and, to a certain extent, also a debt-to-equity swap and vague commitments regarding the sale of assets.

The largest financial creditor[20] (with an exposure of approximately €125 million) opposed this plan and filed a motion for compulsory settlement proposed by creditors, while at the same time an opposing block of financial creditors (supported by the debtors friendly to Sava and its affiliates) also filed its own motion for compulsory settlement proposed by creditors. Since the Insolvency Act does not regulate a situation where two groups of creditors would propose compulsory settlement against the debtor (with different views on the restructuring plan, etc.), the burden to set the procedural rules was passed to the court, which unfortunately did not manage to resolve the controversies that had arisen. The controversies between both groups of creditors escalated to the extent that the proceeding was almost blocked with filing of controversial motions, legal remedies, etc.

The most important conclusion of the court was that there may be more than one group of initiating creditors that may file a motion for compulsory settlement proposed by the creditors.[21] During the course of the compulsory settlement[22] several of the initiating creditors assigned their claims to a non-related third party, which then became the initiating creditor. During the proceeding the government also issued a decision that the Bank Assets Management Company (BAMC) has to assign its claims to certain other state-owned companies and the CEO of Sava resigned. All of the above resulted in a reduction of tensions, where only one restructuring plan was filed, and the compulsory settlement would most likely be concluded.

The *Sava* case has revealed that the intention of the legislator to regulate the procedural rules in detail does not help the court, which (in absence of rules) prefers to avoid resolving controversies, if possible, than to provide guidance to the parties. It is also evident that the compulsory settlement proposed by the creditors is not an appropriate forum to resolve controversies between creditors with different interests.

iii Rimske Terme

The company Rimske Terme d.o.o. (RT) is a fairly small debtor, operating a newly refurbished, previously abandoned spa resort in east Slovenia. The company became insolvent because of a lack of liquid funding at the initiation of a business operation. The business operation was supported by EU funding; however, owing to irregularities (which resulted in the criminal proceeding against the company) RT was also obliged to repay part of the received funding. In order to resolve the insolvency, the company proposed a compulsory settlement that was not successful and, as a result, the bankruptcy proceeding was initiated in March 2013.[23]

The bankruptcy proceeding against RT is interesting because it is one of the few bankruptcy proceedings in Slovenia where the debtor continued business operations. Namely,

20 Slovenian bad bank (BAMC).

21 The decision of the Higher Court in Ljubljana, No. Cst 450/2015 of 23 July 2015.

22 That was initiated on 10 June 2015 and reinitiated on 16 September 2015, after the initial decision on invitation of the proceeding was reversed.

23 The decision of the District Court in Celje, No. St 2422/2011 of 13 March 2013.

because of the nature of its business operations (a spa resort with three hotels) the bankruptcy administrator assessed that the value of the bankruptcy estate would be worth more in case of sale as an ongoing concern. The bankruptcy estate was consequently sold as a going concern business, where the buyer of the business entity purchased the entire business operation for a price of €8.5 million. During the process the spa resort and the hotels continued business operations throughout the proceeding and the resort was not even closed for a day.

iv Vegrad

Vegrad d.d. (Vegrad) was one of Slovenia's largest construction companies. The company was permanently illiquid and overindebted, and in addition to that, the bank accounts of Vegrad were continuously blocked for over eight months. After several creditors filed motions to initiate bankruptcy proceedings, Vegrad's management attempted to rectify the insolvency in a compulsory settlement proceeding; however, the attempt failed and on 6 October 2010 a bankruptcy proceeding was initiated.

The bankruptcy proceeding revealed that the financial situation was far worse than expected, since the assets of the company were valued at approximately €69 million, debt exceeded €240 million and there were also potential liabilities in an amount exceeding €228 million. Almost all the assets of the debtor were pledged and consequently only secured creditors would (and to a certain extent already had) receive payment of their claims. The gap between the claims and assets of the debtor was so wide that even the general costs of the bankruptcy proceeding had to be borne from the proceeds, received from the sale of pledged property. The proceeding also clearly demonstrated that the possibilities of the creditors to increase the recovery of claims after the initiation of bankruptcy proceedings are very limited and therefore a proactive approach from the creditors prior to the insolvency proceeding (e.g., filing the motion to initiate insolvency proceedings sooner) leads to better recovery of the claims.

v Merkur

Merkur, d.d. (Merkur) was the largest wholesale dealer and specialised retailer in Slovenia with a dominant market position.

In 2010, the company became insolvent owing to the global financial crisis that resulted in a drop in sales. Furthermore, the company was forced to increase its financial debt to an unsustainable level and experienced a negative impact from the takeover of the company by the management. Consequently, Merkur became overindebted and thus insolvent. In 2011, it went through a compulsory settlement, where a 40 per cent haircut of the non-secured claims was imposed as a major measure of restructuring.

This first compulsory settlement plan should have rescued Merkur but it proved to be insufficient and the company continued to struggle. Thus, by the end of 2013, the second compulsory settlement procedure had been initiated. In course of this second compulsory settlement procedure the profitable businesses of the insolvent debtor had been carved out into two independent companies, namely, Merkur Nepremičnine d.d., which took over the debtor's real estate, and Merkur Trgovina d.d., which continued with the debtor's retail business. The owners of the newly established companies are the financial creditors of Merkur, who thereby achieved higher repayment of their financial claims. After these carveouts, the courts opened a bankruptcy procedure against Merkur (the insolvent debtor), during the course of which other creditors shall be proportionally repaid from the remainder of the bankruptcy estate.

IV ANCILLARY INSOLVENCY PROCEEDINGS

i Alpine Bau GmbH Podružnica Celje

There is currently only one pending ancillary bankruptcy proceeding in Slovenia, which involves the Slovenian branch office of the primary insolvency proceeding against the construction company Alpine Bau GmbH in Austria. The bankruptcy proceeding was initiated in 2013 and is still pending. Since this ancillary proceeding is thus far the only ancillary proceeding in Slovenia, the case law regarding ancillary proceedings in Slovenia has not yet been properly developed.

V TRENDS

The trend of rising insolvency activity from the previous years is likely to reduce or at least stagnate during the coming year. Namely, the Slovenian economy is predicted to grow further in the coming year as private consumption is predicted to rise because of private investments. The predicted growth rate for 2016 is 1.5 per cent. Considering the macroeconomic background and forecasts, stagnation of the insolvency proceedings is expected. For the coming year, the development of the *T–2* insolvency case should be monitored as it could have a severe impact on insolvency practice.

In the past few years the market of non-performing loans has been revived, particularly because of increased activity of the BAMC in this field in relation to domestic loans, followed by increased activity in the trade of non-performing loans of commercial banks to foreign entities.

The legislator's proactive approach, which resulted in six changes to the Insolvency Act from 2009 to 2013, was suspended, and therefore the legislator enabled the court practice to develop. The most recent changes to the Insolvency Act in 2016,[24] *inter alia*, excluded small enterprises from participating in the simplified compulsory settlement;[25] extended the possibility for the creditors to initiate compulsory settlement proceedings against their debtor even if the debtor is a small enterprise; and extended a time period in which a clawback action can be brought in a bankruptcy proceeding (from six to 12 months after the initiation of the proceeding).[26] It is expected that the most recent amendment of the Insolvency Act shall result in an increased number of clawback lawsuits in bankruptcy proceedings and an increase in the number of compulsory settlements are also expected. In addition, this recent amendment clearly shows the tendency of the legislator to regard bankruptcy as the least favourable option and restructuring of an insolvent debtor as the most preferable, the latter being a principal focus of the Insolvency Act.

24 ZFPPIPP-G.

25 This amendment was introduced to prevent financial holding companies from misusing the simplified compulsory settlement.

26 Amended Article 277(1) of Insolvency Act.

Appendix 1

ABOUT THE AUTHORS

GREGA PELJHAN

Rojs, Peljhan, Prelesnik & partners o.p., d.o.o.

Grega is managing partner of the law firm Rojs, Peljhan, Prelesnik & Partners o.p, d.o.o. He joined the firm in 1994 and became a partner in 1999. As a partner in the law firm he specialises in banking and finance, insolvency and restructuring and commercial and corporate law. Grega has been advising many Slovene and international clients including UBS, Erste Bank, Hypo, Raiffeisen, Unicredit, EBRD, EIB, Hewlett Packard, National Instruments Corporation, Goodyear, Novartis and many others, on different finance, M&A, general corporate and commercial and insolvency law and restructuring issues, including issues related to syndicated loans, securitisations, collateralisation, close-out netting, bankruptcy remoteness and similar matters.

His recent deals in relation to insolvency and restructuring practice include advising a Slovenian bank syndicate in the bankruptcy proceedings of one of the largest Slovenian telecommunication companies, T-2; advising a creditor with the largest exposure in restructuring of one of the largest Slovenian retailers; and advising creditors in compulsory settlement of financial holding Sava. In addition, he advised a multinational bank on debt restructuring and the sale process of Kempinski Palace hotel in Portorož and the financing of the real estate project (construction of the residential building with over 100 flats). He has been representing a client in a dispute with the construction company, regarding its legal relations with future tenants, purchasers of real estate and in finding a solution how to continue with a project, after the main construction company went bankrupt.

BLAŽ HRASTNIK

Rojs, Peljhan, Prelesnik & partners o.p., d.o.o.

Blaž joined Rojs, Peljhan, Prelesnik & Partners in 2014 after working as a senior associate in a local Slovenian law firm, specialising in insolvency proceedings. During his work, Blaž completed his post-graduate studies and obtained a PhD in 2014 at the University of Ljubljana with a thesis from the field of construction law.

Blaž's fields of expertise include litigation, insolvency proceedings, construction and real estate. He has been involved in several M&A transaction projects, with subsequent refinancings, and advised clients in numerous insolvency and restructuring matters. His recent track record includes representing and advising clients on the restructuring of Slovenian holding company Sava; in the insolvency proceedings of T-2; the completion of a residential building after the investor and construction company went bankrupt; and in resolving open issues and disputes related to the completion of the largest sports shopping complex in Slovenia between the municipality and a private partner.

URH ŠUŠTAR

Rojs, Peljhan, Prelesnik & partners o.p., d.o.o.

Urh is an associate at Rojs, Peljhan, Prelesnik & Partners, where he practices corporate law, with a primary focus on M&A, insolvency and restructuring, and dispute resolution.

Urh graduated from University of Ljubljana (with a master's degree in commercial law, *cum laude*) in 2014. As a part of his commercial law specialisation Urh studied also at University of Munich and at University of Münster. Recently, Urh has been engaged in various insolvency and restructuring proceedings. Namely, he has been a member of a team advising the syndicate of banks in the bankruptcy proceedings of T-2, a bank with the single largest exposure in compulsory settlement proceedings over Sava, and has independently advised various Slovenian and foreign creditors on the matters in connection with insolvency proceedings and pertaining to litigation.

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