THE INSOLVENCY REVIEW

Fifth Edition

Editor
Donald S Bernstein

THE LAWREVIEWS

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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.

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.

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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.

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.

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

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

4 Applies also to the members of the supervisory board.

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.

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; and

b a 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 concerning a small, medium-sized 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.

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 no 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 Section VI.vii.

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.

II INSOLVENCY METRICS

In the first quarter of 2017, GDP growth continued as a result of a notable strengthening of exports. GDP growth was 2.5 per cent in first quarter of 2017, which is 5.3 per cent higher than in the same period of 2016. 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 continues to decline, namely from 102,289 people in mid-2016 to 79,000 people in mid-2017.

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 2016, company performance improved significantly for the third 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 2017, 678 bankruptcy procedures, 31 settlement procedures and 114 compulsory settlements and voluntary winding-up procedures were commenced. The number of opened insolvency procedures has risen in comparison with the first half of 2016; however, their complexity and social impact continue to decline (as there are few insolvency procedures over large or mid-sized undertakings).

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

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.

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 share 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 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 shareholder 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 views 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

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.

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

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 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] This decision was appealed on the merit by the state prosecutor; however, the Supreme Court of the Republic of Slovenia on 11 August 2016[18] confirmed the decision of the Higher Court in Ljubljana of 4 March 2016. The shareholders of T–2 again filed a constitutional appeal against the decision of the Higher Court in Ljubljana of 4 March 2016 and the Supreme Court of the Republic of Slovenia of 11 August 2016, and the Constitutional Court again suspended the bankruptcy proceeding until it has made a final decision.[19]

The Constitutional Court delivered its ruling on 22 March 2017 and reversed the decision of the Higher Court in Ljubljana and of the Supreme Court of the Republic of Slovenia. The Constitutional Court decided that the decisions of the Higher Court in Ljubljana and of the Supreme Court were arbitrary and violated the constitutionally guaranteed equal protection of rights.[20] In its views the secured creditors whose secured claims were not affected by a

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.
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 Supreme Court of the Republic of Slovenia, No. III Ips 75/2016 of 11 August 2016.
19 The decision of the Constitutional Court, No. Up-280/16-9, Up-350/16-7 of 10 May 2016.
20 Article 22 Slovenian Constitution.

compulsory settlement cannot request commencement of bankruptcy of the debtor on the ground that the debtor is in default with repayment of such secured claims before the security is enforced. The reasoning of the court is that the secured creditors could only be paid from the collected collateral, not from the generated income.

This decision of the Constitutional Court is perceived as highly controversial among the insolvency and restructuring specialists as it enables debtors that are obligated to fulfil their obligations from a compulsory settlement to completely disregard the secured creditors whose secured claims were not affected. Such creditors may subsequently demand repayment only from the collateral and cannot commence an enforcement procedure on the remainder of the debtor's assets or request commencement of bankruptcy. The Constitutional Court *de facto* created a safe haven for the insolvent debtors to procrastinate the commencement of bankruptcy regardless of actual prospects of them becoming solvent after execution of the measures from a compulsory settlement. As this decision is controversial among the practitioners and the legal experts, it is yet to be seen what is its real impact for the future restructuring practice in Slovenia.

ii GREP

GREP d.o.o. - v stečaju (GREP) is a project company established as a joint venture of two major construction companies for the purposes of public private partnership with the Municipality of Ljubljana for the construction of a national stadium, a sports hall and a large shopping mall in Stožice, Ljubljana. The stadium and shopping mall represented the public part of the public private partnership, and the shopping mall represented the private part, whereby Grep was obligated to build the stadium and sports hall in exchange for the right to build a shopping mall.

GREP successfully completed the construction works of the majority of the public part of the project in 2012; however, it failed to construct the shopping mall because of over-indebtedness and inability to attract new financing. Therefore, in October 2014 the court commenced a simplified compulsory settlement; however, GREP failed to obtain sufficient consent of the creditors for the proposed financial restructuring. Consequently, in September 2016 the court commenced the bankruptcy procedure upon a request of the largest creditor, Rastoder, d.o.o., Ljubljana (Rastoder), who purchased financial claims on secondary market. The total indebtedness of GREP on the day of commencement of the bankruptcy procedure amounted to over €450 million, whereby the claims of Rastoder amounted to €114.6 million. The Rastoder's claims are secured by a right of a separate settlement on the real estate forming the shopping mall Stožice. The bankruptcy administrator attempted an auction sale of this real estate for the starting price of €20.9 million; however, the auction was not successful as there were no bidders. The bankruptcy administrator proposed a second auction sale with a starting price of €18 million; however, Rastoder, as a creditor with the best ranking right of separate settlement over these assets, opposed to such auction. Instead Rastoder proposed to take over the real estate forming the shopping mall Stožice as the assets that could not be sold for a price of €15 million (as determined by Rastoder's appraiser). The claim of Rastoder would then be considered reduced for that amount. The bankruptcy administrator agreed to such proposal; however, the transaction is still subject to the consent of the bankruptcy court. If the transaction is successfully completed, Rastoder will acquire the assets without actually generating any cash flow, which is a very rare case in Slovenian bankruptcy proceedings.

iii Kolosej Kinematografi

KOLOSEJ kinematografi d.o.o. - v stečaju (Kolosej) is a Slovenian cinema operator company that used to operate a few cinema complexes in various Slovenian cities. In 2012, Kolosej was taken over by its manager Sergej Racman who lead the management buyout, and in 2012 the cinema business was transferred to a friendly company KOLOSEJ zabavni centri, d.o.o. Kolosej became insolvent in 2014 and filed a request for a compulsory settlement. The compulsory settlement proceeding was opened with the decision of the district court in Ljubljana on 6 January 2015, and the final list of tested claims was prepared on 28 July 2016. The list was confirmed with a decision on recognition of claims and among others comprised claims of friendly companies KOLOSEJ zabavni centri, d.o.o., Onisac d.o.o. and KD finančna družba d.d., all of which represent claims arising from the suretyships for the obligations of Kolosej. Such claims arise conditionally if and up to the amount each of the creditors actually pays the debt of Kolosej. The Insolvency Act stipulates that when voting on adoption of proposed compulsory settlement, the creditors with the conditional claims vote with factor 0.5. However, these claims were erroneously recognised as non-conditional; thus, the friendly creditors KOLOSEJ zabavni centri, d.o.o., Onisac d.o.o. and KD finančna družba d.d. all voted with the factor 1.0. Their votes were crucial for the adoption of the proposed compulsory settlement that was very much to the detriment of the creditors, and consequently the compulsory settlement was confirmed on 28 July 2016. This decision was appealed by some creditors, and on 14 October 2016 the Higher Court in Ljubljana corrected the erroneous voting factor to 0.5, reversed the decision on compulsory settlement and commenced bankruptcy over Kolosej.

The decision of the Higher Court in Ljubljana of 14 October 2016 was challenged in front of the Constitutional Court, which set aside the decision ruling that any claim that is recognised on the final list of tested and confirmed with a decision on recognition of claims becomes final cannot be subsequently altered because of *res judicata* effects. The Higher Court in Ljubljana on 10 July 2017 delivered a new decision with due consideration given to the ruling of the Constitutional Court. The Higher Court in Ljubljana ruled that fact that the claims of friendly creditors were recognised unconditionally in fact multiplied the debtor's debt. Namely, the unconditional debt owed to the banks was now multiplied as the debtor owed the same amount also to each of the guarantors. Such conclusion is not sustainable and just, therefore, the Higher Court in Ljubljana again ruled that the decision to correct the factor was correct. The court further held that Sergej Racman as the actual beneficial owner abused its procedural rights as he circumvented the voting prohibition that applies to the creditors that are interpersonally connected with the debtor or the debtor's shareholders. Namely, just before the scheduled voting Sergej Racman was the director of Kolosej's shareholders and also of the friendly creditor Onisac d.o.o. However, before the voting on compulsory settlement, Sergej Racman (acting through the Onisac shareholder that is 100 per cent owned by him) recalled himself as the director of the creditor Onisac d.o.o. and appointed his elderly father as the director. With this Sergej Racman enabled the creditor Onisac d.o.o. to vote on the compulsory settlement, which enabled for the compulsory settlement to be confirmed. The Higher Court in Ljubljana, however, held that this replacement of the director represented an abuse of procedural rights that was evidently contrary to the principle of good faith and that the votes of Onisac d.o.o. should be disregarded. Consequently, the proposed compulsory settlement was considered refused because of lack of support of the creditors.

The Higher Court in Ljubljana on 10 July 2017, therefore, ruled that the compulsory settlement was deemed not confirmed and commenced bankruptcy over Kolosej. The decision is especially interesting as the court based its decision predominantly on abuse of procedural rights and disregarded actions that were contrary to good faith.

iv Agrokor and Mercator

AGROKOR d.d. (Agrokor) is the largest privately owned company in Croatia and one of the leading companies in south-east Europe. Agrokor is mainly active in consumer retail sector though Croatian Konzum d.d. and Slovenian Mercator d.d.; however, it also comprises many (over 70) other companies active on various levels of the supply chain. In spring 2017, Agrokor was threatened with insolvency. As the conglomerate is deemed of systemic importance for Croatia, the Croatian parliament adopted a special *ad hoc* Act 'Lex Agrokor' governing the restructuring process. The Zagreb Commercial Court on 10 April 2017 issued a decision to initiate the procedure for extraordinary administration over Agrokor and some of its affiliated or subsidiary companies in Croatia in accordance with Lex Agrokor.

The extraordinary administration procedure over Agorkor was recognised also in Slovenia as of 14 July 2017. The recognition bears the legal consequence that the creditors are prevented from enforcing their claims with a seizure of Agrokor's assets in Slovenia. That mainly applies to Agrokor's approximately 70 per cent share in Mercator d.d.

As Mercator d.d. is one of the most valuable of Agrokor's assets and is also deemed a company of a systemic importance for the Republic of Slovenia, the decision was challenged by Sberbank d.d. (Slovenia), Sberbank of Russia and also the Republic of Slovenia. The grounds for opposition are mostly based on alleged violation of public policy because of uncertain legal consequences and the *ad hoc* nature of Lex Agrokor. The court has yet to decide on these oppositions.

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 the 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 court 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. In July 2017 the carved-out company Merkur Nepremičnine d.d. was

sold to a New York-based HPS Investment Partners for €28,560,000. The transaction is still pending regulatory approvals from the bankruptcy court and the competition protection agency.

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 2017 is 3.6 per cent. Considering the macroeconomic background and forecasts, stagnation of the insolvency proceedings is expected.

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,[21] *inter alia*, excluded small enterprises from participating in the simplified compulsory settlement;[22] 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).[23] It is expected that the most recent amendment of the Insolvency Act will 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.

21 ZFPPIPP-G.

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

23 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 postgraduate 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 refinancing, and advised clients in numerous insolvency and restructuring matters. His recent track record includes representing and advising clients 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; advising various banks in sale of their exposure with regard to bankrupt debtors or debtors in process of restructuring, and providing legal advice in Slovenia to the administrator in the proceeding of recognition of effects of one of the largest foreign insolvency proceedings in CEE region.

URH ŠUŠTAR

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

Urh is an associate at Rojs, Peljhan, Prelesnik & Partners, where he practises 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 the University of Munich and at the 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, various banks in sale of their exposure with regard to bankrupt debtors or debtors in process of restructuring, and providing legal advice in Slovenia to the administrator in the proceeding of recognition of effects of one of the largest foreign insolvency proceedings in CEE region. Urh has also independently advised various Slovenian and foreign creditors on the matters in connection with insolvency proceedings and pertaining to litigation.

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