Legal Update

July 2017

Weinhold Legal

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Bills Under Discussion

Insolvency Act amendment and creditor claims

On 1 July 2017, an extensive amendment of Act No. 182/2006 Coll. on bankruptcy and settlement (the Insolvency Act), as amended (the "InsA") entered into force. We looked at this amendment in Legal Update No. 3/2017. One area of insolvency law affected by the amendment is registering claims in an insolvency proceeding and filing a creditor's insolvency petition.

The amendment introduces minor changes relating to claims applications in insolvency proceedings that are of practical significance, e.g. the obligation to deliver documents to the court via a data mailbox in the case of a sender whose data mailbox was set up without a request, as well as more extensive changes such as:

- the obligation of certain creditors to identify their beneficial owner;
- the possibility of imposing an obligation on certain foreign creditors to secure the costs of proceeding; or
- the presumption of a debtor's consent to the dealing of its claims arising from the debtor's business by way of it being dealt with in the pool of other creditors'claims.

As of the Amendment's effective date, a creditor who acquires a registered claim by assignment or in some similar manner after insolvency proceedings have begun or 6 months prior to its commencement is obliged to identify the creditor's beneficial owner in an annex to the claim application, pursuant to Act No. 253/2008 Coll. on selected measures against the legitimization of proceeds of crime and financing of terrorism, as amended (the "AML Act") and to state why this entity is considered its beneficial owner pursuant to the AML Act. Under the AML Act, a beneficial owner is generally understood to be *a natural person with de facto or legal capacity directly or indirectly to exercise controlling influence in a legal entity*. A creditor failing to meet the obligation to identify its beneficial owner cannot exercise voting rights in the relevant insolvency proceedings (at least until such obligation has been met).

There are exceptions to the identification obligation, mainly, the obligation shall not apply to *(a)* creditors whose claims arise from an obliged person (e.g. banks, insurers etc.) and do not pertain to the client verification obligation pursuant to the AML Act, *(b)* creditors whose beneficial owner may be identified through records accessible to a court and an insolvency administrator, and *(c)* creditors where the value of the legal conduct from which the claim arose (and which the creditor conducted with other than an obliged person under the AML Act) is less than EUR 10,000. A creditor to whom any of the exemptions apply shall provide information on fulfilment of the conditions in a sworn affidavit, which should form an attachment to the claim application.

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It is clear from the nature of the obligation that a creditor who is a natural person will not have to identify a beneficial owner or provide reasons for not doing so.

The Amendment also provides for the option for an insolvency court enjoining a creditor who is a foreign national or foreign legal entity to deposit reasonable security for costs at the suggestion of a party to the proceeding or insolvency administrator. The security may serve either to defray insolvency proceeding costs or to indemnify damages that may be incurred by other parties to an insolvency proceeding as a result of the participation of the foreign creditor (obliged to provide a security) in that proceeding.

This obligation may not be imposed:

a) on a creditor who is a citizen of or has its registered office in an EU or EEA Member State;
b) on a creditor who is a citizen of a country that, in similar cases, does not require a security from citizens of the Czech Republic or legal entities with their registered office in the Czech Republic; or
c) if a (foreign) creditor has real estate holdings in the Czech Republic the value of which suffices to cover the reimbursement of insolvency proceeding costs or indemnification of damage.

Where an insolvency court has enjoined a foreign creditor to provide security, failure to comply with this obligation its registered claim will not be acknowledged in the insolvency proceeding. The only possible exception to this harsh sanction is a situation in which the creditor could not, through no fault of his own, provide the security by the prescribed deadline and there is a risk of the creditor incurring damage from a delay.

The last new feature we wish to highlight is the presumption of consent of a creditor with a claim from a debtor arising from the debtor's business that is addressed by bankruptcy or imminent bankruptcy of the debtor in the form of a debt write-off. If a creditor does not agree that a claim arising from the debtor's business may be satisfied as part of a debt write-off, the creditor must explicitly disclose (at the latest with the application for such claims) that it does not agree to resolve the bankruptcy through debt write-off and shall provide a rationale for this standpoint. Otherwise, the creditor's consent is presumed and debt write-off may be employed both to settle claims not related to the debtor's business as well as those that do pertain to its business.

We can conclude by additionally pointing out a new feature in the area of creditor insolvency petitions, which may already be familiar to readers in some form in the Slovak (and other) legal treatments of bankruptcy. An insolvency petitioner (creditor keeping accounting or tax records) is now obliged to substantiate a payable claim against a debtor (legal entity) either by a debtor acknowledgment bearing a notarized signature or in the form of an enforceable decision or notarial or executorial deed with consent to enforceability. A creditor who has none of these documents may substantiate its claim (in what will likely be the most common way) with a confirmation provided by an auditor, forensic expert or tax advisor that the creditor's claim is recognized in its accounting. Both Czech and foreign creditors bear this obligation.

Draft implementing regulation on a new presumption of solvency in the Insolvency Act

The deadline for the interdepartmental comment procedure regarding a draft Ministry of Justice decree on the implementation of § 3(3) of the Insolvency Act (Decree on Entrepreneur Insolvency) (the "Decree") was 26 May 2017.

The proposed Decree aims to establish, or more closely specify, requirements for the content of the terms *liquidity statement* and *liquidity outlook* associated with the newly established presumption of solvency in the provision of § 3(3) of the InsA. This provision creates the presumption that a debtor is able to meet its financial obligations (i.e. is not in bankruptcy taking the form of insolvency), if the difference between the amount of due financial obligations and the amount of financial resources available to the debtor (what's known as the coverage gap) is less than one tenth the amount of the debtor's due financial obligations or if the coverage gap is less than one tenth the due financial obligations in the period for which a liquidity outlook is being prepared. The coverage gap is then ascertained from the prepared *liquidity statement and liquidity outlook*.

The Decree also defines a term new to the Insolvency Act: persons engaged in economic advisory in the field of insolvency and restructuring. According to the draft Decree, such persons may be considered to be *a public trading company engaging in economic advisory in the field of insolvency and restructuring, if the debtor's liquidity statement or liquidity outlook is prepared by a member that is a statutory auditor or an expert in the field of economics with a specialization in accounting records.*

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