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Restructuring across borders

Slovakia

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Introduction

The Slovak insolvency rules are embodied in two pieces of legislation: (i) Act No. 7/2005 Coll. on Bankruptcy and Restructuring (the **Insolvency Act**), which lays down the rules for the insolvency proceedings; and (ii) Act No. 8/2005 Coll. on Insolvency Receivers (the **Insolvency Practitioners Act**), which provides the framework for the business conduct of insolvency practitioners.

As a follow-up to the reform of insolvency legislation in the Slovak Republic in 2004 and its consequent change in autumn 2011, which has significantly altered the dynamics of the bankruptcy and restructuring process and the relationships between the parties involved in bankruptcy and restructuring proceedings, the Slovak Parliament enacted in April 2015 a significant amendment to the Insolvency Act as a response to the problematic restructuring of a major Slovak construction company (the **2015 Amendment**). The purpose of the 2015 Amendment was to react to the concerns arising out of insolvency proceedings in the Slovak Republic and to other related problems in commercial relations and the social impact thereof. The essential objective of the 2015 Amendment was to restrict harmful behaviour towards creditors and strengthen the responsibility of the business community.

The key areas covered by the 2015 Amendment are as follows:

- a revised definition of the cash flow insolvency test;
- a re-defining of the monetary sanction payable by statutory representatives of the debtor for failing to file the bankruptcy petition on time;
- a mechanism facilitating the filing procedure for an employer's bankruptcy by the employees;
- the imposition of additional conditions that must be met by a debtor in order for an insolvency receiver to recommend its restructuring;
- rules restricting the distribution of profit in companies in restructuring;
- a mechanism for awarding creditors voting rights by the court in bankruptcy and restructuring proceedings;
- additional rules regarding quasi-security (retention of title and financial leasing);
- rules restricting changes to be made to the corporate structure (such as fusions, mergers or de-mergers) of companies in bankruptcy and restructuring without consent; and
- the ability to change the restructuring plan in the approval meeting.

A further significant amendment to the Insolvency Act came into effect in March 2017 (the **2017 Amendment**). The main objective of the 2017 Amendment was to introduce a separate insolvency regime for natural persons. This Factsheet is limited to corporate insolvency, and as such the new regime is not discussed.

The 2017 Amendment also contains changes reflecting the creation of a public sector partners register, which are detailed below.

The three principal restructuring and insolvency regimes for companies under Slovak law are:

- bankruptcy (konkurz);
- restructuring (reštrukturalizácia); and
- informal restructuring.

Bankruptcy (konkurz)

Purpose of proceedings

The purpose of bankruptcy proceedings is to resolve the debtor's insolvency by realising its assets and collectively satisfying the debtor's creditors. Either the debtor itself or its creditors have the right to file a petition for bankruptcy. However, the debtor must apply for its own bankruptcy within 30 days of the day on which it became aware of, or (if it acted with professional care) could have become aware of, its over indebtedness (ie the debtor meets the balance sheet insolvency test). The same duty applies to the persons authorised to act for and on behalf of the debtor (ie its statutory representative or liquidator in any solvent liquidation). There is no obligation for the debtor to apply for its own bankruptcy if it is unable to pay its debts (ie the debtor meets the cash-flow insolvency test).

If a person responsible for applying for bankruptcy on behalf of the debtor (ie its statutory representative or liquidator in a solvent liquidation) fails to do so in a due and timely manner, he or she is liable for any damage caused to the creditors of such debtor by such failure to apply for bankruptcy. Unless a different amount of damage is proved by the respective creditor, it is deemed that the amount of damage caused to a creditor equals the amount of such creditor's claim as remains outstanding after the bankruptcy proceedings are stopped or terminated due to insufficiency of the debtor's assets. A valid and enforceable court decision imposing an obligation to compensate such damage is treated as a 'decision on exclusion' of a statutory representative, meaning such statutory representative may not perform the functions of a statutory representative or be a member of a supervisory body in any company or cooperative in the Slovak Republic for a period of three years from the date on which such court decision becomes enforceable. A court decision imposing a fine for failing to cooperate with the receiver under Section 74(6) of the Insolvency Act has the same consequences.

Commencement of proceedings

When the court ascertains that the debtor's or creditor's petition for a declaration of bankruptcy "formally" complies with the statutory requirements, the court must decide to commence the bankruptcy proceedings by issuing a resolution within 15 days from receipt of the petition. Otherwise the court must request that the applicant remedy the defects within ten days and, if the applicant fails to do so, the court will reject the petition within 15 days thereafter. The court resolution on the commencement of the bankruptcy proceedings must be published in the Commercial Bulletin without delay after it has been issued. The commencement of the bankruptcy proceedings takes effect the day following the publication.

The major effects of the commencement of bankruptcy proceedings are as follows:

(i) the debtor must restrict its activities to ordinary legal acts only;

(ii) a resolution on the fusion, merger or de-merger of the debtor cannot be adopted and any change resulting from such resolution cannot be registered in the commercial register;

(iii) there is an automatic stay of individual court or administrative enforcement proceedings in respect of the assets owned by the debtor, and new proceedings cannot commence;

(iv) there is an automatic stay of enforcement actions by individual secured creditors (save for enforcement of a security interest over bank accounts, government bonds, transferable securities or continued enforcement of a security right by a public auction), and new proceedings cannot commence; and

(v) there is an automatic stay of proceedings on the termination of the debtor without liquidation.

The above effects are a consequence of the first phase of the two-step procedure the court must follow when deciding on the declaration of bankruptcy. In the first phase, the court merely decides whether or not to commence the proceedings. This should be a relatively straightforward process, as the only requirement for the court to commence the proceedings is the receipt of a complete petition (ie the court only assesses whether the petition meets the statutory requirements). This is why the period for a court to decide whether to commence the proceedings is relatively short – within 15 days after the petition has been received. In contrast, the second phase of the decision-making process gives the court some room to consider the substance of the case and to decide whether or not to declare (ie to order) the debtor's bankruptcy.

If the bankruptcy proceedings are commenced by a petition of one or more creditors, the court will deliver, within five days from the commencement of the bankruptcy proceedings, the counterpart of the petition to the debtor. In addition, the debtor is requested by the court to prove its solvency within 20 days after

Bankruptcy (konkurz) (cont.)

delivery of the request. A court hearing date will be set, which must take place no later than 70 days after the bankruptcy proceedings have been commenced (unless the debtor waives its right to a court hearing). If the debtor fails to prove its solvency within the specified periods (or if it omits to communicate at all), the court will declare the debtor bankrupt. The court must decide on the declaration of bankruptcy: (i) within seven days after it has examined all the evidence; or (ii) after the debtor has waived its right to a court hearing. Alternatively, if there are circumstances indicating that the debtor may have no assets, before the bankruptcy declaration, the court shall appoint a preliminary receiver (*predbežný správca*) to verify whether the property of the debtor will be sufficient to at least cover the costs of bankruptcy. The debtor and any creditors that have filed the petition can appeal against the court decision terminating the bankruptcy proceedings (ie where the court does not make the bankruptcy declaration). In addition, the debtor can appeal against a court decision declaring the debtor bankrupt. The appellate court must decide the appeal within 45 days of the case being referred to it.

If the bankruptcy proceedings are commenced by the debtor's petition, the court will declare the debtor's bankruptcy within five days from the commencement of the bankruptcy proceedings. Also, if the bankruptcy proceedings are commenced by a petition filed by a liquidator appointed by the court from the list of receivers, the court will, within five days from the commencement of the bankruptcy proceedings: (i) declare the debtor's bankruptcy; or (ii) stop the bankruptcy proceedings due to the lack of debtor assets. If it declares the debtor's bankruptcy, the liquidator will be appointed as the receiver.

Alternatively, the court can appoint a preliminary receiver (if there is any doubt as to whether the property of the debtor will be sufficient to at least cover the costs of the bankruptcy).

If a preliminary receiver is appointed, he or she will produce a report on whether the debtor's property will cover the costs of the bankruptcy. The court will stop the bankruptcy proceedings should the preliminary receiver discover that the debtor has no assets. Otherwise the court shall declare the bankruptcy within ten days from the delivery of the preliminary receiver's report.

Bankruptcy (konkurz) (cont.)

In the court resolution by which the bankruptcy is declared, a receiver (*správca podstaty*) is appointed for the purpose of administering and realising the debtor's estate. The receiver appointed by the court is selected randomly. For this purpose the court must use technical equipment specially designed for this task to ensure that the selection of the receiver is impartial. The equipment referred to herein is a computer software that randomly selects the receiver from a list of eligible receivers (those having an office in the district of the bankruptcy court where the proceedings are conducted). This is similar to the computer software used when court cases are being allocated to judges.

Creditors' meetings and committee

After the bankruptcy has been declared, the receiver convenes a first creditors' meeting (*schôdza veriteľov*), which will not take place before the 90th day after the declaration of bankruptcy. The receiver shall also convene any subsequent creditors' meeting whenever it receives a request to do so from: (i) creditors holding at least 10% in nominal value of the registered claims; (ii) the creditors' committee; or (iii) the court. Such creditors' meeting is to take place no earlier than 20 days and no later than 30 days after the delivery of the request.

If the receiver does not convene the creditors' meeting despite its statutory obligation to do so, the creditors' meeting shall be convened by the court instead. The breach of the receiver's obligation to convene the creditors' meeting is deemed to be a material breach of the receiver's obligations – as a result, the court can remove the receiver.

The purpose of a creditors' meeting is: (i) to vote on the replacement of the receiver; (ii) to elect a creditors' committee of three to five members (*veriteľský výbor*) to represent the interests of the unsecured creditors; and (iii) to express an opinion on any issue related to the bankruptcy. The first creditors' meeting must always consider and vote upon whether it approves the receiver randomly appointed by a court, or whether it will replace that receiver with a new one elected by the creditors' meeting. Any subsequent creditors' meetings may replace the receiver only if: (i) the receiver repeatedly or seriously breaches obligations prescribed by the law; (ii) the voting rights of all creditors have changed materially (by at least 30%) from the last creditors' meeting (eg if the number of votes of all creditors has increased/decreased by at least 30%); or (iii) at least three-quarters of all creditors' votes by value approve the replacement.

Filing of claims

When the court makes a declaration of bankruptcy, it will also request that the creditors file their claims within 45 days from the bankruptcy declaration. All secured claims must be filed within the 45-day period as any security interest over the debtor's assets will not be taken into account if the claim is not filed within the 45-day period. If creditors file their claims to an electronic mailbox of the receiver, the claim will automatically be deemed to have been delivered to the court. Unsecured claims may be filed after this deadline but the creditor is stripped of any voting rights with respect to such claim. Creditors who file their claims late simply take part in any distribution which takes place after their claim is filed and will not catch up with any distributions that have been made before their claim was filed. Both creditors who have filed their claims and the receiver can contest the filed claims. The receiver must investigate each filed claim with professional care and compare it with the accounting books of the debtor and with the list of liabilities of the debtor. The receiver must also conduct independent investigations in order to independently ascertain the status and reasons for disputing a filed claim. A filed claim cannot be contested solely on the ground of discrepancies in the accounting books of the debtor

Bankruptcy (konkurz) (cont.)

or on the basis of statements made by the debtor or other persons whose interests may be aligned with the interests of the debtor (eg the debtor's current or previous legal, accounting or tax advisors). If a creditor contests a claim of another creditor, the creditor whose claim is contested can request the court (through the receiver) to grant the creditor voting rights with respect to its contested claim, until the court decides whether the objection is justified or not. A special position is granted to: (i) a creditor whose claim is contested by another creditor; (ii) a creditor of a claim confirmed by a court decision or other document which can serve as an execution title; and (iii) a secured creditor. If a claim of any such creditor is contested, the receiver is, upon the request of such a creditor, obliged to submit the creditor's claim to a court to decide on the awarding of voting rights to that creditor.

The insolvency legislation encourages the receiver to involve creditors with accepted claims in the key parts of the decision-making process. This is achieved by the legislation prescribing, in quite a detailed manner, the steps that the receiver should follow in this respect. For example, any material actions in relation to secured assets must be discussed with all the stakeholders in such assets (including not just first-ranking secured creditors, but also any other secured, and possibly unsecured, creditors having an economic interest in the residual value of the same assets – unsecured creditors would be represented in this case by the elected creditors' committee).

Continuation of business

The receiver can continue the running of the debtor's business only if certain criteria are met. In particular, the business should be kept going only if the receiver can reasonably assume that by running the business the creditors will be better off than if the business was terminated. At the same time, the receiver must be able to pay all post-bankruptcy claims due to public authorities (such as taxes, social security contributions, custom duties etc). Additionally, the value of the assets forming separated bankruptcy estates (ie those assets subject to security interests) must not significantly decrease as a result of running the business.

As the continuation of the debtor's business is conceptually a rescue measure, it should, due to the risks related to the operation of any business, be used in bankruptcy proceedings only where it is economically justifiable.

Realisation of assets and distribution to creditors

Another task of the receiver is to realise the debtor's estate in a way that ensures that the highest possible proceeds will be obtained within the shortest possible period whilst incurring the lowest possible costs. When realising the bankruptcy estate, save for certain exemptions, the receiver is free to use any available method of realisation. However, the receiver must always act with professional care and ensure that the objective of realisation mentioned above (ie in respect of proceeds, time and costs) is fulfilled. Except for the sale of perishable goods, the receiver may realise any other material assets only after the first creditors' meeting has taken place (to ensure that the realisation is made by the receiver approved and/or elected by the creditors).

The distribution of proceeds will take place after all or substantially all of the assets have been realised. However, if possible, the receiver should distribute the proceeds after a partial realisation of assets. A secured creditor (with respect to its separated bankruptcy estate) or the creditors' committee (with respect to the general bankruptcy estate) may ask the court to order that the receiver makes a partial distribution of proceeds.

After all the assets have been sold, the receiver is responsible for drawing up the final account and final distribution order. The court will only get involved if objections are raised against this account and order.

Termination of proceedings

Once all the proceeds from the liquidation of the debtor's estate have been distributed, the bankruptcy proceedings will be terminated by court order. The termination of the proceedings does not have the effect of releasing the claims of creditors who have not been discharged in full. The Insolvency Act does not provide any details as to how the claims could be enforced after the termination of the bankruptcy proceedings if any new assets of the corporate debtor subsequently emerge.

Public sector partners register

As a result of new legislation concerning the partners of the public sector (Act No. 315/2016 Coll. on the public sector partners register), which came into force as of 1 February 2017, the 2017 Amendment introduced a new requirement on creditors' of a debtor who is registered on the public sector partners register (the **Register**).

Bankruptcy (konkurz) (cont.)

If a debtor is registered on the Register, or it has been registered on the Register in the five years prior to the declaration of its bankruptcy or the opening of its restructuring, any creditor of the debtor who is not a public administration body, a bank, electronic money institution, insurance company, reinsurance company, health insurance company, asset management company, securities broker, stock exchange or central depository of securities, and whose claims against the debtor exceed the aggregate amount of EUR 1,000,000, is considered to be the debtor's affiliated party (within the meaning of Section 9 of the Insolvency Act) until it provides evidence to the insolvency receiver that it has been registered on the Register. The exceptions referring to various entities listed above only apply to Slovak entities within the relevant designation as defined in the Insolvency Act.

On this basis, if a creditor does not register, it will be regarded as the debtor's affiliated party and such debtor's liabilities will be considered related-party liabilities. Special considerations apply to related party liabilities. First, such liabilities are automatically and fully subordinated to the liabilities owed by the debtor to its unaffiliated creditors and such related-party liabilities will not be satisfied in the bankruptcy proceedings (in full or in part) before full satisfaction of all other unsubordinated liabilities of the debtor registered in said bankruptcy proceedings. Second, related-party liabilities cannot receive equal or better treatment than unsubordinated liabilities owed to unaffiliated creditors registered in the said restructuring proceedings. Furthermore, any security over the assets of the debtor will be, to the extent that it is securing such related-party liabilities, disregarded in the relevant bankruptcy or restructuring proceedings in the Slovak Republic.

Restructuring (reštrukturalizácia)

Purpose of proceedings

Rather than filing for bankruptcy, a petition for restructuring may be filed. In legal terms, the purpose of restructuring is to resolve the debtor's insolvency by gradually satisfying the debtor's creditors in the manner agreed in a restructuring plan. The main idea is to rescue financially troubled businesses whenever there is a real chance that the business is economically viable and where the rescue will not be at the expense of creditors.

The key features of the restructuring proceedings are that:

(i) the feasibility of the restructuring must be supported by an expert opinion prepared by a restructuring receiver before the petition for restructuring is filed (the restructuring receiver may be appointed either by a debtor or a creditor with the consent of the debtor);

(ii) there will be a moratorium on creditors' claims against the debtor;

(iii) the debtor remains in possession of its business (DIP concept) under the supervision of a restructuring receiver, the court and the creditors;

(iv) the outcome of the restructuring proceedings is a restructuring plan that must be approved by relevant majorities of the creditors (and in some circumstances, also by the shareholders) and subsequently confirmed by a court;

(v) there is the option of binding dissenting creditors with the plan (cram-down); and

(vi) "new money" provided in the course of the restructuring proceedings enjoys a priority ranking (but only over the unsecured and not the secured creditors).

Restructuring (reštrukturalizácia) (cont.)

Commencement of proceedings

A debtor may file a petition for the declaration of restructuring if a restructuring receiver has prepared a restructuring opinion and in the prepared opinion (which must not have been written more than 30 days prior to the date of the filing of the petition) the receiver recommended the restructuring.

The debtor may appoint the receiver to prepare the opinion not only if it is already insolvent, but also in cases where the insolvency is imminent. The purpose of the opinion is to see whether the preconditions for the debtor's restructuring are satisfied. The opinion must be prepared by a receiver who is included in the list of qualified insolvency practitioners. The receiver must prepare the opinion in an impartial manner using professional care. The persons who instructed the receiver to prepare the opinion must provide the receiver with the required cooperation, especially with all documents, information and explanations required for a proper preparation of the opinion.

The debtor's creditors are allowed to appoint the receiver and to make a petition for restructuring themselves. However, in practice, this requires substantial cooperation on the part of the debtor. Therefore, unless the debtor agrees with the use of restructuring proceedings, the successful initiation of this type of insolvency proceeding by the creditors may be somewhat hypothetical.

In the opinion, the receiver will recommend a restructuring of the debtor only if the following conditions are met:

– the debtor performs a business activity;

– the debtor is insolvent or the insolvency is imminent;

– it is reasonable to expect that at least a material part of the operation of the debtor's business can be preserved; and

– it is reasonable to expect that if a restructuring is permitted, the extent of satisfaction of the debtor's creditors will be higher than if bankruptcy was declared.

One of the goals of the 2015 Amendment was to increase the transparency of insolvency proceedings in the Slovak Republic. New terms under which the receiver can recommend restructuring were introduced: only a company which keeps its accounts in accordance with applicable regulations will be able to enter into the restructuring process. A list of all legal acts of the debtor with its related parties, the value of which exceeds the statutory threshold, must be attached to the petition for the declaration of restructuring. In addition, the debtor company will be obliged to describe all transactions and legal acts with related parties that caused the company damage prior to the restructuring. The receiver can only recommend restructuring if at

Restructuring (reštrukturalizácia) (cont.)

least two years have passed since any previous restructuring of the debtor or its legal predecessor.

The opinion must contain a detailed analysis of the debtor's legal acts with related parties and the persons providing a guarantee for, or securing, the debtor's obligations, together with a list of the assets securing the obligations. These new requirements are aimed at simplifying the circumstances under which the court and creditors are able to reasonably consider the proposed restructuring, and the likely rate of return, compared to its alternative, bankruptcy. Additional information which must be contained in the opinion includes data on the amount of net income and other own resources of the debtor which have been distributed to the debtor's shareholders during (as a minimum) the preceding two years, and a statement of an auditor or an expert witness confirming that the debtor's financial statements attached to the petition for the declaration of restructuring provide a true and complete picture of the debtor's financial situation.

In its schedule, the opinion must contain an agreement on the fees to be paid to the receiver for the preparation of the opinion and its further cooperation in connection with the restructuring. It may also contain a draft restructuring plan and binding declarations of the debtor and of one or more creditors agreeing to the proposed plan (ie the concept of a pre-packaged plan).

If the court ascertains that the petition for restructuring complies with the statutory requirements, the court must decide to commence the restructuring proceedings within 15 days from receipt of the petition. Otherwise it shall reject the petition within the same period of time. The court resolution on the commencement of the restructuring proceedings must be published in the Commercial Bulletin without delay after it has been issued. The commencement of the restructuring proceedings takes effect the day following such publication.

The effects of the commencement of restructuring proceedings are as follows:

- the debtor must restrict its activities to ordinary legal acts only – any other legal acts of the debtor are subject to approval by the receiver who prepared the opinion;
- a resolution on the fusion, merger or de-merger of the debtor cannot be adopted and any change resulting from such resolution cannot be registered in the commercial register;
- there is an automatic stay of individual court or administrative enforcement proceedings in respect of the claims of unsecured creditors, and new proceedings cannot commence;
- there is an automatic stay of enforcement actions by individual secured creditors (without any exceptions), and new proceedings cannot commence;
- counterparties may not terminate or rescind an agreement entered into with the debtor due to the debtor's default in any payment or performance that the other party became entitled to before the commencement of the restructuring proceedings – any termination or rescission of the agreement for this reason is ineffective;
- any contractual provisions or stipulations allowing the other party to terminate or rescind an agreement entered into with the debtor due to restructuring proceedings or bankruptcy proceedings are ineffective; and
- no claim that originated before the commencement of the restructuring can be set off against the debtor.

After the restructuring proceedings have been commenced, the next step for a court is to ascertain whether all preconditions to ordering a restructuring have been satisfied. However, the court does not analyse the economic feasibility of the restructuring, as it is bound by the recommendation of the receiver as expressed in his/her opinion. In other words, unless the opinion suffers from any formal deficiencies, if the receiver has recommended the restructuring, the court is obliged to issue a resolution pursuant to which the restructuring is ordered. The court must decide whether or not to order a restructuring within 30 days from the commencement of the restructuring proceedings.

Restructuring (reštrukturalizácia) (cont.)

Relationship with bankruptcy

In the case of concurrent petitions for bankruptcy and restructuring, the Insolvency Act prefers the latter, allowing, in certain circumstances, bankruptcy proceedings to be suspended in favour of restructuring proceedings (but only up until the stage where bankruptcy is declared – once bankruptcy is declared it is no longer possible to suspend bankruptcy proceedings in favour of restructuring proceedings).

Where the debtor is preparing an application for restructuring proceedings, the court shall suspend any ongoing bankruptcy proceedings if requested to do so by the debtor and if the debtor submits sufficient evidence that the restructuring receiver appointed by the debtor is preparing an opinion on the feasibility of restructuring. The court will automatically continue with the suspended bankruptcy proceedings after the 60th day from the suspension of the bankruptcy proceedings (this means that the debtor has 60 days breathing space to obtain a court order commencing restructuring proceedings).

If the court has commenced restructuring proceedings during ongoing bankruptcy proceedings that were initiated by an earlier petition, the ongoing bankruptcy proceedings are automatically suspended until the court orders the restructuring or until the restructuring proceedings are terminated. The restructuring proceedings will be terminated if, for example, the petition for restructuring does not meet the statutory requirements. If the court terminates the restructuring proceedings, the suspended bankruptcy proceedings shall resume. If, on the other hand, the court orders the restructuring, it will also terminate the suspended bankruptcy proceedings.

In contrast, if certain conditions are met, the conversion of a restructuring into a bankruptcy is possible even after the restructuring has been ordered. This could happen, for example, if the financial situation or the business situation of the debtor has changed to the extent that the successful completion of the restructuring can no longer be reasonably expected. The other triggers for the conversion into bankruptcy are, for example, if the debtor or the restructuring receiver seriously or repeatedly breach their respective obligations prescribed by the Insolvency Act or if there are material procedural defects and/or breaches of applicable law during the restructuring proceedings. Creditors can also bring about a conversion if, at the request of a creditor having at least 10% of all votes by value, the creditors by a simple majority of votes by value approve the conversion.

Restructuring (reštrukturalizácia) (cont.)

Filing of claims

In the resolution by which the court has ordered the restructuring, the court will appoint a receiver (*reštrukturalizačný správca*), request the creditors to file their claims within 30 days of the court order, and determine the scope of those legal acts of the debtor that will be subject to prior approval by the receiver. The receiver appointed by the court is selected randomly using the technical equipment specially designed for this task.

The requirement to file claims within 30 days applies to both unsecured and secured creditors. If a creditor fails to meet this deadline, it shall not be able to exercise its rights in the proceedings or participate in the restructuring plan. The filing of claims after the expiration of the deadline has no effect – the creditor cannot remedy the failure to file the claim in time by filing after the deadline.

A filed claim can be contested only by the receiver, and within 30 days from the date on which the time period for filing of claims lapses. The debtor and any creditor that has filed a claim can submit a suggestion to the receiver to contest any filed claim. The receiver has an obligation to investigate each such suggestion with professional care.

Creditors' meetings and committee

After the restructuring has been ordered, the receiver will convene a creditors' meeting (*schôdza veritel'ov*) within 30 days of ordering the restructuring so that the meeting takes place no earlier than on the 15th and no later than on the 20th day since the date on which the time period for contesting claims lapses (ie no earlier than on the 75th and no later than on the 80th day after the court orders the restructuring). The purpose of the creditors' meeting is to express an opinion on any issue related to the restructuring and to elect a creditors' committee (*veritel'ský výbor*). The creditors' committee, consisting of either three or five members, represents the interests of both the secured and unsecured creditors. If the court ordered the restructuring on the basis of a creditor's petition, the creditor who filed the petition is always a member of the creditors' committee.

However, unlike in bankruptcy proceedings, it is not mandatory for the creditors' meeting to vote on the approval or replacement of the receiver. In fact, a change of receiver is possible only if the originally appointed receiver dies, ceases to exist (if the receiver is a legal person) or if a statutory obstacle prevents the receiver from performing its office. In this case the court will remove the original receiver and appoint a new receiver on the basis of a random selection made by the technical equipment specially designed for this task. The 2015 Amendment sets out that the receiver can also withdraw from its function on grounds other than the grounds for which the court may remove the receiver. In this case, a new receiver will be appointed on the basis of a random selection made by the technical equipment specially designed for this task.

The ordering of a restructuring does not deprive the debtor of the control over its business. The debtor remains in possession of its business (DIP concept) – however, it is under the supervision of a restructuring receiver, the court and the creditors. In addition, in the resolution ordering the restructuring, the court may determine the scope of those legal acts of the debtor that will be subject to prior approval by the receiver. The scope of these legal acts may be extended by the creditors' committee at any time during the restructuring proceedings.

Restructuring plan

As already mentioned above, the key idea and the desired outcome of the restructuring proceedings is a restructuring plan (the **Plan**), which needs to be approved by the relevant majorities of the creditors (and, in some circumstances, also by the shareholders) and subsequently confirmed by the court.

In legal terms, the Plan is a document providing for the creation, variation or termination of rights and obligations of persons identified in it as well as the scope and method of satisfaction of those parties to the Plan who are either creditors with filed claims or the debtor's shareholders. Once the court approves the Plan, the Plan is binding on all parties to the Plan. The Plan consists of a descriptive part and a binding part.

The Plan has to be drafted so that it provides for the highest possible extent of satisfaction of the creditors. The satisfaction of the claims of unsecured creditors under the Plan must be at least 20% higher than it would be in bankruptcy in order for the Plan to be admissible.

Restructuring (reštrukturalizácia) (cont.)

The measures to be adopted by the Plan are very flexible. For example, they may include a typical plain vanilla restructuring of the debtor's financial debt, the conversion of debt to equity, the transfer of the debtor's assets or business to a newly established entity, the merger, amalgamation or de-merger of the debtor or a change in its legal form. The 2015 Amendment introduced a limitation that can have a positive effect on the rate of creditors' satisfaction under the restructuring plan. After completion of the restructuring, the debtor or its legal successor cannot distribute profits or other own resources to shareholders until it has satisfied unsecured creditors' claims up to the amount of confirmed claims. For this purpose, 50% of the value of the creditor's original claim continues to exist and the remaining part is considered a separate ownership right of the respective creditor, to be satisfied from the debtor's profits or other own resources. These claims are enforceable only after the fulfilment of the restructuring plan or its ineffectiveness. If the court orders restructuring on a debtor's petition, the Plan will be prepared by the debtor. In contrast, if the court orders restructuring on a creditor's petition, the Plan will be prepared by the receiver.

Before all the creditors (and in some cases, the shareholders) vote on the approval of the Plan, it must first be submitted to the creditors' committee for its preliminary approval. The party submitting the Plan must submit the final draft Plan to the creditors' committee within 90 days from the ordering of restructuring. If the party submitting the Plan makes a justified request, the creditors' committee may extend this period of time by 60 days. If the creditors' committee does not approve the draft Plan on a preliminary basis within the statutory period of time or if it refuses to approve the Plan, the court must convert the restructuring into a bankruptcy. Conversely, if the Plan is approved, the creditors' committee will request that the receiver convene a confirmatory creditors' meeting (where the creditors of all filed claims, and in some cases also the shareholders, will vote on the approval of the Plan).

Restructuring (reštrukturalizácia) (cont.)

The voting at the confirmatory creditors' meeting takes place in at least two groups – one for secured creditors whose rights are affected by the Plan and the second for the other creditors. If there are any subordinated creditors these will also form a separate group. Where the rights and obligations of the shareholders are affected by the Plan, the shareholders will also form a separate group. The party submitting the Plan may divide the above groups into further separate groups so that the claims of creditors or shareholders having identical economic interests will belong to the same group. In particular, this means that, unless the secured creditors agree otherwise, a separate group shall be formed with respect to each secured creditor where there is a reasonable chance that such creditor would be satisfied from the proceeds of the sale of assets securing its claim.

In simplified terms (as the exact formula for calculating the relevant majorities is more complex), the following is necessary for the confirmatory creditors' meeting to adopt the Plan:

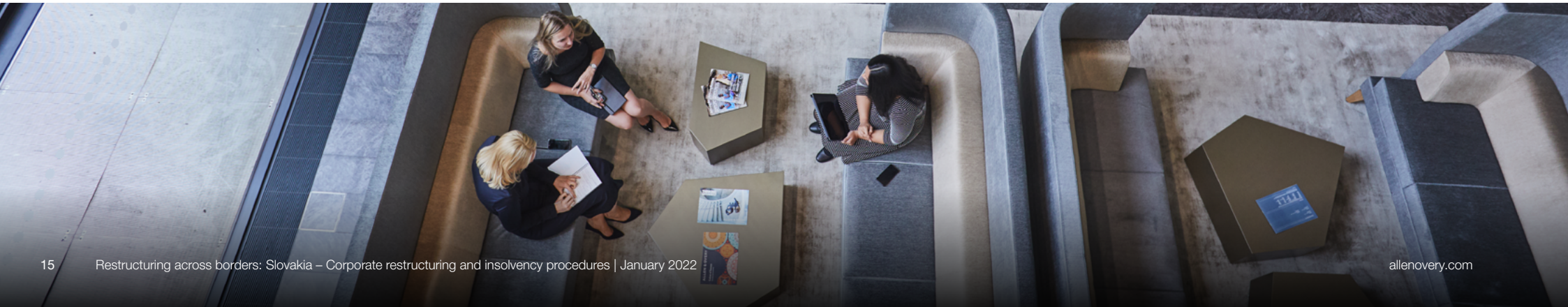
- for secured claims, 100% approval;
- in each group for unsecured claims, a simple majority of votes by value;
- in each group for subordinated creditors, a simple majority of votes by value;
- in each group for shareholders, a simple majority of votes by number; and
- in aggregate, a simple majority of the creditors by value attending the confirmatory creditors' meeting.

In some circumstances, even if the required majority in one of the groups has not been reached, at the request of the party submitting the Plan, the court may order the adoption of the Plan if:

- the position of the creditors or shareholders in the dissenting group is not worse than their position if the Plan had not been adopted;
- the majority of groups voted for the adoption of the Plan by the required majority; and
- in aggregate, a simple majority of the creditors attending the confirmatory creditors' meeting voted for the adoption of the Plan.

In order for the Plan to become effective, it still needs to be confirmed by the court. The court will confirm the Plan if the Plan was approved by the confirmatory creditors' meeting (or if the dissenting group was successfully "crammed down" as referred to above) and if there are no reasons for its rejection. The court can reject the Plan only on specific grounds, including that:

- there were defects in the process of restructuring or if any other provision of applicable law was breached and such a defect or breach adversely affected any party to the Plan;
- the Plan is not equally fair in relation to all groups of creditors as it anticipates the creation of, changes to, or the termination of rights or obligations in the restructuring plan which will mean that the unsecured creditors' groups will be satisfied over a longer period of time than the secured creditors in the absence of a fair reason;
- the Plan was adopted due to a fraudulent act or because any party to the Plan has been given a special advantage;



Restructuring (reštrukturalizácia) (cont.)

– the Plan materially conflicts with the joint interest of all the creditors;

– the extent of satisfaction of any unsecured claim, with the exception of the claims in the subordinated claims group, is lower than 50% of the amount of the claim, unless the creditor agrees with the lower extent of satisfaction; or

– the considerations to be used for satisfaction of any of the unsecured claims, with the exception of subordinated claims, are to be provided for a period longer than five years, unless the relevant creditor agrees with the longer maturity period for the satisfaction of its claim.

The consent of the debtor is not required for the adoption of the Plan.

If the Plan is rejected, the court is required to convert the restructuring into a bankruptcy. The decision on conversion is published in the Commercial Bulletin. The person who submitted the plan subsequently has a 15-day period to file an appeal. The relevant insolvency court must hand the file over to the appellate court; however, a statutory period for such handover is not set. The appellate court must then decide on the appeal within 30 days from receipt of the file.

If the court confirms the Plan, it will terminate the restructuring proceedings and publish the relevant resolution in the Commercial Bulletin. As of the date of this publication, the Plan becomes effective and the moratorium connected with the commencement of the restructuring proceedings ceases to exist.

If the Plan so provides, the debtor may be subject to a supervisory regime until the Plan has been fully performed. In such cases, the supervisory regime is performed by the supervisory receiver designated for that purpose in the Plan.

If the Plan is not fulfilled vis-à-vis a particular creditor, all the waivers and reductions of, and other changes in, claims provided in the Plan in respect of this particular creditor terminate. This creditor can also initiate bankruptcy proceedings. If the bankruptcy is declared before the Plan has been fulfilled in full, the Plan as a whole becomes ineffective and all the creditors whose claims under the Plan have not yet been discharged can file their claims in the declared bankruptcy in accordance with their original terms. Under the 2015 Amendment, new restructuring proceedings in respect of the same debtor can only start after the expiration of at least two years from the completion of the previous restructuring.

Restructuring (reštrukturalizácia) (cont.)

Informal restructuring

An informal restructuring based on a contractually agreed compromise between the debtor and some of its creditors is not explicitly regulated in Slovak legislation. However, it can be implicitly derived from the legislation that, in addition to using the formal proceedings (whether bankruptcy or "formal" restructuring), insolvency or threatened insolvency may also be solved by way of an informal restructuring. In particular, it is a requirement under the Insolvency Act that each debtor must prevent its insolvency. In addition, a debtor must continuously monitor its financial situation so that it is able to detect the potential threat of its insolvency and to take measures that will avert the threatened insolvency. This supports the implementation of informal restructurings.

Early protection mechanism – temporary protection of businesses (dočasná ochrana)

Temporary protection of businesses (*dočasná ochrana*) is regulated in the Act No. 421/2020 Coll. on the temporary protection of businesses in financial difficulty, as amended (the **Temporary Protection Act**). The Temporary Protection Act was initially adopted as a response to the COVID-19 pandemic, to create a time-limited framework for protection against creditors and instruments to support entrepreneurs in financial difficulty to enable them to continue doing business and to prevent job losses, loss of know-how and to achieve a higher level of satisfaction of claims of creditors. This instrument is now permanently available to businesses infinancial difficulty.

Conditions for granting temporary protection

Only businesses with a centre of main interests in the Slovak Republic may apply for temporary protection under the Temporary Protection Act.

This measure is however not available for banks, insurance companies, health insurance companies, asset management companies, securities brokers, stock exchanges, central depositories of securities, subjects of collective investments, payment services providers, pension management companies, additional pension management companies, payment institutions, limited payment services providers, providers of information on payment accounts and creditors under the Act No. 90/2016 Coll. on housing loans.

Temporary protection is granted by courts. Competence to grant temporary protection is determined on the basis of the registered office or place of business of the entrepreneur at the time the application for temporary protection is submitted. Only four courts in the Slovak Republic are competent to grant temporary protection, being:

(i) the District Court Trnava for the district of regional courts in Trnava and Bratislava;

(ii) the District Court Žilina for the district of regional courts in Žilina and Trenčín;

(iii) the District Court Banská Bystrica for the district of regional courts in Banská Bystrica and Nitra;

(iv) the District Court Prešov for the district of regional courts in Prešov and Košice.

The application must be filed electronically using a designated form. The applicant must declare that it meets the criteria for the granting of temporary protection and provide certain other representations, such as:

(i) it is not obliged to file for bankruptcy as at the time of filing the application;

(ii) a simple majority of its creditors by value consents to with the temporary protection;

(iii) no execution or other enforcement proceedings are pending in relation to it;

(iv) it complies with any accounting rules and regulations applicable to it;

(v) in the past 48 months, it was not granted temporary protection.

Early protection mechanism – temporary protection of businesses (dočasná ochrana) (cont.)

Granting temporary protection

If the application meets the statutory requirements, the court will grant temporary protection immediately. If the applicant does not have a registered office or place of business in Slovakia, the court will only grant temporary protection after it has been proven that the centre of main interests of the applicant is in Slovakia. Notification of granting temporary protection is published in the Commercial Bulletin. The temporary protection is considered granted on the day following the date of publishing the notification in the Commercial Bulletin; however, it is effective against third parties from the moment they have become aware of it.

If the application does not meet the statutory requirements, the court will reject it. The applicant can file an objection against this decision within 15 days of its delivery.

Legal effects of temporary protection

The legal effects of providing temporary protection are specified in Section 10 of the Temporary Protection Act:

(i) it is not possible to commence bankruptcy proceedings in respect of an entrepreneur under temporary protection;

(ii) an entrepreneur under temporary protection is not obliged to comply with its statutory obligation to file for bankruptcy;

(iii) claims against an entrepreneur under temporary protection that arose before temporary protection was granted cannot be satisfied in execution or enforcement from its business (*podnik*) or movable assets, rights or other assets forming the business (*podnik*) of the entrepreneur under temporary protection (however, certain statutory exemptions apply);

(iv) set-off of claims against an entrepreneur under temporary protection that arose before temporary protection was granted against claims that arose after the temporary protection was granted is not allowed;

(v) if the entrepreneur under temporary protection is in default which arose before the temporary protection was granted, its contractual counterparty is not allowed to rescind or terminate the relevant agreement or decline to perform its obligations under such agreement during temporary protection; any contractual provisions to the contrary are disapplied. There are certain statutory exemptions from this rule, eg if the counterparty's business could be endangered by complying with this rule; and

(vi) statutory periods for challenging voidable legal acts (*odporovateľné právne úkony*) against an entrepreneur under temporary protection do not run during temporary protection.

Obligations and rights of an entrepreneur under temporary protection

The Temporary Protection Act introduces several obligations for an entrepreneur under temporary protection:

(i) the obligation to be registered in the public sector partners register for the whole duration of temporary protection;

(ii) the obligation to prioritise the joint interest of its creditors (including, without limitation, the restriction on dividends distribution and the prohibition on intra-group loan repayments); and

(iii) the obligation to refrain from any material disposals of its business or integral parts of its business.

The entrepreneur is entitled to prioritise payments of ordinary business expenses and obligations necessary for the survival of its business which arose during temporary protection before payments with an earlier due date and prioritise creditors who are not its affiliated persons.

Early protection mechanism – temporary protection of businesses (dočasná ochrana) (cont.)

New loan financing during temporary protection

In order to maintain the business, the entrepreneur can enter into new loan agreements on arm's length terms and related security agreements. The proceeds of such loan can only be used for the purpose of maintaining the business specified in the loan agreement. Secured creditors of the entrepreneur have a priority right to provide the new loan financing pro rata to the value of the security of their claims (unless they agree otherwise). If the secured creditors decline to provide the new financing, it can be provided by another party on arm's length terms.

If a bankruptcy of the entrepreneur is declared within five years from termination of the temporary protection, the claims from the new loan financing provided during temporary protection are treated as super priority claims and satisfied before other unsecured claims against the debtor (same as "new money" provided to a debtor during restructuring).

Duration of temporary protection

Temporary protection lasts for three months from the moment of being granted. The entrepreneur may request an extension of the temporary protection for an additional three months at the earliest 30 days and at the latest ten days before the expiry of the original term of the temporary protection. In addition to meeting the formal statutory requirements, the conditions for the extension of temporary protection are:

(i) the entrepreneur declares it is in the process of negotiations with its creditors regarding amendments to its obligations, partial waiver of its obligations or new loan financing; and

(ii) the written consent of at least a two-thirds majority of all creditors to the extension, granted not earlier than 30 days before filing the request for the extension of temporary protection.

Expiration of temporary protection

Temporary protection expires on the day following the day a notification of expiration of the temporary protection is published in the Commercial Bulletin. The court will do so if:

(i) three months have elapsed since the temporary protection was granted;

(ii) three months have elapsed since the extension of the temporary protection;

(iii) the protected entrepreneur has asked the court to terminate the temporary protection or has entered into liquidation; or

(iv) one of the creditors of the entrepreneur has requested the termination of temporary protection and attached the written consent of an absolute majority of creditors to the request.

Termination of temporary protection

The court may at its sole discretion or on the basis of a qualified complaint decide to terminate the temporary protection.

A qualified complaint can be filed by anyone (ie not only a creditor), if the statutory requirements for temporary protection have not been met, have ceased to exist or the entrepreneur under temporary protection has breached the obligations arising from temporary protection.

The court will decide within 15 days from delivery of the qualified complaint.

European Insolvency Regulation

The EU Regulation on Insolvency Proceedings 2015 (Regulation (EU) 2015/848) (the **Recast Regulation**) applies to all proceedings opened on or after 26 June 2017. Its predecessor, the EC Regulation on Insolvency Proceedings 2000 (Regulation (EC) 1346/2000) (the **Original Regulation**) continues to apply to all proceedings opened before 26 June 2017. One of the key changes in the Recast Regulation is that it brings into scope certain pre-insolvency "rescue" proceedings and these are now listed alongside the traditional insolvency procedures in Annex A to the Recast Regulation. The Recast Regulation retains the split between main and secondary/territorial proceedings but secondary proceedings are no longer restricted to a separate list of winding-up proceedings – secondary proceedings can now be any of those listed in Annex A. By contrast, the Original Regulation listed main proceedings in Annex A and secondary proceedings (which were confined to terminal proceedings) in Annex B.

Of the above corporate restructuring and insolvency regimes, bankruptcy (*konkurz*) and restructuring (*reštrukturalizácia*) were available as main proceedings under the Original Regulation.

Under the Recast Regulation, bankruptcy (*konkurz*) and restructuring (*reštrukturalizácia*) are listed in Annex A.

Key contacts

If you require advice on any of the matters raised in this document, please call any of our partners or your usual contact at Allen & Overy, or email **rab@allenovery.com**

Renátus Kollár
Partner
Tel +421 2 5920 2423
renatus.kollar@allenovery.com

Matúš Kudlák
Counsel
Tel +421 2 5920 2447
matus.kudlak@allenovery.com

Jennifer Marshall
Partner
Tel +44 20 3088 4743
jennifer.marshall@allenovery.com

Katrina Buckley
Partner
Tel +44 20 3088 2704
katrina.buckley@allenovery.com

Sigrid Jansen
Partner
Tel +31 20 674 1168
sigrid.jansen@allenovery.com

Lucy Aconley
Counsel
Tel +44 20 3088 4442
lucy.aconley@allenovery.com

Jon Webb
Senior PSL
Tel +44 20 3088 2532
jon.webb@allenovery.com

Harini Viswanathan
Associate
Tel +44 20 3088 3992
harini.viswanathan@allenovery.com

Mark Pugh
Associate
Tel +44 20 3088 7179
mark.pugh@allenovery.com

Further information

Developed by Allen & Overy's market-leading Global Restructuring Group, "**Restructuring Across Borders**" is a free and easy-to-use website that provides information and guidance on all key practical aspects of restructuring and insolvency in Europe, the Middle East, Asia and the U.S.

To access this resource, please **click here**.

For more information, please contact:

Bratislava

Allen & Overy Bratislava, s.r.o.
Eurovea Central 1, Pribinova 4
Bratislava
81109

Tel +421 2 5920 2400

London

Allen & Overy LLP
One Bishops Square
London
E1 6AD

Tel +44 20 3088 0000

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