Country Reports

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Updates from The Czech Republic, The Netherlands, Lithuania

The Czech Republic: Creditors with secured contingent and future claims have gained more certainty

On 1 July 2017, an extensive amendment to the Insolvency Act shall take effect.

The amendment brings several substantial changes to a number of aspects pertaining to insolvency proceedings, including security of future or contingent claims (including bank guarantees), the assessment of a company's insolvency and the discharge from debts. This report focuses on the position of creditors with secured contingent and future claims.

Security on contingent claims and future claims

Insolvency proceedings are commenced upon the entitled person filing the insolvency petition to the relevant insolvency court, which is then published by the court in the publicly available insolvency register. One of the most substantial effects of the commencement of insolvency proceedings is that a security interest relating the assets owned by the debtor or other assets belonging to the insolvency estate may be created or executed only pursuant to the statutory conditions of the Insolvency Act. Indeed, only the so-called debtor-in-possession financing (in Czech: *úvěrové financování*) enables the creation of "new security interest".

The mentioned rule of the automatic moratorium has led to various disputed issues, including for example the question whether in case of a pledge on a stock in a warehouse, items arrived to the warehouse after the commencement of the insolvency proceedings are still pledged in favour of a secured creditor. The Supreme Court rightfully answered in the affirmative.

Similarly, a related question has arisen in the context of the then applicable Bankruptcy and Resolution Act in the ELMA-THERM case. In the judgment, the Supreme Court has concluded that a bank is not entitled to the satisfaction of its claim against a bankrupt arising from collateral if the bank performed in compliance with a bank guarantee only issued in favour of the bankrupt after the declaration of bankruptcy, although the pledge securing the bank guarantee had been entered in the land register before bankruptcy was declared.

Insolvency practitioners feared that the Supreme Court would come to the same conclusions under the current Insolvency Act. In fact, our clients experienced that insolvency trustees had embarked on denying their claims on the basis of the ELMA-THERM case in similar scenarios. Against this background, the amendment of the Insolvency Act overrides the Supreme Court's judgment.

The legislator's intention was to ensure that a bank or a person performing under a bank or financial guarantee following the commencement of insolvency proceedings should be regarded as a secured creditor on condition that the right to satisfaction from the security of a recourse claim against a debtor was entered in the land register before the initiation of the insolvency proceedings. Similarly, this rule is to apply to secured future claims arising after the initiation of insolvency proceedings.

Although the majority of the insolvency practitioners probably agree that the ELMA-THERM case was rather the issue, which should be overcome by interpretation rather than legislative intervention, secured creditors generally welcome the amendment. In practice, insolvency trustees have already in many instances recognised the security interest of our clients, that they originally intended to deny. ■

PETR SPRINZ
Partner, Havel, Holásek & Partners, Prague, Czech Republic

> THE MENTIONED RULE OF THE AUTOMATIC MORATORIUM HAS LED TO VARIOUS DISPUTED ISSUES