



INSIDE STORY – MAY 2016

Czech Republic: Frivolous insolvency motions recognized as criminal offense

According to a ruling by the Czech Supreme Court, filing a motion for the initiation of insolvency proceedings on the basis of knowingly false information (i.e., what is known as a "frivolous insolvency motion") may qualify as a criminal offense – that of defamation. If the knowingly false insolvency motion moreover serves to coerce a third party (who is otherwise not bankrupt) into taking certain actions (such as making payments towards the party who filed the motion), the elements of the criminal offense of extortion may also be met. In this sense, filing a frivolous motion for insolvency may not only have civil-law consequences but also criminal-law consequences for the applicant.

A case heard by the Czech Supreme Court under ref. No. 8 Tdo 1352/2014 concerned a motion for the initiation of insolvency proceedings which was aimed not so much at resolving the debtor's inability to pay, but at attaining unlawful enrichment for the petitioner.

The Supreme Court established that the petitioner had filed the insolvency motion in spite of having been fully aware that the claim raised against the "debtor" lacked any legitimate title, and that the "debtor" was not in fact bankrupt. At the same time, the petitioner knew well that the insolvency motion would have adverse consequences (i.e., in particular, damage to the reputation of the "debtor", or the exclusion of the "debtor" from the possibility to participate in tenders for public contracts as a bidder), and in fact sought to use these adverse consequences as leverage in order to coerce the "debtor" to satisfy illegitimate claims for payment and to withdraw a court action which the "debtor" had filed earlier.

The petitioner was eventually found guilty of the misdemeanor of defamation, in that it had disseminated false information which was apt to cause substantial harm to the reputation which the other party enjoyed among the general population, and of the misdemeanor of

extortion, in that the actions of the petitioner were not aimed at resolving a bankruptcy situation but at forcing another person (who is not bankrupt) to engage in, refrain from, or suffer, certain actions.

With a view to the above, it stands to reason to assume that the risk of being the subject to criminal prosecution over a frivolous insolvency motion is substantial enough to act as a deterrent. Practice has shown that the current fine of up to CZK 50,000 envisioned by Sec. 128a of the Insolvency Act has had little value as a deterrent, and the same goes for the recourse to claiming damages in a potential civil-law procedure. By contrast, the risk for specific individuals of becoming exposed to criminal-law penalties may very well play a protective role in this respect.

This Inside story is written by Mgr. David Fechtner (David.Fechtner@bnt.eu), Associate, bnt attorneys-at-law s.r.o., Prague (Czech Republic)