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Infoservis – Insolvency Act (debtor's view)

In the previous issue of the information service we have pointed out general changes brought by the Insolvency Act. In a current issue, we would like to deal with a situation of bankruptcy from the point of view of the debtor, especially with the debtor's obligation to lodge an insolvency petition or with the consequences of breach of such an obligation. We will also consider the possibility of deletion of the debtor from the list of debtors. First of all, we will determine when the subject is bankrupt.

When is the subject bankrupt?

The debtor is bankrupt if it has:

- a) more creditors and
- b) pecuniary obligations **more than 30 days after their due date** and
- c) is unable to perform these obligations.

The debtor is considered to be unable to perform its pecuniary obligations if:

- a) it stopped performance of a substantial part of its pecuniary obligations, or
- b) it does not perform its obligations for more than 3 months after their due date, or
- c) it is not possible to achieve a satisfaction of some of the due pecuniary claims at the expense of the debtor by the enforcement of a decision or by the execution, or
- d) the debtor did not perform its obligation to submit the lists provided for in Section 104 par. J, imposed on him by the insolvency court (if the debtor acts as a petitioner, it is obliged to attach a list of its property, including its claims, a list of its obligations, a list of its employees and documents attesting bankruptcy or threatening bankruptcy to its petition).

The debtor, who is a legal entity or a natural person – entrepreneur, is also considered to be bankrupt, if it is insolvent (it has more creditors and a total of its obligations exceeds the value of its property).

There is a threatening bankruptcy, if, with regard to all circumstances, it can be reasonably presumed, that the debtor will not be able to perform a substantial part of its pecuniary obligations duly and on time. If there is a threatening bankruptcy, the insolvency petition may be lodged only by the debtor (if the debtor is bankrupt, either because of its inability to pay or because of its insolvency, the insolvency petition may be also lodged by its creditor).

The debtor's obligation to declare its bankruptcy.

The debtor, who is a legal entity or a natural person – entrepreneur, is obliged to lodge an insolvency petition without undue delay after it found out or, **with an appropriate carefulness, was supposed to find out** that it is bankrupt. The debtor also has such an obligation, if the enforcement of a decision by sale of its enterprise or the execution pursuant to the Civil Code was lawfully discontinued, because the value of the property belonging to the enterprise does not exceed the amount of obligations belonging to the enterprise (this does not apply, if the debtor has other enterprise).

The obligation described in the previous paragraph is also owed by debtor's legal representatives and **its statutory body and its liquidator**, who is a winding up legal entity. If there are more of these persons and these persons are authorized to act separately on behalf of the debtor, such obligation is owed by **each** of these persons. They lodge the insolvency petition on behalf of the debtor.

The abovementioned obligation to lodge the insolvency petition by the debtor itself or by its legal representatives, its statutory body or its liquidator is, however, not performed, if the insolvency proceedings were discontinued due to petitioner's default or the insolvency petition was rejected (the court rejects the insolvency petition e.g. for defects).

Breach of the obligation

The person, who breached the obligation to lodge the insolvency petition (e.g. debtor's statutory body), **is liable to the creditor for damage** or other detriment caused by such a breach.

Damage or other detriment consists in **difference between the amount of, in the insolvency proceedings ascertained, the claim submitted by the creditor for satisfaction and the amount received by the creditor for satisfaction of this claim in the insolvency proceedings**. The liability of the person in breach of the obligation to lodge the insolvency petition for damage or other detriment can be relieved only, if such a person shows that a breach of the obligation to lodge the insolvency petition did not influence the amount determined to satisfy the claim submitted by the creditor in the insolvency proceedings, or that it did not perform this obligation owing to the circumstances not dependent on its will, which it could not avert even upon exertion of all effort reasonably demanded from such a person.

Preliminary ruling.

If it is apparent during the insolvency proceedings that damage or other detriment was caused to the creditor by a breach of the obligation to lodge the insolvency petition, the insolvency court may award a preliminary ruling, ordering the obliged person to place a **reasonable amount of money** into the judicial custody to compensate damage of other

detriment. The insolvency court will award such a preliminary ruling only **upon the authorized creditor's proposal**. The award of a preliminary ruling is not precluded by the impossibility to calculate a total amount of damage or other detriment.

The amount to be placed into the judicial custody shall be determined by the insolvency court so as to compensate a substantial part of anticipated damage or other detriment. While awarding the preliminary ruling, the insolvency court places a duty on the petitioner to lodge a claim for damages or other detriment by a competent court within a time-limit determined by the insolvency court, which may not expire before the termination of the insolvency proceedings. The proceedings on this claim are not an incidental litigation. To the extent of the court's accommodation of a claim for damages or other detriment pursuant to the previous paragraph, the court's decision shall be considered as a decision on the award of consent to release the object of the judicial custody to the claimant.

Deletion of the debtor from the list of debtors.

After 5 years of the coming into force of the decision on the suspension of the insolvency proceedings, the insolvency court deletes the debtor from the list of debtors and locks up the information about the debtor in the insolvency register.