Uniunea Naţională a Practicienilor în Insolvenţă din România

Institutul Naţional de Pregătire a Practicienilor în Insolvenţă INPPI

Nr. 703 din 09.04.2020

Către:

Consiliul Superior al Magistraturii
Bucureşti, Calea Plevnei nr. 141B, Sector 6

În atenţia Doamnei Preşedinte, Judecător – **Nicoleta-Margareta ŢÎNŢ**

Ministerul Justiţiei
Bucureşti, str. Apolodor nr. 17, sector 5

Direcţia Elaborare Acte Normative

În atenţia doamnelor consilier juridic: **Claudia Roşianu** şi **Honoria Olaru**

- Văzând Hotărârea Consiliului Superior al Magistraturii – Secţia pentru Judecători nr. 417/24.03.2020, potrivit căreia tribunalele pot judeca, în materia insolvenţei, doar cererile de suspendare a executării silite întemeiate pe dispoziţiile art. 66 pct. 11 din Legea nr.85/2014, având în vedere obiectul de aplicabilitate restrânsă al acestor cereri – fiind vorba doar despre acele executări silite demarate de către creditorii individuali împotriva unui debitor care a depus deja o cerere de deschidere a procedurii insolvenţei care nu a fost judecată;

- Cu privire la aplicarea Hotărârii de mai sus, a Consiliului Superior al Magistraturii, au fost adoptate Hotărârea nr. 65/26 martie 2020 a Colegiului de Conducere al Curţii de Apel Bucureşti şi Hotărârea Colegiului de Conducere al Tribunalului Bucureşti nr. 8 din 30.03.2020, hotărâri care restrâng, de asemenea, în mod drastic, aria cererilor ce pot fi soluţionate în materia insolvenţei;

- Având în vedere că nesoluţionarea cererilor aferente materiei insolvenţei produce sincope majore mediului economic şi afectează profund drepturile tuturor participanţilor la procedura insolvenţei, indiferent de calitatea acestora – creditori bugetari, creditori privaţi, creditori instituţii financiare, salariaţi sau antreprenori dar deopotrivă şi drepturile profesiilor liberale implicate – practicieni în insolvenţă, evaluatori, experţi contabili, avocaţi;

- Având în vedere faptul că reglementările insolvenţei sunt dedicate unei situaţii de fapt care necesită un tratament juridic rapid, în care principiile de reglementare

vizează o situaţie de urgenţă a celor implicaţi, cu profunde repercusiuni în mediul economic şi în economia de piaţă, efecte care nu vor putea fi remediate în lipsa activităţii jurisdicţionale a instanţelor de judecată;

- Având în vedere faptul că procedura judiciară de insolvenţă implică, în primul rând, o componentă economică, care există şi funcţionează indiferent de situaţia de normalitate sau de criză, urmărind fie salvgardarea debitorului comerciant, fie definitivarea lichidării sale pentru restabilirea echilibrului creditorilor, şi în măsura legală componenta judiciară, care urmăreşte încuviinţarea de măsuri şi soluţionarea contestaţiilor la măsuri, fără de care activitatea economică nu poate continua ci ar presupune măsuri inutile şi costisitoare de conservare;

- Procedura insolvenţei este singura procedură judiciară care se bucură de o formă de citare şi încunoştinţare a participanţilor la procedură prin BPI, aşa cum aceasta este reglementată de art. 42 din Legea 85/2014.

Solicităm să ne acordaţi sprijinul şi să întreprindeţi demersurile ce se impun către Consiliul Superior al Magistraturii în vederea modificării de urgenţă a hotărârii care reglementează cauzele ce pot fi soluţionate în această perioadă excepţională, în materia insolvenţei.

Redăm mai jos propunerile noastre concrete privind tipurile de cauze care s-ar impune a fi soluţionate în materia insolvenţei şi subliniem faptul că, în elaborarea acestor propuneri, am avut în vedere practica altor state care au adoptat măsuri similare în procedurile de insolvenţă pe perioada pandemiei.

Materialul care a stat la baza acestor propuneri ne-a fost înaintat de către organizaţia europeană cea mai reprezentativă în domeniu – INSOL EUROPE – şi prezintă măsurile concrete adoptate de diferite state în domeniul insolvenţei. Ideea centrală măsurilor din statele studiate este că ceea ce se suspendă sunt doar *obligaţiile* reprezentanţilor debitoarei – administratori, directori – în declararea stării de insolvenţă în termenele definite de lege, nu şi *dreptul* companiilor de a solicita deschiderea procedurilor şi de a se pune sub protecţia tribunalului, procedurile fiind obligatoriu a fi continuate, mai ales în acest context al pandemiei COVID-19.

I. Cu titlu **principal**, având în vedere argumentele prezentate şi practica altor state, apreciem că pentru a nu fi blocate procedurile de insolvenţă, judecătorul sindic trebuie să judece toate cauzele ce au ca obiect litigiile prevăzute la art. 45 alin. (1) din Legea nr. 85/2014, cu excepţia termenelor administrative de control, fără caracter contencios.
Corespunzător ar trebui ca şi instanţele de apel să soluţioneze aceleaşi cauze.

II. **Subsidiar**, în situaţia în care se apreciază că nu este posibilă judecarea tuturor pricinilor, enumerăm mai jos cele mai importante tipuri de litigii a căror nesoluţionare conduce la blocarea plăţilor de la debitor către creditori.
Lipsa de judecată cu celeritate a acestor cauze generează o pagubă iminentă, însemnată şi care nu s-ar putea repara ori a cărei reparare ar fi dificilă în viitor.

a) Cereri în **materia mandatului ad-hoc şi a concordatului preventiv** conform Titlului I din Legea 85/2014. Acestea sunt măsuri de prevenţie ce se aplică debitorului aflat în dificultate şi care conform art. 12 alin. (1), respectiv 18 alin (1) reprezintă cauze ce se judecă cu urgenţă şi celeritate.

1. desemnarea mandatarului ad-hoc, în condiţiile art. 13 alin. (1) din Legea 85/2014;
2. încetarea mandatului ad-hoc, în condiţiile art. 15 alin. (2) din Legea 85/2014;
3. deschiderea procedurii de concordat, numirea administratorului concordatar, omologarea concordatului, constatarea aderării la concordat, suspendarea provizorie a executărilor silite, conform art. 17 lit. a), b) c) şi d) din Legea 85/2014;
4. închiderea procedurii de concordat, conform art. 37 alin. (2) din Legea 85/2014.

b) Cereri **în materia insolvenţei, respectiv Titlul II din Legea 85/2014**

1. cererile privind deschiderea procedurii de insolvenţă, formulate de debitor conform art. 71 alin. (1), precum şi cererile de suspendare provizorie a cererilor de executare silită conform art. 66 alin. (11);
2. cererile privind deschiderea procedurii de insolvenţă formulate de creditori conform art. 70 alin. (1);
3. contestaţiile la măsurile luate de practicianul în insolvenţă conform art. 59 alin. (7);
4. contestaţia la decizia de valorificare a unor bunuri în observaţie, atunci când nu este încă desemnat un Comitet de creditori, conform art. 39 alin (6) din Legea 85/2014;
5. contestaţiile la planurile de distribuire şi rapoartele asupra fondurilor conform art. 160 alin. (6);
6. cererile de înlocuire ale practicianului în insolvenţă şi cererile de confirmare ale acestuia conform art. 57 din Legea 85/2014;
7. cererile privind confirmarea planului de reorganizare conform art. 139 alin. (1);
8. cererile privind deschiderea procedurii de faliment (procedura simplificată sau generală) conform art. 145 alin. 91);
9. cererile administratorului judiciar/lichidatorului judiciar în situaţiile în care nu se poate lua o hotărâre în şedinţele comitetului creditorilor sau ale adunării creditorilor din lipsa de cvorum conform art. 45 alin. (1) lit. o);
10. cereri privind pronunţarea unei hotărâri de închidere a procedurii de insolvenţă conform art. 174 - art. 178.

Corespunzător ar trebui ca şi instanţele de apel să soluţioneze aceleaşi cauze.

Toate aceste cereri din materia insolvenţei se vor face cu aplicarea directă şi a art. 45 alin. (1) şi (2)

Totodată propunem ca în aceasta perioadă, conform reglementărilor şi din Uniunea Europeană să fie inclusă o nouă posibilitate a judecătorului sindic de a soluţiona o eventuală cerere de suspendare a executării Planului de reorganizare/Cerere de modificare a acestuia, ca efect al pandemiei COVID-19 (exemplu: Cehia, Germania)

Vă transmitem alăturat, materialul furnizat de către INSOL EUROPE, menţionat în cuprinsul prezentei solicitări.

Cu profundă consideraţie,

U.N.P.I.R.

Preşedinte

Niculae BĂLAN

BUCUREŞTI 2 UNIUNEA NAŢIONALĂ A PRACTICIENILOR ÎN INSOLVENŢĂ DIN ROMÂNIA ROMANIA

I.N.P.P.I.

Preşedinte

Simona Maria MILOŞ

Anexa 1 la Adresa Nr. 703 din 09.04.2020

Raportul INSOL Europe de monitorizare a modificărilor impuse de pandemia COVID-19 în legislațiile mai multor state la nivel global

Coronavirus (COVID-19) Tracker of insolvency reforms globally (as at 3 April 2020)

This tracker is produced by Lexis Nexis in partnership with INSOL Europe.

We look at various countries which are expediting reforms to their restructuring and insolvency laws, temporarily suspending onerous insolvency law provisions, increasing limits for statutory demands, suspending enforcement powers and introducing other measures to deal with the coronavirus (COVID—19) crisis. As the situation is rapidly evolving with more countries adding new measures daily, you should contact local lawyers in the relevant jurisdiction to check the current measures in force.

Reforms of which we are aware include:

Country	Summary of change(s)	Further reading
Australia	**Insolvent trading**: Australia's Federal Government has ordered a relaxation of insolvent trading laws for six months. During this time, directors will be relieved from their duty to prevent a company from trading while insolvent with respect to debts incurred in the ordinary course of carrying on its business. This relief only relates to debts incurred in the ordinary course of business and not where dishonesty and fraud are involved. **Temporary Increase In Thresholds and Time to Comply**: Statutory demand threshold is increasing from $2,000 to $20,000. The time period within which to	News Analysis: COVID-19 Australia's temporary changes to insolvency laws to support businesses during coronavirus crisis

	comply is going from 21 days to six months. Threshold amount for a Bankruptcy Notice to be issued is also increasing, this time from the current amount of $5,000 to $20,000. The government is also increasing the time within which to comply with a Bankruptcy Notice from the existing 21 days to six months. Also, where a debtor declares an intention to present a debtors petition, the moratorium is extended from 21 days to six months. **ATO Enforcement May Be Suspended**: Businesses may also seek tailored reductions in, or deferrals of, payments owing to the Australian Tax office (ATO). **Power To The Treasurer Under The Corporations Act**: The Treasurer is being given temporary instrument power in the Corporations Act 2001 to amend provisions of it to provide relief or modify obligations to enable a company to comply with requirements during this time. This power will apply for six months and any instrument made by the Treasurer will apply for six months from the date it is made. **When?**: Now in force.	
Czech Republic	**Relaxing directors' duty to file for insolvency and imposing a moratorium:** Changes in Czech insolvency law include: (i) a preference for delivering documents by way of their publishing in the insolvency register in order to reduce the administrative burden on insolvency courts (ii) the obligation of the insolvency court to remit a procedural deadline, provided that the procedural act is missed for an excusable reason based on the extraordinary measures unless the case has already been decided (iii) the application for remission must be submitted to the court together with the missed act within seven days from the date of termination of the relevant emergency measure, but the period for the submission will not end earlier than seven days after the end of the state of emergency (iv) abolition of the obligation to file a debtor's insolvency petition as of the effect of the Act on	

	the Mitigation of the Impact of an Epidemic and until six months after the termination of the emergency measures (however, no later than by 31 December 2020), if the insolvency occurred as a result of such a situation (vi) abolition of the obligation to file a debtor's insolvency petition as of the effect of the Act on the Mitigation of the Impact of an Epidemic and until six months after the termination of the emergency measures (however, no later than by 31 December 2020), if the insolvency occurred as a result of such a situation (vii) it will not be possible to effectively file a creditor's insolvency petition (petitions will have no legal effect) as of the effect of the Act on the Mitigation of the Impact of an Epidemic up to 31 August 2020 (viii) possibility to apply for a temporary suspension of a reorganisation plan during the effectivity of the Emergency Measures. The application is only possible in the event that a plan has been approved by 12 March 2020 at the latest and has not yet been fully performed. If granted, the reorganisation cannot be turned into bankruptcy proceedings during this period (ix) possibility to apply for a temporary suspension of a reorganisation plan during the effectivity of the Emergency Measures. The application is only possible in the event that a plan has been approved by 12 March 2020 at the latest and has not yet been fully performed. If granted, the reorganisation cannot be turned into bankruptcy proceedings during this period (x) excluding the duration of the emergency measures and a further six months from their termination to the relevant period with regards to action for the relative ineffectiveness of an act (Actio Pauliana) and (xi) a debtor-business operator who is not insolvent as at 12 March 2020 will have the opportunity to file a proposal for an extraordinary moratorium which can last (if extended) up to six months (hereinafter the 'extraordinary moratorium'); the extraordinary moratorium will be newly introduced directly in Act No. 182/2006 on insolvency procedures	

	(hereinafter the 'Insolvency Act'). **When?**: On 31 March 2020, the draft of the Act on the Mitigation of the Impact of an Epidemic was approved by the Government of the Czech Republic, and has now been sent to the Chamber of Deputies to be adopted in an abbreviated procedure under a State of Legislative Emergency. The adoption of the Act on the Mitigation of the Impact of an Epidemic can therefore reasonably be expected to occur during the first half of April 2020.	
Germany	**Directors' duties to file for insolvency**: In Germany, directors are normally required to file for insolvency without undue delay and at the latest within three weeks (21 days) after becoming illiquid or over-indebted. The federal government has temporarily suspended this requirement until 30 September 2020 (with the option to extend until 31 March 2021) due to the coronavirus crisis. This is a welcome reform to allow directors some breathing space to assess all options during this turbulent time and potentially rescue otherwise viable companies. For the suspension to apply, it must be proved that the company's insolvency is caused by the coronavirus pandemic and that the company has requested state aid or is engaged in serious financing or restructuring negotiations with reasonable prospects of restructuring. **When?**: the COVID-19 Insolvency Suspension Act (COVInsAG) was published on 27 March in the Federal Gazette and has retrospective force from 1 March 2020 onwards.	
Hong Kong	**New Chapter-11 style rescue**: Currently, Hong Kong does not have any form of rescue procedure available to distressed companies. It has been reported that Hong Kong is reconsidering a new kind of restructuring procedure based on the US chapter 11 process, which has been resurrected in light of the pressures companies face from coronavirus. The Chapter 11-style corporate rescue bill was first discussed in 1996 by the Law Reform Commission, but it is reported that the government plans	

	to finalise its proposal and potentially table a bill during the legislative session beginning in October 2020. **When?**: We understand that the government intends to consult on the draft bill over the next few months.	
Luxembourg	**Directors' duties to file for insolvency**: The Luxembourg Government issued the Grand-Ducal Regulation of 25 March 2020 suspending the statutory requirement for directors to file for bankruptcy proceedings within one month of insolvency. **When?**: Effective from 26 March 2020 onwards.	
Netherlands	**New scheme style rescue**: Last year, draft proposals for a new type of scheme were submitted to Parliament on 8 July 2019. The draft Bill allows for global restructurings as it features elements of the US Chapter 11 (such as a cram down mechanism and moratorium) and the UK scheme of arrangement (such as implementing a plan outside of formal insolvency proceedings). The Dutch Scheme (the Act on the Confirmation of Private Plans, otherwise known as WHOA (Wet homologatie onderhands akkoord)) claims to be a state-of-the-art restructuring procedure as it is simple, fast, flexible, reasonable and cost-efficient. It would be a procedure that remains outside of formal insolvency proceedings. Instead, it merely facilitates a procedure where the court can be requested to confirm the plan (where a majority can bind a minority within each class) and it can be imposed on dissenting classes (cram down). One of the flexible elements of the draft Bill is the provision of an option to choose between a public and a confidential procedure. Only the public procedure will be placed on Annex A of the Recast Regulation on Insolvency 2015/848, Regulation (EU) 2015/848 (the Recast Regulation on Insolvency) and (thus) applies only when the centre of main interests (COMI) of the debtor is	News Analysis: The new Dutch scheme

	located in the Netherlands. The confidential procedure will fall outside the Recast Regulation on Insolvency. **When?**: We understand that the WHOA was originally expected to enter into force in January 2021, although lawyers are calling for this to be expedited to later this year.	
Russia	**Moratorium on bankruptcy proceedings**: The Duma will be reviewing a draft law (expected to be adopted shortly) granting the RF Government in exceptional cases the right to impose a moratorium on initiation by creditors of bankruptcy proceedings against certain categories of debtors (entities engaged in a particular type of economic activity, or entities which have suffered most from the circumstances which resulted in the imposition of such moratorium, most likely to be airline, tourist, hospitality and catering companies), for a term to be determined by the government. During the term of the moratorium: (i) eligible debtors are no longer obliged to file voluntary bankruptcy petitions in the prescribed circumstances; (ii) any non-bankruptcy enforcement procedures against eligible debtors, as well as enforcement procedures by secured creditors against collateral pledged by eligible debtors (including out-of-court enforcement procedures) are prohibited; and (iii) any eligible debtors' transactions falling out of the scope of their ordinary business with a value exceeding 1% of the debtor's assets shall be considered void **When?**: We understand that the new law will be enacted shortly.	News Analysis: Coronavirus (COVID–19) Russian Bankruptcy Law Developments
Scotland	**Suspending enforcement actions**: Accountant in Bankruptcy (AiB), Scotland's insolvency service, has announced that sale and eviction from property in	Scotland suspends sales and evictions during coronavirus

	ongoing bankruptcy proceedings will be suspended until further notice due to the coronavirus outbreak. New measures introduced by AiB will simplify procedures to help those seeking debt relief through bankruptcy and extend deadlines for payment of debts through the Debt Arrangement Scheme. **When?**: Now in force.	(COVID-19) pandemic (LNB News 23/03/2020 68)
Spain	**Directors' deadline to file for insolvency**: Spain has relaxed its strict deadline which previously required directors to file for insolvency within two months of the company becoming insolvent. **When?**: Now in force.	News Analysis: Spanish measures for restructuring/insolvency in the context of coronavirus (COVID-19)—threats and opportunities
South Africa	**Relaxation of fraudulent trading:** On 24 March 2020, the Companies and Intellectual Properties Commission (CIPC) announced a suspension of its power to issue compliance notices to companies which the Commission has reasonable grounds to believe is trading or carrying on business recklessly, with gross negligence or for a fraudulent purpose for a period of 60 days after the declaration of a natural disaster has been lifted if the Commission has reasonable grounds to believe the business conditions were caused by the COVID-19 pandemic. **When?**: Effective from 24 March 2020 onwards.	News: (CIPC) announcement
United States	**Suspending enforcement actions**: The Governor of the State of New York signed an Executive Order on 21 March 2020. In part, this order provides that 'it shall be deemed an unsafe and unsound business practice if, in response to the COVID-19 pandemic, any bank which is subject to the jurisdiction of the Department shall not grant a forbearance to any person or business who has a financial hardship as a result of the COVID-19 pandemic for a period of ninety days'.	

	When?: Now in force	
United Kingdom	**New rescue tools plus suspension of wrongful trading**: On Sat 28 March 2020, the Insolvency Service released plans to reform the UK's insolvency framework to add new restructuring tools including: (i) a moratorium for companies giving them breathing space for from creditors enforcing their debts for a period of time while they seek a rescue or restructure; (ii) protection of their supplies to enable them to continue trading during the moratorium; (iii) a new restructuring plan, binding creditors to that plan The proposals will also include: (iv) key safeguards for creditors and suppliers to ensure they are paid while a solution is sought; and (v) temporarily suspension of the wrongful trading provisions retrospectively from 1 March 2020 for three months for company directors so they can keep their businesses going without the threat of personal liability (NB existing laws for fraudulent trading and the threat of director disqualification will continue to act as an effective deterrent against director misconduct) **When?**: Legislation to introduce these changes will be introduced in Parliament at the earliest opportunity. Provisions will be included to enable the changes to be extended if necessary. The government previously consulted on changes to the corporate insolvency regime and announced plans to introduce new insolvency restructuring procedures in August 2018. The new legislation will implement these plans, including a short moratorium or 'breathing space' that will give companies in difficulty time to explore	LNB News 30/03/2020 47

	options for rescue. This comes after the City of London Law Society (CLLS) submitted a proposal to the government outlining various amendments to UK insolvency regime to assist following the COVID-19 crisis (see News Analysis: Coronavirus (COVID-19)—proposal for temporary changes to UK insolvency law).	

Key takeaways

Obviously, any counties under lock down from coronavirus may face logistical issues in making legal reforms if the relevant parliamentary body/law making body/court is running a reduced or skeleton service. However, many insolvency professionals argue that now is the most important time to make those reforms through emergency legislation to rescue otherwise viable companies and give directors, companies and individuals sufficient breathing space.

Where the reforms include the introduction of rescue type proceedings, EU Member States should bear in mind the requirements of the directive on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures (the Harmonisation and Second Chance Directive) which requires compliance by 17 July 2021 (see Practice Note: Harmonising insolvencies and restructurings across Europe). One upside of coronavirus is that these reforms should be enacted quickly, so enhancing recovery prospects in many more countries throughout the EU.