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A practical cross-border insight into corporate recovery and insolvency work

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1 Issues Arising When a Company is in Financial Difficulties

1.1 How does a creditor take security over assets in Montenegro?

In general, creditors in Montenegro may secure their claims by way of various types of security over debtors' assets, such as pledge (*zaloga*), mortgage (*hipoteka*), suretyship (*jemstvo*), bills of exchange (*menica*), etc.

As a matter of principle, in order for the security to be validly perfected, the secured claims must be monetary (*novčana potraživanja*) and either specified (*određeno*), or specifiable (*odredivo*). Also, bearing in mind the principle of accessoriness (*akcesornost*) of collaterals, the secured claims must be valid and binding.

Pledge

Although they can be established by way of a court decision or by force of the law, pledges are usually established by way of an agreement between the creditor and the owner of the pledged asset. However, the conclusion of a pledge agreement itself does not constitute a perfected security unless additional steps have been taken. In case of a pledge over movables, the pledge is perfected once possession over such asset has been transferred to the creditor. On the other hand, pledges over shares (*udjeli*), receivables and other rights are perfected after due registration with the Pledge Registry within the Commercial Court in Podgorica, while pledges over shares (*akcije*) are mandatorily registered with the Montenegrin Central Depository Agency and perfected at the moment of registration.

Mortgage

Mortgages over immovable assets may be established by way of an agreement, mortgage statement, operation of law (*ex lege*), and a court decision. However, they are most commonly established by way of a mortgage statement (*založna izjava*) given unilaterally by the mortgaged real estate's owner. Mortgages are only perfected once they have been registered with the competent cadastre of real estate.

1.2 In what circumstances might transactions entered into whilst the company is in financial difficulties be vulnerable to attack?

Legal actions (including the establishment of collaterals) of companies threatened by insolvency are particularly sensitive, given that under specific circumstances they can be challenged even if undertaken as part of regular settlement of the company's debts.

As a general rule, the applicable bankruptcy regulations provide that, all actions taken, and omissions made, prior to the initiation of bankruptcy, disturbing a balanced settlement of creditors, or favouring or damaging particular creditors may be challenged in bankruptcy proceedings, even if such actions were supported by, or caused the issuance of, an enforcement title (*izvršna isprava*).

Congruent Settlement

Transactions entered into during the period of six months prior to the insolvency petition filing that settles and/or secures a regular creditor's claim (*uobičajeno namirenje*) may be challenged if at such time the debtor was incapable of effecting payments, and its creditor knew or should have known that the company was insolvent.

Incongruent Settlement

Transactions entered into by a debtor, which it was not entitled to enter into, may be challenged if entered into in the period of twelve months prior to the insolvency petition filing.

Directly Detrimental Transactions

A debtor's transactions which directly damage creditors may be challenged if:

(i) they were entered into in the period of six months prior to the insolvency petition filing, while at such time the company was unable to make payments and its creditor knew of such;

(ii) they were entered into after the insolvency petition was filed, while the creditor knew of the filing or of its debtor's incapability of making payments; or

(iii) such action (or omission) precluded the debtor from exercising its right, while such action or omission took place in the period of six months prior to the insolvency petition filing.

Intentionally Detrimental Transactions

A transaction or action taken or entered into by the debtor in the five years prior to submission of a petition for the initiation of an insolvency proceeding may be challenged if:

(i) they were intended to cause damage to one or more creditors and if the debtor's counterparty knew of such intention; or

(ii) they were taken against no compensation or if such compensation was insignificant.

Transactions without or for Insignificant Consideration

A transaction entered into by a debtor without consideration or for insignificant consideration may be challenged if it was concluded in the period of five years prior to the insolvency petition filing. However, these transactions cannot be challenged if in the form of a donation and if the insolvency debtor was in a financial position to do so and such a transaction was typical for the industry in which the insolvency debtor was operating.

Also, under general civil law rules, a transaction may be challenged through *Actio Pauliana* if the creditor challenging the transaction in question proves its claim is due and that the challenged transaction was detrimental thereto, i.e. having entered into the transaction the debtor became unable to settle the creditor's claim.

1.3 What are the liabilities of directors (in particular civil, criminal or disqualification) for continuing to trade whilst a company is in financial difficulties in Montenegro?

Directors owe a duty of care and diligence to the company whether such company is in financial difficulties or not. If the directors breach their duties and consequently cause damage to the company, the company (or its shareholders through a derivative lawsuit) may claim for damages.

Directors are also liable to criminal charges if, *inter alia*, they: (i) issue securities without sufficient cover; (ii) abuse their position to make material gain or cause material damage; (iii) cause the company's insolvency by mismanaging the company's funds, causing over-indebtedness, failing to recover due payments, etc.; (iv) fraudulently reduce or hide the company's assets, conclude fictive loans, or alter the company's business books, etc. in order to avoid settlement of a creditor's claim; or (v) intentionally engage in fraudulent trading with the intention of damaging or favouring certain creditors.

Pursuant to Montenegrin criminal legislation, a person criminally convicted of corporate crimes may be disqualified from acting as a director/board member for a fixed period of ten years on conviction or, in the case of a company, from carrying on business for a fixed period of five years on conviction.

2 Formal Procedures

2.1 What are the main types of formal procedures available for companies in financial difficulties in Montenegro?

The two main procedures available for companies in financial difficulties are bankruptcy (*bankrotstvo*) and reorganisation (*reorganizacija*), both regulated by the Montenegrin Insolvency Act (*Zakon o stečaju*). While bankruptcy imminently leads to liquidation of the debtor, reorganisation serves the dual purpose of financial recovery of the debtor and the most favourable settlement of creditors' claims. Reorganisation may be filed for either along with a bankruptcy petition or at a later stage of the insolvency proceeding.

2.2 What are the tests for insolvency in Montenegro?

The Insolvency Act envisages the following tests for assessing if a debtor is insolvent: (i) the company is permanently unable to pay its debts (*trajnija nesposobnost plaćanja*), i.e. it cannot settle its debts within 45 days from the due date or it has suspended all payments for 30 consecutive days; and (ii) the company is over-indebted (*prezaduženost*), i.e. its debts are greater than the value of its assets.

2.3 On what grounds can the company be placed into each procedure?

An insolvency proceeding is initiated against a company if it is proven insolvent (please see question 2.2) and additionally if a creditor has obtained an enforcement title but was unable to settle its claims within 45 days of initiation of the enforcement procedure. Also, the insolvency proceeding is initiated if the debtor, during the reorganisation, fails to adhere to the reorganisation plan or if such plan had been adopted fraudulently.

On the other hand, the reorganisation procedure may be implemented if the insolvency has been initiated but the creditors' claims are likely to be settled more favourably than in bankruptcy while the debtor's continuing business is economically justified and viable.

2.4 Please describe briefly how the company is placed into each procedure.

The insolvency proceeding may be initiated by a creditor, the debtor or the company's liquidator (in case the company's assets are insufficient to settle all of the creditors' claims). Under regular circumstances, prior to rendering the decision on opening of the insolvency proceeding, the court would hold a preliminary hearing in order to establish the existence of the grounds therefore. However, in certain limited cases where the existence of grounds is apparent, such preliminary hearing will not be held if (i) the debtor itself files for bankruptcy, (ii) the creditor files such a request but the debtor admits to the existence of grounds for bankruptcy, or (iii) the respective request has been filed by a creditor who failed to settle its claim in an enforcement proceeding. Subsequently, and provided that no reorganisation plan was filed within 90 days of the date of the insolvency proceeding's opening, the insolvency judge would render a decision on opening of the bankruptcy.

On the other hand, insolvency proceedings pursued as reorganisation (*reorganizacija*) are to be implemented in accordance with a reorganisation plan whereas such a plan can be submitted to the insolvency judge either (i) at the time of filing the insolvency petition (that would be a pre-packaged reorganisation plan (*unapred pripremljeni plan reorganizacije*)), or (ii) within 90 days following the date of the insolvency proceeding's opening (this may be extended by 30 days). A reorganisation plan can be submitted by the debtor, the receiver, creditors holding at least 30 per cent of the aggregate amount of the secured claims, creditors holding at least 30 per cent of the aggregate amount of the unsecured claims, as well as persons having a stake of at least 30 per cent in the debtor.

2.5 What notifications, meetings and publications are required after the company has been placed into each procedure?

All notifications, publications, advertisements, etc. are commonly issued by the court. Such notifications mainly pertain to notice to creditors and various public bodies about significant stages within the insolvency proceedings, such as notification to the cadastre of real estate and the commercial register that bankruptcy was initiated, the invitation to the creditors to file their claims, etc.

Probably the most important notice is the competent court's announcement that the insolvency proceeding has been opened. Such announcement must include:

(i) information on the competent court;

(ii) name and registered address of the debtor;

(iii) legal grounds for bankruptcy;

(iv) name and address of the appointed insolvency receiver;

(v) invitation to the debtor's creditors to file their claims within the given deadline;

(vi) invitation to the debtor's debtors to fulfil their obligations;

(vii) time and place of hearing scheduled for examination of claims (*ročište za ispitivanje potraživanja*);

(viii) time and place of the first creditors' meeting (*prvo poverilačko ročište*); and

(ix) date of publication.

Although a bankruptcy proceeding is deemed open on the date the court adopts a decision to initiate bankruptcy, it is only from the date of publication of the court's announcement on the court's notice board that the legal consequences of bankruptcy take effect.

2.6 Are "pre-packaged" sales possible?

Under Montenegrin law, the only institute similar to pre-packed sales is envisaged under the Insolvency Act which provides for a pre-packaged reorganisation plan (*unapred pripremljeni plan reorganizacije*) (please see question 2.4) to enable business or asset sale structured, negotiated and agreed in advance of a debtor declaring itself insolvent and a bankruptcy administrator being appointed. However, such a pre-packaged reorganisation plan would have to be approved by the debtor's creditors once the insolvency proceedings have been opened by the insolvency judge.

3 Creditors

3.1 Are unsecured creditors free to enforce their rights in each procedure?

It should be noted that once an insolvency proceeding is opened, all proceedings (including enforcement) against the debtor are stayed. This means that creditors may only enforce their claims by way of the insolvency proceeding, if they file their claims. For unsecured creditors, settlement means waiting until all of the debtor's assets are cashed-in and the proceeds are distributed according to their ranking and *pro rata* to their claims compared to the aggregate amount of all claims.

However, in reorganisation, settlement of all claims depends exclusively on a confirmed reorganisation plan, binding on all creditors, i.e. the plan has the force of a court order and is considered to be a new contract on the satisfaction of claims presented therein.

3.2 Can secured creditors enforce their security in each procedure?

For the reasons set forth in question 3.1, secured creditors cannot enforce their collateral outside the insolvency proceeding.

However, pursuant to the Insolvency Act a secured creditor may request exemption from the stay regarding the enforcement of its collateral and such request may be approved if (i) the collateral was not adequately safeguarded, (ii) the value of the collateral is depreciating without recourse to adequate protection, or (iii) the value of the collateral is less than that of the secured claim and is not crucial for a potential reorganisation.

Also, within the insolvency proceedings, secured creditors have priority in realising the collateral they validly obtained from the debtor. It should be noted that the validity of the established security may be affected by the rules on challenges of the company's transactions. Also, a security established in the period of 60 days prior to initiation of the insolvency proceeding will cease to exist, thus leaving the relevant creditor unsecured.

Secured creditors settle their claims from proceeds obtained through the sale of their collateral, preventing unsecured creditors from receiving any proceeds until all secured claims have been settled fully.

On reorganisation, the settlement of secured creditors' claims depends solely on the approved reorganisation plan and the reorganisation measures provided therein.

On the other hand, as part of the EU integration process and under EU Directive 2002/47/EC of 6 June 2002 on Financial Collateral Arrangements (Directive), the Montenegrin Parliament enacted the Financial Collaterals Act (*Zakon o finansijskom obezbjeđenju*) in 2012, which applies only to entities in the financial system, such as central banks, states, banks, funds, etc., acting both as collateral provider and collateral taker. It determines that all financial collateral agreements (i.e., pledge over financial instruments, credit claims, etc.) and the rights stemming therefrom shall remain valid even after the initiation and during the insolvency proceedings, which means that collaterals and the creditors' rights to set-off will not be affected even if the debtor is in bankruptcy.

3.3 Can creditors set off sums owed by them to the company against amounts owed by the company to them in each procedure?

As a general rule, the set-off of mutual claims is allowed in the insolvency, if the creditor has acquired its right to set-off prior to the bankruptcy petition filing. In such event, in order not to be precluded, the creditor must state its intention to set-off its claims along with registration of its claims with the competent court.

If a creditor has acquired the right to set-off its claim against the debtor with the debtor's claim against such creditor prior to the insolvency petition filing, the opening of insolvency proceedings shall not constitute grounds for loss of the right to set-off such claim. The creditor must file its claim and a set-off statement with the court prior to the claim filing deadline, otherwise it loses the right to set-off.

Set-off will not be allowed if the right thereto was acquired:

(i) after the insolvency petition filing;

(ii) in the six-month period prior to the insolvency petition filing while the respective creditor knew or must have known that grounds for insolvency exist; or

(iii) through a vulnerable transaction.

For certain exceptions please see question 3.2, paragraph 6.

4 Continuing the Business

4.1 Who controls the company in each procedure? In particular, please describe briefly the effect of the procedures on directors and shareholders.

Parties involved in insolvency proceedings (including bankruptcy) are: (i) the insolvency receiver (*stečajni upravnik*) (acting as the company's management); (ii) the bankruptcy judge (*stečajni sudija*); and (iii) the creditors' committee (*odbor povjerilaca*) (adopting various decisions with substantial effect on the insolvent estate, deciding on the cash-in method of the insolvent estate, etc.). Once the legal consequences of insolvency set in, all directors, representatives and holders of powers of attorney are automatically relieved of their duties and their functions are carried out by the insolvency receiver (occasionally with approval of the creditors' committee).

On the other hand, the management and supervision of a debtor in reorganisation is determined by the approved reorganisation plan. Moreover, whatever system is envisaged by the respective plan, the company's entire business must be conducted in accordance with the reorganisation plan (please see question 2.3).

4.2 How does the company finance these procedures?

The expenses of the bankruptcy procedure are settled preferentially from the proceeds obtained through the sale of the bankrupt estate.

Furthermore, such expenses are fully covered before any unsecured creditor receives any settlement.

For those reasons, a bankruptcy proceeding will not be initiated if the debtor's assets are insufficient to cover the cost of the proceeding. Exceptionally, the proceeding will continue if the person requesting initiation of bankruptcy pays an advance on costs.

A reorganisation, on the other hand, is financed from the assets/funds provided in the adopted reorganisation plan.

4.3 What is the effect of each procedure on employees?

The moment insolvency is initiated all employment agreements are terminated by force of law, whereas the actual decisions on termination of each employment agreement are to be rendered by the insolvency receiver. The insolvency receiver, however, may decide (with the competent court's approval) to employ (or retain) a certain number of employees in order to finalise ongoing business and carry on the business.

4.4 What effect does the commencement of any procedure have on contracts with the company and can the company terminate contracts during each procedure?

In the event a contract with the debtor is not completely performed by both parties by the time bankruptcy is initiated, the bankruptcy administrator will have the right to resume performance of such contract and to request that the counter-party fulfil its obligations. However, the bankruptcy administrator may also choose not to perform such a contract, in which case the relevant counter-party may only apply to the bankruptcy proceeding as a creditor.

If the debtor was a lessee in a financial leasing agreement, the lessor will be authorised to a separate settlement and priority over the leased object.

In case of a fixed contract (*fiksni ugovor*) (which is terminated by force of law in case of failure to perform within the agreed time limit), the creditor cannot claim performance if the agreed performance deadline fell after initiation of the insolvency proceedings. In such cases, the respective creditors can only request damages within a bankruptcy proceeding.

Orders (*nalozi*) and offers issued, or received, by the debtor will be terminated, unless the bankruptcy administrator decides otherwise.

Real estate leases will not be automatically terminated. Claims originating prior to initiation of bankruptcy can be registered with the competent court, while claims arising after the bankruptcy was initiated are considered as bankrupt estate expenses and enjoy preferential treatment. For that reason, the landlord cannot terminate the lease agreement due to late payments or the deteriorated financial position after the bankruptcy petition filing.

5 Claims

5.1 Broadly, how do creditors claim amounts owed to them in each procedure?

Pursuant to the Insolvency Act, both secured (*razlučni povjerioci*) and unsecured (*stečajni povjerioci*) creditors file their claims with a court. Creditors can file their claims only within 30 days of the insolvency petition filing (this may be extended until the examination hearing). Such registration takes place when a creditor files a statement of claim to the court, stating in particular the legal grounds for the claim and the full amount claimed including the principal and accrued interest.

At the so-called examination hearing (*ročište za ispitivanje potraživanja*), which is held before the insolvency judge, the receiver must declare whether he acknowledges or contests a filed claim. Creditors are also entitled to contest claims submitted by other creditors. If a creditor's claim is acknowledged, this creditor is entitled to participate in the bankruptcy proceedings, which means that it will finally receive the sum that is eventually distributed to the unsecured creditors. If a creditor's claim is contested either by the receiver or by another creditor, such creditor must assert its claim through civil proceedings in order to maintain the right to participate in the proceedings and subsequently to receive proceeds from the sale of a debtor's estate.

5.2 What is the ranking of claims in each procedure? In particular, do any specific types of claim have preferential status?

Insolvency creditors are creditors in insolvency proceedings who have a claim on the day the insolvency proceeding opens with no right to preferential settlement. They are, depending on their claims, ranked. Lower ranking creditors can only be settled after all higher rank creditors, but only *pro rata* to the bankruptcy sum in their respective ranks.

Claims are ranked as follows:

(i) unpaid net salaries of debtor's employees up to the amount of the annual minimum wage in the period of two years prior to the insolvency proceeding opening, as well as employee claims for work-related injuries;

(ii) all "public income claims" (i.e. taxes and other moneys owed to the state) due in the last three months prior to the insolvency proceeding opening (save for pension and disability insurance contributions); and

(iii) other creditors' claims.

It should be noted that, pursuant to the Insolvency Act, insolvency creditors can only be settled after the following costs have been satisfied in full: (i) expenses/costs of the insolvency proceedings (i.e. court expenses related to the insolvency proceedings, receivers award and compensation, etc.); and (ii) obligations of the insolvent estate (i.e. receivers' expenses other than costs of the insolvency proceedings, the debtor's employee salaries which arose after the insolvency proceeding opening, etc.).

Secured creditors (*razlučni povjerioci*), i.e. creditors holding a security interest or other right of settlement out of specific assets are not considered insolvency creditors and are entitled to full settlement of their claims from the respective assets. In practice, such preferential position may, however, be difficult to enforce and receivers/the court may (attempt to) obstruct settlement out of the respective collateral. In the event the amount of a secured claim is larger than the amount obtained from the sale of the respective collateral, the secured creditor will be treated as an unsecured creditor for the unsettled part of its claims.

If a reorganisation plan is adopted and confirmed, claim settlement priority will be determined by the reorganisation plan.

5.3 Are tax liabilities incurred during each procedure?

The opening of an insolvency procedure does not affect the general tax regime and debtors are required to continue to pay taxes.

6 Ending the Formal Procedure

6.1 What happens at the end of each procedure?

The bankruptcy of a debtor will result in (i) the sale of all the debtor's assets, (ii) settlement of the debtor's creditors through realisation of the insolvent estate, and (iii) liquidation (winding up and deletion from the companies registry) of the debtor. As an exception, a company may not be liquidated if it is sold as a legal person (not applicable to banks and insurance companies). In such case, the purchaser acquires the company and its assets (or part of its assets).

However, an insolvency proceeding may also be terminated where only one creditor files a claim or the debtor's assets are insufficient to cover the insolvency proceeding costs.

Once a reorganisation plan is adopted and verified, the competent court adopts a decision to suspend the insolvency and the debtor continues to carry on its business. The reorganisation itself is finished once all reorganisation measures have been fulfilled and creditors' claims settled. At that point, the company resumes its business from scratch.

7 Restructuring

7.1 Is a formal procedure available to achieve a restructuring of the company's debts in Montenegro?

Montenegrin law does not recognise a specific institute of financial reorganisation or restructuring outside the insolvency proceeding. However, in practice it may happen that parties contractually arrange restructuring of the company's debts.

7.2 If such a procedure is available, is a debt for equity swap possible and how are existing shareholders dealt with?

When a debt for equity swap is contractually agreed as part of a company's financial restructuring outside of the insolvency proceeding then shareholder consent is necessary pursuant to the Companies Act (*Zakon o privrednim društvima*) while for a debt for equity swap envisaged as one of the measures of the reorganisation plan in accordance with the Insolvency Act, then in practice, creditor consent is needed.

7.3 Can dissenting creditors be crammed down?

As previously mentioned, Montenegrin law does not provide for financial restructuring outside the insolvency proceeding. However, as mentioned above in question 7.1, reorganisation procedure is determined only in the Insolvency Act, which prescribes that a reorganisation plan (including a debt for equity swap as one of its measures) can be approved if the majority of the formed classes of creditors approve it, i.e. a dissenting class of creditors may be crammed down.

For the purpose of voting on a reorganisation plan, creditors are ranked into classes pursuant to mandatory insolvency lines (see question 5.2). In addition, secured creditors represent a separate class. In that respect, a reorganisation plan is approved if the majority of formed creditor classes vote in favour of its adoption; a creditor class approves the plan by a favourable vote of its members who hold more than 50 per cent of the amount of claims in that class. Dissenting creditors are entitled to reimbursement for the amount they would receive if the debtor went bankrupt.

Where a reorganisation plan is adopted by the majority of the creditor classes and approved by the court, it will bind dissenting members within a class.

However, on the other hand, if the financial restructuring is determined contractually, then the consent of all contractual parties is necessary.

7.4 Is consent needed from other stakeholders for a restructuring?

If the restructuring is to be achieved under the provisions of the Insolvency Act then the reorganisation measures must be in line with the regulations governing the business activity of the debtor, i.e., relevant provisions of the Companies Act.

8 International

8.1 What would be the approach in Montenegro to recognising a procedure started in another jurisdiction?

The provisions on international insolvency law regulating recognition of a foreign proceeding and reliefs thereof are aligned with the UNCITRAL Model Law on Cross-Border Insolvency.

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