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*SLOVENIAN FINANCIAL OPERATIONS, INSOLVENCY PROCEEDINGS
AND COMPULSORY DISSOLUTION ACT*

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SLOVENIAN FINANCIAL OPERATIONS, INSOLVENCY PROCEEDINGS AND COMPULSORY DISSOLUTION ACT

Section 2.2: Obligations of the company, its management and supervisory board in the event of insolvency

Subsection 2.2.1: General rules on obligations

Article 33

(application of Section 2.2)

When applying the rules referred to in Section 2.2 of this Act relating to the obligations of the company and the management it is considered, and evidence to the contrary shall not be allowed, that the company becomes insolvent at the moment when such a situation of the company could have been established by the management if members of the management acted with the professional due diligence of the corporate finance and corporate governance profession.

Article 34

(duty of equal treatment of creditors)

(1) On the occurrence of insolvency, the company shall make no payments nor shall it assume any new obligations, with the exception of those which are essential for the continuing operation of the company.

(2) Payments deemed essential for the continuing operation of the company shall be in particular:

1. claims of creditors against the company which are priority claims in insolvency proceedings under the first paragraph of Article 21 of this Act,
2. the running costs of a business (electricity, water rates, etc.),
3. a continuous supply of goods or services necessary for the continuing operation of the company,
4. value added tax, excise duties and other taxes and contributions which the debtor is liable to pay pursuant to regulations.

(3) After the company becomes insolvent, the management or other bodies of the company shall not execute any action which would contribute to the unequal treatment of creditors who are in an equal position towards the company.

(4) An act deemed banned under the third paragraph of this Article shall be in particular:

1. the transfer of operations or financial transactions to another legal or natural person,
2. legal actions which would be challengeable in the case of bankruptcy proceedings under Article 271 of this Act.

(5) Bans referred to in the first and third paragraphs of this Article shall remain in force until:

1. if the management has to present a petition in bankruptcy under the first paragraph of Article 38 of this Act: until the proceedings are initiated,
2. if the management has to present a petition for instituting compulsory settlement proceedings under the first paragraph of Article 39 of this Act: until such proceedings are initiated, or
3. if financial restructuring is carried out outside compulsory settlement proceedings: until all measures of financial restructuring are implemented, and all due liabilities of the company towards its creditors are satisfied.

(6) If the financial restructuring is implemented outside compulsory settlement proceedings, the company may, in addition to the acts referred to in the first paragraph of this Article, also perform legal transactions provided for in the report of the management concerning the financial restructuring measures referred to in Article 35 of this Act.

Article 35

(report on the measures of financial restructuring)

(1) When a company becomes insolvent, the management shall within one month following the occurrence of insolvency present to the supervisory board a report on financial restructuring measures.

(2) The report on financial restructuring measures shall contain:

1. a description of the financial situation of the company,
2. an analysis of the causes of insolvency, and
3. the opinion of the management as to whether there is the probability of a minimum of 50 per cent for the successful execution of financial restructuring, the result of which would be regained liquidity and solvency of the company.

(3) In the case of an affirmative opinion from the management referred to in point 3 of the second paragraph of this Article, the report on financial restructuring measures shall contain also:

1. an analysis of financial restructuring measures necessary for the elimination of the causes of the company's insolvency, and an assurance that the company shall again become liquid and solvent,
2. the description of financial restructuring measures which will be implemented by the management within the limits of its competencies (e.g. the calling up of unpaid shares of share capital, the increase in share capital from new contributions on the basis of approved capital, sale of unnecessary assets), and the periods for their execution,
3. if according to the assessment of the management, the causes of insolvency may not be wholly eliminated by the measures referred to in point 2 of this paragraph, also: the description of financial restructuring measures which are decided by the general meeting (e.g. regular increase in the share capital from new contributions), and time limits for their elimination,
4. the opinion of the management as to the probability of a minimum of 50 per cent existing for the successful execution of compulsory settlement:
 - if the general meeting does not adopt the measures referred to in point 3 of this paragraph, or
 - if the implementation of the increase in share capital referred to in point 2 or 3 of this paragraph is not successful (e.g. because new shares based on the increase in the share capital are not paid).

(4) In the case of an affirmative opinion of the management referred to in point 4 of the third paragraph of this Article, the report on financial restructuring measures shall contain also a description of the proposal for a compulsory settlement, with the content referred to in Articles 143 or 144 of this Act which would be, according to the assessment of the management, acceptable to creditors and would ensure that the company would again become liquid and solvent.

(5) The supervisory board shall give the opinion on the report concerning financial restructuring measures within five working days following the acceptance of such report.

(6) The opinion referred to in the fifth paragraph of this Article shall include an assessment by the supervisory board as to:

1. whether the company is insolvent, and
2. the necessity and adequacy of the measures referred to in points 2 and 3 of the third paragraph of this Article.

Article 36

(convening a general meeting)

(1) The rules laid down in this Article shall apply if pursuant to the report on financial restructuring measures, an increase in the share capital of the company with new cash contributions is executed, which shall be decided by the general meeting.

(2) Notwithstanding the first paragraph of Article 297 of ZGD-1, the general meeting which is to decide on the increase in share capital referred to in the first paragraph of this Article, shall be convened at least fifteen days prior to the general meeting.

(3) The management shall make public the convening of the general meeting for the purpose of deciding on an increase in the share capital referred to in the first paragraph of this Article no later than within three working days after the expiry of the time limit referred to in the fifth paragraph of Article 35 of this Act, for a day which shall be no later than one month after the expiry of such a time limit.

(4) The second and the third paragraphs of this Article shall apply *mutatis mutandis* also when, in addition to the increase in share capital referred to in the first paragraph of this Article, a simplified reduction in subscribed capital is carried out in order to cover losses that have not been offset.

(5) If, pursuant to the report on financial restructuring measures the company fails to comply with capital adequacy requirements, however the situation of overborrowing or continuous insolvency has not yet occurred, each shareholder or member of the supervisory board may counter-propose the proposal for a resolution referred to in the first paragraph of this Article in order to adopt a resolution on the dissolution of the company and initiation of bankruptcy proceedings referred to in the first paragraph of Article 403 of ZGD-1.

Article 37

(subscribing and paying up of new shares)

(1) The rules laid down in this Article shall apply when an increase in the share capital of the company from new cash contributions should be carried out pursuant to the report on financial restructuring measures.

(2) The management shall publish a call for subscription to and paying up of shares on the basis of an increase in the share capital through contributions within three working days.

(3) The time limit referred to in the second paragraph of this Article shall commence:

1. for an increase on the basis of authorised capital: as of the expiration of the time limit referred to in the first paragraph of Article 35 of this Act,
2. for an increase on the basis of a resolution by a general meeting referred to in the first paragraph of Article 36 of this Act: from the end of the general meeting where such a resolution has been adopted.

(4) When the priority right to subscription of new shares is not excluded, the time limit in which such a right should be exercised shall be eight days, irrespective of the second sentence of the first paragraph of Article 337 of ZGD-1.

(5) The time limit for subscription and paying up of shares shall not be longer than fifteen days following the publication of the call for subscriptions and paying up of shares.

Article 38

(obligation of the management to present a petition in bankruptcy)

(1) The management shall within three working days present a complete petition in bankruptcy:

1. if the opinion of the management referred to in point 3 of the second paragraph of Article 35 of this Act is adverse, or
2. if the opinion of the management referred to in point 4 of the third paragraph of Article 35 of this Act is adverse, and if
 - the general meeting does not adopt a resolution as referred to in the first paragraph of Article 36 of this Act, or
 - not all those shares are subscribed and paid up within the determined time limit which are the subject of the increase in share capital referred to in the first paragraph of Article 37 of this Act.

(2) The time limit referred to in the first paragraph of this Article shall commence:

1. in the case referred to in point 1 of the first paragraph of this Article: as of the expiry of the time limit referred to in the first paragraph of Article 35 of this Act,
2. in the case referred to in the first indent of point 2 of the first paragraph of this Article: from the conclusion of the general meeting which decided on the increase in share capital,
3. in the case referred to in the second indent of point 2 of the first paragraph of this Article: as of the expiry of the time limit referred to in the fifth paragraph of Article 37 of this Act.

Subsection 2.2.2: Special rules on obligations in the event of compulsory settlement

Article 39

(obligations of management in relation to compulsory settlement proceedings)

(1) In the case of an affirmative opinion of the management referred to in point 4 of the third paragraph of Article 35 of this Act, and if the general meeting does not adopt a resolution referred to in the first paragraph of Article 36 of this Act, or if not all those shares are subscribed and paid up within the determined time limit which are the subject of an increase in share capital as referred to in the first paragraph of Article 37 of this Act, the management shall file a complete petition for a compulsory settlement within three months after the occurrence of insolvency.

(2) The management shall ensure that during compulsory settlement proceedings, the company acts in accordance with orders, and that it does not breach the regulations provided for in Chapter 4 of this Act.

Article 40

(obligations of the management after confirmation of compulsory settlement)

(1) The rules provided for in this Article shall apply when a compulsory settlement has been made final by the court, and until the debtor pays the claims of all creditors which are affected by the compulsory settlement, to the share and with interest as determined in the confirmed compulsory settlement.

(2) The management shall ensure that all financial restructuring measures are carried which are outlined in the financial restructuring plan, on the basis of which creditors have decided to conclude a compulsory settlement, within the time limits determined in this plan for the implementation of such measures.

(3) After the compulsory settlement is confirmed, the management or other bodies of the company shall not execute any act which would contribute to the unequal treatment of creditors who are in equal position towards the company.

(4) Acts deemed banned under the third paragraph of this Article shall be in particular:

1. the transfer of business or financial transactions to another legal or natural person, except when the financial restructuring plan provides for the company to

transfer a part of the business to another legal entity which is in the position of a person depending on the company,

2. the payment of claims of individual creditors amounting to a portion which is larger than the portion of payment determined by the confirmed compulsory settlement, or any such payment being made before the date when the claim falls due for payment according to the confirmed compulsory settlement.

(5) The management shall draw up a report on implementing financial restructuring measures for each calendar three-month period which shall contain the following in respect of the relevant period:

1. a description of financial restructuring measures which have been carried out, and their effects on the debtor's liquidity and solvency,

2. the total of payments of claims of creditors which are affected by the compulsory settlement, and the portion of paid claims,

3. a three-month balance sheet, income statement and cash flow statement,

4. a statement by the management that the debtor has not acted in any way to contribute to the unequal treatment of creditors who are in equal position towards the company.

(6) Notwithstanding the fifth paragraph of this Article the first report shall be drawn up by the management for the period from the end of the period of the last regular report which has been submitted during compulsory settlement proceedings under Article 168 of this Act by the last day of a calendar three-month period when the resolution on confirmation of compulsory settlement has become final.

(7) The management shall submit the report referred to in the fifth paragraph of this Article to the court which decided on the confirmation of compulsory settlement, within forty-five days following the expiry of the relevant period.

(8) The court shall publish the report referred to in the fifth paragraph of this Article under Article 122 of this Act within three working days following receipt.

(9) If the debtor does not submit to the court the report drawn up in accordance with the fifth paragraph of this Article within the time limit referred to in the seventh paragraph of this Article, the debtor shall be deemed to be insolvent.

(10) The debtor may challenge the presumption referred to in the ninth paragraph of this Article only if presenting, together with an objection to the creditor's petition in bankruptcy, a report drawn up in accordance with the fifth

paragraph of this Article in respect of all three-month periods to which the non-fulfilment of such obligation refers.

(11) If the creditor presents a petition in bankruptcy on the basis of the presumption referred to in the ninth paragraph of this Article, and the debtor, when entering the objection, fails to comply with the tenth paragraph of this Article, the court shall reject such an appeal as inadmissible.

Article 41

(accounting treatment of the effects of confirmed compulsory settlement)

(1) In the income statement of the company incomes shall not be recognised due to the termination of liabilities of the company on the basis:

1. of the termination of claims which the creditors have transferred to the company in the procedure of a change in share capital which is made in order to carry out financial restructuring pursuant to Subdivision 4.4.4 of this Act, or
2. of a decrease of claims in accordance with the confirmed compulsory settlement.

(2) The company shall cover losses, brought forward, to the debit of the amount of its liabilities referred to in the first paragraph of this Article, and create capital reserves for an eventual difference from the total amount of such liabilities.

(3) A company which created capital reserves under the second paragraph of this Article shall not carry out an ordinary reduction of the share capital earlier than ten years of the resolution on the confirmation of compulsory settlement having become final, and also not before the expiry of the time limit determined for meeting all liabilities after a confirmed compulsory settlement.

(4) The first to the third paragraphs of this Article shall apply *mutatis mutandis* also when the company carries out financial restructuring outside the compulsory settlement, based on the report on financial restructuring measures referred to in Article 35 of this Act, so as to conclude an out-of-court settlement with all creditors which results in the decrease of its liabilities due to the partial relief of the debt agreed by the creditors through such settlement.

Subsection 2.2.3: Liability for damages of the members of management and supervisory board of the company towards creditors

Article 42

(liability for damages of members of management)

(1) The management shall be liable to creditors for any damages incurred to the creditors due to their failure to achieve a full payment during bankruptcy proceedings if the company has been adjudicated bankrupt and if the management prior to the initiation of bankruptcy proceedings:

1. has not performed acts in time referred to in Articles 35 to 39 of this Act, or
2. has acted in conflict with the bans referred to in Article 34 f this Act.

(2) If the management does not prove otherwise, the creditor shall be deemed to have sustained a damage due to an omission or acts of the management referred to in the first paragraph of this Article, which amounts to the difference between the total amount of his claim and the amount up to which such claim has been settled in settlement proceedings.

(3) If the management consists of two or more members, all members shall be jointly and severally liable to creditors for damages under the first paragraph of this Article.

(4) Members of the management shall be wholly or partially relieved of their liability for the damages referred to in the first paragraph of this Article if they can prove that the whole or a part of the damages were caused by events or the actions of other persons whose prevention, avoidance or limitation of their adverse consequences was beyond the management's capacity, despite their having acted with the professional due diligence of the corporate finance and corporate governance profession.

(5) Individual members of the management shall be relieved of their liability for the damages referred to in the first paragraph of this Article if they can prove one of the following reasons of acquittal:

1. that they could not have carried out acts, laid down in Articles 35 to 39 of this Act, individually and:

– they made a proposal at the management meeting for such actions to be carried out, but were opposed by other members of the management, or

– the member of the management who had the responsibility in the internal relation between the members of the management for the financial operations of the company failed to establish adequate expert grounds in time,

or

2. they have not been aware of the bans referred to in Article 34 of this Act, or were not able to prevent them, despite their having acted with the professional due diligence of the corporate finance and corporate governance profession.

Article 43

(liability for damages of members of the supervisory board)

(1) Members of the supervisory board shall be jointly and severally liable to creditors for any damages incurred by them due to their failure to achieve a full settlement in bankruptcy proceedings if the company has been adjudicated bankrupt and subject to the fulfilment of one of the following conditions:

1. if in the two years preceding the institution of bankruptcy proceedings the management has proposed to the general meeting, on the basis of the report on financial restructuring measures, to adopt a resolution on an increase in share capital by contributions and:

– the supervisory board has given its opinion as referred to in the fifth paragraph of Article 35 of this Act concerning the report on financial restructuring measures which provided the judgement of the supervisory board that the company is not insolvent and that increase in share capital is not necessary, and
– the general meeting has refused to adopt a resolution on increasing share capital,

2. if they have not requested reports from the management under the second and fourth paragraphs of Article 272 of ZGD-1, although they should have requested them according to the rules of the corporate finance and corporate governance profession,

3. if they could establish on the basis of the annual report or other reports by the management, if acting with the professional due diligence of the corporate finance and corporate governance profession, that the company had become insolvent, but they did not apply any measures within their competence to ensure that the management took action in time referred to in Articles 35 to 39 of this Act, or prevented actions contrary to the bans referred to in Article 34 of this Act.

(2) Causal links between the actions or omissions of members of the supervisory board and damages shall, *mutatis mutandis*, be subject to the second paragraph of Article 42 of this Act.

(3) Exemption from the obligations of members of the supervisory board shall, *mutatis mutandis*, be subject to the fourth and fifth paragraphs of Article 42 of this Act.

Article 44

(limitation, exclusion and enforcement of liability for damages)

(1) Individual members of the management or supervisory board shall be liable to creditors for damages referred to in the first paragraph of Article 42 or first paragraph of Article 43 of this Act, up to twice the total amount of all their

remunerations for performing the function of the members of the management or supervisory board in the year, in which an act has been carried out or omitted as referred to in the first paragraph of Article 42 or first paragraph of Article 43 of this Act; however, for the members of the management not less than:

1. for a large company, EUR 150 000,
2. for a medium-sized company, EUR 50 000, and
3. for a small-sized company or other legal entity, EUR 20 000.

(2) The limitation of liability for damages under the first paragraph of this Article shall not apply if the act has been carried out or omitted intentionally or by gross negligence.

(3) Liability for damages pursuant to Articles 42 or 43 of this Act shall not be excluded or limited if this would frustrate the first and the second paragraphs of this Article.

(4) Regulation of the liability for damages in Subsection 2.2.3 of this Act shall not exclude the liability for damages of members of the management and supervisory board under other acts.

(5) Claims for damages under Articles 42 and 43 of this Act:

1. shall be enforced for the account of all creditors who have the right for payment of their claims in bankruptcy proceedings against the company, so that the responsible person pays compensation to the company as the debtor in bankruptcy.

2. shall be entitled to be enforced by:

- a bankruptcy administrator on behalf of the company as the debtor in bankruptcy, and

- each creditor who is, pursuant to this Act, entitled to carry out procedural acts in bankruptcy proceedings against the company, on his behalf and for the account of the company as the debtor in bankruptcy.

(6) If a member of the management or supervisory board is liable for damages under Articles 42 or 43 of this Act, payment of the liabilities on the basis of such responsibility shall give him the right to claim compensation in bankruptcy proceedings against the company for the amounts paid (hereinafter referred to as: claim of recourse).

(7) A member of the management or supervisory board who is the subject of a complaint for enforcement of the liability for damages under Articles 42 or 43 of this Act shall within one month following the date of delivery of such complaint

declare in bankruptcy proceedings as his conditional claim the claim of recourse referred to in the sixth paragraph of this Article; otherwise, such claim of recourse in relation to the company as the debtor in bankruptcy terminates.

(8) The claim of recourse referred to in the sixth paragraph of this Article shall be settled upon distribution of the bankruptcy estate as a subordinated claim of the second order from the distribution estate remaining after all priority, ordinary and any eventual subordinated claims referred to in the third paragraph of Article 21 of this Act are settled.