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A Comparative Analysis of Insolvency Proceedings in France, Germany and Slovak Republic

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***Abstract*—**This contribution aims to compare legislation adjusting the course of insolvency proceedings in France, Germany and Slovakia. On the basis of an investigation of the legislative adjustment of this problem, an attempt is made to ascertain in the given countries the extent to which the outcome of the entire proceedings is influenced by legislation and to determine the fundamental moments that influence costs, recovery rate and the duration of proceedings. A comparative analysis was utilized in order to achieve the set goal. The results of the survey could be used to improve legislation so as to lead in the best and most expedient way to a departure from the market of those subjects that are for economic reasons unable to continue with their activities whilst burdening the entire process with the lowest possible costs, which would lead to a high level of satisfaction for creditors.

***Keywords*—**Costs, Insolvency Proceeding, Recovery Rate, Time.

I. Introduction

INSOLVENCY proceedings are at present a highly debated problem. This is heightened by the number of subjects whose economic situation has worsened to the extent that they are unable to cover their liabilities and have thus arrived at a state of insolvency. According to [8], one of the main causes of the increasing number of bankruptcies is the financial crisis, which has not yet been overcome.

An endeavour should be made to amend insolvency legislation in such a way that insolvency proceedings could run their course as quickly as possible, with the lowest possible costs and the highest possible recovery rate for creditors. It was therefore of interest to us which determinants within the scope of legislative amendments of insolvency proceedings are decisive for the outcome of the proceedings as a whole.

Three economies from various legal systems were selected for analysis. France and Germany are representatives of specific legal systems. An analysis of Slovakian insolvency proceedings has been added for comparison. This is also a representative of the German legal system, although the problem of insolvency proceedings there have been developing only briefly in comparison to Germany.

Reference [3] conducted a long-term survey across 88 countries when they surveyed the real state of insolvency proceedings on a model case in cooperation with insolvency administrators, judges and legal representatives. On the basis of this survey, they gained an overview as to the course of insolvency proceedings from the perspective of average duration of proceedings, costs of insolvency proceedings and the average recovery rate. The following table contains a summary of the indicators for the countries we surveyed.

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TABLE I
THE COURSE OF INSOLVENCY PROCEEDINGS IN SELECTED COUNTRIES [3]

Economy	Time (years)	Cost (% of estate)	Recovery rate (cents on the dollar)
France	1.9	9	48.4
Slovak Republic	4	18	53.6
Germany	1.2	8	78.1
OECD high income	1.7	9	70.6

II. Literature Review

A. German Insolvency Law

Insolvency law in Germany has a substantially longer history than does the Slovak Republik. The fundamental attribute of German law is captured by [7]: *"Today's German insolvency law does not monitor only the securing of founded creditor's receivables when a business is bankrupt, but also emphasizes the importance of retaining the value of the business and employment positions while the commercial activity of the business (which is in a state of bankruptcy) continues."*

In Germany, insolvency proceedings are adjusted by the Insolvency Act (Insolvenzordnung). Its main aim is to provide support for the realization of debtor's activity and thus satisfies all non-secured creditors.

According to this act, a debtor's bankruptcy occurs in three cases. The first variant is the debtor's inability to pay, which means that the debtor is unable to cover its liabilities past maturity. The second case of a debtor's bankruptcy is its over-indebtedness; this can of course occur only with a debtor – legal persons, when the debtor's assets do not cover its liabilities. And lastly, a debtor can be bankrupt also when inability to pay threatens – if it could occur that at some time in the future it will not be able to cover its liabilities. If the management of the business identifies signals marking the bankruptcy of a business, it is obliged to commence insolvency proceedings. It takes personal responsibility for this step [10].

After filing the proposal for commencement of insolvency proceedings, preliminary insolvency proceedings are commenced; while they are in progress, it is necessary to ascertain whether the conditions for declaring the company's bankruptcy have been fulfilled. In the event that the conditions for insolvency have been met, and the company has at its

disposal assets at an amount that would suffice to cover at least the costs of the proceedings, the proceedings are commenced after the bankruptcy. The bankruptcy of a company can be settled in various ways. Clearly, the best-known variant is the realisation its assets and subsequent distributing the proceeds. Furthermore, satisfaction of the creditors may be achieved whilst continuing the activity of the debtor during the course of the formal insolvency proceedings. The last variant is the compilation of the so-called insolvency plan, which can, if possible, be carried with self-administration. Settling the bankruptcy of a debtor by using an insolvency plan is intended to preserve the debtor's business as a going concern in the event that the debtor's assets are evaluated as being capable of restructuring. An insolvency plan can be compiled either by the actual debtor still prior to filing the proposal for insolvency proceedings, or it is compiled following the proceedings – once again by the debtor, or possibly by the insolvency administrator. The creditors cannot compile this plan, but they can entrust the administrator with this task. Within the scope of the insolvency plan, it is necessary to divide the creditors into groups, such as employees, purchasers, secured creditors etc. When voting on the acceptance of the insolvency plan, it has to be accepted by all groups. Even though the plan may be rejected by some of the creditor groups, the insolvency plan may yet be accepted by the court. The Insolvency Act permits autonomous entry into the insolvency proceedings. In such a case, it is precisely the management of the debtor that remains at the helm of the business and is authorized to handle assets. The court then appoints a trustee onto whom some of the obligations of the insolvency administrator are transferred. A self-administration insolvency proceeding is ordered by the court when bankruptcy is declared, assuming that this is requested by the debtor and the court does not find any circumstances that could damage the creditor. It is most appropriate to request this manner of proceedings simultaneously to the filing of the insolvency proposal, whilst it is advisable to furnish proof of agreement on the parts of the main creditors. In a case where a debtor's bankruptcy is settled by an insolvency plan with self-administration, it is possible request protective proceedings, where restructuring proceeds under the court's protection. This variant is permissible only when the debtor is threatened by illiquidity or over-indebtedness. The debtor is thus given up to a three month period to prepare an insolvency plan and appoint a preliminary insolvency administrator [10].

The insolvency administrator is a key figure while insolvency proceedings are in progress. In view of the fact that the entire insolvency proceeding is divided into two parts, we also distinguish two types of insolvency administrators – the preliminary and insolvency administrator after bankruptcy is declared. The main task for the preliminary insolvency administrator is to secure the debtor's assets and prepare a report for the court. This report contains the reasons due to which insolvency proceedings can be commenced, an evaluation as to whether the bankruptcy of the debtor should be solved by reorganization, as well as information as to whether the debtor's assets suffice at least to cover the costs of the insolvency proceedings. At this stage, the court may designate a weaker or stronger role for the insolvency administrator. If the insolvency administrator performs only a weak role, the debtor remains in the business management and is the owner of the assets. The administrator then approves the debtor's steps. A preliminary insolvency administrator with a strong position is, by contrast, entrusted with the management and administration of the debtor's assets. He continues the debtor's business activities and, with certain limitations, also sells goods and arranges the defrayal of the debtor's receivables. The court may also administrate the debtor's assets itself, without designating a preliminary insolvency administrator. As soon as the debtor's bankruptcy is declared, the court designates a further insolvency administrator. In the majority of cases, the same administrator that assumed the role of preliminary administrator is appointed. At this point, the administrator assumes full control over the business and the management thus loses the right to direct the business and transfer assets. The administrator determines which assets belong to the business and which do not – he determines the bankrupt's estate from which the demands of the creditors are to be satisfied. He is obliged, furthermore, to pay the salaries of the debtor's employees, prepare an overview of assets, to monetize the assets that make up the bankrupt's estate.

The role of the debtor is considerably limited when the insolvency proceedings are in progress. The debtor still remains the proprietor of the business, although it loses the right to direct and handle it (the business). However, the commencement of insolvency proceedings also entails numerous obligations for the debtor. These are especially coactivity with the insolvency administrator and a liability to provide information [4].

In the scope of insolvency proceedings, creditors are grouped into a so-called creditors' committee. This too can be appointed preliminarily or following the declaration of bankruptcy further to a phase of the insolvency proceedings in which the debtor finds itself. The preliminary creditors' committee is appointed by the court following the filing of a proposal to commence insolvency proceedings, assuming that two out of three of the following conditions are fulfilled: a) the sum of the assets amount to more than 4,840,000 EUR, b) the net turnover has amounted to more than 9,680,000 EUR in the last 12 months, c) the company employs an average of over 50 employees per year. If the conditions for appointing a preliminary creditors committee are not fulfilled, he will be named notwithstanding in a case where this is requested by the debtor itself, with a specific request for a person who is to hold this post. The creditor committee is authorized to appoint an insolvency administrator. The main body of the insolvency proceedings as a whole is then the creditors' meeting, the purpose of which is to advance the creditors' rights face to face with the insolvency court, insolvency administrator and the debtor. It thus holds an important position in terms of determining the direction of the insolvency proceedings as a whole. During the creditors' meeting, the members of the creditors' committee are voted, the further development of the

insolvency proceedings is decided (the insolvency administrator can be entrusted with the compilation of the insolvency plan), another insolvency administrator is voted, or the current insolvency administrator is dismissed. In the course of the proceedings after bankruptcy, the creditors' committee is appointed once again, the members of which should be representatives of all creditor groups, including the debtor's employees. In Germany, the creditor committee has such a fundamental influence on the course of the insolvency proceedings that members of various financial institutions too can become its members. Its main task is to monitor the activity of the insolvency administrator, and is for this purpose authorized to request documentation, information, accounting and methods by which the whole proceedings are run [4].

B. French Insolvency Law

The main aim of both the insolvency and pre-insolvency proceedings in France is the preservation of the business, preservation of employment positions and ensuring payments for creditors [1].

The general legal framework adjusting French pre-insolvency and insolvency proceedings is rooted in the French Commercial Code, in articles L.610-1 and following.

According to this legal amendment, a business finds itself in a state of insolvency when it is unable to satisfy its liabilities with its current cash and circulating assets that can be converted into cash. The debtor is obliged to file an insolvency proposal within 45 days of discovering the bankruptcy. Furthermore, the insolvency proposal is also filed by the creditor or by the local public prosecutor. [1]

As it follows from the preceding text, insolvency proceedings in France are divided into pre-insolvency proceedings and the insolvency proceedings as such. The consensual pre-insolvency proceedings can be an *ad hoc* mandate and a conciliation. Their purpose is negotiation between the debtor and its main creditors, moving towards settling a burdensome situation without having to commence proceedings. During *ad hoc* mandate proceedings, the court appoints a representative who will be of assistance in the company while its burdensome financial situation is being settled and who can also negotiate with the debtors. Conciliation pursues basically the same goal, i.e. negotiation with the creditors and helping the debtor to solve its situation. Even here, the debtor can request commencement of this method of settlement, although not only the debtor (who is truly threatened by bankruptcy), but also the company in bankruptcy (in which it has found itself for less than 45 days, however) may be at issue. The conciliation has to be declared by the court for a maximum period of 4 months, and it can be prolonged for a further month after the proposal. Another difference from the *ad hoc* mandate is the fact that, in the event that an agreement is reached between the debtor and creditor, this agreement is legalized by court ruling. The safeguard proceeding is something of a bridge between the pre-insolvency proceedings and the insolvency proceedings. It can be commenced only by an impulse on the debtor's part and leads to a rehabilitation of its financial and economic situation under court supervision in the event that it is facing problems, but is not yet insolvent. In the event that these proceedings are commenced, an observation period of six months, which can be extended once, is set by the court. This serves especially towards the preparation of a restructuring plan. If the debtor finds itself in insolvency, its situation can be settled within the scope of insolvency proceedings in two possible ways. Rehabilitation proceedings are the first of these. Even in this case, the court fixes an observation period of up to 18 months in length, which can culminate with the insolvency administrator's report to the court. This report should contain a rehabilitation plan and offers for acquisition, as the company could be sold as a going concern or sold off in parts. An important moment is also the fact that the court, within the scope of its ruling on bankruptcy, sets a date when the company became insolvent, which can reach up to 18 months previously. During this period, certain actions that are not in the company's interest may be annulled. After the court receives the report, the insolvency plan or offer for acquisition is accepted. The court orders liquidation in a case where the rescue of a business does not appear to be realistic. Even in this case, the court sets a period of three months in length, which serves the liquidator to prepare a plan for the sale of the entire business. If the business cannot be sold as a whole, it is sold off in parts, and the yields are then used to satisfy the creditors [5].

In the case of consensual pre-insolvency proceedings, the insolvency administrator holds the position of advisor and negotiator. He does not assume control of the business, but only observes the debtor's steps and endeavours to help it overcome a difficult period. The advantage is that he enters the creditor-debtor relationship as a new person, and it is therefore easier for him to convince both sides to cooperate. In the event of reorganization, the administrator's main obligation is to supervise operation of the business and take fundamental decisions in the area of everyday enterprise. He evaluates current contracts with suppliers and customers and decides on the annulment of those which do not have a positive influence on the operation of the company. Furthermore, he appoints the creditor committee and focuses especially on compilation of a report for the court. If the liquidation of the business does occur, the liquidator becomes the only person who is authorized to act on behalf of the company going bankrupt. After the sale of all the assets, the creditors are satisfied from the yields in the order determined by the law. The main position, however, is held by the insolvency court, as the proceedings as a whole are directed and supervised by the court. Its duty is to take all important decisions such as acceptance of a reorganization plan or the sale of the business as a going concern [1], [5].

In the course of insolvency proceedings, the administrator divides the creditors into two creditor committees. The first committee is comprised of suppliers of goods and services; the second represents the creditors and creditor institutions such as banks and financial institutions. The main goal of these committees is especially to decide on the approval of a

restructuring plan. This can be passed by a two-thirds majority of all creditors present [1].

The debtor's main obligation is to file an insolvency proposal within 45 days of discovering the bankruptcy. In the case of pre-insolvency proceedings, the debtor remains in the company management. In a case of bankruptcy settled by means of reorganization, it can be replaced by an insolvency administrator who, however, acts on behalf of the business and takes crucial decisions. If liquidation of the company occurs, the debtor loses control over the business [1], [5].

C. Slovak Insolvency Law

Current Slovak insolvency law abides by Act no. 348/2011 Z.z on bankruptcy and restructuring. In view of the common history of the Czech and Slovak Republics, this law too had to undergo its own often convoluted development dating back to 1993, i.e. since the establishment of the CSFR. The new legal amendment attempts to react to current economic development both in its own state and on a broadly European scale. Unfortunately, inauspicious tendencies can be observed in the development of numbers of settled bankruptcies of legal persons. One can also trace an endeavor to approach western legal amendments of this problem, dominated by the endeavor to preserve a business before its actual liquidation. This phenomenon is apparent especially in the constantly growing numbers of permitted reorganizations.

According to the above-mentioned act, a debtor is bankrupt when it is in default or is over-indebted. A debtor is considered to be in default when it cannot meet at least two monetary commitments 30 days past maturity to more than one creditor. A person who is obliged to keep accounts according to a special regulation, has more than one creditor and the value of its mature liabilities exceeds the value of its property is considered to be over-indebted [9].

Slovak insolvency law gives legal persons two possibilities to settle a bankruptcy. These are bankruptcy and reorganization ("restructuring" in Slovak terms). The result of the former is classic realization of the bankrupt's remaining property and subsequent satisfaction of the creditors with the yields. By contrast, the aim of reorganization is the satisfaction of creditors from the bankrupt's further (restructured) activities [6].

The cornerstone of Slovak insolvency proceedings is the figure of the administrator, whereas it is not possible to omit his strictly regulated selection. His role is crucial especially in the case of reorganization in view of the fact that a debtor can file an insolvency proposal only in a case where an appraisal has been compiled by an appointed administrator. It is precisely here that strict requirements as to the person (qualification) of the administrator appear, as he must (besides his legal knowledge) prove knowledge of economic indicators and practical commercial skills in the appraisal. The result of his efforts is therefore a recommendation or non-recommendation for reorganization. The court then acts according the administrator's standpoint and permits or denies reorganization or, more precisely, it cannot in fact permit it if it is not recommended by the administrator. The administrator thus has a special role which represents a necessary first stage of judicial proceedings to permit reorganization. Here it is possible to follow a certain (and clearly founded) wariness on the parts of Slovak legislators who do not want to place in the hands of a non-forensic subject absolute authority in deciding about reorganization in the way that is usual in certain European states that have greater and longer experience with insolvency law and especially reorganization [9].

The position of creditors in the Slovak amendment of insolvency law is connected with numerous fundamental decision-making powers. These are placed directly into the hands of individual creditors or their collective decision-making at the creditors' meeting and also when mediating decision-making to the creditors' committee. The basis of the strong position of the creditor is primarily the fact that it is precisely the creditor who can best decide how to handle the debtor's property. The fact that, in the event of bankruptcy the creditors have, for instance, the right to dismiss the court-appointed administrator as early as the first meeting or, more precisely, replace him with another administrator is proof of the broad decision-making powers of the creditors. In the case of reorganization, it is once again possible to observe the wariness of the legislator when he refuses the creditors the right to replace the administrator. Moreover, they can propose reorganization only with the approval and coactivity of the debtor [9].

The position of the debtor is then clearly conditioned by the manner in which the bankruptcy is settled. Bankruptcy proceedings impose on the debtor the obligation to file an insolvency proposal. Non-fulfillment of this obligation is understood to be a contravention of protection of the creditors and is punishable by law. In a case where a legal person – debtor is unable to repay its debts and the company management is aware of this state, it is obliged to file a proposal for declaration of bankruptcy or a proposal to permit reorganization. This can be understood as an obligation for timely commencement of proceedings. If a member of the board of directors does not commence bankruptcy proceedings within 30 days from the moment when they become aware – in their position in the company – of its bankruptcy, the company continues to be responsible to the creditors for damages incurred to them as a result of such conduct. A necessary obligation of the debtor in bankruptcy proceedings is at the same time coactivity with the administrator when gathering property and completion of liabilities. Where reorganization is concerned, the debtor is granted the more initiative position, which is, however, strongly subordinate to the administrator's jurisdiction. The debtor primarily retains limited authority to handle property and continue to manage the business. This, moreover, pertains only to the period between the commencement of reorganization proceedings and possible permission to reorganize. Fundamental decision-making authority is then concentrated into the hands of the administrator [6].

It must also be mentioned that, in the event that both bankruptcy and reorganization proceedings are commenced against the same debtor, reorganization takes priority (until

reorganization proceedings are stopped or reorganization is permitted) to bankruptcy. The Act at the same time enables the court to adjourn the proceedings up to a period of 60 days should the debtor prove that the administrator appointed by them is preparing a reorganization assessment [6].

III. Conclusion

The preceding text has focused on the course of insolvency proceedings in three selected countries. It has devoted attention not only to legislation adjusting the problem of insolvency, but also on the main characteristics of given insolvency laws, the definition of bankruptcy, possibilities of its settlement and also the positions of the three main figures, i.e. the debtor, creditors and insolvency administrator. What influence, then, does the course of insolvency proceedings have on the duration, costs and recovery rate of the insolvency proceedings?

Germany fared best from among the surveyed countries, achieving the best parameters from the surveyed countries in the areas of recovery rate, costs and length of insolvency proceedings. It even exceeds the average of OECD high income countries. The legal amendment of insolvency proceedings here moves in the direction of settling bankruptcy out of court, which in itself entails reduction of costs for the proceedings as a whole. Moreover, the insolvency proceedings are settled very quickly, which also contributes to a reduction of costs. Of course, the lower the costs for the entire course of proceedings, the more there is from the yields that can be divided among creditors. On the other hand, the poorest results are attained by insolvency proceedings in Slovakia, although the legislation historically originates also from the German legal system. Long-term development within the scope of a centrally planned economy in the past certainly plays a role in this regard. Now, however, the Slovak legal amendment too attempts to approach Western European states and apply time-tested experiences to the system. For this reason, one can track in the development of insolvency law in Slovakia a certain endeavor to accelerate the whole process and also elements of liberalism and informality in which a certain amount of jurisdiction is placed into the hands of non-forensic subjects. The main decision-making jurisdiction, however, is nevertheless left to the court. In France, insolvency proceedings as a whole aim towards preserving the business and its employment positions. As a result, the court frequently rules on the sale of the business for an offer that is not the highest, but carries with it the highest probability that the business will be preserved [2]. The average recovery rate of insolvency proceedings is thereby reduced. The whole insolvency proceeding is prolonged in the attempt to settle a critical, but not insolvent state of a company out of court initially. After the insolvency proceedings have commenced, an observation period is set which serves towards the preparation of a reorganization plan and accepting offers for the purchase of the business.

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