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THE REFORMATION OF THE SERBIAN ACT ON INSOLVENCY PROCEDURE (SAIP)

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Abstract. *The objective of the paper is to accentuate some of the major downsides of the Serbian Act on Insolvency Procedure. Those have been encountered by the author as practical obstacles in the administration of the bankruptcy cases pending before the Commercial Court in Nis.*
The paper also contains the author's proposals for the amendment of the Act. They came about as the result of the comparative research in the US Bankruptcy Code. The main body of the paper comprises the following sub-sections: 1. The definition of 'insolvency', 2. Adjustment of debts of municipality, 3. Who may file a petition for insolvency, 4. Entering an order for relief (Entering a decision for commencement of the insolvency proceedings), 5. The jurisdictional authority of the court, 6. The trustee. Preliminary awards and compensations, 7. Creditors' representative bodies, 8. Allowance of the creditors' claims and interests, 9. Set-off, 10. Reorganization, 11. The protection of employees.
The references of the US Bankruptcy Code and the German Insolvency Statute, typed in bold, point to the very source of the author's ideas on the possible amendments of the Serbian Act.

Key words: *insolvency, bankruptcy, reorganization, creditor, debtor, claim, petition for insolvency, order for relief, trustee, creditors' representative bodies, set-off, employees.*

INTRODUCTION

The Serbian Act on Insolvency Procedure (SAIP) was enacted in 2005. The author has had a one-year experience in assisting the bankruptcy judges to administer insolvency cases. During that year she encountered numerous difficulties in the application of the Act, and found herself many a time in a position to weigh the implementation of the legal provisions to the letter against the general principles of equity, equality, fairness and effectiveness of the judicial proceedings.

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This paper underscores only some of the deficiencies of the SAIP, juxtaposing them against the aforementioned general principles of law, as well as some well-defined provisions of the U.S. Bankruptcy Code and the German Insolvency Statute. The employees' rights chapter needs further developing and changing so as to bring it in concurrence with the internationally accepted norms of the ILO Conventions, as well as some well-established standards of the employees' rights in the European Union.

SAIP IMPLEMENTATION OBSTACLES AND PROPOSALS FOR ITS AMENDMENTS

1. The definition of 'insolvency'.

The introductory part of the SAIP (Chapter I – General Provisions) contains provisions as to who may file the bankruptcy petition and on what terms. The insolvency of the debtor ('inability to pay') is defined in Article 2 as the inability to respond to its pecuniary commitments in the period of 45 days beginning from the date of the maturity of the obligation; also, if he has ceased all payings during the period of 30 days; and, finally, on the cause shown that the debtor would not be able to fullfil his undue obligations timely – *imminent inability* to pay. Article 3 assumes the legal presumption to the insolvency – if the creditor has not been able to receive his claim in the judicial or tax-revenue enforcement procedure. The presumption has the expediting function – in such cases the court (the insolvency panel, consisting of three judges) will, after notice and due hearing, issue an order for relief, without having to enter an order for the opening of the interim insolvency proceedings.

Some of the crucial obstacles that judges and bankruptcy practitioners may come across while implementing the aforesaid provisions, are as follows. 'Insolvency' is not well-defined. The given definition applies to illiquidity and not insolvency. This creates a loophole which could be abused by competitors of the debtor who may file a bankruptcy petition in bad faith. In fact, the value of the debtor's assets may well be above the value of his liabilities, while in fact, he could not be able to manage his mature obligations in time due to some kind of temporary impediment, e.g., market failure, cash-flow problems caused by some extraneous factors deriving from money-market or financial-market systems, etc. ***Title 11 § 101(32) US BC ('Definitions – "insolvent"'); Sections 24-26 German Insolvency Statute ("Illiquidity", "Imminent Illiquidity", "Overindebtedness").***

2. Adjustment of debts of municipality.

The other problem concerns the municipality indebtedness, which is expressly exempted from the SAIP application. The Act provides that the State and municipalities are directly responsible for the debts of municipalities and municipality-owned public entities. The said provision is not sustainable, given the fact that public expenditures have to be earmarked in advance. Also, those expenditures are bounded by the pre-defined budgetary policy which must coincide and cohere with other state policies – monetary and financial policies, trade policies etc. ***Title 11 US BC Chapter 9 – Adjustment of Debts of a Municipality, Chapter 1 (§ 109c); Section 12 German Insolvency Statute ('Corporations under Public Law').***

3. Who may file a petition for insolvency?

There is also an inadequate provision concerning who may file a bankruptcy petition. The question is not addressed among general provisions, but among Chapter IV provisions ('Initiation of the Insolvency Procedure and Interim Insolvency Proceedings'). Article 40 prescribes that the authorized petitioners are creditors and the debtor himself. This corresponds to the U.S. BC differentiation between involuntary and voluntary bankruptcy cases. However, unlike the US Code, SAIP contains no caveat as to the creditor's petition regarding the number of creditors and the value of their claims, that may qualify as an admissible bankruptcy petitioner. Thus, under SAIP, it is legally possible for one small creditor to file an admissible bankruptcy petition. Under the Article 4 provision, the court will simultanously order the commencement of insolvency procedure as well as the immediate case closure, if the debtor has only one creditor. But that provision does not eliminate the probability of petitions filed fraudulently or in bad faith. ***Title 11 US BC § 303(b) – 'Involuntary cases'.***

Regarding fraudulous petitions and petitions in bad faith, SAIP does not contain provisions which could effectively abate those practices. There are no provisions on the competent bankruptcy petition preparers, nor the provisions on the compensation of charges and damages payable to the debtor and its attorney upon court finding that the petition has been filed in breach of law or good faith principle. ***Title 11 US BC § 303(b) – 'Involuntary cases', under (e) and (i-2), Chapter 1 § 110 ('Penalty for Persons who Negligently or Fraudulently Prepare Bankruptcy Petitions').***

There is no provision in SAIP on the special responsibility of the transferor or transferee of claim, who has filed a petition commencing an insolvency case, to annex to a petitition a signed statement that the claim was not transferred for the purpose of commencing a case for liquidation (bankruptcy) or for reorganization. Notwithstanding, if such has been the actual cause for the transfer, the court should on its own motion disqualify a transferor/transferee from filing a petition commencing a case. It should do so, if the facts stated in the petition and supported by the annexed evidence, raise reasonable doubt that the petitioner had fraudulently engaged in the transfer of claim for the sole purpose of commencing the case of bankruptcy or reorganization. [1] ***US Federal Rules on Bankruptcy Procedure - Rule 1001.***

[1] One insolvency case pending before the Commercial Court in Nis involved the transferee who filed a petition for bankruptcy against the privatized company. The facts in issue were as follows: The buyer of the company had outstanding obligations under the contract of sale of the socially-owned capital. However, the buyer, which was a private limited company, established another company for the sole reason of transferring to it some of the major, probably secured, claims of the privatized company's creditors (the newly-founded company was the buyer of those claims). The ultimate goal was well-packaged, but nonetheless obvious – filing the petition through a transferee for bankruptcy of the privatized company in order to avoid the buyer's responsibilities under the contract of sale, which he had been in breach with. The reasonable doubt of the petitioner's fraudulous intent was substantiated on the facts gathered by the court's *ex officio* investigative search on the insiders and related companies.

4. Entering an order for relief
(Entering a decision for commencement of the insolvency proceedure).

The insolvency proceedings may not be commenced (US: The order for relief may not be entered) before the debtor has been served a copy of the petition and given the appropriate period of time to contest it. In the case of expedited insolvency procedure (on the presumption on insolvency, established by Article 3 SAIP), the law has not set the *appropriate* time period for the debtor to file a responsive plea with the court. There is the provision that the court must decide on the petition at the latest on the third day from the day it has been filed and that it must docket a hearing of the parties at the latest on the tenth day from the day the petition has been filed. There is no clear provision as to the time frame from its docketing to the actual hearing – in the case of the interim insolvency procedure it must be done by the end of the 30-day period from the filing of the petition. However, there is a loophole as to the time of the hearing in the expedited insolvency procedure.

This kind of legal obscurity must be avoided. The mentioned set of provisions has to be replaced by the new one which is simple and clear-cut. There is no need to differentiate in law between the interim and the expedited insolvency proceedings – only the need to appoint an interim trustee in order to preserve the estate and prevent the loss to the estate. The interim trustee could also be entrusted with the duty to verify whether the debtor's assets will cover the costs of the insolvency proceedings, as is prescribed by the ***Section 22 German Insolvency Statute. US Rules on Bankruptcy Procedure - Rule 1011, 1013.***

I propose the following provisions on the matter – The court should decide on the admissibility of the petition on the next day from the date when it has been filed with the court. 'Deciding on the admissibility' means: checking if the caption requirements are satisfied, whether the petitioner has annexed proofs of liquidated and undisputed claim or interest, as well as whether he has payed the appropriate ***filing fee***. ***Rule 1006, and 28 US Code § 1930 (a)(1) – (a)(5)***. If some of those requirements are not met, the court shall, on the same day, issue an order for petitioner to comply in the prescribed period, which should not be shorter than three days nor longer than ten days, counting from the day of the service of the court order. If the petitioner submits, the court shall serve the petition to the debtor, instructing him that he has the right to file a responsive plea. The time for filing a response should be fixed at appropriate time-length, e.g. 20 days after the service of the petition. There should be a default rule, as in ***Rule 1013 (b)***, stating that, if no pleading or other defense to a petition is filed within the time provided, the court, on the next day or as soon thereafter as practicable, shall enter an order for the relief requested in the petition. Otherwise, the court shall order the summons for the hearing in order to determine the issues of the contested petition. The date for the hearing should be set at the earliest practicable time (not exceeding a prescribed length of period). The court should forthwith (after the hearing – meaning on the same day or on the second day from the hearing, at the latest) enter an order for relief (meaning: enter a decision for commencement of the insolvency proceedings), dismiss the petition or enter any other appropriate order.

5. The jurisdictional authority of the court.

SAIP provides for a two-tier court jurisdiction that has proved to be one of the downsides of the system. The main part of the authority lies with the bankruptcy judge, although some crucial procedural issues regarding the commencement as well as closing of the proceedings are in the range of the jurisdictional authority of the judicial panel (consisting of three judges). In some instances, expressly designated in the law, the panel is authorized to review the decisions of the bankruptcy judge. Otherwise, outside the scope of appellate authority of the panel, the jurisdiction to review the decisions of the bankruptcy judge is on the High Commercial Court (court of second instance). In my opinion, the two-tier jurisdiction should be abolished in favour of the bankruptcy judge. There is no need for the internal supervision, esp. given the fact that the court jurisdiction is not specialized, i.e. the judges of the commercial court (constituting the panel in bankruptcy cases) are simultaneously burdened with more than one brief (they are not bankruptcy-specialized).

The downsides of the split jurisdiction between the judge and the panel come from the fact that the division of authority is not always clear-cut. The insolvency proceedings are beset with numerous instances of the panel authorizing the act that the judge has previously denied, or denying the act that the judge has previously approved. These practices undermine the authority of the court and detract from the coherence and smooth running of the case. It, therefore, seems that the appellate jurisdiction against orders and decisions of the judge should be preserved for the High Commercial Court only. Of course, the number of instances giving rise to immediate appellation should be restricted to decisions which are proceduraly most important. Other decisions and orders of the judge should be contested only by a joinder to an immediate appeal. Appeals on the points of law should be contested in the second, as well as in the third instance.

6. The trustee. Preliminary awards and compensations.

The eligibility of the insolvency trustee, under the SAIP provisions, is under the special authority of the Agency for the licensing of insolvency trustees. The law itself obligates the licensed trustees to operate under the registered private uncorporated business. Liability for damages inflicted on the parties in interest, and caused by undue dilligence of the trustee in power, is determined by the statutory boundaries of the liabilities of the individual uncorporated business. There is no provision in law that the trustee should have an indemnity insurance against loss incurred by his professional negligence (professional, i.e. business liability).

The law will have to be inhanced in this respect. It should provide for the general obligation of the trustee to be insured against liability for damages. This insurance would serve as a guarantee that the inflicted parties could rely on for indemnification, but only against the trustee's acts of negligence. Intent and gross negligence would have to stay outside the scope of the insurance in kind. That is the reason why there should be an explicit supplemental provision in law obligating the trustee to issue a blanket bond in the favour of the State, whereby any party in interest could bring proceeding on the bond in the name of the State and for the use of any entity injured by the breach of the condition. ***US Rules on Bankruptcy Procedure - Rule 2010.***

The authority to appoint the trustee, by the SAIP provisions, is vested in the bankruptcy court (the panel). The appointed trustee can, though, be removed from the position at the request of the creditors' committee, but only on the grounds that he has not performed his duties under law, the standards and the ethics prescribed. But even in such cases, the power to appoint a new trustee stays with the court. This is not legitimate method for the election of a trustee. The court should have the power to order the Agency for the Bankruptcy Trustees' Licensing (ABTL) to appoint an interim trustee before, as well as after an order for relief (opening of the insolvency procedure). Afterwards, the election of the trustee (from the panel of private trustees licensed by the ABTL) should be in the hands of the creditors themselves (on the first meeting of the creditors).

The U.S. Bankruptcy Code, as well as the German Insolvency Statute, provide for more comprehensive and legitimate method for the election of the trustee (administrator). Under the US law, the court may order the United States trustee to appoint an interim trustee. The court may do so on request of a party in interest, at any time after the commencement of the case but *before* an order for relief in the case. An order can be issued only after notice to the debtor and on hearing. The order must be substantiated, i.e. it can be entered if it is necessary to preserve the property of the estate or to prevent loss to estate. *After* the order for relief has been given, the United States trustee has a legal duty to appoint one disinterested person, that is the member of panel of private trustees, to act as an interim trustee. The *final* election of the trustee lies with the creditors themselves on the meeting, called by the US trustee after the order for relief (no fewer than 20 days and no more than 40 days after the order for relief) – ***US Rules on Bankruptcy Procedure - Rule 2003***. ***Rule 2001 ('Appointment of Interim Trustee Before Order for Relief'), Title 11 § 303g, Title 11 § 701 ('Interim Trustee').***

In Germany, the court designates the insolvency administrator, as well as the temporary insolvency administrator. However, under Section 57 GIS, the creditors may not go with the court's choice of the administrator. They can, on their first meeting, elect another person to replace him. The court may refuse such designation only if the chosen person is unqualified to assume such an office. ***Section 22 German Insolvency Statute ('Temporary Insolvency Administrator').***

Preliminary award and compensation can, under SAIP, be granted by the court even *before* the specified services of the trustee are actually performed, or the costs incurred. This is illogical and leaves room for misappropriation. Also, there is no imposition of duty on the court to keep public record on all approved awards and compensations – those of the trustee, as well as those of accountants, attorneys, appraisers, auctioneers, agents and other professionals employed under the approvement order issued by the court. ***US Rules on Bankruptcy Procedure - Rule 2013.***

7. Creditors' representative bodies.

SAIP provides for the two creditor-representative bodies – the meeting of the creditors ('the assembly') and the creditors' committee. In practice, though, the assembly is rarely functionable, if not almost entirely unfunctionable. The only function it performs is that of the first creditors' meeting, i.e. that of choosing the members of the creditors' committee. However, even that role is not adequately defined, as to the manner of filing of notice to creditors of the time and the place of the meeting. The notice is addressed to all the

creditors (general notice) and is issued in either of the two prescribed ways: by publishing it in the official gazette and/or by putting it up on the court's notice board.

The appropriate solution would be to impose a duty to file *individual* notices to all of the creditors, or at least to the minimum number of the creditors and/or to the creditors whose claims' value reach beyond the prescribed threshold, e.g. to all creditors having unsecured claims of over 50,000 CSD or to 100 unsecured creditors having the largest claims. Those creditors should be given at least five days' notice in writing as to the date and the time of the meeting. ***Title 11 Chapter 11 ('Reorganization') § 1102 ('Creditors' and equity security holders' committees'); Rule 2003. "Meeting of Creditors and Equity Security Holders", Rule 2007. "Review of Appointment of Creditors' Committee Organized Before Commencement of the Case".*** On the inhancement of the functionability of the creditors' assembly – ***Sections 74-79 German Insolvency Statute. Also: US Rules of Bankruptcy Proceedure – 'Right to vote' (Rule 2003 (3)).***

8. Allowance of the creditors' claims and interests.

SAIP allows only creditor's claims that are filed by the creditors themselves in the period prescribed by the court. The law provides that the claims may also be filed in the later stages of the proceedings, up until the point the trustee has filed the schedule for the distribution of the proceeds with the creditors' commitee and the court. Those provisions are at odds with the obligation of the trustee to file the schedules (lists) of creditors and equity security holders, at least as far as the reorganization procedure is concerned. Those lists, as well as the lists of assets and liabilities of the debtor, are constitutive parts of the report that the trustee is under obligation to file with the court and the creditors at the end of the 30-day period beginning from the court's order for the commencement of the case (order for relief). The sound solution would be the one prescribed by the US Code, i.e. if the creditor fails to file the proofs of claim in the given period of time, the trustee and the debtor could file it instead of him. Also, if the creditor has not filed a timely proof of claim, the entity that is liable to him with the debtor, or that has secured such creditor, may file a proof of such claim. ***Title 15 US BC § 501 ('Filing of Proofs of Claims and Interests').***

There is a general obligation imposed on the debtor by SAIP to submit under the court order to provide crucial information as to the debtor's financial affairs, current income and expenditure, assets and liabilities, etc. The sets of information under such obligation are not stated in the law, but those listed above are commonly recognized as the ones that are essential for the administration of the insolvency proceedings. The SAIP contains the damages liability clause in case the debtor fails to submit to the court order, or gives inadequate or false information. The statements given to the court in a written report or orally upon hearing have the significance of a sworn statement (affidavit) and the debtor may come under the criminal procedure for perjury, if he consciously gave false or inadequate information. The duty is imposed on the persons who have the power of the representation of the debtor, those who perform financial servises for the debtor as well as the members of the board of directors and the supervisory board.

In my opinion, the US BC has the more detailed and comprehensive provisions on the obligation of the debtor to provide information. ***US Rules on Bankruptcy Procedure - Rule 1007. "Lists, Schedules, Statements, and Other Documents; Time Limits".*** It is in-

cumbent upon the debtor to file within 15 days after entry for the order for relief in involuntary cases (i.e. with the petition or in 15 days following the petition in voluntary cases) the list containing the name and address of every entity included or to be included on the prescribed schedules by the Official Forms. The sets of information to be stated are clearly identified and the schedules are prescribed by the Official Forms: Corporate ownership statement, List of creditors and equity security holders, Schedules of assets and liabilities, Schedule of current income and expenditures, Schedule of executory contracts and unexpired leases, Statement of financial affairs. If a list, schedule or statement is not prepared and filed under this rule, the court may order the trustee, a petitioning creditor, committee or other party to prepare and file any of these papers within a time fixed by the court. Also: ***Rule 2004. "Examination".***

Once the court and the trustee are provided with such detailed information, there seems to be no reason why the claims of the creditors admitted on the list of creditors should be left out from the distribution of assets, on the grounds that they failed to deliver a timely proof of claim or interest. The duty to file should be mandatory only for those creditors whose claims have not been included on the list, or have been included as disputed, contingent or unliquidated claims.

The time-limit for filing a proof of claim should be defined and restricted to a given period, e.g. as in US BC – 90 day-period beginning from the day of the first meeting of the creditors and an additional 30 day-period in which the debtor or the trustee could file a proof of claim instead of the creditor.

The filed proof of claim under the prescribed rules should have an evidentiary effect, i.e. all such claims should be considered a prima facie evidence of the validity and amount of the claim. ***Rule 3001(f) 'Evidentiary effect'.*** Allowance of a claim can be objected in writing and filed with the court. A copy of the objection with the notice of the hearing shall be mailed or otherwise delivered to the claimant, the debtor and the trustee at least 30 days prior to the hearing. ***Rule 3008 'Reconsideration of Claims'.*** A party in interest may move for reconsideration of an order allowing or disallowing a claim against the estate. The court after a hearing on notice shall enter an appropriate order.

9. Set-off.

Unlike the previous Act, SAIP has not resolved the issue of set-off. There is not one provision on the admissability of the set-off in the insolvency proceedings. An authoritative judge's opinion on the subject has been published in the court's bulletin. [2] The judge of the Supreme Court of Justice of the Republic of Serbia argued in favour of the admissability of set-off, explaining that what is not expressly forbidden by the law, must be regarded as legally admissable. In my opinion, that is not a legal argument, but a fallacy. Legal systems are logically compounded systems – comprehensively structured upon the basic legal principles. False deductive interpretation of law creates leeway for the misuse of the legal rights as well as the use of rights to the detriment of others. And those are expressly forbbiden by the principle of law.

[2] Stojan Jokić, the Supreme Court of Serbia Judge: *The Fifth Traditional Judicial Congress "Vršac 2008", march 2008,Working Material ('Questions & Answers'), Q/A No 66, page 45-46.*

The issue of the insolvency set-off is way too important to be left to the interpretations of the law. It must be regulated clearly and in detail. The comparative legal analysis can be helpful in that respect. [3]

There are legal systems which generally prohibit insolvency set-off, e.g. in countries of Napoleonic legal tradition (France, Luxemberg, Netherlands, etc). But even in those countries, the prohibition is not absolute, i.e. the set-off of two or more mature and liquidated obligations is admissable. *Only the agreement to set-off whereby one of the obligations has not, at the time of the agreement, matured, is prohibited.* Those agreements, when they are concluded in the suspect period, are considered payment. Even the agreements to set-off two or more mature and liquidated obligations, when they are struck in the so-called suspect period, could be subject to avoidance, if they are proved to be preferential. Furthermore, even the automatic (legal) set-off of two or more matured debts can be avoided if, under the circumstances of the transactions upon which those debts have been incurred, it can be proved that one of the parties knew of the others' insolvency. Finally, the systems of general prohibition of the insolvency set-off under no means prohibit the set-off of the obligations which are integrated in the financial systems of settlement payments. Those obligations are permitted to set-off upon insolvency regardless of their maturity, under the conditions set in the EU Directive on settlement finality in payment and securities settlement systems. [4]

On the other hand, there are systems that generally permit set-off upon insolvency, like in USA. But, as in the case of general prohibition systems, the admissibility of set-off is not absolute. If the transactions giving rise to the debt eligible to set-off prove to have been preferential, then the set-off is void. The preference condition is satisfied if the creditor would be better off by the effects of a set-off than he would have been under insolvency. The transaction must satisfy the following elements of preference: *debtor insolvent*, *undervalue transaction*, *debtor intent to prefer*, *creditor knowledge of insolvency*, etc., as the case may be. The set-off is prohibited if the creditor incurred an obligation to the debtor in the suspect period (90 days before the petition for bankruptcy is filed) for the purpose of obtaining the right to set-off. ***US BC 1978 § 553.***

Comparing the two systems, and given that they are not absolute, but rather carved-out, one could not oversee that they are, at the bottom line, very similar.

10. Reorganization

SAIP does not provide for the comprehensive and effective reorganization of the debtor. The reorganization plan can be filed with the insolvency petition or in the aftermath period of 90 days from the court's entering the decision on the commencement of the case (US: from the court's entering the order for relief). The hearing and voting for the proposed plan must be held within 20 days from the filing of the plan. The notice of hearing is published in the official gazette. Voting takes place within the classes of the creditors' claims. Number of votes of individual creditors is dependent on the value of their claims, which is set by the court with reference to the proofs of claim filed before the

[3] Philip R. Wood, *Principles of International Insolvency*, Sweet & Maxwell, 2007. Internet source: http://books.google.com.
[4] Directive 98/26 of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems, *Official Journal OJ L 166, 11.6.1998, p. 45-50.*

hearing, as well as the list of creditors prepared by the trustee. The plan is considered to be voted for if each of the creditors' classes vote for it, whereby the plan is considered voted for in the class if the creditors whose claims constitute the major part of all the claims within the class have voted for it.

There are numerous procedural set-backs on reorganization, beginning with those concerning determination of the value of the claims, to the ones on the voting mechanism, as well as on the procedural frames for the consideration of the plan's feasibility.

Some of the author's proposals for the enhancement of SAIP in this respect are as follows. First, there should be a clear reference in the law to the admissibility of claims as a determining factor of the voting rights. Only claims for which the creditors have filed proofs of the evidentiary effect with reference to the validity and the value of the claims, can be admitted. That is, only those claims which are liquidated, uncontingent and undisputed can give their owners a right to vote for the reorganization plan. Second, there should be a provision that the plan is considered voted if the majority (not all) of the classes of the creditors have voted for it. This rule should be supplemented by the safeguard rule stating that among the classes which have voted for the plan must be the ones whose creditors would be better off in the case of bankruptcy than under reorganization. Third, the voting mechanism within the class should be more balanced so as to exclude the possibility of the minority of large claims creditors prevailing over the majority of small claims creditors and vice-versa.

Lastly, the procedural framework must be reformed so as to allow the possibility of filing with the court economically feasible *pre-packaged* and *pre-negotiated* reorganization plans. The court's duty, in such cases, would be to verify that the voting procedure have been in compliance with legal prescriptions and that the plan itself is not in breach of the substantive law.

11. The protection of employees.

The SAIP rules on the admissability and priority of the workers' claims have proved to be confusing and inefficient. Also, it could be said that they are not in all aspects in concurrence with the provisions of the ILO Employers' Insolvency Convention 1992 ('ILO EIS'), as well as with the EU Directive on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer ('EU Directive'). [5]

Article 8 of the ILO EIC states that, "..., where workers' claims are protected by a guarantee institution in accordance with Part III of this Convention, the claims so protected may be given a lower rank of privilege than those of the State and the social security system".

SAIP gives the workers' claims the same rank of priority as the claims of the social security system, but the higher rank than that of the State. My proposal is to adjust the rule of priority with the aforementioned provision of the ILO Convention. That adjustment would not affect the workers's rights upon insolvency, given the fact that the Labor

[5] Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer, *Official Journal L 283, 28/10/1980 P. 0023-0027.*

Act has instituted the Solidarity Fund, the proceeds of which are used for the distribution to employees upon insolvency of their employer, under the condition that the insolvency estate is not sufficient to satisfy their priority claims. The said adjustment of the SAIP should be followed by the simultaneous amendment of the Labor Act in the sector regulating the technical procedure for the filing of the workers' claims with the Solidarity Fund. Namely, the 'trigger' for the Fund's distribution to workers would be the court's order for the main distribution of the estate, from which it is clear that the value of the estate is not sufficient to cover the priority workers' claims.

The proposed amendment would substitute the current, ill-structured provision that the workers have to file *individual* claims with the Solidarity Fund in an individually assessed period of time. That period of time is 15 days from the date of an individual service to an employee of the final court's decision on the admissibility (confirmation) of his priority claim. It is exactly that provision which has caused so much trouble for the Fund in the execution of its duties under the Labor Act.

The employee's duty to file a claim to the Solidarity Fund should be substituted by the court's *ex officio* duty to serve the final order for the main distribution of the estate to the Fund. It would be incumbent upon the Fund to pay the difference between the value of the priority claims in total and the value of the estate's portion that is available for that payment. To that effect, the trustee should annex to the draft of the order for the main distribution a balanced account of the residual monies due to the workers' priority claims *after* the estate's distribution. The annexed account would have to be served to the Fund together with the court's order. The account should contain a tabulated specification of the outstanding payments under each and every individual worker's claim.

The proposed amendment is aimed to provide the Solidarity Fund with the clear-cut and manageable set of technical provisions for the discharge of its legal duties.

With regard to the formal 'trigger' of the Fund's duty to pay, the SAIP should be supplemented with the provision concurrent with the Article 2(b) of the EU Directive. Namely, the Solidarity Fund would have to pay the outstanding priority workers' claims *in total*, upon the court's decision which establishes that the employer's undertaking or business has been definitively closed down and that the available assets are insufficient to warrant the opening of the proceeding.

The claims which are covered by means of a privilege should corespond to the claims covered by the guarantee institution (Solidarity Fund). However, those are differently defined, due to the fact that the priority claims are prescribed by the SAIP, while the claims covered by the Solidarity Fund are prescribed by the Labor Act. It is the further cause for the amendment of both acts, in order to approximate them to the provisions of Articles 6 and 12 of the ILO Convention C173. Furthemore, the claims to be covered (either by priority or by means of a guarantee institution) should be extended so as to include, apart from wages, the following entitlements: holiday pay, all legally prescribed types of paid absence, as well as severance pay due to workers upon termination of their employment.

Also, the SAIP should by all means be supplemented in the manner prescribed by the Article 11 of Workmen's Compensation (Accidents) Convention 1925, which says: "The national laws or regulations shall make such provisions as, having regard to national circumstances, is deemed most suitable for ensuring in all circumstances, in the event of the insolvency of the employer or the insurer, the payment of compensation to workmen who suffer personal injury due to industrial accidents, or, in case of death, to their de-

pendents.". In my opinion, those claims should be given the highest priority of payment upon insolvency. [6]

Finally, I wish to accentuate the following notions: The workers' benefit entitlements covered by priority have to be assessed collectively, not individually. The individual workers' rights can be assessed and enforced individually before the commencement of the insolvency proceedings of their employer and outside of the causes linked with his state of insolvency. Those individually assessed rights, enforceable under the final court's order, injunction or decision, are given the same rank as the claims of the unprivileged creditors.

Collective assessment of the workers' claims under priority presupposes the impartial and professional investigation of the debtor's (employer's) business documentation. On that account, it should be a *statutory* duty of the debtor/trustee to make and produce a detailed record of all outstanding workers' claims under priority payment. However, under the SAIP rules, the filing and assessment of the workers' claims are not distinguished from the other creditors' claims, which is why their administration so far has not always been fair, nor equal.

IZMENA ZAKONA O STEČAJNOM POSTUPKU (ZSP) REPUBLIKE SRBIJE

Vanja Serjević

Cilj ovog rada je da istakne neke od osnovnih nedostataka Zakona o stečajnom postupku Republike Srbije. Sa tim nedostacima autor rada se susretala u vidu praktičnih problema u vođenju stečajnih predmeta pred Trgovinskim sudom u Nišu.

Rad takođe sadrži autorove predloge za izmenu Zakona. Ti predlozi su rezultat uporednog istraživanja Stečajnog kodeksa Sjedinjenih Američkih Država. Osnovnu celinu rada čine sledeći podnaslovi: 1. Definicija "insolventnosti", 2. Regulisanje dugova javnopravnih tela, 3. Ko može podneti predlog za pokretanje stečajnog postupka, 4. Rešenje o pokretanju stečajnog postupka, 5. Sudska nadležnost, 6. Stečajni upravnik. Preliminarna nagrada i naknada troškova, 7. Predstavnički organi poverilaca, 8. Priznanje potraživanja poverilaca, 9. Prebijanje, 10. Reorganizacija, 11. Zaštita zaposlenih.

Oznake odredaba američkog stečajnog kodeksa i nemačkog Zakona o insolventnosti, kucana masnim slovima, upućuju na sam izvor autorovih ideja o mogućim izmenama srpskog zakona.

Ključne reči: *insolventnost, bankrotstvo, reorganizacija, poverilac, dužnik, prijava potraživanja, predlog za pokretanje stečajnog postupka, rešenje o pokretanju stečajnog postupka, stečajni upravnik, predstavnički organi poverilaca, prebijanje, zaposleni.*

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[6] C17-Workmen's Compensation (Accidents) Act 1925, revised in 1964 by: C121-Employment Injury Benefits Convention.