The Insolvency Law of Central and Eastern Europe

Twelve Country Screenings of the New Member and Candidate Countries of the European Union and Russia: A Comparative Analysis

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1. Introduction

The new Insolvency Law which will become effective on 1 January 2008 contains systematic and complex regulation of insolvency proceedings.[175] It replaced the Bankruptcy and Composition Law of 1991[176] which was criticised especially due to lack of flexibility of proceedings, a very strong position of the court, a particularly strong position of the administrator in relation to the creditors, inefficient implementation and partly lengthy proceedings. At the same time, the new Law on Insolvency Administrators which regulates i.a. qualification of insolvency administrators will come into force.[177] The law of 1991 will apply to

[175] Law no. 182/2006 Sb., hereinafter referred to IC; it was planned that the new IC should become effective on 1 July 2007, but it was postponed by law no. 108/2007 Sb. to 1 January 2008 (Law no. 108/2007 Sb. of 12 April 2007) as well as the Law on Insolvency Administrators (Law no. 312/2006 Sb.). The cause of postponement were, apparently, problems in connection with establishing the insolvency register. At the moment, no implementing provisions, i.a. on the remuneration of insolvency administrators, have been issued. However, they are being prepared; preparations are now at the stage of comments (Information of the Ministry of Justice of 24 July 2007). Presently, there are only few publications on the new IC, i.a. the commentary by Ilona Schelleová, IC, (in Czech); Publishing Company EUROUNION, Prague 2006 and the commentary by Jaroslav Zelenka et al. to the IC (without the Law on Insolvency Administrators) including the grounds to the law and the Regulation of the European Council 1346/2000 (EG), Publishing Company Linde Praha, a.s., 2007 (Insolvenční zákon; poznámkové vydání s důvodovou zprávou a nařízením Rady ES 1346/2000, Linde Praha, a.s., 2007); T. Richter, Insolvency Law: from the Government Draft to the Published Law („Insolvenční zákon: od vládního návrhu k vyhlášenému znění", Právní rozhledy 2006, pp. 765 et seq.); a series of publications on the new Czech IC in German was published in the journal WiRO (Wirtschaft und Recht in Osteuropa) (including a partial translation into German by Soňa Sedláčková / Christoph Keller, WiRO 2006, pp. 344 et seq., 373 et seq., WiRO 2007, 19 et seq., 54 et seq., 84 et seq., 117 et seq.).

[176] Law no. 328/1991 Slg; hereinafter referred to as BCL. For further details see J. Kallies, J. Lowitzsch, Das Novellierte Tschechische Insolvenzrecht, Internationale Wirtschaftsbriefe 2002, no. 9, pp. 441-452.

[177] Previously, only rudimentary regulations on bankruptcy administrators were contained in an order of the Ministry of Justice of 1991.

bankruptcy and composition proceedings which have been commenced prior to 1 January 1991 until they are terminated.[178] The assignment of proceedings depend on the date of filing the petition on the basis of which the insolvency proceeding is commenced pursuant to § 97 para. 1 IC.

a) Reform of Insolvency Law of 2006 and Insolvency Practice

In contrast to the law of 1991, the new IC a unitary insolvency proceeding instead of two separate proceedings based on different principles. The new proceeding is divided in different procedures (liquidation, reorganisation or discharge of debt) after adjudication. The position of the insolvency administrator has changed: he can take certain measures (e.g. realisation of debtor's property) only upon approval of the creditors' meeting and can be dismissed by the court upon application of the creditors' meeting under certain conditions. Under the new IC, the creditors are not limited to the proposal that the court should choose a new administrator. Secured creditors (previously referred to as preferential creditors) whose claims are secured by a pledge on a collateral from the insolvency estate can be satisfied from the proceeds of the collateral's sale to up to 95% of the amount of their claims (approx. 4-5% constitute the cost of proceeding) instead of only 70% under the previous law. Moreover, secured creditors can elect a special administrator to administer collaterals separately from other debtor's assets.

The number of insolvency petitions has been annually increasing in the last three years (2004 - 3,643; 2005 - 3,882; 2006 - 4,227), and so was the number of completed proceedings (2004 - 4,778; 2005 - 4,870; 2006 - 5,106), whereas the number of pending insolvency proceedings has been decreasing (2004 – 8,876; 2005 – 8,135; 2006 – 7,456). Although there are no official statistics on the average duration of insolvency proceedings, it can be concluded from the above data that the duration has been shortened in the last years.[179]

[178] Law no. 328/1991 Sb.; hereinafter referred to as LIA.

[179] See http://www.creditreform.cz/nov_2006_01_03.htm.

b) Insolvency Register

Under the new IC, the so-called insolvency register (§§ 419 et seq. IC), a public information system operated by the Ministry of Justice, will be established.[180] It should prevent delay of information, only fictive notification and lack of transparency in insolvency proceedings and replace time-consuming service of printed documents or notification through noticeboards in courts. Pursuant to § 424 para. 1 IC, a document is deemed as officially served when it is published in the insolvency register, even if it is stipulated by the law that it should be published in the insolvency register and, at the same time, be put on the noticeboard of the court. Information on insolvency proceedings are public only during the proceeding, i.e. before the court order on termination of the proceeding becomes effective (§ 25 para. 1 IC). Public access to information on insolvency proceedings, i.a. through publication in the insolvency register, is limited in relation to data on physical persons, in particular, in consumer insolvency proceedings if the physical person concerned applies for it (§ 422 para. 1 IC). In addition, the insolvency register contains information on the insolvency debtor, the insolvency administrator and on records of insolvency proceedings.

c) Overview of the Insolvency Proceedings and Relation to Pending Court Proceedings Concerning Claims Connected to Insolvency

The insolvency proceeding is generally a written proceeding, but a main court hearing is also possible. Within three months following the petition, the court must meet a decision on the appropriate procedure, unless e.g. the debtor submits an application for a moratorium. Generally, three insolvency procedures are applicable: liquidation, reorganisation and the so-called discharge of debt (introduced by the new IC in connection with consumer insolvency). All procedures are based on the same principles. By adjudication (§ 136 para. 1 IC), the so- called open-

[180] Previously, information on bankruptcy and composition proceedings has been published in different public registers; records of insolvency proceedings have only partly been published.

ing procedure is terminated. The decision on the applicable procedure (§§ 148 et seq. IC) can be included the adjudication court order or be met separately at a later time. In the case of discharge, the consumer's debts are discharged, as a rule, in five years if he fulfils certain conditions of the debt payment schedule. The provisions of the Czech Code of Civil Procedure[181] are applicable by analogy to insolvency proceedings as well as to the so-called incidence disputes.[182] Under the new IC, incidence disputes are settled within the insolvency proceeding (and not separately as under the BCL) and generally by the same court which issued orders in the insolvency proceeding. An exception of this rule constitutes § 160 para. 2 IC by stipulating that the presiding judge of the insolvency court can delegate the power of conducting a hearing on an incidence dispute to another judge of the insolvency court if the hearing by the original insolvency court chamber could lead to delay of the insolvency proceeding. In an incidence dispute, the court gives a judgment (not an order as in insolvency proceedings) which is also to be published in the insolvency register.

2. Commencement of Insolvency Proceedings

a) Scope and Applicability

For all parties to legal relations with the exception of legal personalities to which the IC is not applicable as the state, municipalities, the Czech National Bank, the General Health Insurance, some forms of funds for deposit security and public colleges (see the list of legal personalities to which the IC is not applicable in § 6 para. 1 IC), the IC contains such

[181] Law no. 99/1963 Sb.; hereinafter referred to as CCP.

[182] This are generally pending court proceedings concerning claims or assets which are connected to the insolvency proceedings (definition in § 2 d) IC); see § 159 para. 1 a) to e) IC.

procedures as liquidation and reorganisation. To certain legal personalities, e.g. banks[183] and insurance companies,[184] special proceedings are applicable (see §§ 367 et seq. IC). Provisional limitations of applicability exist for financial institutions, health insurance companies with a special authorisation and for political parties during election campaigns (see the list in § 6 para. 2 IC) according to special provisions. Provisional limitations of applicability in relation to agricultural enterprises which existed in the BCL were not retained in the new IC.

b) Grounds for Opening Insolvency Proceedings

The illiquidity of the debtor is established if three cumulative pre-conditions are met (§ 3 para. 1 IC): the debtor has several creditors, has not paid his debts which have been due at least 30 days and is unable to satisfy these claims. The term corresponds to the term in § 369a of the Commercial Code[185] which regulates claims arising in the case of delay. Additionally, illiquidity is assumed according to § 3 para. 2 IC if the debtor ceased the payments in connection with a substantial part of his obligations, or has not paid his debts three months after they have become due, or satisfaction of creditors by execution is impossible, or the debtor has not submitted the inventory of his assets on demand of the court. It can be concluded from the systematics of the IC that the burden of proof, that the facts allowing the assumption of debtor's illiquidity are not true, lies with the debtor. However, it is not clear how the term "substantial part" should be defined.[186] An additional criterion

[183] According to Directives 2001/24/EG of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding-up of credit institutions and 2000/12/EG of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business by credit institutions.

[184] According to the Directive 2001/17/EG of the European Parliament and of the Council of 19 March 2001 on the reorganisation and winding-up of insurance undertakings.

[185] Law no. 513/1991 Sb.; hereinafter referred to as CC.

[186] It could be the majority of claims (see § 1 para. 3 BCL) or e.g. 20% of claims could be sufficient (see i.a. T. Richter, Insolvenční zákon: od vládního návrhu k vyhlášenému znění", Právní rozhledy 2006, p. 766).

of insolvency for debtors who are entrepreneurs[187] is over-indebtedness according to § 3 para. 3 IC. The over-indebtedness is established if there are several creditors and the debtor's assets fall short of his liabilities. For the valuation of debtor's assets, a prognosis of assets' administration and future development of the debtor's business should also be considered. It is of special importance if the debtor is in a position to continue to administer his property or to continue his business. In contrast to the abolished provisions of the BCL (§ 1 para. 3 BCL), not only due debts, but also debts which will fall due in the future must be considered.

Finally, § 3 para. 4 IC introduces the criterion of "imminent illiquidity". In this case, only the debtor is authorised to file a petition if considering all circumstances it is to be expected that he will not be able to settle a substantial part of his obligations when they fall due. Neither examples as basis of rules are given nor is the term "substantial part" defined. Hence, this provision is similar to the rules in other modern insolvency laws, but it remains imprecise.

c) Persons Entitled and Persons Obliged to File the Petition

The insolvency proceeding is initiated by petition filing (§ 97 para. 1 IC). The debtor and creditors are entitled to file the petition. An exception is established only in the case of imminent illiquidity under § 3 para. 4 IC where only the debtor is entitled to file the petition according to § 97 para. 1 IC. The obligation to file the petition immediately emerges when the management bodies, legal representatives of the debtor or the liquidator of a over-indebted legal entity acquire knowledge of the insolvency or had to acquire knowledge of the insolvency when acting with due care according to § 98 para. 1 IC. If the management bodies consist of several persons who are entitled to act in the name of the debtor, each person is entitled to file the petition pursuant to § 98 para. 2 sentence 2 IC. It can be concluded from this provision by inversion of

[187] Entrepreneurs are all persons entered into the Commercial Register who perform entrepreneurial activities or activities in agricultre on the basis of a business or other licence as well as legal entities (§ 2 para. 2 CC).

argument that, in the case of general agency, all these persons have to submit the petition jointly.

If the persons obliged to file the petition do not fulfil the obligation they are liable for damages caused to creditors or for other disadvantages caused by failing to file the petition pursuant to § 99 para. 1 IC; the amount of the claim for damages is defined by the difference between the amount of claim determined in the insolvency proceeding and the amount paid out to the creditor on this claim in the course of distribution (§ 99 para. 2 IC), unless the persons who failed to file prove that there was neither intention nor negligence on their part (§ 99 para. 3 IC). Several obliged persons are jointly liable. The corresponding provision for debtor's protection contains § 147 IC, according to which the debtor has a claim for damages if the petition of a creditor was rejected and the creditor filed the petition deliberately or negligently, whereby the onus of proof lies with the creditor. The debtor must deliver the action within three months after the rejection of petition by the court; this dispute is not regarded as an incidence dispute. Additionally, liability can arise according to other laws. E.g. if the executive board of a joint-stock company or the director of a limited liability company fails to file the insolvency petition timely, these management bodies are liable in relation to the company for damages caused by their failure to act (§§ 194 para. 5, 135 para. 2 CC).

The requirements regarding the content of the insolvency petition are laid down in §§ 103 et seq. IC. In the petition, it should be made credible that the criteria of current or imminent insolvency are fulfilled. Special rules apply to insolvency petitions of debtors which are aimed at discharging debt; the aim should be given in the petition. If the debtor files the petition, there is no legal remedy against adjudication pursuant to § 140 para. 1 IC. If a creditor files the petition, the debtor can lodge an appeal against adjudication. The person who filed the petition can appeal against the rejection of the petition (§ 145 para. 1 IC). In this case, the petition will be published in the insolvency register. The court can order that the person who filed the petition should make an advance payment; the maximum amount of the advance payment was not changed (CZK 50,000 = approx. EUR 1,700), however, it can not be ordered that the advance payment should be made several times as it was the case under the previous law (§ 5 para. 1 BCL). In contrast to BCL, the new IC stipulates that the court has the discretionary power to decide

whether the person who filed the petition has to make the advance payment (§ 108 para. 1 IC). If the person who filed the petition does not make the advance payment according to the court order, the court can terminate proceedings without making a decision on the petition (§ 108 para. 2 IC); if the court does not terminate proceedings, the claim on advance payment can be enforced.

3. Institutional Framework

In addition to insolvency creditors and the insolvency debtor, the court, the insolvency administrator, the attorney public and the liquidator are parties to insolvency proceedings (see § 9 IC). If a creditor assigns his claim against the debtor during the insolvency proceeding, the court has to decide that the assignee can join the proceeding instead of the assignor upon application by the assignor and with the consent of the assignee on the same working day on which the assignor submitted his application (§ 18 IC). Intervention is not allowed according to § 14 para. 2 and § 16 para. 3 IC; however, it is allowed in incidence disputes.

a) Courts

Insolvency cases and incidence disputes are heard by a sole judge in the trial court (§ 12 para. 1 IC). According to § 12 para. 2 IC, it is possible to regulate in which cases a higher-ranking judge should be empowered to perform procedural activities and to make decisions. In order to facilitate the implementation of insolvency proceedings by the court, the new IC introduced the position of an "assistant to the judge in an insolvency court" (§ 13 IC). He can perform certain procedural activities by power delegated to him by the judge. The subject-matter jurisdiction of insol-

vency courts is governed by the CCP (§ 17 para. 1 IC).[188] Trial court is the district court (krajský soud). Proper venue is determined by the location or domicile of the insolvency debtor.

The powers of the court are laid down in §§ 11 and 12 IC. It has a two-fold role in the insolvency proceedings: on the one hand, it has to issue the orders according to IC, on the other hand, it is a supervisory authority in relation to the insolvency administrator according to § 10 IC. It is authorised to demand from the administrator reports and explanations on his activities, to control his accounts and to conduct the necessary investigations.[189] Additionally, the court is empowered to give notices to the administrator and to oblige him to obtain the opinion of the creditors' committee on certain issues. An individual creditor can not initiate that the court takes important measures e.g. in relation to the administrator. A hearing is scheduled by the court if it is stipulated by law or if the court regards it necessary (see § 85 para. 1 IC). It should be noted that the court is not limited to the evidence produced by the parties, but has to take evidence ex officio (§ 86 IC); in consequence, the proceedings can be considerably prolonged. Generally, all orders and judgments in the insolvency proceedings become effective by publishing in the insolvency register; however, if they are pronounced before the parties to proceedings, orders and judgments come into force by pronouncing.

b) Insolvency Administrator, Special Administrator, Provisional Administrator

§§ 21 et seq. IC regulate the status of the insolvency administrator in the proceedings, whereas the LIA contains provisions on the administrators'

[188] For further details see §§ 9 para. 4 f), 11, 84-89 CCP. On incidence disputes, the CCP is applicable by analogy (§ 7 para. 1 IC). In § 7 para. 2, direct application, (not application by analogy), is regulated, i.e. concerning the determination of proper venue for insolvency proceedings and incidence disputes (§ 7 para. 2 IC).

[189] According to § 11 IC, powers of the court seem to be relatively extensive. However, it should be noted that, as compared to the previous law, the new IC extended the powers of the administrator on the cost of the powers of the court.

organisation, qualification,[190] list of administrators etc. The insolvency administrator acts in his own name (§ 40 para. 1 IC), but at the debtor's cost and for protection of the joint interest of creditors (§ 2 j) IC). Pursuant to § 21 para. 1 IC, the court appoints the administrator upon proposal of the presiding judge from the list of the Ministry of Justice, at the latest, with adjudication. Physical persons, who have i.a. a college degree and knowledge of insolvency law,[191] as well as legal entities (also general partnerships under Czech law, see § 21 para. 2 a) IC)[192] can be inserted in this list upon application. Pre-conditions laid down in § 3, §§ 6 et seq. or § 5 and § 8 LIA (i.a. legal capacity, no criminal record) should be fulfilled. Pursuant to § 37 IC, the insolvency administrator is liable for damages he caused in office by violation of his professional duties in relation to the debtor, the creditors and third persons. Detailed regulation of the administrators' obligation to conclude a third party liability insurance agreement at his own expense according to § 23 IC is contained in § 6 para. 1 f) LIA. Also a foreign physical person or legal entity can be appointed as insolvency administrator.[193] Pursuant to § 419 para. 2 IC, the insolvency register contains a register of insolvency administrators; details are laid down in §§ 18-22 LIA. The administra-

[190] Under the previous insolvency law (Order no. 37/1992 Sb.), the court had to consider whether the administrator's qualification is „appropriate" for the respective proceeding; however, there was no thorough assessment in practice.

[191] According to § 40 para. 2 LIA, all administrators who have been registered on 1 January 2008 can perform their professional activities in the next two years without passing the examination stipulated by § 6 para. 1 c) LIA. According to § 41 LIA, physical persons are not obliged to have a college degree within six years after the new IC becomes effective, i.e. until 1 January 2014.

[192] In this case, the functions of the administrator have to be performed by partners or shareholders who have the qualification required from physical persons. Insofar, the Czech law differs from e. g. German law according to which legal entities and, according to the prevailing opinion, also partnerships (e. g. general and limited partnerships) can be appointed liquidators, but not insolvency administrators.

[193] Pursuant to the Regulation of the Council 1346 / 2000 / EG and § 2 para. 2 LIA, foreign legal entities which are formed according to the law of an EU member state and authorised to perform the functions of an insolvency administrator in the state of its origin.

tors' register is a part of the insolvency register and, therefore, accessible for the public via internet.

According to § 31 para. 1 IC, the court can replace the administrator if there are substantial grounds or dismiss him if he does not perform his duties with due care. Moreover, the court can impose a fine (§ 81 para. 2 IC), also several times and up to the amount of CZK 200,000. There is a new regulation that the creditors are entitled to take influence on the administrator's appointment or replacement/dismissal at the first creditors' meeting after the court hearing for examination of creditors' claims. According to § 29 para. 1 IC, the creditors' meeting can decide by a simple majority of claims (based on the claims for which notice was given on the day preceding the meeting) to dismiss the administrator appointed by the court and appoint a new administrator even without giving reasons for the decision. This new provision is a cornerstone of the new IC; the court is only entitled to examine whether the new administrator fulfils the formal requirements.[194] An insolvency administrator can be dismissed due to conflict of interest (§ 24 IC); this applies also to legal entities if a partner or shareholder is involved in conflict of interest. He is liable for damages caused to other parties by breach of duty according to § 23 IC.

The administrator is entitled to remuneration and compensation of costs (§ 38 IC); his claim is to be satisfied from debtor's assets.[195] If debtor's assets are insufficient, the remuneration should be paid from the advance payment (§ 108 IC); if the advance payment is insufficient, the debt has to be covered by the state. The amount of remuneration and compensation of costs is calculated by the administrator in his final report (§§ 302-307 IC) or in his progress report according to § 354 IC.

[194] This decision of the creditors' meeting must be approved by the court if the creditors dismissed the current administrator, but did not select a new administrator. If they did select a new administrator, the court must confirm this candidate (§ 29 para. 2 IC) provided that he meets the formal requirements of §§ 21-24 IC.

[195] The amount of remuneration will be determined in the implementing provision of the Ministry of Justice. According to the previous regulation (Implementing Order no. 476/1991 Sb.), the remuneration was comprised of a degressive fee depending on the amount of the debtor's assets which factually can be distributed and a lump sum for each creditor amounting to CZK 500.

Due to special circumstances, the court can increase or reduce the administrator's remuneration upon approval of the creditors' committee (§ 38 para. 3 IC). The remuneration can be reduced e.g. if the administrator did not perform one of his duties with due care.

The court can appoint a provisional administrator before adjudication according to § 27 para. 1 sentence 2 IC. It is possible if the Securities' Commission[196] suspended the trade on the regulated market upon application of a creditor (details are laid down in § 84 para. 2 IC), or if the court issues a provisional order limiting the debtor's powers of administration and disposal to a greater extent than § 111 para. 1 IC stipulates (§ 112 para. 1 IC), or if the court orders a moratorium according to § 123 para. 1 IC.

A special administrator can be appointed by the court during the insolvency proceeding if special expert knowledge is required (§ 35 IC). The creditors have to cover the costs and to pay remuneration to the special administrator.

c) Creditors' Meeting, Creditors' Committee, Creditors' Representative

The decisions of creditors' organs must serve the joint interest of creditors (§ 54 para. 1 IC), with the exception of cases regulated by §§ 29 para. 1 and 51 para. 1 IC and of the decision on the form of procedure. Otherwise, the court can annul a decision which violates this principle upon application of the administrator or a creditor. A creditor who voted for the decision can lodge an appeal against the court order; the court has to inform creditors about their rights (§ 55 para. 1 and para. 3 IC).

If, after examining a claim for which notice is given at a certain amount, it is established that the actual amount of claim is less than 50% of the amount in the notice, this claim is not recognised for the purposes of insolvency proceedings, not even at the determined lower amount. In addition, the court can order that the creditor has to contribute an amount corresponding to the difference between the actual amount of

[196] After the Commission had been dissolved, its functions were transferred to the Czech National Bank according to the Capital Market Law (no.256/2004 Sb.).

claim and the amount of claim in the notice to the insolvency estate (§ 178 IC). A similar provision applies to the so-called secured creditors (§ 179 IC): those persons who signed the notice, e. g. representatives, are jointly liable with the creditor for the above contribution.[197]

The creditors' meeting is called by the court on its own initiative or upon application of the administrator, the creditors' committee or of at least two creditors whose added up claims amount to at least a tenth of the total amount of claims within 30 days according to § 47 para. 1 IC. Its powers include election and dismissal of the members of the creditors' committee and their proxies or of the creditors' representative. The meeting can extend its powers to the issues originally addressed by other creditors' organs. The creditors who have given the notice of claims, the debtor, the administrator and the attorney public and, as far as they are a party to proceedings, trade unions are entitled to participate in the creditors' meeting (§ 47 para. 2 IC). All creditors present are entitled to vote (§ 50 para. 1 IC); however, creditors of claims in dispute only have the right to vote if the meeting decides on that (§ 51 para. 1 IC). By inversion of argument of § 51 para. 1 IC, the creditors of determined claims are generally entitled to vote. The court examines the voting rights of each creditor; there is no legal remedy against the respective court order (§ 52 para. 2 IC). Among the control powers of the meeting, the right to elect a new administrator and the possibility to oblige the administrator to file an action for avoidance (§ 239 para. 2 IC) are to be highlighted.

If there are more than 50 creditors who gave notice for their claims, a creditors' committee with not less than three and not more than seven members has to be elected pursuant to § 56 para. 1 IC. All groups of creditors according to the kind of claims must be represented in the creditors' committee (§ 57 para. 1 IC). The powers of the creditors' committee are control of the administrator, support to the administrator, approval of disposals by the administrator and approval of the remuneration of the administrator (§ 58 para. 2 IC). The members of the creditors' committee must perform their duties with due care according to § 60 para. 1 IC and are liable for damages or other disadvantages caused by

[197] Creditors' liability for false information on the amount of their claims does not exist e. g. in German insolvency law.

breach of duty. They have to give priority to the joint interest of all creditors in relation to their own interests and interests of third persons; they are entitled to dispose of the debtor's assets only upon approval of the creditors' meeting. The members are paid an appropriate remuneration for necessary costs, whereby the amount is determined by the court, and can hire experts to clarify issues for which a special knowledge is needed upon approval by the court. If the election of the creditors' committee is not prescribed by law, the creditors' meeting can elect a creditors' representative and his proxy according to § 68 para. 1 IC. Provisions on the creditors' committee are applicable to them by analogy. However, they can not be appointed by the court under the new IC as compared to BCL.

d) Other Participants of Proceedings

Pursuant to § 69 para. 1 IC, the attorney public who joined the insolvency proceedings or an incidence dispute can lodge an appeal against orders and judgments of the court if all parties to proceedings are entitled to appeal. Participation of attorneys public in insolvency proceedings is governed by the CCP. Attorney public does not represent the state as creditor, but safeguards the interest of the state in the right and timely decision of the court; it seems to be a relict from the socialist law.

The status of a liquidator in insolvency proceedings is regulated by § 70 IC corresponding to the transfer of powers from the debtor to the administrator. The remuneration of a liquidator is determined by the court upon application of the administrator according to § 70 para. 3 IC.

4. Insolvency Proceedings

a) Effect of Commencing the Insolvency Proceeding

In contrast to the previous law, the first stage of proceedings is uniform for all three possible following procedures. At the beginning of insolvency proceedings, i.e. the receipt of the insolvency petition by the competent court (§ 97 para. 1 IC) which has to be published by the court within two hours following the receipt (§ 101 para. 1 IC), the effects of the petition emerge. It is, in particular, the obligation of the debtor not to dispose of his property, „as far as substantial changes in the structure, use or purposes of the property or more than an insignificant use are concerned" (§ 111 para. 1 IC). Activities in the usual way of business and those activities which are necessary for prevention of damages and for prevention of court sanctions are excluded. If the debtor violates the restriction, his disposals are null and void in relation to insolvency creditors. In addition, the following effects emerge after the insolvency petition was filed according to § 109 IC:[198] no civil action can be filed in relation to claims and other rights concerning the insolvency estate, a notice of these claims must be given to the court instead; claims arising from securities encumbering the debtor's assets can be asserted only within the insolvency proceeding; execution of claims against the debtor's estate is prohibited.

b) Provisional Measures and Moratorium

If the court seeks to extend restrictions against the debtor stipulated in § 111 IC by a provisional measure, it appoints a provisional administrator according to § 112 para. 1 IC. He is authorised to take measures in order to determine and to protect the debtor's property and to examine the debtor's books. If the debtor is an entrepreneur, the court can issue

[198] Pursuant to § 109 IC, the effects generally emerge with the publication in the insolvency register and last until the end of the insolvency proceeding or the approval of a reorganisation plan.

an order on the so-called moratorium within seven days following the debtor's petition (or within 15 days following the creditor's petition) upon application of the debtor according to § 115 IC. The duration of the moratorium can not exceed three months; it should enable the debtor to prevent his illiquidity or imminent illiquidity by his own means and to continue his business afterwards. The application on which the court has to issue a court order on the next day (see § 117 IC) must fulfil the general requirements of § 116 para. 2 IC and include the last annual statement and the written consent of the creditors' majority based on the amount of the claims on which notice has been given. If all formal requirements are fulfilled the court must impose moratorium. There is no legal remedy against a positive court order on the moratorium; however, if the application of the debtor concerning a moratorium is rejected, the debtor is entitled to lodge an appeal (§ 118 para. 2 IC). If the debtor commits breach of duty during the moratorium, he is liable for damages in relation to creditors, unless he proves that it was impossible to prevent the damages or that damages would have been caused even if he acted with due care (§ 127 para. 1 IC). Pursuant to § 127 para. 2 IC, the debtor and the members of his management bodies according to the statutes are jointly liable.

During the moratorium which can be extended for up to 30 days upon application of the debtor (§ 119 IC), adjudication is not possible, although the creditors can give notice of their claims. The core element of the moratorium is that the debtor can satisfy claims arising in connection with the continuation of his business within 30 days before the beginning of insolvency proceedings at a preferential basis (§ 122 para. 1 IC). This concerns especially claims in connection with on-going supply (energy, water etc.). The moratorium ends when the term ends or earlier on the basis of a court order, i.a. upon creditors' application or if the debtor made false statements. The moratorium can be applied for before the beginning of insolvency proceedings; in this case, only the debtor is entitled to apply according to § 125 IC. If the debtor files the insolvency petition, the preliminary moratorium is terminated; this order is not published in the insolvency register. Effects of the beginning of insolvency proceedings emerge with the court order on the preliminary moratorium (§ 122 para. 2 IC); the provisions on the general moratorium are applicable to the preliminary moratorium by analogy. However, it is

problematic that the creditors do not have the necessary knowledge that they can not file individual actions or enforce their claims.

c) Court Order on Insolvency Petition and its Effect

The debtor is not entitled to dispose of his property only upon adjudication (§ 140 para. 1 sentence 2 IC) which is made generally without a hearing (§§ 133 et seq. IC) if the debtor filed the petition. If a creditor filed the petition, a hearing should take place, unless the court accepts the petition in full whereas other parties to proceedings do not object or the decision can be made on the basis of the petition content and other parties to proceedings refuse to participate or consented that the decision should be made without a hearing. The court must prepare the decision within 10 days (§ 134 para. 1 IC); the judgment is to be made within 15 days, if the petition was filed by the debtor, otherwise immediately. The judgment on adjudication[199] is to be submitted to all participants of proceedings and to a number of state authorities (§§ 138 et seq. IC) and published in the insolvency register. The effects of the petition are sustained after adjudication, provisional measures can be changed by the court (§ 140 para. 1 IC). The court can reject an insolvency petition if formal requirements are violated, if pre-conditions are not fulfilled (e.g. if it is not proven that claims have fallen due), or if the debtor's assets are insufficient. Notice of claims can be given within a term which begins 30 days after adjudication and ends two months following adjudication (§ 136 para. 2 d), para. 3 IC). In the case of discharge, notice must be given within 30 days (§ 136 para. 4 IC).

[199] According to § 136 IC, the adjudication must address i.a. the following issues: which administrator is appointed; when the effects of the adjudication come into force; whithin which term creditors must give notice of their claims; when and where the creditors' meeting takes place (within 2 months following adjudication).

d) Status of Secured Creditors and of Creditors whose Assets Must Be Separated from Debtor's Assets

The administrator submits the decision on distribution to the court after the court order on approval of the final report has become effective, § 306 para. 1 IC. Before the general distribution begins, claims arisen during insolvency proceedings, other claims with the same status and secured claims up to the amount pursuant to §§ 298 and 299 para. 1 IC. Under § 298 IC, secured creditors are entitled to the proceeds less 4% or 5% of distribution and administration costs. The priority ranking of secured claims corresponds to the moment when the claim has arisen. If the proceeds are insufficient to satisfy all secured claims according to § 305 para. 1 IC, they are to be satisfied in the following order: (1) remuneration and costs of the administrator; (2) claims arisen during the moratorium (§ 168 para. 1 d) IC) and claims arisen from contracts the performance of which was approved by the authorised person and which were not terminated (§ 169 para. 1 g) IC); (3) claims arisen from credit funding; (4) costs of maintaining and administration of the insolvency estate; (5) alimony claims based on the law; (6) the remaining claims on the pro rata basis.

Actions for annulment can be filed only by the administrator according to § 239 para. 1 IC. However, individual creditors are entitled to file actions for separation of assets from the insolvency estate pursuant to §§ 225 et seq. IC within 30 days following the notice on the inclusion of the creditor's assets into the insolvency estate. The action is to be filed against the administrator. If the action is successful, the asset must be transferred to the claimant. Although the asset can be realised only after the end of the insolvency proceedings, it can be disposed of if the trial court rejects the action or suspends the civil proceeding. § 225 para. 6 IC clarifies that the claimant, in this case, is entitled to the full amount of proceeds; the corresponding provision concerning secured creditors is § 298 IC.[200]

[200] Correspondingly, the provision of § 28 para. 4 BCL was abolished according to which creditors of claims secured by pledge, mortgage, retention or a limitation of transfer were entitled only to up to 70% of the proceeds; for the remaining amount of claim, they were included in the genereal priority ranking.

e) Rescission and Invalidity

Like the BCL, the IC contains provisions on invalidity of legal transactions; however, the number of these transactions is now limited to few transactions which are concluded after the commencement of insolvency proceedings as rejection of a gift, of an inheritance and transfer of property between spouses, §§ 264 para. 4, 269, 270, 276 IC. However, the insitute of invalidity of transactions eo ipso which was laid down in 15 BCL was not taken over into the new law. Under the IC, only the court is authorised to decide on the validity of transactions according to § 231 para. 2 IC (in the so-called incidence disputes). The decisions of other courts are not binding for the insolvency court; the decisions of the insolvency court have a constitutive effect (not only a declarative effect as under the BCL). The regulation of rescission (§§ 239 et seq. IC) was completely revised as compared to the previous law.

Only the administrator is entitled to rescission; however, he can be forced by the creditors' committee to file an action for rescission. The action must be filed within one year after the adjudication has become effective; an action for separation of assets is not allowed. The following transactions can be rescinded:

- inequivalent transactions, i.e. gratuitous transactions or transactions for an inadequate consideration; such transactions can be rescinded if they were concluded within one year before the commencement of insolvency proceedings; if such transactions benefit a person closely connected to the debtor or an affiliated legal entity of the debtor, the term for rescission is three years (§ 240 para. 1, para. 3 IC);
- preferential transactions to the benefit of one creditor at the expense of other creditors can be rescinded within the same term as inequivalent transactions (§ 241 para. 1, para. 4 IC); such transactions are i.a. satisfaction of a claim before it has fallen due, substitution of debt at a disadvantage for the debtor, debt forgiveness by the debtor in relation to his debtors, encumbrance on debtor's assets. § 241 para. 5 IC contains a list of examples as a basis for non-exhaustive rules for transactions which are not deemed preferential, i.a. a transaction for an equivalent consideration, however, such transactions are deemed

preferential if they benefit a person closely connected to the debtor or an affiliated legal entity of the debtor;
- transactions by which the debtor deliberately reduced the satisfaction of creditors; hereby, the debtor's intention is assumed if transactions were concluded with a person closely connected to the debtor or an affiliated legal entity of the debtor (§ 242 para. 1, para. 2 IC); the term for rescission was prolonged to five years before the commencement of insolvency proceedings (§ 242 para. 3 IC).

f) Realisation of Debtor's Property

The debtor's property is realised either at a public auction or outside an auction (§§ 283 et seq. IC). Special rules apply if the enterprise is to be sold as a going concern (§§ 290 et seq. IC) according to the decision of the court and the creditors' committee. The court can define the sale conditions; §§ 476-488a CC apply to the sales contract. Obligations under the labour law are transferred to the purchaser, with the exception of employee claims which have arisen before the contract became effective.

After the administrator has submitted his final report, the report is examined and approved by the court (§ 304 para. 1 IC). When the final report is approved and becomes effective, the administrator submits the final distribution plan to the court which also has to be examined and approved (§ 306 para. 2 IC) and implemented within two months. The court terminates insolvency proceedings ex officio, especially if evidence on the pre-conditions of insolvency is not sufficient, if there are no creditors and all claims arisen during insolvency proceedings have been satisfied, if the distribution order has been implemented according to the report by the administrator or if the court establishes that debtor's property is insufficient for creditors' satisfaction. If there was no adjudication, the management bodies of the debtor return into office (§ 312 para. 2 IC). If liquidation is not ordered due to insufficient assets (§ 144

para. 1 IC) or if the liquidation was completed by distribution, the debtor is deleted from the Commercial Register.[201]

g) Reorganisation

The rules on enforced composition and composition under the previous law (§§ 34-43 and §§ 46-66 BCL) are replaced by reorganisation procedure. The procedure consists of three stages: first, the application for reorganisation (can be submitted with the insolvency petition), second, court order on approval of reorganisation and, third, court order on approval of the reorganisation plan. The pre-condition of reorganisation is that the debtor had a turnover of at least CZK 100,000,000 in the last business year preceding the petition or has at least 100 employees (§ 316 para. 4 IC). Reorganisation can also be conducted if the debtor submits a reorganisation plan with the insolvency petition or within 15 days after adjudication and this plan is approved by at least 50% of secured and not secured creditors (based on the amount of claims).

aa) Application for Reorganisation and Reorganisation Plan

The debtor or a creditor who has given notice of his claims can apply for reorganisation (§ 317 para. 1 IC), at the latest; 10 days before the first creditors' meeting, in the case of debtor's petition based on imminent illiquidity, before the adjudication. A delayed application is rejected by a court order against which there is no appeal. If a creditor submits the application, the application should have been approved by the creditors' meeting (§ 323 para. 1 IC). If the debtor submits the application, the court issues an order on admissibility of reorganisation (§ 325 referring to §§ 148-152 IC; § 329 para. 1 IC) by which the debtor is obliged to submit the reorganisation plan. Also in this case, a previous approval by the insolvency court is required (§ 152 para. 1 IC). The application for reorganisation can be rejected if the court establishes that the applica-

[201] § 144 para. 4 IC or § 312 para. 3 IC in conjunction with § 68 para. 3 f) , g) CC; the provisions of the CC were not amended after the new IC become effective.

tion is based on an dishonest intention (§ 326 para. 1 and 2 IC).[202] Against such court order, an appeal can be lodged by the applicant (§ 326 para. 3 IC). If the application is neither withdrawn nor rejected, the court allows the implementation of reorganisation (§§ 328, 329 para. 1 IC). In the respective court order, an administrator must be appointed, if no administrator has been appointed before, and the debtor must be obliged to submit a reorganisation plan within 120 days or to inform, under which conditions other persons can submit a reorganisation plan.

The core of reorganisation procedure, on which the content of procedure and creditors' rights are based, it the reorganisation plan (§§ 338 et seq. IC). It contains i.a. division of creditors in groups,[203] determination of the reorganisation form, determination of reorganisation measures, what claims and to which amount are to be satisfied, continued employment of workers, how and to which amount claims subject to incidence disputes are to be satisfied (§ 340 para. 2 IC). The reorganisation can be conducted by restructuring creditors' claims, by sale of all or a part of the debtor's assets, by transfer of assets to creditors, by merger of the debtor' enterprise with a creditor's enterprise, by issue of shares, by funding of continuation of business of the debtor, by an amendment of the debtor's statutes or other adequate measures (§ 341 para. 1 and 2 IC).

The plan must be approved by the creditors (§ 334 et seq. IC) in the creditors' meeting where the creditors vote within the groups determined by the reorganisation plan. It must be approved by the court (§ 348 para. 1 IC) against which an appeal can be lodged only by the creditors who have voted against the plan (§ 350 para. 1 IC). If the court rejects the plan, a new plan can be submitted within 120 days after rejection according to § 329 para. 1 IC (this term can be prolonged by

[202] The court can conclude it from the debtor's history, e. g. if the debtor has already applied for reorganisation and his application was rejected or on the basis of his criminal record.

[203] The separate creditors' groups are the secured creditors, partners or shareholders of the debtor (§ 335 para. 1 IC) and creditors who were not considered in the reorganisation plan (§ 337 para. 2 IC). The "sufficient grounds and appropriateness" of assignment of individual creditors to certain groups is to be approved by the court in the court order on approval of the reorganisation plan (§ 337 para. 5 IC).

court order, § 350 para. 2 and 3 IC). If no plan which could be approved is submitted within the term, the court issues an order on continuing the proceeding by liquidation (§ 363 para. 1 b) and c) IC). If reorganisation is to be implemented, the rights of creditors and third persons are determined by the approved reorganisation plan. After the reorganisation plan has become effective, enforcement of judgments and claims is only possible if it is determined in the plan (§ 360 para. 1 IC). This concerns also enforcement by third persons, i.e. those who do not participate in the reorganisation procedure as creditors (§ 360 para. 2 IC).

bb) Effect of the Court Approval and Termination of Reorganisation Proceedings

According to the effective approval of reorganisation by the court, the debtor is entitled to administer and dispose of his property during the procedure, unless the court order stipulates otherwise (§ 330 para. 1 and 2 IC). Limitations of the disposal right of the debtor can be based only on the reorganisation plan, other limitations are abolished. However, the so-called disposal of the insolvency estate which "would lead to a substantial change of value of the insolvency estate or of the creditors' status or of the degree of creditors' satisfaction" is excluded (§ 330 para. 4 IC). Such disposals can only be implemented upon approval by the creditors' committee. If the limitation of disposal is violated, the creditor or third person to which damages were caused are entitled to demand compensation of damages from the debtor or his statutory management bodies (§ 330 para. 3 IC). The court can further limitate the right of the debtor to disposal on its own initiative or upon application by the creditors' committee or the administrator. The powers of the debtor are then transferred to the administrator (§ 332 para. 1 and 3 IC).

The debtor must submit an interim financial statement before the court approval of reorganisation becomes effective (§ 330 para. 6 IC). The creditors' meeting controls that the debtor keeps the reorganisation plan (§ 355 para. 1 IC); it can reserve the right to approve of debtor's transactions which are not determined in the reorganisation plan (§ 355 para. 2 IC). If the debtor violates the reorganisation plan, the creditors' meeting can apply to the court for taking the necessary measures which can also lead to the termination of reorgansation (§ 355 para. 3 IC). The

court can issue orders on such measures only upon an application (§ 364 para. 1 IC); by this, the strong position of the creditors' meeting is highlighted.

If the reorganisation procedure ends by implementing the reorganisation plan in full, the court confirms the implementation of the reorganization plan in an order against which there is no appeal (§ 364 para. 2 IC). If the plan is implemented all claims outside the plan expire, the court decides on the remuneration and costs of the administrator (§ 364 para. 3 IC). However, the court can annul the reorganisation plan within six months after it has become effective if it establishes that some creditors are discriminated as compared to others, or the plan was approved on the basis of fraud (§ 362 para. 1 IC), and within three years if the debtor or one of his statutory management bodies has been convicted of a deliberate crime in connection with the plan (§ 362 para. 2 IC). The court can also change the form of procedure from reorganisation to liquidation (§ 363 para. 1 IC), i.a. upon application of the debtor if he does not fulfil substantial obligations in the course of reorganisation plan implementation or if he did not continue his business after the reorganisation plan has been approved, although he was obliged to do so under the plan. If the court issues an order on the change of the procedure form from reorganisation to liquidation, the effects of the court order preceding reorganisation become effective again (§ 363 para. 5 IC), and the proceedings are continued according to the provisions on liquidation. However, it is not prohibited that the form of procedure can be again changed to reorganisation.

h) Consumer Insolvency

The consumer insolvency procedure is aimed at discharging of debt in connection with claims which were not satisfied and claims for which notice was not given in the course of implementation of the debt discharge plan, if the debtor fulfils the plan. The procedure consists, as the reorganisation procedure, of three stages: application for debt discharge which can be submitted with the insolvency petition, approval of discharge and court order on the debt discharge plan. Only a debtor who is no entrepreneur can apply for debt discharge (§ 389 para. 1 IC). If the insolvency petition is submitted not by the debtor, the court must inform

the debtor of the possibility of debt discharge, so that the debtor should be able to apply for discharge within 30 days after the receipt of the insolvency petition (§ 389 para. 2 IC). The application should contain information on the debtor, information on the expected income of the debtor in the next five years and on his income within the last three years (§ 391 para. 1 IC). An inventory of the debtor's assets and obligations as well as a written statement of a not secured creditor who gives his consent to obtain less than 30% of the amount of his claim (§ 392 para. 1 IC) must be attached. If the application does not meet all requirements, the court can demand that the debtor submits the lacking parts; otherwise, the application must be rejected (§ 395 para. 1 IC). If the court approves the application, the court order must be submitted to the debtor, the administrator and the creditors' meeting (§ 397 para. 1 IC). Discharge of debts can be conducted by realisation of debtor's property (this corresponds to liquidation, § 398 para. 2 IC) or by implementation of the discharge plan. According to the discharge plan, the debtor has to pay to not secured creditors monthly in the course five years an amount by which preferential claims could have been satisfied in execution proceedings (§ 398 para. 3 InsG). The debtor must attend the following creditors' meeting in person (§ 399 para. 2 IC); if he is absent without sufficient grounds, it is assumed that he withdrew his application for discharge (§ 399 para. 2 IC). Only if the creditors did already decide on approval of discharge and its form outside the meeting, no creditors' meeting takes place, and the result of voting is disclosed (§ 399 para. 3 IC).[204] If there was no majority for any form of discharge, the court (§ 400 para. 4 IC) must decide on the approval of discharge. If the court does not approve the discharge, it has to decide, at the same time, on liquidation of the debtor (§ 405 para. 2 IC). The court order is binding for the debtor and all creditors, irrespective of the fact whether they voted for the discharge. The court determines the person of the adminis-

[204] Only not secured creditors who gave notice of their claims within the prescribed term are entitled to vote (§ 400 para. 1 IC); secured creditors and creditors who are closely connected to the debtor according to the Czech law (see § 116 of the Czech Civil Code: i.a. siblings, spouses etc.) and affiliated persons of the debtor if he is a legal entity (see § 66a para. 7 of the Czech Commercial Code: i.a. dominated and dominating companies) are not entitled to vote (§ 400 para. 1 sentence 3 IC).

trator and his remuneration, the amount of debtor's assets on the day on which the order is issued and the not secured creditors who gave their consent to the satisfaction of their claims at less than 30% of the claim amount and the minimum amount of satisfaction which was agreed upon in the negotiations between the debtor and the creditors (§ 406 para. 2 IC). The court order also contains the discharge plan according to which the discharge is conducted (§ 406 para. 3 IC). Only creditors, who voted against the form of discharge or whose objections were not accepted by the court, can lodge an appeal against the court order (§ 406 para. 4 sentence 2 IC). The effects of the court order on approval of discharge emerge when the order is published in the insolvency register (§ 407 para. 1 IC). When the court order becomes effective, the debtor is entitled to administrate and dispose of his assets (§ 407 para. 2 IC), with the exception of inheritance which can only be rejected with the assent of the administrator (§ 412 para. 3 sentence 1 IC).

In the course of implementation of the discharge plan (as a rule, five years), the debtor has to fulfil i.a. the following obligations (§ 412 para. 1 IC): to remain in appropriate paid employment and to seek employment in the case of termination of employment contract; to realise inheritance and to use extraordinary income to make extraordinary payments to creditors in excess of the plan; to inform of the change of his domicile; to submit a statement of his income of the last half-year each three months (to the court, the administrator and the creditors' meeting); to make no payments to individual creditors on a preferential basis; to conclude no additional contracts if the debtor is not in a position to fulfil them. The administrator controls how the debtor implements the plan and regularly informs the court and the creditors' meeting (§ 412 para. 2 IC). If the plan has been implemented, the court confirms it by an order, against which there is no legal remedy (§ 413 para. 1 IC). When this court order becomes effective, the consumer insolvency procedure is terminated. At the same time, the court decides on the administrator's remuneration and his costs (§ 413 sentence 2 IC). If the plan is fulfilled and the debtor performed all his duties under the plan, the court issues an order by which the debtor is discharged from all debts which were considered in the discharge procedure, but have not been paid yet (§ 414 para. 1 IC). Also claims which were not considered in the discharge procedure and those notice of which has not been given are discharged (§ 414 para. 2 IC); guarantors and other persons

who gave a guarantee for a claim against the debtor are discharged from liability (§ 414 para. 3 IC). However, if it is established within three years following the court order on discharge that the discharge was decided on due to fraud on the part of the debtor, the discharge of debt will be revoked (§ 417 para. 1 InsG). If the debtor does not make payments during the plan implementation or if it can be expected that he will cease to make the payments, if he concludes new contracts or applies for concluding new contracts (§ 418 para. 1 IC), the court issues an order on termination of the discharge procedure and commencement of the liquidation procedure.

i) International Insolvency Law

The IC refers in §§ 426 et seq. to the directly applicable Council Regulation (EC) 1346/2000 of 29 May 2000 on Insolvency Proceedings. According to these provisions, an insolvency proceeding is within the scope of the Regulation if the centre of a debtor's main interests is situated in an EU member state (excluding Denmark) and at least one creditor or a part of the debtor's assets are located in an EU member state. If the centre of main interests of a debtor against whom insolvency proceedings have been commenced in the Czech Republic is in another EU member state and at least one creditor and a part of assets are situated in this EU member state, the Czech court terminates the insolvency proceeding (§ 427 IC) and the insolvency proceeding in the other EU member state is governed by its national law. An insolvency administrator who has been appointed by the order of the competent court of an EU member state (excluding Denmark, see Art. 249 para. 2, Art. 299 ECT), can exercise his powers also in another EU member state, i.a. in the Czech Republic. He must present only a certified copy of the document of appointment to which, on demand, an officially certified translation must be attached (§ 428 IC); the same rules apply to Czech insolvency administrators performing their duties in other EU member states. Court orders on commencement of insolvency proceedings and on appointment of the insolvency administrator in a proceeding where the debtor has an establishment in the Czech Republic must be published in the Czech Republic. The proceeding is within the jurisdiction of the court in whose district the establishment is situated; the information

must be published immediately after it has been submitted by the insolvency administrator or another organ which is authorised under the national law of the state where the order was issued (§ 429 IC). The court informs the creditors (§ 430 IC).

In the IC, there is no regulation on insolvency proceedings conducted in Denmark and outside the EU.[205] The principle of limited universality (previously regulated in § 69 para. 1 BCL) still applies to the question whether and to what extent seizure of debtor's assets in connection with insolvency in one country influences the execution proceedings or a concurrent insolvency proceeding in another country. If there is no bilateral treaty with Denmark and states outside the EU, the Czech insolvency proceeding concerns also the movable property of the debtor situated abroad. Whether the seizure in connection with insolvency is applicable to the immovable property of the debtor situated abroad was subject to debate under the BCL.[206] The universality of foreign proceedings (Denmark and states outside the EU) is probably still accepted in so far as the movable property of the debtor situated in the Czech Republic is transferred to the foreign court upon application, unless it is subject to an insolvency proceeding in the Czech Republic.[207] What rules apply to the immovable property remains unclear under the IC.

[205] The respective provision of § 69 para. 1 and 2 BCL was abolished. This is considered as a "substantial defect of the new law"; see Richter, ibid, p. 773.

[206] Contra F. Zoulík, Zákon o konkursu a vyrovnání (Law on Bankruptcy and Composition, BCL), 1998, § 69 BCL, p. 257; pro J. Marsíkova / J. Zelenka, Zákon o konkursu a vyrovnání (Law on Bankruptcy and Composition, BCL), 2002, § 69 BCL, p. 1034.

[207] The respective provision of the BCL (§ 69 para. 2 BCL) contained the rule that prevented the obtaining of further preferential rights to the assets situated in the Czech Republic. The return of movable assets in the case of a foreign proceeding (according to the Czech law) will probably further depend on reciprocity; the assets are returned after the satisfaction of creditors who are entitled to separation of assets provided that their rights emerged before the application was submitted.

j) Criminal Offences in Connection with Bankruptcy

The IC contains no provisions regulating criminal offences in connection with bankruptcy. Criminal offences under the Czech Criminal Code,[208] which have not been amended in connection with the enactment of the new IC, have had very little impact in practice and, therefore, were even referred to as "dead law".[209] Numerous cases of mismanagement and personal enrichment of individuals and groups in the last years[210] have raised the awareness, but no practical measures have been taken to combat economic crime. The elements of crime are not defined with sufficient precision. Additionally, new problems emerged after the IC was adopted: e.g. a serious impediment to or frustration of the actions of the "bankruptcy administrator" is a criminal offence under § 126 para. 1 CrimC, but, under the new law, the position of the "bankruptcy administrator" was replaced by the "insolvency administrator". Bankruptcy administrators continue to exercise their duties only in insolvency proceedings which were commenced before 1 January 2008. The lawmaker has not determined whether this provision of the CrimC should apply also to insolvency proceedings commenced after 1 January 2008. Similarly, § 126 para. 2 CrimC refers to the "bankruptcy petition" (violation of the obligation to file the "bankruptcy petition"), whereas proceedings under the new IC are initiated by an insolvency petition. Since the terms in the CrimC have not been changed and the criminal law is based on the principle of prohibition of analogy, many provisions can not be applied to insolvency proceedings under the new IC.

However, § 256 CrimC (frustration of creditor's satisfaction or detriment to a creditor) is still applicable, since there is no reference to a certain procedure. The same is true of § 256a CrimC (preferential treat-

[208] Criminal Code (Trestní zákon, hereinafter referred to as CrimC), Law no. 140/1961 Sb.

[209] See M. Löff, WiRO 2002, p. 300 et seq., 305; the cause is apparently the imprecise formulation.

[210] E.g. the case of the judge Berka from Ústí nad Labem of 2003 was discussed in the mass media. The judge conducted unlawful insolvency proceedings in conjunction with administrators and experts, in the result of which financially sound enterprises were sold to the accomplices at inadequately low prices.

ment of a creditor) and § 256b CrimC (deliberate or grossly negligent bankruptcy). In addition, some criminal offences are typically committed shortly before and in connection with an insolvency proceeding, e.g. violation of accounting rules (§ 125 CrimC), misuse of business information (§ 128 CrimC), embezzlement (§ 248 CrimC), fraud and credit fraud (§§ 250, 250b CrimC).

5. Summary and Perspectives

The new IC which will take effect on 1 January 2008 has fundamentally changed and simplified the competence rules and the rules of procedure as compared to the BCL. It is of special importance that the new IC contains a uniform commencement procedure which can be continued as liquidation, reorganisation or discharge procedure. If pre-conditions of reorganisation or discharge procedure are not fulfilled, the proceedings, as a rule, result in a liquidation procedure. The liquidation procedure generally leads to winding-up of legal entities and their deletion from the register either after the realisation of assets or due to insufficient assets – in so far, the principle has not changed. In contrast, reorganisation and discharge procedures are new and aimed at the debtor's recovery, whereas creditors' claims are discharged according to the reorganisation or discharge plan. Special provisions apply to banks and insurance companies concerning the stage after the commencement procedure.

New provisions on the election and control of insolvency administrators mean a substantial improvement. However, the rules on the transitional period of two and six years are problematic and rightly regarded as a "legislative hazard"[211], since they delay the reform in an important

[211] So T. Richter, „Insolvenční zákon: od vládního návrhu k vyhlášenému zn . ní", Právní rozhledy 2006, P. 767.

area. The role of the court has become less prominent, whereas the power of the administrator and of creditors' organs increased. Drawbacks of the IC are the imprecise definition of insolvency and imminent illiquidity as well as lack of regulation of international insolvency proceedings in connection with states outside the EU and Denmark. Lack of co-ordination of the texts of the IC with the CrimC is problematic. The new IC has not been proved in practice. There is a hope that the duration of proceedings can be further shortened and the transparency can be increased.