

# IFLR

INTERNATIONAL FINANCIAL LAW REVIEW

# INSOLVENCY AND CORPORATE REORGANISATION SURVEY 2014



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**LATHAM & WATKINS**

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# IFLR

INTERNATIONAL FINANCIAL LAW REVIEW

Ivana Manovelo and Anita Krizmanic, Macesic & Partners

## Section 1: CREDITORS' RIGHTS

### 1.1 When may a company seek relief from creditors? Must a company be insolvent?

Bankruptcy proceedings are governed by the Bankruptcy Act, while reorganisation proceedings are governed by the Pre-bankruptcy Settlement Agreement Act. In both cases, bankruptcy and reorganisation, a company must be insolvent to seek relief from creditors. In principle, Croatian legislation is familiar with three insolvency tests: (i) illiquidity; (ii) incapacity to pay; and (iii) over-indebtedness.

### 1.2 Does an automatic stay against creditor action arise upon filing of a bankruptcy case?



The general principle is a stay on payments to creditors once the debtor becomes insolvent and throughout the insolvency period. However, the law prescribes exceptions to this principle, and allows payments that are necessary for keeping the business running (such as electricity, water supplies and other operative costs). In bankruptcy proceedings, such payments are called bankruptcy mass obligations.

### 1.3 Who administers the estate following commencement of a voluntary bankruptcy case?



In bankruptcy proceedings, the estate is administered by the bankruptcy trustee appointed by the court. In reorganisation proceedings, the estate is administered by the settlement committee appointed by the Minister of Finance and/or the settlement trustee appointed by the settlement committee.

## Section 2: DEBTORS' RIGHTS

### 2.1 Does the debtor have an exclusive right to propose a reorganisation plan?



Under the Pre-bankruptcy Settlement Agreement Act, only the debtor is authorised (and has the obligation) to file a motion for reorganisation with the Croatian Financial Agency (FINA). The motion must include a proposed financial and operative reorganisation plan by the debtor. If the debtor fails to submit the reorganisation plan within time limit set by FINA, the pre-bankruptcy settlement agreement proceeding shall be terminated.

### 2.2 What are the voting requirements for approval of a plan?



For voting purposes, the creditors may be grouped into at least three categories (but there may be more if necessary): (i) state-owned companies and public administration; (ii) financial institutions; and (iii) other creditors. The reorganisation plan is adopted if accepted by the creditors whose claims amount to more than half of total claims in each group of creditors, or if accepted by the creditors whose claims amount to two-thirds of total claims, regardless of the group.

### 2.3 May a plan be approved over the objection of a creditor or a class of creditors (ie does the concept of a cram-down exist)?



Reorganisation plans may be approved over the objection of a class of creditors, if creditors whose claims amount to two-thirds of total claims, regardless of the class, vote in favour of the plan. It is often the case that claims of one or two classes of creditors (usually financial institutions and tax administrations) amount to more than two-thirds of total registered claims, and therefore their votes decide on the reorganisation plan. A pre-bankruptcy settlement agreement may be imposed on other creditors (such as suppliers) even though they may have objected to the reorganisation plan.

### 2.4 Is post-petition financing able to receive super-priority status?



Post-petition financing is not regulated by Croatian reorganisation law. In some of the recent major reorganisation cases, this has proved to be quite a downside, because without new sources of financing the reorganisation process has failed.

### 2.5 Can the debtor sell all or a portion of its assets through a going concern reorganisation plan or otherwise?



In the pre-bankruptcy settlement agreement proceedings, the reorganisation plan may include the sale of some of the debtor's assets. However, the sale of all debtor assets is not possible, because in that case the business could not be continued. All debtors' assets are sold in the bankruptcy proceedings. Usually, the assets are sold through public bidding.

Credit bidding is allowed; however, Croatian insolvency law is not familiar with stalking horse bids.

### 2.6 What are the duties of directors of an insolvent company?

Once the company becomes insolvent, directors must take all measures to make the company solvent again. If these measures fail and the pre-bank-

ruptcy settlement agreement proceeding is initiated, a settlement trustee is appointed. The settlement trustee supervises and approves the director's decisions, company management, and (in particular) financial operations.

### Section 3: CONTRACTS AND SUBORDINATION

#### 3.1 How are executory contracts treated?



If the debtor and the contractual counterparty did not fully or partially fulfil a bilateral contract at the time of opening the bankruptcy proceedings, the bankruptcy trustee may fulfil the contract instead of the debtor and request the counterparty to fulfil his obligations. If the bankruptcy trustee refuses to fulfil the debtor's obligations, the other party may only file the claim for non-fulfilment as the bankruptcy creditor.

#### 3.2 Is contractual subordination enforceable?



The main principle under the Croatian Bankruptcy Act is that contractual subordination is not allowed because claim priorities are provided by the law.

The exception to the general rule is provided in the Croatian Credit Institutions Act as *lex specialis*, which allows contractual subordination in the bankruptcy proceedings of credit institutions. Creditors and credit institutions may enter into contracts that stipulate a creditor's claim may be settled upon settlement of all others creditors' claims in bankruptcy proceedings.

### Section 4: OTHER MATERIAL CONSIDERATIONS

#### 4.1 What other major stakeholders (eg governmental or regulatory institutions) could have a material impact on the outcome of the reorganisation?

The reorganisation proceeding is an administrative proceeding before FINA (Ministry of Finance). The Ministry of Finance appoints the council in the first instance proceeding, while at the same time it decides on creditors' appeals against first instance council's decisions. On the other hand, the Ministry of Finance is one of the creditors in the reorganisation proceeding. In other words, the Ministry of Finance decides on its own claims and at the same time, as the body of reorganisation proceedings, governs the proceedings. Such legislative solutions question the right of other creditors to independent and equal proceedings.



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#### About the author

Ivana Manovelo advises domestic and international clients on insolvency, restructuring, energy, commercial, banking and finance and civil matters. Recently she has co-represented a large international oil trader in a high-profile case before an international court of arbitration in a complex energy dispute. She has acted as a team leader and member in a number of financing projects for foreign banks.

Manovelo joined the law offices of Macesic & Partners immediately after graduating law in 2006. She is a member of Croatian Bar Association and the court interpreter for English. She is a contributor to a number of publications, including the World Bank's *Doing Business, International Law Office – Energy & Natural Resources Newsletter, Getting the Deal Through, The Lawyer, Lawyer Monthly* and *International Comparative Legal Guide*.



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Anita Krizmanic advises clients on bankruptcy and restructuring, as well as transportation and insurance matters. In complex bankruptcy and restructuring, she acts as a team leader for the office. She also provides counsel in commercial, corporate, financing and other related matters, predominantly to international clients. Krizmanic acts as a correspondent for international law firms in various international transactions, representing clients before all courts in complex disputes. She is listed as the correspondent in Croatia for Protection and Indemnity (P&I) clubs.

Krizmanic joined the law offices of Macesic & Partners in 2000. She is a member of the Croatian Bar Association, and a local partner and contributor of *Doing Business*, a co-publication of the World Bank and the International Finance Corporation for resolving insolvency issues (2009-2014), and other publications such as *Lawyer Monthly* and *International Comparative Legal Guide*.

Key	CREDITORS' RIGHTS		DEBTORS' RIGHTS					CONTRACTS & SUBORDINATION	
	Automatic stays	Administrator	Reorganisation plan	Voting requirements	Cram-downs	Post-petition financing	Asset sales	Executory contracts	Contractual subordination
<p><b>Key</b></p> <ul style="list-style-type: none"> <li> Generally favourable to creditors</li> <li> Neutral or neither favourable to creditors or debtors</li> <li> Generally favourable to debtors</li> <li> Creditors' rights</li> <li> Debtors' rights</li> <li> Contracts and subordination</li> </ul>									
<b>Austria</b> Binder Grösswang									
<b>Brazil</b> Felsberg Advogados									
<b>Croatia</b> Macesic & Partners									
<b>Cyprus</b> Andreas Neocleous & Co									
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