

## DIRECTORS' DUTIES – CRISIS MANAGEMENT CHECKLIST – SERBIA

WHAT DUTY?	WHAT DOES IT MEAN?	WHEN DOES IT APPLY?
<p><b>MAINTENANCE OF SOLVENCY</b></p> <p><b>MANAGEMENT OF BUSINESS RISKS</b></p>	<ul style="list-style-type: none"> <li>• directors need <b>to manage</b> and continuously assess <b>credit risk, market risk, operational risk</b> and <b>liquidity risk</b></li> <li>• best efforts to <b>preserve</b> company's <b>liquidity</b> and <b>sound financial structure</b></li> <li>• <b>intentionally causing insolvency</b> (e.g. through excessive borrowing, irrational use of company's funds etc) may constitute a <b>criminal offence</b></li> <li>• <b>intentional damaging of creditors</b> via <b>unequal treatment</b> may constitute a <b>criminal offence</b> <ul style="list-style-type: none"> <li>◦ <b>CAVEAT</b>: liquidity support via <b>shareholder loans</b> if a company is in "crisis" may entail <b>equitable subordination</b> of such loans and susceptibility to claw-back in potential subsequent insolvency</li> </ul> </li> </ul>	<p><b>Pre-crisis and post-crisis</b></p>
<p><b>FILING FOR INSOLVENCY</b></p> <p>[Not a duty but an option]</p>	<ul style="list-style-type: none"> <li>• insolvency proceedings can be initiated by a <b>creditor, liquidator</b> or <b>debtor itself</b></li> <li>• <b>no express obligation</b> on the debtor's management to file for insolvency</li> <li>• a <b>fraudulent insolvency petition</b> with an aim to avoid the settlement of creditors' claims may constitute a <b>criminal offence</b></li> <li>• a creditor applying for the opening of insolvency proceedings is required to <b>prove the existence of its claim</b> and the fact that the debtor is <b>unable to settle it</b></li> <li>• after the court determines whether there are <b>valid grounds for insolvency*</b>, the court decides on the opening of insolvency proceedings (<i>rešenje o otvaranju stečajnog postupka</i>)</li> <li>• depending on the decision of the debtor's creditors, the insolvency proceedings may be carried out either in form of <b>bankruptcy</b> (<i>bankrotstvo</i>) or in form of <b>reorganisation</b> (<i>reorganizacija</i>)</li> </ul>	<p><b>Before opening of insolvency proceedings</b></p>
<p><b>RESTRICTED TRANSACTIONS</b></p> <p><b>AVOIDANCE RULES</b></p>	<ul style="list-style-type: none"> <li>• although there are no specific restrictions regarding the transaction in vicinity of insolvency (apart from the general rule of duty of care stated above), certain <b>pre-insolvency actions</b> may be <b>challenged</b> by the insolvency administrator or creditors (<i>pobijanje pravnih radnji stečajnog dužnika</i>)</li> <li>• <b>congruent settlement</b> - transactions providing security interest/settlement to a specific creditor, which the company undertook in the period of <b>six (6) months</b> before the insolvency petition is filed, may be <b>challenged</b> if the debtor was <b>insolvent</b> at the time and if the creditor <b>was or ought to have been aware</b> of debtor's insolvency</li> <li>• <b>incongruent settlement</b> - transactions providing security interest or settlement to a creditor who was <b>not entitled to request them</b>, or was entitled to request them but <b>not in the manner and at the time they were provided</b>, may be challenged if they were entered in a period of <b>twelve (12) months</b> before the insolvency petition is filed</li> <li>• <b>directly detrimental transactions</b> - transactions entered into within a period of <b>six months</b> before the filing of the insolvency, <b>which directly damage the creditors</b>, may be challenged, <i>inter alia</i>, if the debtor was <b>insolvent at the time</b> and the counterparty <b>was aware</b> of the debtor's insolvency</li> <li>• <b>intentionally detrimental transactions</b> - transactions entered into in bad faith, with the <b>intent to damage</b> one or more creditors, within a period of <b>five years</b> before the filing of the insolvency petition may be challenged if the debtor's counterparty <b>was aware of the debtor's intent</b>. Likewise, transactions concluded <b>without compensation or against negligible compensation</b> may be challenged if made in the same period of 5 years prior to the insolvency petition</li> <li>• <b>automatic challenge</b> - transactions or actions providing <b>security interest</b> to a creditor within <b>60 days</b> before the opening of insolvency proceedings shall not be valid and such creditors shall not be considered secured creditors</li> </ul>	<p><b>Before/during insolvency proceedings</b></p>

\* A **corporate** debtor is deemed insolvent in case of

- **continuing illiquidity** (*trajnja nesposobnost plaćanja*); this ground, which is set as an objective test, occurs if the debtor cannot repay its debts within 45 days of their maturity date, or completely suspends payments for at least 30 days. There is an assumption of continuing illiquidity if a creditor could not satisfy its claim in an enforcement procedure. Both the creditors and the debtor may initiate insolvency on the grounds of illiquidity
- **threatening illiquidity** (*preteća nesposobnost plaćanja*), defined as a forecast that the debtor will not be able to service its debt when due, as evidenced by the debtor itself. Therefore, this is a subjective test, given that it relies on the debtor's forecast. Consequently, only the debtor (and not the creditors) can initiate insolvency on this ground
- **over-indebtedness** (*prezaduženost*), which means that a debtor's liabilities exceed its assets (balance sheet insolvency). There is no guidance in the law as to whether assets should be valued as a going concern or if liquidation value is relevant. Since only the debtor (and not the creditors) can initiate insolvency on this ground and the debtor's management is not obligated to file for insolvency, over-indebtedness is rarely used as an insolvency ground in practice. However, if in case of voluntary liquidation (voluntary dissolution) proceedings initiated by the counterparty's shareholders the liquidation administrator were to establish that the assets of the liquidated company cannot cover its liabilities, the liquidator would have to file for insolvency
- **breach of the reorganisation plan or fraudulent/illegal adoption of such plan** (*nepostupanje po usvojenom planu reorganizacije i ako je plan reorganizacije izdejtvovan na nezakonit ili prevaran način*).

## RESTRUCTURING TOOLBOX – CRISIS MANAGEMENT CHECKLIST – SERBIA

WHAT TOOL?	WHAT DOES IT DO?	WHAT IS REQUIRED?
<p><b>OUT-OF-COURT (INFORMAL) CONSENSUAL RESTRUCTURING</b></p>	<ul style="list-style-type: none"> <li>• arrangement between <b>company</b> and <b>its creditors</b> (typically financial creditors) where:               <ul style="list-style-type: none"> <li>◦ creditors agree to postpone due date and enforcement of payment claims for limited period of time such that terms of restructuring can be agreed ("<b>stand-still</b>"); and</li> <li>◦ if negotiations are successful, creditors and company enter into restructuring agreement</li> </ul> </li> <li>• freedom of contract:               <ul style="list-style-type: none"> <li>◦ parties are <b>free to shape contents</b> of standstill/restructuring agreements</li> <li>◦ no cram-down of dissenting creditor (unless such mechanism is contractually agreed)</li> <li>◦ <b>affected parties</b> (company and relevant creditors) <b>must agree</b> to a stand-still and restructuring agreement</li> </ul> </li> </ul>	<p style="text-align: center;"><b>Consent by the relevant creditor</b></p>
<p><b>OUT-OF-COURT (FORMAL) CONSENSUAL RESTRUCTURING</b></p>	<ul style="list-style-type: none"> <li>• legal tool available under the Consensual Financial Restructuring Act, with the Serbian Chamber of Commerce (the "<b>SCC</b>") acting as institutional mediator</li> <li>• so far, the number of financial restructuring cases before the SCC was <b>negligible</b></li> <li>• aimed at enabling <b>distressed Serbian companies</b> to <b>avoid insolvency</b> by entering into a formal financial restructuring agreement with creditors outside compulsory settlement proceedings</li> <li>• debtor companies are able to take advantage of an <b>optional stand-still agreement</b> (effective only against accepting creditors), which includes <b>moratorium/suspension of enforcement and forced collections</b></li> <li>• <b>(final) financial restructuring agreement</b> is a formal and binding agreement between the company and participating creditors in which different restructuring/forbearance measures may be included (e.g. grace period/payment moratoriums, extension of maturity/term, rescheduled payments, interest rate amendments, debt-to-equity swap, claim/debt assignment, new credit facilities, additional security, etc.)</li> <li>• <b>no cram-down of dissenting creditors</b>, i.e. 100% consent of participating creditors is required</li> </ul>	<ul style="list-style-type: none"> <li>• <b>At least two creditors must be banks and be willing to negotiate</b></li> <li>• <b>Request for financial restructuring to SCC may be submitted either by debtor or one or more creditors</b></li> </ul>
<p><b>COVID-19 MEASURES</b></p>	<ul style="list-style-type: none"> <li>• <b>opt-out moratorium on financial debt (only in relation to resident debtors and Serbian banks/leasing entities):</b> <ul style="list-style-type: none"> <li>◦ the resident companies may (voluntary) suspend debt service for loan/leasing/factoring instalments due after 30 March 2020 for at least 90 calendar days, and/or for the duration of the state of emergency due to the pandemic</li> <li>◦ during this period, the creditor banks/leasing entities may not charge any default interest on due outstanding claims, shall not initiate enforcement or forced collection procedures or take any other legal action to collect receivables</li> </ul> </li> <li>• additional legal tools introduced due to the COVID-19 pandemic include: direct financial assistance, tax policy, liquidity preservation</li> <li>• liquidity preservation measures for SMEs (large corporates excluded):               <ul style="list-style-type: none"> <li>◦ subsidised loans in RSD in the maximum amount of up to RSD 120 million (approx. EUR 1 million)</li> <li>◦ liquidity/working capital EUR or RSD bank loans backed by a government guarantee</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• <b>Direct financial assistance: application to the Tax Authority, based on the number of employees</b></li> <li>• <b>Postponement of tax: filling in the payment date in the tax return form for the relevant month as 4 January 2021 (via electronic services, by end of April/May/June)</b></li> <li>• <b>Loans for liquidity preservation: application to the Development Fund/chosen bank</b></li> </ul>
<p><b>(PRE-PACKED) REORGANISATION PLAN</b></p>	<ul style="list-style-type: none"> <li>• as an alternative to straightforward bankruptcy, a restructuring of the company's debts can be achieved through <b>reorganisation</b>, as a formal rescue procedure in insolvency</li> <li>• the debtor may file a <b>reorganisation plan</b> together with an insolvency petition (a <b>pre-packaged</b> reorganisation plan). If the company has worked out the pre-packaged plan together with the creditors, the debtor may avail itself of expedited reorganisation proceedings</li> <li>• a reorganisation plan however may also be proposed <b>after an insolvency case has been opened</b> – by the debtor, the insolvency administrator, or the creditors (subject to certain thresholds)</li> <li>• a reorganisation plan is approved if <b>each creditor class votes in favour of its adoption</b>; a creditor class approves the plan by a favourable vote of its members who hold more than 50% of the amount of claims in that class. If just one creditor class does not approve the reorganisation plan, the plan will not be adopted (<b>no cross-class cram-down</b> possible)</li> <li>• after the adoption of a reorganisation plan, all creditors' claims and rights are regulated solely by the reorganisation plan, which represents an <b>enforceable document</b></li> <li>• if a reorganisation plan is adopted, management retains control, subject to provisions of the reorganisation plan (typically, company's management is <b>overseen by independent expert and creditors committee</b>)</li> </ul>	<ul style="list-style-type: none"> <li>• <b>Application with court</b></li> <li>• <b>Consent of each creditors' class</b></li> </ul>

*Legal notice: the above summary, prepared by Schoenherr Attorneys at Law, is for informational purposes only and does not constitute legal advice which should be sought in relation to specific situations. In case of questions, please contact [p.kojdic@schoenherr.rs](mailto:p.kojdic@schoenherr.rs); [d.obradovic@schoenherr.rs](mailto:d.obradovic@schoenherr.rs); [j.arsic@schoenherr.rs](mailto:j.arsic@schoenherr.rs)*