

# Assessing Your Business Viability and Director Risk Guide – Slovak Republic

September 2022



## Contents

Directors' Duties .....	3
Summary of Government Financial Support to Businesses.....	5
Assessing Viability and Business Risk.....	7
Managing Supply Chain Issues and Risk.....	10
Changes to Insolvency and Restructuring Laws .....	15
Our Team .....	20

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# Directors' Duties

## Considerations for Directors When a Company Is in Financial Difficulty

This quick guide summarises the duties that directors of companies incorporated in the Slovak Republic are subject to, and how those duties change when the company is insolvent or at risk of being insolvent.

It also gives an overview of the personal risk to directors when the company is in financial difficulty.



### Directors' Duties When Solvent

- Each director has a fiduciary duty to act with the diligence of a prudent businessperson.
- Directors must exercise their duties in compliance with applicable laws, the company's articles of association and bylaws, any instructions issued at shareholder meetings, and the obligations under their agreement.

### Financial Distress

### Directors' Duties When Insolvent, or at Risk of Being Insolvent

- A company will be bankrupt if it is (a) insolvent, or (b) over-indebted under a "balance sheet test," where it has at least one creditor and the company's liabilities (actual, contingent and prospective) exceed its assets.
- If a company is bankrupt, directors are ordinarily obliged to file for the company's bankruptcy within 30 days of the date the directors knew of the company's over-indebtedness, or when they ought to have known about it, if they were exercising professional care.
- Apart from the above, the company may also find itself within "crisis." The company is in crisis when it is either bankrupt or the company is in danger of going bankrupt, i.e. when the ratio of company's equity to company's liabilities is less than 8 to 100. In such case, the directors are obliged to act with due diligence and do everything to overcome the crisis. The company in crisis has various statutory obligations, including an obligation not to enter into any transaction where the company would provide disproportionate consideration to the company's shareholder.

It is important for directors to understand their directors' duties, as well as how their actions and the decisions the board makes when the company is in financial distress, could expose them to personal liability, criminal sanction and risk.

Below is an overview of the potential claims and potential exposure for directors if the company is insolvent or at risk of insolvency.

## Liability to Creditors

If a director fails to file a petition on time, they may be obliged to compensate creditors for the damage suffered by creditors in relation to the creditors' receivables deficit due to insufficient assets at the end of the bankruptcy process, or for a different amount of proved damage.

## Obligation to Pay Contractual Penalties

If the petition is not filed on time, the directors will be obliged to pay a contractual penalty of €12,500 into the bankruptcy estate.

## Fines

A director must cooperate and assist a bankruptcy trustee. Failure to do so renders a director liable to a fine of up to €165,000.

## Disqualification

If a court decides that a director breached the obligation to file for bankruptcy and is, thus, liable for damages, the relevant director will be disqualified from being a member of the statutory body or supervisory body, the head of a branch or a procurist (disqualified representative) for a period of three years from the effective date of the decision.

## Criminal Liability

Failure to submit a petition for bankruptcy proceedings in a timely manner may constitute a criminal offence.

Directors may be criminally liable if they do not fulfil their statutory duties. This may result in a prison sentence and/or other punishments available under the Criminal Code.

## Preference

If a company is in financial difficulties, directors may be committing a crime if they make preferential payments to creditors.

## Practical Tips to Mitigate Liability

- Maintain good lines of communication on a regular basis with suppliers, logistics providers and end customers as to what they are doing and the steps they are taking to mitigate the impact of the virus on the business.
- Agreeing extended payment terms could be considered as a legitimate tool for maintaining the business and avoiding illiquidity of the company. The Slovak Commercial Code allows parties to agree payment terms longer than 60 days only if it is expressly agreed and such payment terms are not grossly unfair to the creditor. Public sector entities can only extend for a maximum of 60 days.
- Consider if the company can pay in instalments.
- Prepare and review short-term and mid-term liquidity forecasts to assess whether the company is illiquid and, therefore, obliged to file for insolvency, and to help determine whether the company can survive the crisis.
- Seek professional advice, if cash flow issues cannot be managed.
- Keep records of key decisions. This will help the directors if the company does not survive and they later have to justify their decisions.
- Consider whether the company can make use of available government support, as not doing so may be considered a failure to act like a prudent businessperson and result in liability (see below for a link to the financial support measures available).
- Directors should consider convening the general meeting to consider appropriate measures to deal with current issues. However, currently, only public joint-stock companies are able to vote remotely and an amendment to the Commercial Code is, therefore, required.
- Directors should avoid preferential treatment of creditors.

# Summary of Government Financial Support to Businesses

This guide summarises the financial support measures that are available to the Slovak Republic businesses.

## Financing Facility Support

What help is available?	What does the help entail?	Which companies are eligible?	What are the criteria (if any) for applying?	How to apply	Availability
<b>Support during part-time work</b>	<p><b>Financial contribution to cover employer's costs with respect to employee salaries.</b></p> <p>Generally, the aid is designed to cover 60% of the average hourly earnings of the employee. However, the maximum financial contribution is capped at <b>EUR 7.53</b> per hour the employee worked.</p>	<ul style="list-style-type: none"><li><b>Slovak employers.</b> For particular details please see the next column.</li></ul>	<ul style="list-style-type: none"><li>Following general criteria shall be met in order for an employer to be eligible to apply for the aid:<ul style="list-style-type: none"><li><b>Part-time work:</b> The employer shall be in the part-time work regime, i.e. it cannot assign more than 10% of the established weekly working time due to occurrence of an external factor (e.g. COVID-19 pandemic, War).</li><li><b>Timely payment of mandatory public payments:</b> The employer shall have duly settled all public payments related to employees (insurance, taxes, pension contributions) for an employment period of 24 months prior to the month, for which the employer requests the aid.</li></ul></li></ul>	<ul style="list-style-type: none"><li>By filling out and submitting an official form <a href="#">here</a>.</li></ul>	<ul style="list-style-type: none"><li>The Act No. 215/2021 Coll. on support during part-time work and on the amendment of certain laws expects to either terminate by the end of 2023 or by exhausting the assigned EUR 20 mil.</li><li>The aid's availability is also limited by the existence of an external factor that shall meet following criteria:<ol style="list-style-type: none"><li>temporary nature;</li><li>which the employer could not influence or prevent; and</li><li>which has a negative effect on the allocation of work to employees by the employer.</li></ol></li><li>Further to the above, the aid shall be provided to the employer only for a maximum of six months in total for 24 consecutive months.</li></ul>

What help is available?	What does the help entail?	Which companies are eligible?	What are the criteria (if any) for applying?	How to apply	Availability
			<p>(iii) <b>Illegal employment:</b> The employer shall not have violated the prohibition of illegal employment at least two years prior to requesting the aid.</p> <p>(iv) <b>Agreement:</b> The employer shall have an agreement with trade unions or, if there are none, with the concerned employee, subject of which would be that the employer requests the aid.</p> <p>(v) <b>Time bar:</b> The employer shall request the aid at the latest one month following the month for which the aid is requested.</p> <ul style="list-style-type: none"> <li>• There are also additional criteria applying to employees for which the aid is quested:           <ul style="list-style-type: none"> <li>(i) the employment shall have lasted at least one month;</li> <li>(ii) the employee is not in notice period;</li> <li>(iii) the employee spent its vacation for the prior year and has exhausted positive working time account (if applicable), and the employer cannot assign the employee to another work;</li> <li>(iv) the employer does not draw on other aid for compensating the concerned employee's salary.</li> </ul> </li> </ul>		

# Assessing Viability and Business Risk

## Key Points for Slovak Republic Businesses to Consider

The purpose of this quick guide is to help organisations focus on key issues that impact viability and sustainability



### Cash Flow and Financing

Directors should prepare new cash flow forecasts for best and worst case scenarios (i.e. further restrictions impacting the business and economy), considering any expected changes to supply and demand, any changes to operational costs and factoring in any deferrals of historic liabilities, and any new debt which has been taken on. Forecasts and projections should be continually reviewed and updated to reflect changes in the market, and lessons learnt.

#### Repayment of borrowing

- Aggressive debt recovery
- Use of government financial support
- Other additional borrowing from existing lenders
- When and how will payments be met?
- Is there a need to restructure debt?

#### Deferred payments

- Paying deferred payments/rent/suppliers/tax (if applicable)

#### Forbearance

- Repaying existing lenders – forbearance may end and payments need to resume
- Availability of financial support

#### Employees

- Is a redundancy programme going to be necessary? If so, how should this be managed?

#### Rent

- Rent holiday/reduction agreed?
- Ability to meet future (and missed) rent payments
- Restructure future rent
- Dealing with rent arrears

#### Restrictions

- Impact of remaining worldwide COVID-19 restrictions on supply chain and demand

#### Suppliers

- Catching up on payments to suppliers
- Agreeing and abiding by new terms
- Ability to meet future obligations – increased costs
- Aggressive debt recovery action

#### Cash Flow Pressures

#### Debtors

- Have debtor days slipped?
- What action can/should be taken to address any potential bad debt issues?
- Reduced credit terms/payment on delivery/increased prices/credit insurance



## Supply and Demand

### Operational

- Identify key suppliers: business critical and projected spend
- Able to meet demand
- Changes to delivery timescales
- Alternative sourcing? Costs consequences?
- Material/staffing shortages
- Impact of COVID-19 restrictions on suppliers

### Pricing and payment

- Changes to payment terms/cost (e.g. cash on delivery)
- Financial health of suppliers
- Ability to obtain credit

### Stock

- What stock is available?
- Are goods stranded at port or elsewhere in distribution network?
- Right to reject
- Import/export tariffs and taxes

### Termination of existing contracts

- Force majeure
- Material adverse change
- Termination rights

### De-risking the supply chain for the future

- Enhanced IT due diligence
- Business continuity measures
- Review of whole supply chain
- Look to achieve greater diversity in supply chain
- Potential investments in technology



### Shape of demand

- Has demand returned? Increased?

### End-user/customer

- Decrease in consumer confidence
- Cash-strapped customers

### Changes to product and offering

- Changes to consumer habits (e.g. e-commerce and importance of home delivery)
- Increase in appetite for online suppliers and delivery services

### Pricing and payment terms

- Review pricing structure, are pre-COVID-19 margins still achievable?
- Consider credit terms and customer insolvency risk
- Is credit insurance still available?
- Is invoice discounting an option to improve working capital?

### Government/Other Restrictions

- Impact of restrictions in the UK or countries where end users/customers are based e.g. self-isolation and reduced operating capacity

## Employee Considerations

### Business requirement/need

- Does the business need the same number of employees in light of any changes to supply/demand/business model? Are redundancies necessary?
- Re-allocation of resource according to business plan

### Availability/costs

- Impact on employees (fear of infection, childcare responsibilities or self-isolation etc.)
- Will there be any permanent changes to working patterns/habits that impact operational costs? (i.e. increase in homeworking and decrease in office space)
- Psychological support – assisting employees to adapt

### Long-term changes to contracts and remuneration

- Flexible remuneration plans
- Agree reductions in salary and bonuses

## Macro Economics

- Expected interest rate rises
- Rising inflationary costs (energy, food, etc.)
- Fuel inflation/rationing
- Impact of sanctions on Russia
- Shortage of or increased costs of major commodity supplies
- Cautious end users/customers
- Supply chain cost increases (shipping, re-routing)

## Operational Costs

### Licences

- Inability and capacity of named individuals/licence holders/trained individuals to carry out role (e.g. long-term absences, sickness, self isolation)
- Licence amendments to reflect changed trading arrangements (e.g. changes to hours or activities)

### Increased health and safety costs

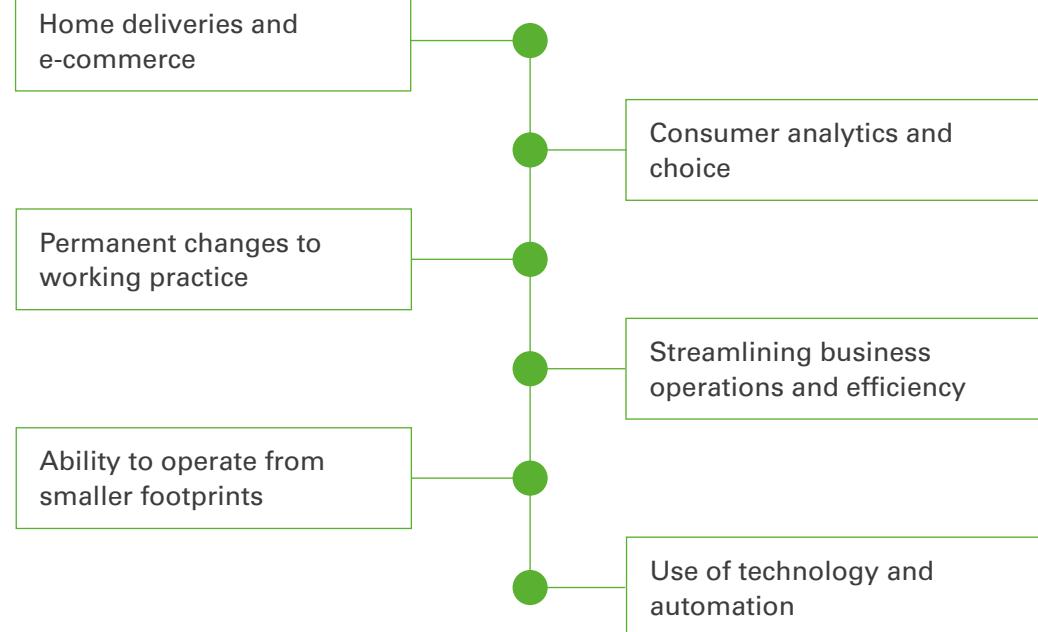
- Strategies for managing COVID-19 risk in the workplace
- Sanitisation and cleaning programmes

### Changes in operational practices and procedure

- Changes to real estate footprint to accommodate changes to employee and working practices (e.g. reduced office space or larger warehouses)
- Investment in technological capabilities to accommodate changes
- Greater automation of processes (or parts of processes)

## Opportunities

Many businesses have already made changes to their day-to-day operations, many changes will be permanent or will require further adaption to meet new government guidelines but all will impact on future cash requirements.



# Managing Supply Chain Issues and Risk

There is an almost infinite variety of issues that can arise within the supply chain, from minor irritants that make business just that bit more difficult to transact than is necessary, to catastrophic failures. We have selected a few of the more high-profile current issues for consideration.

## COVID-19 and Resulting Supply Chain Challenges

The effects of the COVID-19 pandemic on the supply chain continue to be felt by businesses, driving product/service shortages, transport problems and unpredictable cost increases. In particular, parties should carefully consider (among other things):

- Supply chain mapping (if not already completed)- to identify risk areas, particularly further down the supply chain.
- COVID-19 managing related provisions in contracts- whether as general terms or to address specific identified issues (e.g. delays, materials/staffing shortages, travel restrictions and costs).
- Increased risk of significant changes in inflation rates (and variations in these between countries) and the extent to which these may be passed down the supply chain.
- Compliance with provisions that require staff to visit sites in particular territories.
- Increased risk of supply chain insolvencies, cost increases, skills and asset shortages (including warehouse space, access to certifying bodies and specialist service providers).



## Reducing the Risk of Insolvency in the Supply Chain

The current volatile financial and political landscape, combined with extensive reliance on outsourced supplies of critical systems and lean manufacturing processes, means that managing the risk of suppliers (and any of their suppliers) becoming insolvent has become even more important. Points to consider when seeking to reduce this risk include:

- Dual source wherever possible. Identify and monitor particularly carefully any areas where dual sourcing is not possible and plan how you would deal with the loss of any single-source supplier.
- Identify practical issues that could make it difficult to move to a new supplier (e.g. tooling held at the supplier's premises, certifications tied to a particular production line, reliance on proprietary supplier intellectual property) and put in place contractual protections or contingencies to deal with these.
- Ensure that exit plans have all been agreed and tested well before any potential contract termination event occurs.
- Ensure contracts are signed with the group company against whom financial due diligence has been performed and seek parent company guarantees where appropriate.
- Monitor and audit the supplier's financial health throughout the life of the contract. Include rights to obtain necessary information/access from the supplier, as well as obligations on the supplier to do the same with their suppliers and to report to you (and check that they do this). Be vigilant for any early warning signs, such as late or missed deliveries or requests for money on account (where that is not usual practice).
- Consider including rights to terminate (to the extent legally permissible) and/or increased monitoring for material adverse change in the supplier's finances.
- Consider the use of escrow for key software programmes and risk assess any hosted or cloud-based solutions where escrow may not provide effective protection.
- Ensure that the insolvency provisions in contracts are up to date, appropriate for the jurisdiction and take effect early enough in the insolvency process.
- Review the contract, be aware of any retention of title provisions and assess their likely effectiveness.

## Mitigating the Impact of Global Trade Disputes

Trade tensions between global superpowers, notably the ongoing tensions between the US and China, as well as the impact of sanctions on Russia, have the potential to disrupt supply chains globally. Different companies will be affected by the imposition of/increases in tariffs, blacklisting of companies and other trade restrictions in different ways, but it is possible to take steps to mitigate risks, including:

- Mapping the whole of the supply chain to identify high-risk areas and put in place measures to address any identified risks and develop contingency plans for worst-case scenarios (including dual/multi-sourcing).
- Actively monitoring potential future trade policy developments in key territories. The last few years have seen tariff threats between trade blocks, including on steel and aluminium. Proactive monitoring enables you to:
  - Lobby for changes before the scope of tariffs has been determined, either directly or through industry bodies
  - Assess likely consequences for the supply chain and plan accordingly, including amending long-term contracts and making alternative sourcing arrangements, where appropriate
- Identify any levels of the supply chain that may suffer from trade blacklists and plan how each element could be removed in short order if required. In recent times, the US has added dozens of companies to its trade blacklist, including many Chinese chipmakers, Huawei, and Israeli NSO Group whose Pegasus spyware made headlines in 2021. Accordingly, businesses need to have a clear understanding of the sources of all components and plans to address their loss where appropriate.
- Reviewing existing agreements to assess risks and scope for passing these down the supply chain or terminating arrangements that are/become uneconomical or unlawful.
- Identifying and applying for available exemptions. For example, by the end of 2018, the US had granted almost 1,000 waivers from tariffs on Chinese goods. More recently, China has extended existing tariff exemptions from a list of 81 US products ranging from electric vehicle batteries to timber to shrimp.
- Looking for opportunities that may be presented by trade being diverted to third countries as a result of tariff impositions (while remembering that these opportunities may be temporary). For example, it has been estimated that the EU will be able to attract up to US\$90 billion of trade related to value chains as a result of US-China tariffs.



## Ensure Compliance With Data Protection Laws

The introduction of the General Data Protection Regulation (GDPR) brought new obligations for businesses, with significant fines for non-compliance being levied (e.g. Amazon- €746 million, H&M- €35 million). It has been followed by the California Consumer Privacy Act (CCPA), China's Personal Information Protection Law, the Brazilian Data Protection Law and the likelihood is that more countries will follow suit. With this in mind, in relation to the supply chain, companies should (if they have not already done so):

- Identify key territories in which the company's group is obliged to comply with local data protection laws, monitor changing requirements in those territories and ensure that compliance programmes take account of differing approaches between these key territories, in particular any data localisation requirements (e.g. in Russia and China).
- Review existing records of processing to ensure there is a clear understanding of what data is processed by the supply chain on the group's behalf, where it is processed and the procedures in place to ensure compliant processing by the supply chain.
- Reassess whether suppliers act as controllers or processors of company group data and update contracts as necessary to address this and to ensure all contracts include mandatory data protection clauses.
- Ensure that suppliers with access to company group data are regularly audited and monitored.
- Continue to monitor the effect of cases (notably the Schrems II decision on data transfers to the US) and enforcement action, and be ready to make changes to data hosting and transfer processes with suppliers and customers if required.
- Maintain and test breach response plans, to include dealing with breaches by suppliers, and ensure that supplier agreements contain appropriate breach notification and support commitments.

## Consider the Impact of Ransomware and Other IT Security Issues

Internal IT security has been a key risk area for businesses for some considerable time. However, we are now seeing an increased focus on the risks posed as a result of attacks on suppliers leading to loss of or interruption to critical supplies. Accordingly, in addition to addressing security of their own systems and of systems that connect to/interact with, parties should consider:

- Enhanced due diligence on IT security, disaster recovery and business continuity measures taken by critical suppliers.
- Including IT security, disaster recovery and business continuity commitments in contracts with all major suppliers and not just those who are providing IT services.



## Compliance With Anticorruption and Anti-bribery Laws

Anticorruption and anti-bribery laws gained heightened publicity following new legislation extending potential liability up and down the supply chain. Parties should:

- Establish, implement and enforce appropriate anti-bribery and anticorruption policies throughout their organisations and ensure that their contracts flow these requirements up and down the supply chain.
- Identify key risk areas (both in terms of geography and business function) and provide increased training, monitoring and audits for them.
- Draft and use appropriate anti-bribery/anticorruption provisions for contracts that provide a reasonable level of protection, but that procurement/marketing teams are realistically likely to be able to negotiate and police.
- Consider implementing whistleblowing policies across the supply chain, but take care to respect local restrictions (e.g. in France). Be aware of the EU Whistleblowing Directive 2021, which is likely to affect many EU-based businesses.
- Stay alive to advancements or changes in relevant anticorruption and anti-bribery laws, particularly failure to prevent tax avoidance and failure to prevent bribery. Where appropriate, seek external advice on these advancements, as violation could lead to significant reputational and financial damage.

## Environmental, Social and Governance

Environmental, Social and Governance (ESG) issues have come to the fore in recent months. Media and social activists are increasingly adept at identifying environmental and ethical issues arising within companies' supply chains and then tracing these back to the source.

We are also seeing more and more ESG-centred legislation targeted both at companies and their supply chains across Europe. This is only likely to increase, particularly following the conclusion of COP26. Legal teams can help support businesses' compliance efforts by:

- Designing ESG policies so that they have a particular focus on ESG issues most relevant to a businesses' industry or sector.
- Updating ESG policies regularly so they extend to cover key legislative changes promptly, and take account of policy and legislative changes that are on the horizon where appropriate.
- Help businesses stay on top of advances in the environmental law and policy (waste, water, air pollution, net zero targets, etc.) of countries in which they operate and possible implications.
- Incorporating into supply agreements a commitment from suppliers to comply with (and ensure that their own key suppliers comply with) the business' ESG policies and/or targets, or equivalent policies or targets approved by the business. It may also be prudent to include obligations to comply with (and provide the business with evidence to demonstrate compliance with) specific legislative requirements.
- Including ESG audit and reporting requirements in contracts and ensuring that these are exercised by the business and that the business has the right, if necessary, to terminate the contract for non-compliance (particularly where there has been some reputational damage).
- Checking that the business maintains adequate records to enable it to demonstrate compliance and the steps that it has taken to seek to achieve this.
- Utilising the data gathered internally and within a business' supply chain on ESG to inform future goal-setting.
- Ensuring that ESG commitments made by the business are not overly ambitious. Consumer and shareholder groups have already started to investigate the possibility of pursuing companies for failure to comply with published ESG statements.

## Ensuring Product Quality and Avoiding Expensive Product Recalls

Consumer protection and product safety legislation are becoming increasingly prescriptive. Suppliers must not only ensure their products are safe, but also provide certificates of compliance with a plethora of different industry standards. Failure by the supplier or its supply chain to do this can lead to expensive and very public product recalls. Supply contracts will generally include standard product quality and compliance warranties. However, consideration should also be given to:

- Agreeing a product recall process with key members of the supply chain in advance. This reduces the supply chain's exposure to the negative impact of a recall (i.e. the knock-on effects either up or down the supply chain) and ensures that there is an agreed plan of action when a recall occurs.
- Including express recall provisions in supplier contracts that give a business the ability to initiate recalls (and recover costs of this where appropriate) where requested by regulators or the business reasonably considers appropriate, to avoid arguments about whether a recall is/is not legally required.
- Ensuring traceability of individual batches of products/components to assist in root cause analysis and minimise the scope of any recall.
- Clearly identifying territory-specific certification and other requirements and allocating responsibility for compliance with this appropriately. While it may be tempting to seek to pass responsibility for this back up the supply chain, if the supplier is not familiar with requirements in the relevant consumer market, this may cause more problems than it solves.
- Including contractual rights to reject entire shipments/batches if a particular percentage of samples prove to be faulty. It is not uncommon to see contracts that only allow for return of products that are actually faulty, which would technically require testing of every single item before it is sent back.



## Considerations for Supply Chain Disputes

Despite best intentions (and well-worded contracts and contractual protections), some supply chain disputes cannot be avoided. Supply chain partners may find themselves in a formal legal dispute due to a supply chain failure. For example, previously harmonious relationships may have broken down, with positions having become entrenched; one or both supply chain partners may be behaving unreasonably; product supplies may be late and/or not of sufficient quality, quantity, correspond to specification, etc.; a project may suffer unexpected losses, or margins may suddenly narrow and contracts become unprofitable/unworkable; and/or as a result of management and other stakeholders demanding that action be taken. Resultant litigation can be time consuming, inherently uncertain (in terms of outcome) and costly.

When disputes unavoidably arise, then a business/its advisers will (among other things) need to:

- Establish the applicable law.
- Consider geographic locations and jurisdictional issues, including enforcement.
- Confirm the contractually applicable dispute resolution mechanism (e.g. litigation, arbitration or other).
- Assess whether the appropriate contractual procedures have been followed, including any pre-dispute/pre-action requirements.
- Ascertain whether the contract provides for a particular or exclusive remedy.
- Consider whether you have sufficient resources internally to deal with the dispute.
- Consider whether external lawyers and experts need to be engaged.
- Undertake prompt documentary and information gathering and, thereafter, manage and collate documents. This should include suspending any routine document destruction policies, and ensuring both paper and electronic records are investigated and preserved.
- Assess the operative terms and conditions- is there a battle of the forms argument?
- Investigate whether any other parties are potentially involved/culpable.
- Assess whether there are helpful/unhelpful warranties and indemnities, any caps on liability, the nature of the losses (direct or indirect) and the extent to which loss and damage have been excluded (if at all).
- Understand who your key people/witnesses of fact are and what they are saying. This may extend to interviewing and drafting witness statements- preferably by lawyers and preferably before memories dim.
- Carefully and accurately assess the merits of the case and what your overall objectives are for the dispute/litigation- what are your best, most likely and worst-case outcomes?
- Ascertain your optimum resolution strategy.
- Establish the likely overall cost of the litigation.
- Make a prompt assessment of whether any time limits apply that could bar a claim (and, indeed, if the claim is already time barred).
- Investigate whether there is insurance cover. If there is, then a timely notification to insurers will likely need to be made.
- Understand whether the opposing party is/parties are likely to be good for the money.
- Assess whether the nature of the dispute will also expose the business to reputational damage.
- Ensure communications with your lawyers/third parties remain privileged (as far as possible).
- Take stock of whether it is a business-critical dispute and/or whether an emergency remedy needs to be invoked (e.g. an injunction).
- Assess the scope for an early resolution before trial (e.g. negotiation), including the appropriate use of settlement offers.
- Consider any enforceability issues should you obtain a judgment against the opposing party, particularly if that party is located in another country.



# Changes to Insolvency and Restructuring Laws



Law on Solving the Likelihood of Insolvency

<b>Overview of the Law</b>	<p>As of 17 July 2022, a new law on solving impending insolvency has become effective and replaced the provisions of the law on temporary protection for companies from insolvency that was enacted in response to COVID-19.</p> <p>The new law transposes the EU Directive 2019/1023 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency).</p> <p>The scope of the law is to solve the likelihood of insolvency due to payment inability of the debtor (who is a legal person) by:</p> <ul style="list-style-type: none"><li>• Public preventive restructuring</li><li>• Non-public preventive restructuring</li></ul> <p>The law also deals with the issue of the insolvency of the debtor that occurred during the public preventive restructuring.</p>
<b>Overview of Certain New Terms Used in the Law</b>	<p>The law provides a list of new terms that are used throughout the law. Among them are definitions of different kinds of creditors:</p> <ul style="list-style-type: none"><li>• “Petty creditor” is a creditor whose claims against the debtor are not more than €500.</li><li>• “Small creditor” is a creditor who has at least 10 employees, and according to the last financial statement has revenue and value of assets lower than €2 million.</li><li>• “Relevant creditor” is a creditor whose unrelated claims represent at least 20% of all unrelated claims.</li><li>• “Important creditor” is a creditor whose unrelated claims represent at least 5% of all unrelated claims.</li><li>• “Disputed creditor” is a creditor whose claims are at least partially disputed by debtor.</li><li>• “Public-law creditor” is a creditor whose claims against the debtor arose from a public-law relation.</li><li>• “Known creditor” is a creditor on whom the debtor is to account for as a creditor, as well as a creditor with a claim the debtor knows or must know.</li></ul>

<b>Public Preventive Restructuring (PPR)</b>	<p>PPR is a right of a debtor (that is a legal person) that faces the likelihood of insolvency due to payment inability. The debtor has to be registered in the Register of Partners of the Public Sector.</p> <p>The court shall:</p> <ul style="list-style-type: none"> <li>• Approve the PPR if the debtor is in the likelihood of insolvency and no other obstacle presumed by the law has occurred</li> <li>• Not approve the PPR if it can be presumed that the enterprise is not viable, especially when: <ul style="list-style-type: none"> <li>– Reasons for dissolution of the debtor exists</li> <li>– The debtor was dissolved or is in liquidation proceedings</li> <li>– The effects of declaration of bankruptcy or commencement of restructuring are in force towards the debtor</li> <li>– There is an ongoing enforcement proceeding towards the debtor for the payment</li> <li>– The enforcement of lien or other security right toward debtor has commenced</li> <li>– The debtor does not practice sound bookkeeping or does not file the annual financial statement into the collection of documents</li> <li>– The debtor has performed activities that threaten its financial stability and has not repaired their consequences</li> </ul> </li> </ul> <p>The statutory body of the debtor shall consider the use of a third-party consultant during the solving of the likelihood of insolvency. The third-party consultant shall have relevant knowledge and experience, as well as technical and personal equipment, and shall have the faith of the relevant creditors.</p> <p>The debtor is obliged to use the services of a third-party consultant during the PPR.</p> <p><b>Insolvency of the debtor during the PPR:</b></p> <ul style="list-style-type: none"> <li>• If during the PPR the insolvency of the debtor occurs, the statutory body is obliged to inform the court, bankruptcy trustee, creditors' committee and creditors that agreed to the temporary protection.</li> <li>• The debtor may continue with the PPR even after the insolvency occurred, if it can be reasonably presumed that the debtor will be able to pay all of its new obligations in a timely manner, and the public plan will be confirmed by the court or the debtor will avert the insolvency in another way.</li> </ul>
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<b>Temporary Protection During Public Preventive Restructuring</b>	<p>The new law superseded the previous law on temporary protection of enterprises in financial troubles that was enacted to address the negative impact of COVID-19. The law sets conditions for when the court will grant the temporary protection to the enterprise.</p> <p>The court will grant a temporary protection for a period of three months, together with the issuing of the decision on approval of PPR, if:</p> <ul style="list-style-type: none"> <li>• More than half of the creditors (counted in accordance with the amount of their unconnected claim) agreed with the granting of the temporary protection.</li> <li>• At least 20% of all creditors (counted in accordance with the amount of their unconnected claims) agreed with the granting of the temporary protection and, in the draft plan, the partial forgiveness of the claim or the recognition of its partial unenforceability does not exceed 20% of the claim for any of the creditors, and the deferment of repayment of any of the claims does not exceed one year.</li> </ul> <p>The temporary protection can be prolonged on the request of the debtor for an additional three months, presuming that all conditions are fulfilled. The total length of temporary protection shall not exceed six months.</p> <p><b>Dispositive restrictions during the temporary protection:</b></p> <ul style="list-style-type: none"> <li>• The creditors may set the acts of the debtor that shall be approved by the third-party consultant.</li> <li>• The debtor is obliged to restrict its activity only to the acts that do not change the nature of their assets, obligations or obligatory relations; other acts may be done only with the consent of the creditors' committee.</li> <li>• If the debtor makes an act requiring approval by the creditors, the creditors or the bankruptcy trustee may oppose such acts, unless the other party proves that such acts were not detrimental to the creditors.</li> </ul> <p><b>Effects of the temporary protection means that during the temporary protection:</b></p> <ul style="list-style-type: none"> <li>• The debtor is not obliged to file for insolvency.</li> <li>• Insolvency or restructuring cannot be declared in accordance with the general law on insolvency.</li> <li>• It is not possible to undergo enforcement proceedings against the debtor – such proceedings shall be interrupted, except for the enforcement of: <ul style="list-style-type: none"> <li>- A claim that occurred during the realisation of the joint program of the Slovak Republic and the EU financed from EU funds</li> <li>- Claims arising out of the decision of the EU body, institution, office or agency</li> <li>- Tax arrears, customs duty, fines or other payments levied by customs bodies</li> </ul> </li> <li>• The debtor is entitled to fulfill the new obligation before the old one, and unrelated obligations before related obligations.</li> <li>• It is not possible to commence the enforcement of the security right for the debtor's assets.</li> <li>• It is not possible to set-off related claims with the debtor.</li> </ul> <p><b>Crisis financing:</b></p> <ul style="list-style-type: none"> <li>• The debtor may, for the purposes of securing the standard operation of its enterprise with the approval of the creditors' committee during the temporary protection, accept crisis financing. Crisis financing is financing that was agreed upon prior to the granting of temporary protection and the financial means were drawn by the debtor with the approval of creditors' committee after the granting of the temporary protection.</li> <li>• The means of crisis financing may be used only for the purposes of securing the proper operation of the enterprise during the temporary protection. It cannot be used for the purposes of the refinancing of other financing that was provided to the debtor prior to the temporary protection.</li> </ul>
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<b>Public Plan</b>	<p>The public plan shall be drafted in a way to ensure that the just division of the value of the assets of the debtor among the affected creditors is certain, clear, real, sustainable and, if possible, consensual. The public plan shall contain all data that the affected creditors need to vote on.</p> <p>The public plan shall not diverge from the draft concept of the plan in a substantial way. Substantial diversion is understood in particular if the expected level of satisfaction of the creditor in the group, according to the public plan, differs by more than 10% from the lower limit of the range of the expected level of satisfaction in the concept of the plan.</p> <p>Legal acts made during the PPR that provide an affected creditor with an advantage not presumed by the public plan are invalid.</p> <p><b>Restructuring measures:</b></p> <ul style="list-style-type: none"> <li>• These are measures of an economic and legal nature that aim to avert the insolvency of the debtor and secure the viability of the enterprise.</li> <li>• Examples: <ul style="list-style-type: none"> <li>- Restructuring of obligations of the debtor against the affected creditors (e.g. adjournment of payments or partial forgiveness)</li> <li>- Restructuring of assets of the debtor (e.g. selling off assets)</li> <li>- Restructuring of the capital structure (e.g. issuing of new shares, changing of articles of association)</li> <li>- Restructuring of human resources (e.g. termination of employment contracts)</li> <li>- Financing of restructuring measures</li> </ul> </li> </ul> <p><b>Assessment, approval and confirmation of the public plan:</b></p> <ul style="list-style-type: none"> <li>• Assessment: <ul style="list-style-type: none"> <li>- The public plan shall be assessed by the bankruptcy trustee who has also the right to fix incorrect provisions.</li> </ul> </li> <li>• Approval: <ul style="list-style-type: none"> <li>- The public plan shall be approved by the creditors on the meeting of creditors, which shall take place no earlier than 60 days and no later than 70 days from the day of approval of PPR.</li> <li>- The public plan is approved if every group of creditors voted for its approval with quorums set out for each group in the law.</li> <li>- If any group of creditors do not approve the public plan, the debtor is entitled to ask the court to replace the consent of the group by the court's decision.</li> </ul> </li> <li>• Confirmation of the court: <ul style="list-style-type: none"> <li>- The debtor is entitled to file the plan for the court's approval within 7 days of the end of the approval meeting, and also send the electronic version of the plan to every creditor who didn't approve the plan. Any creditor that did not vote for approval has the right to send their comments within 10 days.</li> <li>- The court decides on confirmation of the plan within 30 days from the lapse of the period allowed for sending the statement to creditors that did not approve the plan, as noted above.</li> </ul> </li> </ul>
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<b>Non-public Preventive Restructuring (NPR)</b>	<p>The provisions relating to NPR may apply to the debtor who is in the likelihood of insolvency, and the effects of a declaration of bankruptcy or the initiation of restructuring proceedings do not apply to them. These debtors can agree on a non-public plan in a non-public preventive restructuring with one or more creditors who are subject to the supervision of the National Bank of Slovakia or another similar institution abroad.</p> <p>If the creditors agree with the NPR, the NPR will commence after the debtor notifies the court on the commencement of NPR. The debtor is obliged to file a non-public plan to the court within three months of the commencement of NPR, otherwise the NPR proceedings end.</p> <p>Assessment of the non-public plan by court:</p> <ul style="list-style-type: none"> <li>• The non-public plan is confirmed by the court if, within 15 days of the filing of the non-public plan, the court does not decide on rejection of the plan.</li> <li>• The court will reject the non-public plan if it finds that the non-public plan could harm the asset interests of the creditors that are not participants of the non-public plan.</li> </ul> <p>Effects of the confirmed non-public plan:</p> <ul style="list-style-type: none"> <li>• The confirmed non-public plan can be opposed only in the case that at the time of the agreement of the non-public plan, conditions for such agreement were not fulfilled.</li> <li>• The non-public plan is binding only to the creditors who agreed with it in writing.</li> </ul>
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