Olomouc High Court
through the

Ostrava Regional Court
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Insolvency proceeding case file No.: **KSOS 25 INS 10525/2016**

Appellant: **NWR Holdings B.V.**, with its seat at 1017 CA Amsterdam, Herengracht 448, Kingdom of the Netherlands, registration No. 61294179

represented by: JUDr. Luděk Chvosta, *advokát* (attorney) with his office at White & Case (Europe) LLP, Na Příkopě 14, 110 00 Prague 1

Debtor: **OKD, a.s.**, with its seat at Stonavská 2179, Doly, 735 06 Karviná, entered in the Commercial Register kept by the Ostrava Regional Court in Section B, File No. 2900, identification number (IČ) 268 63 154

represented by: Mgr. Petr Kuhn, *advokát* (attorney) with his office at BADOKH - Kuhn Dostál advokátní kancelář s.r.o., 28. října 12, 110 00 Prague 1

Appeal against resolution KSOS 25 INS 10525/2016-B-43 of 26 May 2016

Schedules: Extract from the Companies Register for the Appellant

Extract from the Commercial Register for the Debtor

Power of attorney

I.
Introductory Observations

1. By way of its resolution KSOS 25 INS 10525/2016-B-43 of 26 May 2016, the Ostrava Regional Court decided as follows:

> *I.* *The operations of the Debtor's enterprise may only be halted (and be it partly) or restricted with the prior consent of the interim creditors' committee or, until the interim creditors' committee has been appointed, with the prior consent of the Insolvency Court.*
>
> *II.* *The effectiveness of*
>
> – *decisions of the sole shareholder exercising the powers of the Debtor's General Meeting,*
> – *decisions of the Debtor's General Meeting, and*
> – *decisions of the shareholders outside the Debtor's General Meeting*
>
> *is conditional upon the consent of the interim creditors' committee (or, until the interim creditors' committee has been appointed, the consent of the Insolvency Court).*

2. The Appellant hereby appeals the above-mentioned decision. Its appeal is based primarily on the grounds set out in Sec. 205 (2) (c) and (g) of the Code of Civil Procedure (Act No. 99/1963 Coll.).

3. The Appellant deems it appropriate to briefly recount the situation.

4. By way of its motion of 25 May (published in the ISIR at 1:09 p.m.) and within the context of the above-referenced insolvency procedure, the Debtor sought issuance of a temporary injunction, which was fully accommodated by the Ostrava Regional Court in the challenged decision. The Debtor justified its motion by proclaiming that, in the Debtor's view, *"Under such circumstances, it is imperative to preempt any doubts as to the bias of the debtor's management to the maximum possible extent, and to ensure that the debtor treats all its creditors equally and that the debtor's assets are managed in a transparent manner. In the same vein, one must ensure that the debtor is protected against unfounded speculations concerning any potential transactions concerning the debtor's assets,"* within the context of the fact that entities who are in indirect control of the Debtor (i.e., entities who are affiliated with the Debtor within the holding group) are at the same time its creditors.

5. The Debtor perceives this fact to be indicative of a collision of interest that requires to be resolved by an interim injunction so that the exercise of the Appellant's shareholders' rights in the Debtor is being subjected to the oversight of the interim creditors' committee (or, as the case may be, of the Insolvency Court), with emphasis on the enforcement of the creditors' common interest. The Debtor believes that the effect of approving reorganization anticipated by Sec. 333 of the Insolvency Act (Act No. 182/2006 Coll., on insolvency and the methods of its resolution, hereinafter the "**Insolvency Act**") – i.e., a suspension of the powers of the general meeting of the debtor – is aimed at resolving conflicts of interests between shareholders and creditors of a given debtor; through its motion for issuance of a temporary injunction, the Debtor seeks a similar application of this effect to the period prior to the decision on how to resolve the insolvency. The Debtor further believes that to proceed in this manner properly reflects the principles of insolvency proceedings.

6. Moreover, the Debtor believes that the motion for issuance of a temporary injunction is in fact directed only against the Debtor itself, given that its very own bodies are being subjected to restrictions. In the words of the Debtor: *"the Debtor proposes <u>that it be ordered to tolerate the suspensive effects of a</u>*

decision of its General Meeting (or similar decision) until the interim creditors' committee gives its consent (to such decision)."

7. On the very next day after the Debtor's voluminous motion (accompanied by various schedules) was filed (the time of publication of the decision was in fact the early hour of 9:45 a.m.), the Insolvency Court accommodated the motion, whereas the *ratio decidendi* of its decision essentially copies the Debtor's arguments point by point. By contrast, the given reasons for the challenged decision provide no insight into the deliberations which guided the Court towards its decision. The issued decision suffers from fragmentariness and lacks proper reasoning and is therefore inscrutable, which the Appellant considers grounds for an appeal pursuant to Sec. 205 (2) (c) of the Code of Civil Procedure.

8. Aside from the fact that the decision is crucially marred by not being open to judicial review, the Appellant emphatically rejects the reasons given for the restriction of its shareholders' rights by the Debtor in its motion (which the Insolvency Court then adopted in its decision to grant the temporary injunction without any further explanation). In the opinion of the Appellant, the decision which is being challenged by the present Appeal rests on an incorrect legal assessment of the matter within the meaning of Sec. 205 (2) (g) of the Code of Civil Procedure.

II.
Appellant's Standing to File an Appeal

9. In several places in its motion, the Debtor stresses that it believes the motion to be aimed solely against itself. The Appellant will briefly demonstrate below why the Debtor is wrong and why the Appellant is in fact a person whose rights and obligations are directly affected by the decision on the temporary injunction. Specifically, the Appellant has the right to challenge the decision on the temporary injunction in an appeal for the following reasons in particular:

10. The Appellant is the single shareholder of the Debtor. Pursuant to Sec. 353 of Act No. 90/2012 Coll. (the "**Corporations Act**"), the rights of the shareholder include the right to attend the general meeting and cast votes at the same, and it is in this manner, according to Sec. 398 of the Corporations Act, that the Shareholder exercises its right to participate in the management of the company. Also according to the same provision of statutory law, the shareholders may exercise their right to participate in the management of the company outside the general meeting. The same rights, and ways to exercise them, are afforded by the single shareholder (pursuant to Sec. 12 of the Corporations Act).

Evidence:	Extract from the Companies Register for the Appellant, incl. its translation into Czech	Schedule 1
	Extract from the Commercial Register for the Debtor	Schedule 2

11. As the Appellant has shown, the shareholder exercises its right by participating in the decision-making process either at the general meeting or outside the general meeting, and a single shareholder adopts decisions exercising the competencies of the general meeting. None of the laws applicable to the Debtor's situation stipulate that the effectiveness of decisions by the general meeting (or by the single shareholder acting as the general meeting) requires the consent of the (insolvency) court or of the interim creditors' committee. The exercise of shareholders' rights is thus immediate, and automatically binds the company.

12. When the temporary injunction was granted, this immediacy with which shareholders' rights may be exercised was fundamentally disturbed, which doubtlessly represents a restriction of the Appellant's rights. With respect to the issue of whether or not the Appellant has standing to appeal, one therefore

must not look at the matter through the Debtor's eyes, who in its motion sought to create the illusion that the temporary injunction was really only directed against the Debtor itself.

13. For that matter, the assertion that the temporary injunction is only aimed against the Debtor itself is in logical conflict with the claimed collision of Debtor's interests and the interests of its general meeting. If the Debtor wishes to claim that the general meeting (or, more precisely, the persons who together form the general meeting) or the single shareholder exercising the competencies of the general meeting is identical with the Debtor – and that because of this, the motion is aimed solely against the Debtor itself – then it cannot very well assert in the same breath that the interests of the general meeting are at odds with its own; it would in essence be saying that it finds itself in a conflict of interest with itself.

14. The Debtor itself must be quite aware of this dissonance: while it has been able to create the (misguided) illusion that the general meeting is a body of the Debtor which is why it is the Debtor rather than shareholders' rights that are being restricted,[1] and that, by the same token, the single shareholder is also a body of the Debtor so that even in the case of the single shareholder, no shareholders' rights are supposedly being restricted,[2] the Debtor's self-serving line of argument literally runs aground[3] as soon as the Debtor attempts to 'explain' why this tortuous construction should also apply to the decision-making process of shareholders outside the general meeting, because in the latter case, no such thing as a general meeting (supposedly the Debtor's body) exists. It is here that the Debtor can no longer reasonably invoke its *pons asinorum* of some hypothesized single 'consubstantial' entity manifesting itself in the duality of the Debtor and its bodies, and that is why the Debtor's last sentence in para. 19 of its motion does not follow from, and cannot build upon, the two sentences before it.

15. In reality, both the motion for a temporary injunction and the injunction itself are aimed solely against the current single shareholder of the Debtor – the Appellant. After all, the purported collision between shareholder's interests and debtor's interests does not concern the general meeting in the abstract, but solely and exclusively the current single shareholder of the Debtor – the Appellant[4].

16. Pursuant to Sec. 76 (2) of the Code of Civil Procedure, a temporary injunction may also be used to impose an obligation on someone who is not a participant to proceedings (though only if such imposition may be considered equitable). This possibility to bind a third party by a temporary injunction implies that the third party must have the right to appeal the resolution whereby the temporary injunction was granted, in that part which affected the third party[5].

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[1] cf. the wording *"The General Meeting is a body of the debtor within the meaning of Section 151* et seq. *of the Civil Code (building upon Section 398* et seq. *of the Corporations Act). This means that a temporary injunction is aimed at the debtor alone."*

[2] cf. the wording *" This applies similarly in the case of a sole shareholder who exercises the powers of the supreme body pursuant to Section 12 of the Corporations Act."*

[3] cf. the wording *" An application for a temporary injunction also concerns* per rollam *decisions, i.e., decisions of debtor's shareholders* outside *the General Meeting pursuant to Section 418 of the Corporations Act."*

[4] This is more or less in line with how the entire situation is being perceived by the general public – see for instance the news article entitled "Court restricts parent company NWR's capability to decide about OKD", which can be accessed at http://byznys.lidovky.cz/soud-omezil-moznost-materske-firmy-nwr-rozhodovat-o-okd-pe1-/energetika.aspx?c=A160526_184909_energetika_sij

[5] Ludvík, D. et al. Občanský soudní řád. Komentář. I. díl (Commentary on the Code of Civil Procedure, Part One). Wolters Kluwer, 2009.

17. The only permissible conclusion is therefore that the Appellant, being a person who is affected by the issued temporary injunction, has standing to appeal. To rule otherwise would be a flagrant case of *denegatio iustitae* and thus a violation of the right to a due process within the meaning of Article 36 of the Charter of Fundamental Rights and Freedoms.

III.
Lack of reviewability of the decision

III(1) Insufficient substantiation of the finding of a conflict of interest

18. Both the Debtor and the Insolvency Court concordantly assume that there exists a conflict of interests between the Debtor and the participants in the Ad Hoc Group, and that this conflict of interests must be resolved in the form of a temporary injunction, for *"AHG Group is on the one hand an association controlling the debtor, and on the other hand the biggest creditor of the debtor. The interests of the persons controlling the debtor and those of the debtor may therefore be in conflict."* However, nowhere are we being told on what basis the Debtor / Insolvency Court have arrived at this assumption.

19. One of the mandatory elements of any motion for a temporary injunction under the law is a description of the facts which clearly justify the granting of the temporary injunction. This description must follow a discernible train of thought and must be sufficiently convincing to the court, seeing as the latter, by granting the temporary injunction, interferes in a major way with the rights of both participants to the proceedings and of third parties who at this stage do not have any recourse to procedural means of defense. The petitioner must therefore show that the current state of affair is in need of a preliminary arrangement, whereas showing the evidence which justifies a temporary injunction means substantiating the statements (assertions) of fact of the petitioner to such a degree that the court may consider them established, i.e., incontrovertible facts.[6]

20. The Insolvency Court adopted the Debtor's assertion according to which Ad Hoc Group is *"an association controlling the Debtor"* without having established this conclusion beyond doubt. True: the presiding judge of the panel will usually not engage in a full-fledged evidentiary procedure before deciding on the motion for a temporary injunction. Even so, when it comes to the statutory requirements in terms of the evidence which must be produced for asserted facts, the standard of evidence is more stringent than a mere recitation of statement of facts, i.e., the petitioner must *convince* the court of the need for a preliminary arrangement.

21. The Appellant believes that in this respect, it is not only the motion of the Debtor which suffers from major shortcomings, but also the challenged decision itself – because the *ratio decidendi* reveals in no way which facts were considered by the Insolvency Court before it arrived at the conclusion that NWR Plc. is in fact controlled by Ashmore Investment Management Limited, M&G Investment Management Limited and Gramercy Funds Management LLC ("**AHG**"). In this respect, 'evidencing' as understood by the law means that the motion, in conjunction with the submitted evidence, must provably establish with certainty the factual character of the assertions.

22. For the Insolvency Court to be in a position to conclude that this standard of evidence has been met, it would first have to adjudge the real character of the relationship between the aforesaid foreign-law fund managers and the company NWR Plc. with its seat in Great Britain. The Court would have to

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[6] Svoboda, K., Šínová, R., Hamuláková, K. et al. "Civilní proces. Obecná část a sporné řízení." (The Civil Procedure. General Part and Adversarial Proceedings) 1st ed. Prague: C. H. Beck. 2014, p. 125.

assess this issue also from the point of view of British or English company law, for NWR Plc. is solely and exclusively subject to the latter. However, in this respect, the challenged decision neither tells us the Court's view nor how it arrived at the same, so that the challenged decision suffers from a lack of reasoning. The conclusion of the Insolvency Court as to the existence of a conflict of interest rests on the naked assumption that AHG was *"an association controlling the Debtor"*, which is vaguely circumscribed in the Debtor's motion and uncritically endorsed by the Court, without any verification whatsoever as to the truth value of such assertions.

23. By acting in this manner, the Insolvency Court has marred its own decision with the defect of inscrutability (i.e., the decision cannot be reviewed for lack of proper reasoning). This in and by itself automatically necessitates a reversal of the decision of the Insolvency Court.

III(2) Insufficient substantiation of the need to grant a temporary injunction

24. The issued decision may take up five pages in print, but a straightforward side-by-side comparison of the Debtor's motion for issuance of a temporary injunction on the one hand and of the reasons given for the Court's decision reveals that the wording of these reasons has been lifted verbatim from the motion for issuance of a temporary injunction all the way up to the third paragraph on the fourth page. The Court's own deliberations as to why it decided to take a step of such major proportions (for it is certainly a grave matter to interfere with the rights of interested parties in the form of a temporary injunction) are confined to a terse statement which takes up the final few paragraphs of the entire resolution.

25. In this part of its resolution, and with respect to Item II of the operative part of the decision, the Court merely has the following substantive statements to make:

"The insolvent Debtor is concerned about a potential conflict between its own interests and those of the persons controlling the Debtor, for AHG Group is at the same time the biggest creditor of the Debtor and an entity which controls the Debtor (see above)."

"In the current case, in which one of the majority creditors of the Debtor is at the same time an entity controlling the Debtor, enjoying a scope of rights which is incomparably larger than that of the other creditors, the Court is convinced that steps must be taken to ensure the equal exercise of rights of all creditors and to prevent situations that could give rise to disputes over transactions involving the divestment of the Debtor's assets. For the same reason, the Court is convinced that the situation calls for an early suspension of the exercise of rights and competencies of the Debtor's body (even prior to the approval of reorganization), because of the potential conflict of interests between the shareholders and the creditors of the Debtor."

26. In other words, all that one can glean from the entire *ratio decidendi* is that the Court (i) perceives a certain fear on the part of the Debtor of its own shareholder, and (ii) somehow has become convinced that the Appellant's rights as a shareholder need to be drastically curtailed. What is not clear from the *ratio decidendi*, though, is how the Court arrived at these conclusions. In fact, the Court does not suggest in the slightest what specific actions of the shareholder could have triggered a concern over *"a potential conflict between [the Debtor's] own interests and those of the persons controlling the Debtor"* or what other causes this concern might have.

27. Suppose for a moment that AHG could be shown – purely hypothetically – to be an entity in control of the Debtor: even so, there would be nothing exceptional about the fact that the controlling entity of a debtor is also a major creditor of the same. Quite to the contrary, this is a very common occurrence, and one would be hard pressed to find an insolvency procedure involving a major corporation in the

position of the debtor in which the shareholder did not at the same time appear in the position of a creditor. In the case at hand, however, this fact alone (which is a natural occurrence in countless insolvency proceedings) has quite incomprehensibly been invoked as pretext for restricting the Appellant's shareholders' rights.

28. The institution of temporary injunctions has its place in cases where there is danger in delay, and where there truly is a pressing need to impose preliminary rules to govern the relations between parties in the interim. The Debtor's motion, however, entirely lacks a convincing description as to wherein this urgency is supposed to rest, and the Court arrived at its conclusion that there was a pressing need for an interim arrangement within less than 24 hours even though the Debtor's assertions cannot support the weight of such finding.

29. If the Court has identified a conflict of interest (mediated across several levels of the group) between the Appellant and the Debtor, it should duly explain the cause for its non-specific concerns over a *"potential conflict of interest."* At this point, the Appellant notes that it has not registered any receivable in the insolvency proceedings of the Debtor. The Debtor itself proved unable to mention a single fact in its motion that could trigger the need to restrict the Appellant's shareholders' rights (leaving aside its general and superficial speculations about possible changes in the composition of the board of directors and its entirely unfounded fear that the company might be dissolved and liquidated). A general reference to the principles of insolvency proceedings cannot justify this degree of interference with the Appellant's rights. The Debtor and the Insolvency Court may have postulated that the current measure serves to fulfill the principles set out in Sec. 5 (a), (b) and (c) of the Insolvency Act but neither of them has explained how a restriction of shareholders' rights is supposed to help attain this goal.

30. It is hard to imagine that a court would grant a temporary injunction under Sec. 74 of the Code of Civil Procedure without explaining the need for a preliminary arrangement to govern the relations between the parties. It is equally hard to imagine that a court would grant a temporary injunction under Sec. 82 (2) (a) of the Insolvency Act without any elaboration of the purpose for which a preliminary trustee is being appointed, or under Sec. 82 (2) (b) of the Insolvency Act without any elaboration of the reasons deserving of special consideration for suspending the effects associated with the initiation of an insolvency procedure, or under Sec. 82 (2) (c) of the Insolvency Act without substantiating its belief that the potential claim for damages vis-a-vis the person filing the motion for insolvency should be secured by bond, and so forth.

31. If a court grants a temporary injunction for which no specific underlying hypothesis is laid down by law, that in itself does not mean it can generally grant just about any temporary injunction. Only a duty which is adequate to the need necessitating a temporary provision for such duty may be imposed, and the court must take special care to justify such *extra legem* course of action.

32. At the same time, it needs to be borne in mind that any *ratio decidendi* for an act of application of the law must be based on a description of the factual basis and its subsequent subsumption under legal standards (whether in a formal or material sense of the word), rather than on general and vague legal deliberations that have no bearing on the factual basis. This conclusion is not affected by the fact that in the case on hand, the decision is of a temporary and interim nature - to the contrary, that makes it even more necessary to ensure that the recipients of a decision of this type are comprehensibly advised what fundamental facts (supported by specific proven presumptions) justify the court's course of action.

33. The Appellant is of the opinion that the Debtor completely failed to demonstrate, and actually did not even contend, the existence of facts leading to the conclusion that there is an urgent need to regulate the relations between the parties on a temporary basis in the case at hand. If the applicant is to succeed with its motion for a temporary injunction, it must convince the court beyond any doubt that it is necessary to grant such extraordinary remedy. As literature shows, *"it must always be shown that the granting of the temporary injunction was well founded, i.e., established beyond contention in the proceeding."* [7] A temporary injunction always means a significant interference with the rights of the entity restricted by it, which is why one must not compromise on the requirements which the law holds for this type of procedural motion by participants to proceedings (moreover represented by an attorney) – in fact, one should err in the opposite direction.

34. Further, the *ratio decidendi* of the contested resolution does not indicate that when deciding on the motion, the court of first instance gave any consideration at all to the risk of damage arising to the Debtor on the one hand, and the consequences of swift interference with the Appellant's rights on the other. Potential damage arising from a temporary injunction must always be adequate to the proven infringement on the applicant's rights, as aptly concluded by the High Court in Prague in its resolution dated July 3, 1996, file No. 3 Cmo 818/95. However, the reasoning of the contested resolution completely lacks a due assessment of whether the motion for temporary injunction is well founded, i.e., how the court arrived at the conclusion that its authoritative intervention would cause less damage than non-intervention in the "conflict". No such line of thought is found in the court resolution, which makes the resolution non-reviewable to a lack of grounds for the decision as well.

IV.
Incorrect legal assessment of the matter

IV(1) Incorrect assessment of the relationship between AHG and the Debtor in general

35. The largest shareholders of NWR Plc are investment funds managed by participants in an "ad hoc group" (referred to as AHG - *Ad Hoc Group* - for better understanding), as well as other clients to whom the AHG members provide investment services. AHG is essentially a descriptive term used to refer to a group of investors who are involved in joint negotiations (i.e., as opposed to seeking the joint exercise of shareholders' or other rights arising from participation in NWR Plc.) with the NWR group (managed by NWR Plc.) and other entities interested in the Debtor's operations, including the Czech Republic. The very choice of words for this association is testimony to its narrow purpose and temporary ("ad hoc") character.

36. AHG lacks legal personality and does not operate on the basis of any joint rules. AHG participants are mutually wholly independent and act as investment managers to certain funds which hold various financial and investment instruments within the NWR group. The percentage interests of the individual AHG participants in said financial and investment instruments vary, and each member thus has its own interests which differ from the interests of the other participants.

37. There is no formal or informal agreement on the exercise of voting rights in NWR Plc., or any similar agreement in relation to debt investment instruments, between the AHG participants. Each of the AHG participants thus looks after its own economic interests (and the interests of the funds managed by it), and they are not exercising collective control over NWR Plc. AHG thus does not, and has not at any time, controlled NWR Plc.

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[7] Svoboda, K., Šínová, R., Hamuláková, K. et al. Civilní proces. Obecná část a sporné řízení. (The Civil Procedure. General Part and Adversarial Proceedings) 1st ed. Prague: C. H. Beck. 2014. p. 125.

38. The Appellant itself is being managed by its statutory body and controlled by its shareholder –New World Resources N.V. In no case can the Appellant be said to act on the instructions of AHG or any of those participating in this group.

39. We may summarize what has been said thus far by stressing that the group(ing) AHG must not be considered a single entity (as the Debtor tried to convince the Court in its motion). In the case at hand, the shortcut AHG refers to three mutually independent companies, each acting of its own accord, which are concerned with the management of investment funds and other funds. It is those funds which actually own equity and debt instruments issued by entities belonging to NWR Group. The Court's conclusion that the Debtor is controlled by an entity called AHG Group is therefore entirely owed to the unsubstantiated and self-serving speculation of the Debtor, which the Court endorsed in the challenged decision even though it finds no support whatsoever in the evidence submitted by the Debtor or otherwise known to the Court. To the contrary, even the official documentation of the Debtor itself (such as the insolvency petition itself) contain no mentioning whatsoever of AHG Group as an entity supposedly controlling the Debtor. The Court therefore built its decision on a false and unsubstantiated assumption – worse still, on an assumption which is in conflict with the available record.

40. In its motion for the temporary injunction, the Debtor asserts that its largest creditor are foreign companies which the Debtor collectively refers to as "AHG Group" (cf. para. 12 of the Debtor's motion), but this is again a falsehood: as of the moment in which the Insolvency Court decided to grant the temporary injunction, none of the 'members' of the AHG Group had registered any receivable in the Debtor's insolvency proceedings, nor has such registration be filed in the meantime. According to the data accessible in the insolvency register, the largest registered creditor ought to be Citibank N.A., London Branch. Again, it should be noted that the Court's decision endorses an assertion of the Debtor which is in conflict with the actual state of affairs.

41. Further still, even if the relationship between the participants in the AHG group and the Debtor could legitimately be viewed as a relationship between a controlled party and a controlling party, that would not be a sufficient reason to conclude that there is a conflict of interests of a nature necessitating the exercise of shareholders' rights in the Debtor's company in the insolvency proceeding.

42. The Appellant is compelled to file an appeal if only on principle, as the decision constitutes a dangerous precedent in terms of rights of parties to the insolvency proceeding – will a temporary injunction be granted automatically on someone's request in every insolvency proceeding where the Debtor's shareholder is at the same time the Debtor's creditor? That would seem to be the case when one looks at the sketchy reasoning of the contested decision.

43. The Appellant can imagine on a general level that the type of the temporary injunction granted in the matter at hand may be justified, but only if the particular facts and circumstances of the relevant case make it legitimate and, moreover, such particular facts and circumstances ought to be meticulously described and explained in the wording of the temporary injunction so granted. However, the contested decision does not meet this requirement. The court did not elaborate as to what made the situation so specific in the case on hand (as compared to other insolvencies) that the temporary injunction had to be granted. Or rather, its *ratio decidendi* could *de facto* be applied to thousands other insolvency proceedings (as pertinent), as the sole reason why it was granted - or rather the sole reason implied in the *ratio decidendi* of the contested decision - was the fact that the Debtor's shareholder is at the same time the Debtor's creditor.

44. However, the Appellant is of the opinion that the brief reference to the potential conflict of the interests of the Debtor and the shareholder, coupled with the "impression" that, theoretically speaking, this might turn out to be no good in the future, does not sufficiently support an infallible conclusion that it is necessary to regulate the relations between the parties on an interim basis, and to resolve the urgency of the situation (on which the motion does not elaborate) by way of a temporary injunction, the effects of which infringe on the fundamental rights of the Appellant in its capacity as the sole shareholder of the Debtor.

45. The Appellant has already stated above, in para 27 hereof, that a situation where the company's shareholder is the company's creditor at the same time is common; after all, such fact actually goes to show that the shareholder invests into the business of its company, or rather supports it financially (in order to save it). The Appellant would like to stress that it has not registered any claim in the insolvency proceeding against the Debtor. The Appellant does not deny that its position vis-à-vis the Debtor differs, to some extent, from the position of the creditors of the Debtor: unlike those creditors who have interests vis-à-vis the Debtor on account of their claims, the Appellant is the Debtor's shareholder, and as such is interested in the Debtor in particular in terms of capital. However, this fact is irrelevant even in the context of insolvency law, as outlined below.

46. Legislative developments concerning Section 59 (2) of the Insolvency Act support the Appellant's line of thought presented above to some extent. Up to December 31, 2013, certain persons (including shareholders and members) were automatically barred from serving on the creditors' committee. However, the amendment which entered into force on January 1, 2014 brought an important change in this regard when it made it possible even for previously barred persons, i.e., in particular members and shareholders of the debtor, to become members of the creditors' committee. The trend is thus clear - the mere existence of the relationship between the debtor and its shareholder who happens to be the Debtor's creditor at the same time, cannot automatically lead to the conclusion, the way the insolvency court concluded in the contested decision, that there is an insurmountable conflict of interests of the parties concerned, which conflict would necessarily jeopardize the common interest of all the creditors. The Appellant would like to stress once again that it has not registered any claim in the insolvency proceeding against the Debtor, nor has it any intention to do so. As of 1 January 2014, this has opened the way for shareholders, members and other previously barred creditors to exercise a greater influence in the insolvency proceeding, in particular through the creditors' committee. Therefore, while the lawmakers' actions extend the options available to shareholders and members of the debtor for wielding their influence in the insolvency proceeding, the insolvency court headed in the opposite direction in the contested decision; however, it failed to provide any legally relevant and legitimate reasons justifying its approach in the reasoning of the contested decision.

IV(2) Section 333 of the Insolvency Act

47. The conclusion that the controlling person intends to exercise its rights in conflict with the principles of the insolvency proceeding cannot stem from the fact that it holds a claim against the Debtor at the same time. If it were true that a person controlling an insolvent debtor and holding a monetary claim against such debtor is unable to exercise its rights duly (in compliance with the law) in the context of an insolvency proceeding, the lawgiver certainly would have coupled the instigation of insolvency proceedings (or declaration of insolvency) with a suspension of general meetings, and would thus eliminate any influence wielded by controlling persons. However, that is not the case, although both the Debtor and the insolvency court try to argue otherwise by putting the effect of Section 333 "forward", to the period preceding the approval of reorganization.

48. Moreover, there is no interpretation that would indicate that the purpose of Section 333 of the Insolvency Act is to address conflicts of interests between members and creditors, as the Debtor proposes in para 16 of its motion, and as the insolvency court concurs. Both are in error, as the statement of basis and purpose pertaining to Section 333 of the Insolvency Bill reads as follows:

"The exercise of powers of the General Meeting of the debtor passes to the insolvency trustee upon the decision approving reorganization (Section 333). The proposal that the exercise of powers of the General Meeting of the debtor remain in the hand of the debtor's members or shareholders (subject to consent to decisions of such bodies by the creditors' committee for such decisions to be effective). If the exercise of powers of the General Meeting of the debtor is left in the hand of the members (shareholders), any meaningful resolution of the debtor's insolvency might be blocked (despite the consent of the creditors' committee) through actions filed by members, contending invalidity of resolutions of general meetings (Section 131 of the Commercial Code). The creditors' committee may further prevent the appointment of any new statutory body of the debtor by withholding its consent at the General Meeting. In this regard, the status of the insolvency trustee is more independent in that it generally only performs a supervisory role in the context of a reorganization, and in connection with the insolvency trustee, the problems related to the application of Section 131 of the Commercial Code largely do not arise."

49. The statement of basis and purpose pertaining to the bill thus shows that its purpose is to prevent the blocking of the process of insolvency resolution by filing actions contesting validity of resolutions adopted by General Meetings, rather than limit conflicts of interest between the debtor's members and creditors.

50. Literature also subscribes to this view: [8]

"Upon the decision approving reorganization, the insolvency trust shall assume the powers of the General Meeting or members' meeting of the debtor. The law thus prevents the blocking of the insolvency proceeding by constant claims concerning the validity of General Meetings."

51. After all, had the lawmakers really intended to limit conflicts of interests between the debtor's members and creditors, why would they have concentrated provisions on this issue only into the special provisions on reorganization, thus excluding their application in other stages of the insolvency proceedings? The reality is different, as a matter of fact. In the reorganization process, emphasis is placed on implementing reorganization measures as swiftly as possible, so that the company could be revitalized as smoothly as possible. That is the only way to ensure the satisfaction of creditors who placed their trust in the reorganization process in the best way. And that is why their trust is stimulated by a transfer of powers of the General Meeting to the insolvency trustee, and by entrusting decisions on the composition of the statutory body to the creditors' committee. One therefore needs to look to what the true intent of the lawgiver was, and abstain from attributing a different purpose to the provision of law than that for which it was drafted.

52. It is therefore completely inappropriate to justify the grant of the temporary manner by the above-mentioned "forwarding" (which can easily be viewed as euphemism for an unprecedented interference with the shareholding rights of the Appellant) of effects envisaged by the provision of Section 333 of the Insolvency Act.

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[8] Kotoučová, J. et al. Zákon o úpadku a způsobech jeho řešení (insolvenční zákon). Komentář. (Commentary on the Insolvency Act) 1st edition. Prague: C. H. Beck, 2010, 1122 p.

53. It further needs to be noted out that as the deadline for the registration of claims has not elapsed yet, it is completely premature to speculate how the Debtor's insolvency will be resolved, and for this reason alone, it is inappropriate to apply provisions of special parts of the Insolvency Act depending on what currently appears - more on the basis of impressions than through an ability to foresee creditors' will - as a suitable or likely solution to the insolvency court.

IV(3) General principles of the insolvency proceeding

54. If the Debtor believes, and the insolvency court concurs, that "*the course of action of the Debtor's Board of Directors may be changed, for instance, by a decision on the level of the Debtor's General Meeting or other corporate decisions of the Debtor's shareholder and its controlling persons (e.g. through a recall of the current members of the Debtor's Board of Directors and the appointment of persons who will proceed in compliance with the instructions of the controlling person, and through adoption of a decision on the winding-up of the Debtor followed by liquidation),*" it disregards the fact that even if the Appellant replaced the Debtor's Board of Directors, such new Board of Directors would still have to comply with obligations imposed thereon by both the Corporations Act and the Insolvency Act.

55. It is necessary to stress in this situation that the potential "new" Board of Directors of Debtor would have to act in accordance with the principles of the insolvency proceeding as listed in Section 5 of the Insolvency Act; and yet, both the Debtor's motion and the *ratio decidendi* of the temporary injunction granted claim to strive to ensure that said principles are observed.

56. And not only that: any Board of Directors, including a potential "new" Board of Directors, as well as the current Board of Directors, is obliged to observe limitations and restrictions applicable to disposal of the debtor's assets under the mandatory rules of the Insolvency Act. Any statutory body is thus prohibited from taking any acts referred to for instance in Section 111 or Section 140 (2) and (3) of the Insolvency Act. In other words, the very provision of law currently in force provides for checks and balances for the protection of the debtor's property and legitimate interests of creditors. A potential decision made by the Appellant in its capacity as the Debtor's shareholder will not prevent or circumvent the effects of such enforcement provisions.

57. The insolvency court states that "*the issued decision reflects the provisions of Sec. 5 (a), (b), and (d) of the Insolvency Act.*" The Appellant believes the opposite to be true. First and foremost, as regards the principle laid down in the provision of Section 5 (d) of the Insolvency Act, pursuant to which creditors are obliged to refrain from any actions towards the satisfaction of their claims outside the insolvency proceeding, unless the law permits such course of action. However, by exercising its shareholding rights, the shareholder cannot (is not able to) satisfy its claims outside the insolvency proceeding, and any limitation of its shareholding rights thus does not contribute to the satisfaction of said principle in any way.

58. To the contrary, the insolvency court betrayed the principle provided for in Section 5 (a) of the Insolvency Act through the temporary injunction granted (despite the fact that said principle applies the most to the insolvency court as it stipulates that the insolvency proceedings be conducted in a particular manner, thus directly referring to the activities and role of the insolvency court). By granting the temporary injunction with reference to a mere speculation as to how the Appellant might jeopardize the insolvency proceeding by exercising its shareholding rights, the court wrongfully harmed the Appellant.

59. Moreover, by conditioning the effects of the exercise of the Appellant's shareholding rights to the consent of the interim creditors' committee, the court gave the committee's future members a tool which - even if it were in the interests of the other creditors - could be used against the Appellant even outside the context of the exercise of its shareholding rights, in particular should the Appellant become a registered creditor. The other registered creditors would thus decide about another creditor of the Debtor. That is in conflict with the principle provided for in Section 5 (b) of the Insolvency Act, whereby creditors with generally identical or similar standing ought to have equal opportunities in the insolvency proceeding.

60. Therefore, the principles supposedly followed by the temporary injunction granted - i.e., the principles provided for in Section 5 (a), (b) and (d) of the Insolvency Act - are not satisfied by the temporary injunction. To the contrary, the temporary injunction defies the principles provided for in Section 5 of the Insolvency Act as outlined above, and as such cannot be invoked in support of the granting of the temporary injunction.

61. The above shows that the resolution rendered is based on an incorrect legal assessment of the matter. A temporary injunction is appropriate in a situation where not granting the same would create room for actions resulting in an irreversible state of affairs, or irreversible consequences. The Appellant is convinced that this is certainly not, and cannot be, the case in the matter at hand. The Appellant further believes that the procedural situation permits the appellate court to amend the contested decision as proposed in para 61 below, which is why it does not propose the decision be quashed.

V.
Motion

62. The Appellant respectfully requests that the appellate court decide on its appeal as quickly as possible within the meaning of Section 92 of the Insolvency Act, in particular with a view to the intensity of the interference with the Appellant's rights.

63. With reference to Part III. of this appeal, in which reasons why the contested resolution must be deemed unreviewable are outlined, the Appellant moves for the appellate court to issue the following

r e s o l u t i o n :

Point II. of the operative part of the resolution of the Regional Court in Ostrava of May 26, 2016, ref. No. KSOS 25 INS 10525/2016-B-43, is quashed, and the matter is referred back to the court of first instance for further proceeding.

64. Should the court conclude that the contested resolution is reviewable, the Appellant hereby, with reference to Part IV. of this appeal, moves for the appellate court to issue the following

r e s o l u t i o n :

Point II. of the operative part of the resolution of the Regional Court in Ostrava of May 26, 2016, ref. No. KSOS 25 INS 10525/2016-B-43, is amended to such effect that the motion for a temporary injunction of May 25, 2016, in the part where the Debtor seeks to have decisions of the sole member exercising the powers of the General Meeting of the Debtor, decisions of the General Meeting of the Debtor, and *per rollam* decisions of members subject to the consent of the interim creditors' committee, or the consent of the insolvency court until the interim creditors' committee is set up, is dismissed.

NWR Holdings B.V.
JUDr. Luděk Chvosta
on the basis of a power of attorney