

**Regional Court in Ostrava**

Havlíčkovo nábř. č. 34

728 81 Ostrava

London, 9. June 2016

**File No. KSOS 25 INS 10525/2016**

**Creditor**

**Citibank N.A., London Branch**, with its registered office at Citigroup Centre, Canada Square, Canary Wharf, London, E14 5LB, United Kingdom, registration number: BR001018

**Debtor**

**OKD, a.s.**, with its registered office at Stonavská 2179, Doly, 735 06 Karviná, IČ: 268 63 154, registered in the Commercial Register administered by the Regional Court in Ostrava, Section B, Insert 2900

Creditor's comments on certain statements of the Debtor contained in its petition for application of interim measures dated May 25, 2016

*Via e-mail and personally to the court's filing office*

## 1. INTRODUCTION

- [1] On May 3, 2016, the insolvency proceeding against the Debtor was commenced at the Regional Court in Ostrava under the file number KSOS 25 INS 10525/2016 (hereinafter referred to as „**Insolvency proceeding**“), and the insolvency of the Debtor was declared on May 9, 2016.
- [2] On May 17, 2016, the Creditor submitted to the Insolvency proceeding a proof of claim in the total amount of CZK 9,530,033,808.71 (hereinafter referred to as „**Claim 1**“). The proof of Claim 1 was published on the insolvency register on May 18, 2016 under the order number P33-1. and P33-2.
- [3] On May 27, 2016, the Creditor submitted to the Insolvency proceeding a proof of its other claims in the total amount of CZK 955,950,972.61 (hereinafter referred to as „**Claim 2**“) (Claim 1 and Claims 2 together hereinafter referred to as „**Claims**“). The proof of Claims 2 was published on the insolvency register on May 27, 2016 under the order number P100-1.
- [4] On May 25, 2016, the Debtor filed at the Regional Court in Ostrava a petition for application of interim measures (hereinafter referred to as „**Petition**“), on the basis of which the Regional Court in Ostrava issued a resolution No. KSOS 25 INS 10525/2016-B-43 dated May 26, 2015, by which it ordered interim measures such that: (i) the operation of the Debtor’s business might be stopped, even partially, or cut down only with the prior approval of the preliminary creditors’ committee and until the preliminary creditors’ committee is appointed, only with the prior approval of the insolvency court; and (ii) resolutions of the sole shareholder of the Debtor, resolutions of the general meeting of the Debtor and resolutions of the shareholders passed outside the general meeting shall only become effective upon the prior approval of the preliminary creditors’ committee and until the preliminary creditors’ committee is appointed, only upon the prior approval of the insolvency court.
- [5] The Creditor wishes to comment on certain statements contained in the Petition, which do not correctly reflect the Creditor’s legal status in respect of the Claims, afforded to it under the Contractual Documentation, and wishes to clarify the Creditor’s legal status in order to ensure that no prejudice arises to the Creditor in the further course of the Insolvency proceeding.

## 2. THE CREDITOR’S POSITION IN THE INSOLVENCY PROCEEDING

- [6] The Debtor stated in the Petition that its biggest creditors are three foreign companies which the Debtor collectively calls the “AHG group”.

- [7] These are Ashmore Investment Management Limited, with its registered office at 61 Aldwych, London, WC2B 4AE, United Kingdom, registration number 03344281 (hereinafter referred to as „**Ashmore**“), M&G Investment Management Limited, with its registered office at Laurence Pountney Hill, London, EC4R 0HH, United Kingdom, registration number 00936683 (hereinafter referred to as „**M&G**“), and Gramercy Funds Management LLC, with its registered office at 20 Dayton Avenue, Greenwich, CT 06830, USA (hereinafter referred to as „**Gramercy**“) (Ashmore, M&G and Gramercy together are hereinafter referred to as the „**Funds**“).
- [8] Notwithstanding the Debtor’s statement, the proofs of the Creditor’s Claims as well as the Debtor’s insolvency petition (see paragraphs 12 to 19 of the Petition) show that the largest claims in the Insolvency proceeding are those submitted by the Creditor in its own name. It is also clear from the proofs of the Creditor’s Claims that the Creditor acts in its own right as a creditor of the Debtor in the Insolvency proceeding in respect of the entirety of the debt outstanding under Claim 1 and Claims 2.
- [9] The position of the Creditor as a creditor of the submitted Claims is set out in the contractual documentation on which the Creditor’s Claims are based. This documentation is attached to the proofs of Claims. The documentation consists of: (a) an „Indenture €300,000,000 Senior Secured PIK Toggle Notes due 2020” in relation to the Claim 1; and (b) a „Super Senior Term Facility Agreement €35,000,000” and „Intercreditor Agreement“ in relation to the Claims 2 (hereinafter referred to as the “**Contractual Documentation**”).
- [10] Under the Contractual Documentation, the Creditor may exercise the rights of the creditors in respect of the Claims. Further, the Creditor has a separate and independent right to enforce the Claims, including a right to submit claims in the Insolvency proceeding. The ultimate and additional beneficiaries of the Claims are irrelevant for these purposes.
- [11] The Creditor wishes to emphasise that the Creditor is an independent entity and a member of the global financial group Citigroup, which occupies a leading position in the global financial services market. The Creditor is not affiliated with the Debtor or any of the Funds. They share no directors, no common management and no corporate structures.
- [12] Since the Creditor is the largest creditor in the Insolvency proceeding, and not the Funds, the Creditor considers that it is not correct to describe the Funds as both the largest creditors and a controlling entity of the Debtor.

### 3. POSITION OF THE FUNDS IN RELATION TO THE DEBTOR

- [13] The Creditor deems it necessary to comment briefly, using the information available to it, on the position of the Funds, and particularly on the Debtor's statement that these Funds are the controlling entities of the Debtor.
- [14] An inaccurate perception of the position of the Creditor, the Funds and the Debtor could adversely affect the Creditor's prospects in the Insolvency proceeding.
- [15] The Funds are three separate legal entities who, respectively, are lenders and bondholders under the Contractual Documentation. There are multiple bondholders and facility lenders under the Contractual Documentation; and the Funds are simply three of such bondholders and lenders.
- [16] As regards the ownership structure of the Debtor, the Creditor assumes that the data provided by the Debtor in its official documents, namely its latest annual report and its insolvency petition, is accurate.
- [17] According to the insolvency petition of the Debtor, NWR Holdings B.V., incorporated and existing under Dutch law, with its registered office at Herengracht 448, 1017 CA Amsterdam, Netherlands, registration number 61294179 (hereinafter referred to as "**NWR Holdings**") and New World Resources Plc., incorporated and registered in England and Wales, with registered office at c/o Hackwood Secretaries Limited, One Silk Street, London EC2Y 8HQ, United Kingdom, registration number 7584218 (hereinafter referred to as "**NWR Plc.**") are the controlling entities of the Debtor. According to the annual report, the company NWR Plc. is the dominant controlling entity of the Debtor and, as such, is considered the controlling entity also in accordance with Section 74 para. 3 of the Act No. 90/2012 Coll., Business Corporations Act.
- [18] In the Debtor's insolvency petition (see paragraphs 49 to 53) and in the Debtor's last annual report, there is no reference to such Funds as controlling entities of the Debtor.
- [19] In our view, the Debtor's assertions confuse the status of the Creditor as the legal creditor of the Claims and, if such confusion is allowed to persist, it may deprive the Creditor of its proper rights as the largest creditor in the Insolvency proceeding and the future operation of the Debtor.

### 4. PRELIMINARY CREDITORS' COMMITTEE

- [20] On June 1, 2016, the Regional Court in Ostrava issued a resolution No. KSOS 25 INS 10525/2016-B52 by which the court designated a three-member preliminary creditors' committee. The Creditor has not been appointed as a member of the preliminary creditors' committee.

- [21] However, the Creditor has so far submitted the largest claims in the Insolvency proceeding. Further, the Creditor's Claims are not subject to any conditions and the Debtor has confirmed the existence of the Claims, as can be seen, inter alia, from its insolvency petition (see paragraphs 13 to 18).
- [22] In this respect, the Creditor wishes to ensure that its position is not prejudiced by any misunderstanding as to its status as the legal creditor of the Claims.

## **5. CONCLUSION**

- [23] To summarise, the Creditor concludes that:
- (a) **the Creditor has submitted the largest claims in the Insolvency proceeding in its own name and is the largest creditor of the Debtor by value;**
  - (b) **the Creditor acts in the Insolvency proceeding as a separate and independent creditor;**
  - (c) **the Creditor is not affiliated with the Debtor, it shares no directors, common management or corporate structures with it;**
  - (d) **the data provided by the Debtor in its official documents show that the person ultimately controlling the Debtor is the company NWR Plc;**
  - (e) **every effort should be made to ensure that no prejudice arises to the Creditor as a result of incorrect assertions as to the Creditor's legal status or the status of the Claims submitted by it.**

**Citibank N.A., London Branch**