KSOS 25 INS 10525/2016
4 VSOL 856/2016-B-133

Resolution

The High Court in Olomouc decided, in a tribunal composed of the chairwoman, JUDr. Ivana Waltrová, and judges JUDr. Pavla Tomalová and Mgr. Diana Vebrová, in the insolvency proceeding against the debtor, **OKD, a.s.,** Id. No. 26863154, with its registered seat at Stonavská 2179, Karviná - Doly, Postal Code 735 06, represented by Petr Kuhn, attorney-at-law, of BADOKH - Kuhn Dostál advokátní kancelář, s.r.o., 28. října 12, 110 00 Prague 1, joined by the **Regional Public Prosecutor's Office in Ostrava,** with its registered seat at Na Hradbách 21, Ostrava, Postal Code 729 01, concerning the debtor's motion for preliminary injunction pursuant to Section 82 of the Insolvency Act, **on the appeal filed by NWR Holdings B.V.,** with its registered seat at 1017 CA Amsterdam, Herengracht 448, Kingdom of Netherlands, reg. No. 61294179, represented by JUDr. Luděk Chvosta, attorney-at-law, of White 8, Case (Europe) LLP, Na Příkopě 14, 110 00 Prague 1, against resolution of the Regional Court in Ostrava, ref. No. KSOS 25 INS 10525/2016-B-43, dated May 26, 2016 ,

as follows:

resolution of the Regional Court in Ostrava, ref. No. KSOS 25 INS 10525/2016-B-43, dated May 26, 2016, **is upheld** as regards paragraph II of the statement of decision**.**

Ratio decidendi:

The court of first instance granted a preliminary injunction by virtue of the above-referenced resolution, ruling in paragraph II of the statement of decision that 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

shall be conditional upon the consent of the interim creditors' committee, or, until the interim creditors' committee has been appointed, the consent of the Insolvency Court.

To justify the above resolution, the court of first instance stated that the insolvency proceeding against the debtor was in a phase where a decision on the debtor's insolvency had already been made by virtue of resolution dated May 9, 2016, ref. No. KSOS 25 INS 10525/2016-A19, on the debtor's resolution, while a decision on the debtor's motion for approval of reorganization had yet to be rendered. On May 25, 2016 (p. B-41 of the file), the debtor delivered a motion for preliminary injunction to the court, proposing that the court decide pursuant to Section 74 *et seq.* of the Rules of Civil Procedure, in conjunction with Section 82 of the Insolvency Act, in addition to relief proposed in Article I (2)(b), that the effectiveness of decisions of the General Meeting, or decisions of the sole shareholder exercising the powers of the Debtor's General Meeting and decisions taken outside the debtor's General Meeting, be conditional upon the consent of the interim creditors' committee, or, until the interim creditors' committee has been appointed, the consent of the insolvency court. It de facto stated that a serious conflict of interests existed between the debtor and persons controlling the debtor, and that it was therefore necessary to ensure immediate regulation of legal relations between the debtor and its controlling parties by way of a preliminary injunction. The debtor saw the serious conflict of interests in the fact that the controlling persons of the debtor are NWR Holdings B.V., a company organized and existing pursuant to the laws of the Netherlands, with its registered seat at Herengracht 448, 1017 CA Amsterdam, Netherlands, reg. No. 61294179 ("NWR Holdings B.V."), and New World Resources Plc., a company organized and existing pursuant to the laws of England and Wales, with its registered seat at c/o Hackwood Secretaries Limited, One Silk Street, London EC2Y 8HQ, Great Britain, reg. No. 7584218 ("NWR Plc.") (a more detailed description of the capital structure and assets of persons controlling the debtor or forming a concern with the debtor is contained in paras 49 through 53 of the insolvency petition). NWR Plc. is further controlled by Ashmore Investment Management Limited, with its registered seat at 61 Aldwych, London, WC2B 4AE, Great Britain, reg. No. 03344281; M&G Investment Management Limited, with its registered seat at Laurence Poutney Hill, London, EC4R 0HH, Great Britain, reg. No. 00936683, and Gramercy Funds Management LLC, with its registered seat at 20 Dayton Avenue, Greenwich, CT 06830, United States of America, grouped in and acting jointly as "Ad Hoc Group" ("AHG"). AHG is thus the entity ultimately controlling NWR Plc., and thus indirectly controlling the debtor. The debtor further elaborated that AHG members are the debtor's creditors at the same time under a bond issue,

"€300,000,000 Senior Secured PIK Toggle Notes due 2020", issued by New World Resources N.V. on October 7, 2014 (the "Bond Issue"), or under the debtor's guarantee for repayment of the Bond Issue, as described in more detail in para 15 of the insolvency petition and in the claim application placed on the insolvency file under No. P33. Said claim was asserted by Citibank N.A., London Branch, reg. No. BRO01018, with its registered seat at Citigroup Centre, Canada Square 25, London E14 5LB, Great Britain ("Citibank"), acting as the Security Agent of the bondholders, and a joint and several creditor of all the bondholders (see Article XIII. 13.06 of the Bond Issue), authorized to enforce claims corresponding to secured debts of the debtor. Most of the bonds issued under the Bond Issue are also held by AHG members who are thus the debtor's main creditors under the debtor's guarantee for indebtedness under the Bond Issue. The AHG members are moreover the debtor's creditors under the "Superior Senior Term Facility Agreement €35,000,000", concluded on September 9, 2014, or rather under the debtor's guarantee for the payment of payables under the above-referenced agreement, as described in more detail in para 17 of the insolvency petition. AHG is thus a group controlling the debtor on the one hand, and the debtor's largest creditor on the other hand. There may thus be mutual conflict between the interests of the persons controlling the debtor and the debtor.

Further, according to the *ratio decidendi* of the contested resolution, the debtor is, as a result of the facts described above, a guarantor of major obligations of NWR Holdings B.V. and persons controlling NWR Holdings B.V. arising from the Bond Issue. As the guarantee was called against the debtor, the debtor might, by way of a subsequent guarantor's recourse, become a major creditor of NWR Holdings B.V. and the persons controlling NWR Holdings B.V. The debtor and its shareholder are thus in the mutual positions of creditor and debtor. Such relations are always contradictory by definition, and as the debtor is insolvent, a transparent solution is required. According to the *ratio decidendi,* such solution is offered by Section 333 of the Insolvency Act (although said provision addresses the situation following approval of reorganization) which suspends the execution of the office of the debtor's bodies, and conditions the effectiveness of decisions of the General Meeting or the Supervisory Board on the consent of the creditors' committee in its sub-section 2. The court of first instance de facto concluded that the person controlling the debtor was at the same time its largest creditor, and it was thus necessary - in a situation where it is in the common interest of the creditors for the debtor to continue operating as a going concern - to ensure equal exercise of rights by all creditors, and, if applicable, to prevent situations where disputes might arise concerning potential transactions involving the debtor's assets. That is why the court applied restrictions on effects of corporate decisions pursuant to Section 333 (1) and (2) of the Insolvency Act designed for situations following approval of reorganization even on the situation prior to approval of reorganization.

Paragraph II of the statement of decision of the resolution was contested by way of an appeal by NWR Holdings B.V., with its registered seat at 1017 CA Amsterdam, Herengracht 448, Kingdom of Netherlands, reg. No. 61294179 (the "appellant"). The appellant stated that it is of the opinion that the appeal was directed both against the appellant in its capacity as the debtor's sole

shareholder, and not only against the debtor, and that it was unreviewable as the court of first instance failed to provide the line of thought it followed when deciding in its *ratio decidendi*. The appellant further stated that it vehemently disagreed with the grounds for the restriction of its shareholder rights. As regards the appellant's status as the debtor's sole shareholder, the appellant basically argued that the preliminary injunction curtails the direct exercise of its shareholder rights since pursuant to Section 353 of Act No. 90/2012 Coll., on Business Corporations (the "BCA"), one of shareholder rights is the right to attend and vote at the General Meeting, whereby the shareholder exercises the right to participate in the management of the company pursuant to Section 398 of the BCA. The appellant elaborated that pursuant to the same provision, shareholders can exercise their right to participate in the company's management even outside the General Meeting. The appellant further argued that such restriction is not provided for in any law. The appellant stated in para 38 of its appeal that the largest shareholders of NWR Plc were investment funds managed by members of an "ad hoc group" (the "AHG"), which was set up as a group for the purpose of joint negotiations, rather than for the purpose of joint exercise of shareholder or other rights arising from participation in NWR Plc.. The appellant added that AHG lacked legal personality and did not operate on the basis of any joint rules. The appellant thus argued that the court of first instance failed to establish with certainty that the Ad Hoc Group was a group controlling the debtor, and that NWR Plc. was truly controlled by companies referred to as AHG. The appellant stated that it was managed by its statutory body, or rather, that it was controlled by its sole shareholder, New World Resources N.V., and definitely did not act upon instructions of AHG or any of its members. The appellant further argued that it was not clear what the conclusion of the debtor and the court of first instance concerning the existence of a conflict of interests between the debtor and members of the AHG was based on, and elaborated at length as to why it believed that there was no legitimate need to grant the preliminary injunction. The appellant further stated that is had not asserted any claim in the insolvency proceeding. It stated that it was not true that AHG was the debtor's largest creditor. None of the AHG members have asserted any claims as yet, and according to data on file in the insolvency register, Citibank N.A. London Branch appears to be the largest creditor.

The following parties submitted replies to the appeal: the debtor (p. B-85 of the file), Citibank N.A., London Branch, with its registered seat at Citigroup Centre, Canada Square, Canary Wharf, London E14 5LB, United Kingdom, reg. No. BR001018 ("Citibank N.A.") (p. B-96 of the file), the High Public Prosecutor's Office in Olomouc (p. B-121 of the file), and the insolvency trustee, Ing. Lee Louda (p. B-122 of the file), at the request of the appellate court.

The debtor argued in its reply to the appeal that the appellant lacked standing for the appeal as it was not a party to the proceeding in the matter of the preliminary injunction, nor was it a third party on whom the preliminary injunction imposes an obligation. The debtor argued that the decision of a sole shareholder exercising the powers of the General Meeting was a decision of the company's bodies (same as a decision of the statutory body of the company). For that reason, under procedural law, a claim seeking to have a resolution of the General Meeting declared invalid (whether such resolution was adopted at the General Meeting or per rollam) is always directed

against the company, rather than the members who adopted same. The debtor is of the opinion that the preliminary injunction is directed against the debtor, and orders the debtor to suffer restrictions to the extent that the debtor is obliged to suffer restrictions whereby the debtor must request the consent of the interim creditors' committee, or the consent of the insolvency court. The debtor stated that the preliminary injunction did not restrict the appellant's rights, that the appellant continued to be the debtor's shareholder and could adopt decisions while exercising the powers of the General Meeting. The debtor pointed out that the appellant did not sufficiently distinguish between the preliminary injunction granted as compared to a preliminary injunction that would order it to refrain from the exercise of voting or other rights. Should the latter be the case, its appeal would be possible, however, it is ruled out in the case on hand. The debtor further believes that since the preliminary injunction is directed against the debtor, rather than the appellant, such preliminary injunction does not have to contain a *ratio decidendi*. The resolution of the court of first instance moreover does contain a *ratio decidendi,* because the insolvency court provides a detailed summary of the principal reasons underlying the grant of the preliminary injunction and capable of explaining the statement of decision in a comprehensible and reviewable manner. As for the control of the debtor by AHG members, the debtor stated that the appellant was the sole shareholder of the debtor, and was a mere holding company, with New World Resources N.V. as its sole shareholder, which is in turn again controlled by New World Resources Plc. (as the sole member). According to the debtor, the debtor is actually controlled by the person which controls New World Resources Plc. The debtor stated that the deeds submitted by the debtor together with the motion for the preliminary injunction showed that persons acting as AHG became shareholders of New World Resources Plc. and their aggregate share was 61.37%. The debtor stated that the appellant confirmed this very fact in para 38 of the appeal, but tried to diminish its importance by contending that there was no formal or informal agreement on the exercise of voting rights between the persons concerned, and that each of them pursued their own interests (paras 38 through 42 of the appeal). The debtor further stated that it had demonstrated in the motion for preliminary injunction that AHG members had swapped bonds of New World Resources Plc. for shares in the company, and further concluded an agreement for the settlement of exit of persons controlling the debtor until then (Cercl and Asental groups). According to the debtor, it is hard to concur with the appellant that the AHG members acted from the beginning without a prior understanding (happened to have the same intent), and that their interests differ even after they had obtained the shares. The swap of receivables under the bonds for a minority shareholding cannot be reasonably expected from sophisticated fiduciary trustees; such transaction only makes sense if AHG members act in a coordinated fashion (in concert), and take advantage of the potential of their aggregate 60% interest, i.e., the potential to gain control over New World Resources Plc., and indirectly over the debtor. This is confirmed by their publicly known offer to the Czech government for the sale of all shares and write off of receivables under the bonds issued by the NWR group, the repayment of which is guaranteed by the debtor. Such offer can only be made by a person who controls the current shareholder (i.e., NWR Holding B.V.), and necessarily also New World Resources Plc., and who holds the bonds at the same time. Therefore, if AHG members made a joint offer of sale of the equity stake in the debtor, they must have been acting under an agreement. The debtor stated that

AHG members actually concede as much on their own webpages, www.adhocgroup.cz, where they present themselves as investors "who jointly control a majority of voting rights in NWR Plc.". The existence of a formal agreement between AHG members is further confirmed by the annual report of NWR Plc., page 65, to which the debtor referred already in its motion for preliminary injunction. If AHG members concluded an agreement for the purpose of settlement of the exit of persons controlling the debtor until then (Cercl and Asental groups), it is obvious that the purpose of the agreement was the acquisition of control over the debtor by AHG. The debtor further stated that the deeds submitted by the debtor together with the motion for the preliminary injunction showed that AHG members are the main creditors with regard to the claim asserted by Citibank N.A. by claim application No. 100, i.e., claims under SSCF. AHG instructs Citibank N.A. with regard to the enforcement of claims asserted in the insolvency proceeding. The debtor further stated that AHG also owned claims asserted by Citibank N.A. by claim application No. 33 (claims under the senior secured notes). This fact also arises from the annual report of NWR Plc. According to the annual report, creditors under SSCF (claim application No. 100) are at the same time shareholders of NWR Plc. and holders of the senior secured notes, asserted by Citibank N.A. by way of claim application No. 33. Therefore, if the appellant claims that none of the AHG members had asserted any claim in the insolvency proceeding, the reason is that AHG has been asserting its claims through Citibank N.A. acting on behalf of the bondholders as the security agent. Citibank N.A. asserted claims in the total amount of CZK 10,485,984,781.32 on behalf of the bondholders. Therefore, if AHG members are not registered creditors, that does not mean they have no direct legal interest in the registered joint and several creditor, Citibank N.A., succeeding with its claim and obtaining as much satisfaction as possible under the registered claim. The debtor noted that when AHG negotiated with the Czech government, it offer to sell the debtor on a debt free basis, i.e., free of debts vis-à-vis the bondholders. The debtor may logically be "stripped" of such claims only by the relevant creditor under those claims, i.e., the holder of bonds and related claims asserted by way of claim application No. 33. The debtor further stated that the NWR made the debtor assume a guarantee in the amount of CZK 10.5 billion, and did not prevent the debtor getting into a situation where its debts are double the value of its assets. When the debtor became distressed, the NWR group carried out transactions designed to get rid of its influence over the debtor, and left it to the creditors. AHG members, i.e., investment fund managers, have an eminent interest in minimizing losses, and there is a threat of further transfers of interests; the individual transactions are moreover likely to be carried out abroad, which greatly increases the uncertainty of both the debtor and the remaining procedural entities. The debtor further elaborated on facts demonstrating the specific position and interests of the appellant, or rather the debtor's controlling persons.

According to the reply provided by Citibank N.A., the bank asserted a claim in the total amount of CZK 9,530,033,808.71 in the insolvency proceeding, which claim is entered in the insolvency register under serial Nos. P33-1 and P33-2, and further, claims in the total amount of CZK 955,950,972.61, published in the insolvency register under serial Nos. P100-1 and P100-2. The bank stated that the claim applications clearly show that the bank, rather than AHG members, is the debtor's creditor, as evidenced by contractual documentation attached to the claim

applications. According to Citibank N.A., the individual AHG members consist of three separate legal entities, each of which is, pursuant to the contractual documentation, in the position of financing entities and bondholders. Pursuant to the contractual documentation, there are many more such financing entities and bondholders that the three members, and the three members are merely three of the financing entities and bondholders. Citibank N.A. argued that neither the debtor's insolvency petition (paras 49 through 53 of the insolvency petition), nor the latest annual report of the debtor contains any mention to the effect that the AHG members are the debtor's controlling persons. According to Citibank N.A., the debtor's contention lead to a misperception of the legal standing of Citibank N.A. as the creditor under the claims, and should such situation persist, the rights and legitimate interests vis-à-vis the insolvency proceeding could be injured, and so could be further operations of the debtor as a going concern. Citibank N.A. further stated that it is not in any way affiliated with the debtor, has no interlocking directorates with the debtor, interlocking management or corporate structures, and further stated that the information provided by the debtor in its official documentation shows that the person ultimately controlling the debtor is NWR Plc.

According to the reply provided by the High Public Prosecutor's Office in Olomouc, the public prosecutor's office is of the opinion that the conditions for the grant of the preliminary injunction had not been proven to exist, that the appeal is substantiated and the contested decision of the insolvency court is substantively flawed. According to the High Public Prosecutor's Office, the appellant cannot be viewed as a party to the proceeding within the meaning of Section 14 of the Insolvency Act, as it has not asserted any claim, nor does it otherwise act as a creditor. However, in its capacity as the sole shareholder of the debtor, it can be viewed as someone whose rights or obligations are to be addressed within the meaning of Section 6 (1) of the Act on Special Judicial Proceedings (in conjunction with Section 7 of the Insolvency Act), and as such, it is a party authorized to file an appeal. According to the High Public Prosecutor's Office, the debtor's view that the preliminary injunction only affects the legal standing of the debtor, rather than the legal standing of the appellant, is formalist, and does not reflect the actual impacts of the court decision. If the effectiveness of decisions of the General Meeting is restricted, then such decision obviously affects shareholder rights. The right of the shareholder as a person other than the debtor to participate (or decide, if there is a sole shareholder) in the outcome of the decision of the General Meeting that binds the company to take any legal act, is undoubtedly curtailed by such decision, albeit indirectly. As regards the relationship between the controlling and controlled person, the High Public Prosecutor's Office is of the opinion that those are undoubtedly NWR B.V., NWR N.V. and NWR Plc. As for the contention that AHG members control NWR Plc., it would also be possible to concur with the debtor who refers to numerous documents, press releases, etc., which show that this group of three entities has been acting in pursuit of a single intent, in concert, and ultimately thus controls OKD, a.s. through holding companies. However, the High Public Prosecutor's Office does not believe that it has been demonstrated unequivocally that the appellant, or an entity controlling the appellant and the debtor, is the debtor's creditor at the same time. This circumstance does not directly stem from the documents referred to by the debtor in its filing and reply. The relationship between the main creditor, Citibank N.A., and AHG, can be considered

unclear, just like the way in which AHG entered into the NWR concern. The situation surrounding the existence of claims against the debtor, whether such claims are actually held by the appellant, AHG or the largest registered creditor, can be considered unclear and inconclusive, whereby it cannot be used as a basis for the contested decision on the preliminary injunction curtailing the appellant's shareholder rights. According to the High Public Prosecutor's Office, even if the appellant was proven to be the person controlling the debtor, and its majority creditor at the same time, such fact cannot automatically justify the court's course of action: the court restricted the exercise of shareholder rights by the appellant to the extent indicated, without providing due reasoning, or rather evidence, for its approach. The High Public Prosecutor's Office deems it relevant that the contested decision does not make it clear what precisely the contented conflict between the interests of the debtor and the appellant is supposed to mean, what actions are threatened and what the restriction on the appellant's shareholder rights is to prevent, or rather, what specific reason makes the insolvency court apply the provision of Section 333 of the Insolvency Act on the situation on hand, thus placing its effects ahead of the approval of reorganization. The public prosecutor's office is of the opinion that the existence of an urgent need to regulate the relations between the parties in this manner, on a temporary basis, has not been demonstrated in the course of the proceeding thus far.

According to the insolvency trustee's reply, the trustee views the preliminary injunction as a measure which is in the common interest of all the creditors, and at the same time, does not substantially affect the exercise of rights of the debtor's shareholder(s), whoever it/they may be. The insolvency trustee contends that the statement of decision of the preliminary injunction shows that the resolution did not prohibit the exercise of rights by the debtor's shareholders but merely stipulated that for corporate decisions to be effective, they are subject to the consent of the interim creditors' committee (hereinafter the "ICC"). The preliminary injunction does not order the appellant to refrain from exercising voting or other rights attached to shares in OKD but merely stipulates restrictions for the purposes of corporate decisions taken by the General Meeting of OKD, rather than to a particular shareholder, or even NWR. The trustee states that should the debtor's sole shareholder (whoever it may be) for instance intend to recall the entire Board of Directors and replace it with a sole director or other directors, then it needs to justify such course of action to the interim creditors' committee (hereinafter the "ICC"), which - in its capacity as a body protecting the common interests of the creditors - will assess the matter, and, provided it is not contrary to the common interests of the creditors and other statutory criteria, should grant such consent. The insolvency trustee stated that to be honest, he could not imagine that in the situation on hand, the sole shareholder would for instance recall all members of the Board of Directors and replace them with a single person who would meet statutory prerequisites but would be completely unfamiliar with OKD's operations. Such approach, although formally flawless, might have fatal consequences for OKD's activities in the further course of the proceeding and in negotiations with the creditors. The contemplations as to all the different persons who might serve on the debtor's Board of Directors abound, and so do the motives and agendas of such persons. The insolvency trustee further noted that this was one of the responses to the objection voiced by the High Public

Prosecutor's Office in Olomouc in its statement, wherein it poses the question that it is not obvious what exactly the insolvency court's concerns were, what action was threatening and what the Preliminary Injunction was supposed to prevent. The trustee further stated that NWR had already made such staffing change in OKD: the debtor had to deal with a sudden removal of the former sales director of OKD, Mr. Peter Dormann, who left the company at the end of May 2016 as a result of procedural and HR changes in the parent company, NWR, and referred to a press release in this context. The trustee noted that NWR had certainly exercised its right to remove an experienced sales director of OKD, thus temporarily weakening OKD's management (Mr. Dormann had a contract with NWR, rather than with OKD). The sole shareholder would be equally authorized to remove the entire Board of Directors and subsequently the entire management of OKD. However, the insolvency trustee asks whether such course of action would be in the common interest of the creditors of a company which has over 10 thousand people on its payroll, concluding that it certainly would not be. To illustrate such course of action, the insolvency trustee notes that at a meeting with the management on May 18, 2016, the insolvency trustee's team met *inter alia* with Mr. Dormann with whom they discussed many issues related to future developments at OKD. Mr. Dormann posed many questions to the insolvency trustee concerning his further course of action in the process of business negotiations for the third quarter of 2016 in the course of the insolvency proceeding against OKD. Mr. Dormann did not inform the insolvency trustee that he would be leaving OKD in a couple of days. At a meeting on May 25, 2016, i.e., a week later, the insolvency trustee was informed that NWR had removed Mr. Dormann from OKD, or, in other words, that his mandate ends as of May 31, 2016. The insolvency trustee further wished to draw attention to a filing made by the High Public Prosecutor's Office in Olomouc (Criminal Section), published on June 21, 2016 in the insolvency register on page D-16, which shows that a police body of the Police of the Czech Republic, Department for the Detection of Corruption and Financial Crime, Ostrava branch, is conducting a criminal proceeding on suspicions of breach of fiduciary duty and insider dealing, which crimes were purportedly committed by unidentified persons acting as bodies of OKD, a.s. and New World Resources N.V. The insolvency trustee further noted that must certainly not take lightly the debtor's contention that the NWR Group forced the Debtor to assume a very substantial suretyship obligation of approximately CZK 10.5 billion, and then failed to prevent OKD's progression into insolvency. The insolvency trustee further stated that in the exercise of its powers, the Police of the Czech Republic had requested and is requesting numerous documents and assistance both from the insolvency trustee and the management of OKD. The insolvency trustee further stated that debtor's representatives informed the insolvency trustee that a forensic investigation had been initiated, the insolvency trustee personally inquired about its progress and has been conducting its own inquiries using the information available. The insolvency trustee noted that it is conceivable that if penal authorities themselves publish the information that a criminal proceeding is pending, and at the same time, the debtor initiates a forensic investigation of directly related matters, then the relevant persons in companies that directly or indirectly control OKD may have a great interest in the current Board of Directors of OKD not taking any material steps in the forensic investigation so published. The insolvency trustee stressed that the creditors had de facto become the economic owners of the debtor's assets because of its insolvency, and the question is

why any shareholder of a company in such a serious economic situation, under the shareholder's corporate control, should make any fundamental corporate changes without discussing same with the creditors (the ICC) and obtaining their consent. The insolvency trustee believes that the preliminary injunction is not a measure that would be unknown to insolvency law in terms of in terms of restrictions on the effects of corporate decisions of an insolvent business corporation. While the effects of the provision of Section 333 of the Insolvency Act only occur after reorganization is approved, the law does not prohibit the imposition of such effect in a modified version by way of a preliminary injunction. The insolvency trustee concurred with the debtor in arguing that the appellant lacked standing for filing an appeal against the preliminary injunction which is directed against the debtor, i.e., the company itself. The insolvency trustee believes this is parallel to a claim contending invalidity of a resolution of the General Meeting which is always directed against the company (rather than the shareholders). According to the trustee, the appellant is not a party to the proceeding concerning the preliminary injunction, and neither is it a third party on whom an obligation is imposed by virtue of preliminary injunction. The content of the insolvency trustee's reply shows that the insolvency trustee believes that preliminary injunction could not be directed against a particular shareholder, because such shareholder could then very simply sell or transfer its shares, and the new shareholder would be able to make such decision without any restrictions under the preliminary injunction, as the preliminary injunction would not apply to the new shareholder. As regards control over the debtor by AHG members, the insolvency trustee pointed to publicly accessible webpages of AHG, www.adhocgroup.cz, which indicate, inter alia, that AHG officially informed government representatives about having gained 60% of voting rights in NWR, and offered OKD to the government on a debt free basis as regards debts to bondholders. As for OKD's corporate structure, the insolvency trustee referred to all the documents and information available to the appellate court, in particular in the filings made by the debtor itself. The insolvency trustee further commented on the reply provided by Citibank N.A., and stated that he was not aware (as yet) of (any of) the companies grouped in AHG having directly filed any of their claims in the insolvency proceeding. The insolvency trustee stated he was not aware of the debtor having indicated in the list of obligations (Schedule 12 to the insolvency petition) (any of) the companies grouped in AHG as direct creditors of the debtor. However, the insolvency trustee stated that the following companies were listed as creditors in the list of claims on page 314, part 2F: NWR Holding B.V., reg. No. 61294179, and New World Resources N.V. A preliminary investigation shows that said companies are not registered as creditors yet but this piece of information cannot be proposed as certain as a claim may have been registered while the trustee's reply was being drafted, for instance. The insolvency trustee further noted that as regards the standing of Citibank N.A., the same registered claims in the insolvency proceeding in its capacity as joint security agent. A security agent, whether under syndicated loans or other contractual instruments, provides services to all creditors participating in the joint claim. In other words, much as from a general perspective, the security agent is an individual creditor asserting the claims of a whole group of creditors, such claims are not all vested in that one entity by definition. The principal creditors actually participating in the claim application may thus be completely different entities, which is also the case of Citibank's claim applications. The behavior of the security agent is

clearly regulated by contractual documentation, and the security agent is by definition influenced by instructions issued by the other majority creditors. The insolvency trustee stated that the whole matter of Citibank's claim applications needed to be viewed in this context, as according to the information and documents available, AHG and its members have been asserting their claims through Citibank which in turn acts as the security agent. The insolvency trustee stated in conclusion that in his opinion, the preliminary injunction was, in terms of the proportionality principle and visible discharge of justice, a judicial instrument designed to prevent excessive actions in the debtor's management, while at the same time, it did not prevent shareholders from approaching the creditors' forum with proposals for corporate changes as may be required, following their pragmatic discussion. The trustee also referred to an opinion voiced by the European Court of Human Rights in Delcourt (1970 A 11, §. 25): "Justice must not only be served, but must be served visibly." The insolvency trustee is of the opinion that the preliminary injunction is justified.

The debtor supplemented its reply to the appeal by a filing received by the court on July 13, 2016 (p. B-127 of the file). By that filing, the debtor both supplements its original reply, and replies to the above replies provided by Citibank N.A. and the High Public Prosecutor's Office in Olomouc. The debtor states that it believes that Citibank N.A. is acting on instructions from AHG members, at least as regards the claim entered in the insolvency register under No. P100. The debtor states that Citibank N.A is merely enforcing the asserted claims for AHG members in its capacity as security agent, while AHG members are the actual creditors. The debtor stated that the Enforcement Instructions to Security Agent issued to Citibank N.A. by the AHG members were attached to the motion for preliminary injunction as Schedule 6. In the relevant filing, the debtor provides their certified Czech translation.

Pursuant to Section 7 of Act No. 182/2006 Coll., on Insolvency and Insolvency Resolution Methods (the "Insolvency Act"), the provisions of the Rules of Civil Procedure concerning adversary proceedings shall be applied to both the insolvency proceedings and adversary proceedings *mutatis mutandis*, unless this Act expressly stipulates otherwise or unless such approach is in conflict with the rules governing the insolvency proceeding; where this is not possible, provisions of the Act on Special Judicial Proceedings shall apply; however, provisions on enforcement of a decision or distraint shall only be applied, *mutatis mutandis*, where this Act refers to them.

Pursuant to the provision of Section 15 of the Insolvency Act, unless they are registered creditors, other persons asserting their rights in the insolvency proceedings shall be parties to the proceeding only as long as the insolvency court is deliberating and deciding on such rights.

Pursuant to Section 82 (1) of the Insolvency Act, the insolvency court may grant a preliminary injunction in the insolvency proceeding even without a motion.

Pursuant to Section 111 (1) of the Insolvency Act, unless the insolvency court decides otherwise, the debtor is obliged to refrain from disposing with the estate (and of any assets which may belong to the estate) as of the moment in which the effects associated with the commencement of insolvency proceedings take hold, insofar as such acts of disposal result in a material change in the composition, utilization, or designation of such assets or in a non-negligible reduction of the same. Payment obligations which originate from the time before the commencement of insolvency proceedings may only be fulfilled by the debtor to such extent, and on such terms, as set out in the Insolvency Act.

Pursuant to Section 333 (1) of the Insolvency Act, unless this Act stipulates otherwise, the execution of the office of the debtor's General Meeting or Members' Meeting shall be suspended by virtue of the decision approving reorganization, and the insolvency trustee shall exercise the powers of the debtor's General Meeting or Members' Meeting in their stead. Pursuant to sub-section 2, the debtor's General Meeting or Members' Meeting shall continue to be entitled to appoint or elect and remove members of the debtor's statutory body and Supervisory Board even after the decision permitting reorganization is rendered; for its decisions to be effective, however, they shall require the consent of the creditors' committee.

The content of the insolvency file indicates in particular the following with regard to the review of paragraph II of the statement of decision of the resolution, as contested by the appeal. On May 3, 2016, the debtor delivered an insolvency petition, together with a motion for approval of reorganization, to the Regional Court in Ostrava. By its resolution of May 9, 2016 (p. A-19 of the file), the court of first instance established that the debtor was insolvent, appointed an insolvency trustee and made further request as formally required in connection with the decision on insolvency under the law.

By its filing delivered to the Regional Court in Ostrava on May 25, 2016 (p. B-41 of the file), the debtor moved for a preliminary injunction, proposing the following:

a) the appointment of an interim creditors' committee,

b) the debtor's operations may only be halted 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,

c) the effectiveness of decisions of the General Meeting, or decisions of the sole shareholder exercising the powers of the General Meeting, and decisions 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.

The appellate court would like to mention in this context for ease of orientation that the court of first instance decided on the interim creditors' committee by a separate resolution of June 1, 2016 which entered into force on the same day (p. B-52 of the file). The decision of the court of

first instance on the motions as per a), b) above was not contested by the appeal, the appellant only appealed against the decision on the motion as per c), because its appeal is expressly directed against part II of the statement of decision of the contested resolution.

The insolvency petition of the debtor shows that the debtor's payables owed to creditors equal CZK 17,246,248,966 (para 20 of the petition), while its assets are worth CZK 6,748,568,000 (para 23 of the petition).

The extract form the Commercial Register for the debtor shows that NWR Holdings B.V., with its registered seat at 1017 CA Amsterdam, Herengracht 448, Kingdom of Netherlands, reg. No. 61294179 ("NWR B.V.") is the sole shareholder of the debtor. Members of the Board of Directors authorized to act by virtue of a written authorization include Boudewijn Wentik, born June 5, 1969, 3583 GK Utrecht, Koningslaan 48, Kingdom of Netherlands.

Extract from the company register maintained by the Chamber of Commerce of the Netherlands shows that New World Recources N.V., 115 Park Street, W1K 7AP London, United Kingdom, reg. No. 34239108 ("NWR N.V.") is the sole member of NWR Holdings B.V. Members of the Board of Directors authorized to act in their sole capacity include Boudewijn Wentik, born June 5, 1969.

Claim application made by creditor Citibank N.A. and maintained under No. P100, and schedules to the claim application, show that the creditor asserted a claim in the amount of CZK 9,530,033,808.71. The claim stems from the fact that the debtor provided a guarantee for the obligations of NWR N.V., as evidenced by a document entitled "Indenture € 300,000,000 Senior Secured PIK Toggle Notes due 2020". Said document shows that it was concluded on October 7, 2014, NWR N.V. is indicated as the issuer, and the debtor, NWR B.V and NWR Karbonia S.A. are indicated as guarantors. Said document also shows that it was signed by a single person, B. Wentik, on behalf of both the issuer and all the guarantors. The claim application further shows that the creditor accelerated the claim as an insolvency proceeding had been initiated against the debtor in its capacity as guarantor, whereby Article VII. (701)(a) (ix) of the Indenture was breached. The creditor further stated that NWR N.V. had made no payments towards its due and payable secured debts.

Claim application made by creditor Citibank N.A. and maintained under No. P33, and schedules to the claim application, show that the creditor asserted claim No. 1 in the amount of CZK 955,109,001.09, and claim No. 2 in the amount of CZK 841,971.52. The claim stems from the fact that the debtor provided a guarantee for the obligations of NWR B.V. under "Super Senior Term Facility Agreement €35,000,000". Said agreement shows that it was concluded on September 7, 2014 (the creditor provided an obviously erroneous date, September 9, in its application form), and the guarantors indicated therein include the debtor. The agreement further shows that as in the case of the above-referenced Indenture (see the preceding paragraph), it was signed by a single

person on behalf of NWR B.V., NWR. NV, the debtor and NWR Karbonia S.A.: B. Wentik. The claim No. 1 application further shows that the creditor accelerated the claim as an insolvency proceeding had been initiated against the debtor, whereby Article 23.6 of the Agreement had been violated. The creditor further stated that NWR B.V. had made no payments towards its due and payable secured debts. The creditor stated that claim No. 2 also stemmed from a guarantee for obligations of NWR Holdings (the creditor did not indicate whether NWR B.V. or N.V.) pursuant to the Agreement and ICA. By its filing of July 11, 2016, the creditor withdrew the claim application in part, whereby, following such withdrawal, the creditor is asserting a claim in the amount of CZK 621,273,214.79 (see P100-4). The creditor stated that the partial withdrawal was effected because security for debts of NWR N.V. and NWR B.V. had been realized. Since the creditor failed to specify with regard to claim No. 2 whether the debtor's guarantee applied to obligations of NWR B.V. or N.V., and whether the claim concerned the same agreement claim No. 1, the appellate court did not examine claim No. 2.

The content of the file further indicates that the appellant is not a registered creditor as of the date of this resolution.

The appellate court first and foremost examined whether the appellant was a person entitled to file the appeal since the preliminary injunction is not directed specifically at the appellant, but rather on the decision of the sole member exercising the powers of the General Meeting, decisions of the General Meeting of the debtor and decisions of members adopted outside the debtor's General Meeting. The preliminary injunction thus restricts the current and any other future member/shareholder. As according to the extract from the Commercial Register, the appellant is the sole current shareholder of the debtor, the appellant is a party to the proceeding pursuant to Section 15 of the Insolvency Act while the preliminary injunction is being decided on, and as such is entitled to file the appeal. The contested resolution undoubtedly decided on the appellant's rights and obligations in the debtor's company (Section 15 of the Insolvency Act, Section 7 of the Insolvency Act, Section 201 of the Rules of Civil Procedure).

Having concluded that the appeal had been filed by an authorized party, in a timely manner and against a resolution which is appealable, the appellate court reviewed the contested resolution, including the proceeding preceding its issuance (Section 212, Section 212a (1), (5) and (6) of the Rules of Civil Procedure), and arrived at the following conclusions without scheduling a hearing in the matter (Section 94 (2)(c) of the Insolvency Act).

As for the objection asserted on appeal that the motion for preliminary injunction was formally inadequate (Section 75 (2) of the Rules of Civil Procedure, Section 7 of the Insolvency Act), i.e., where the appellant contended that there was no need to grant the preliminary injunction, the appellate court concludes that in para 13 of the motion for preliminary injunction, the petitioner contended and demonstrated that the debtor was the guarantor for material obligations of the appellant and controlling persons of the appellant.

The appellate court notes that it will not examine in connection with the appeal who currently controls the debtor, as it did not find it relevant for the assessment of the preliminary injunction, for reasons set out below.

What the appellate court deems relevant is the fact that NWR B.V. (the appellant) as the sole shareholder of the debtor, and NWR N.V., as the sole member of NWR B.V., have burdened the debtor with obligations asserted against the debtor under guarantees by creditor Citibank N.A., at the minimum, said companies have burdened the debtor with obligations in the amount of CZK 9,530,033,808.71 and CZK 955,109,001.09. The appellate court further deems it relevant that to satisfy creditors' claims amounting to CZK 17,246,248,966, the debtor has assets worth CZK 6,748,568,000. The appellate court would like to note that NWR B.V. and NWR N.V., at least when entering into the document entitled "lndenture" (attached to claim application P33), by which they had imposed such a burden on the debtor, knew what they were doing, since one and the same person, Boudewijn Wentik, is always signed on behalf of both NWR.N.V. as the issuer, and NWR B.V and the debtor as guarantors. As claim applications P33 and P100 further go to show, neither NWR B.V., nor NWR N.W. have paid their debts (and the partial withdrawal of claim application P100-4 does not indicate that the partial repayment of the debt was made by NWR B.V. and NWR N.V.), which means that they did not take any action to eliminate the debtor's burden. NWR B.V. and NWR N.V. are thus liable for the fact that creditors' satisfaction (whether by way or reorganization or bankruptcy) will be substantially lower than it would be in the absence of the debtor's guarantee. As a result, there is a real danger that said companies might act inappropriately when deciding on the debtor's assets, but also on changes in the debtor's staffing. This fact alone is a material reason why corporate decisions concerning the debtor need to be controlled by the preliminary injunction: it is not in the common interest of the creditors to have the sole shareholder, following a final and enforceable decision on the debtor's insolvency, for instance elect or remove members of the Board of Directors or decide on mergers or other corporate transformations without any restrictions and to the creditors' detriment.

The appellate court further notes that pursuant to Section 111 of the Insolvency Act, the debtor becomes subject to restrictions as regards disposals with its assets already upon the initiation of the insolvency proceeding. The appellate court is of the opinion that said provision restricts not only the debtor's management, but also the debtor's member/shareholder in asset disposals, even more stringently than Section 333 of the Insolvency Act. Any act, whether taken by the management or by the member/shareholder, in conflict with the provision of Section 111 of the Insolvency Act, would thus be an ineffective legal act. In order to prevent such ineffective legal acts, it is appropriate to supplement said restrictions with the condition, imposed by way of the preliminary injunction, that decisions of the debtor's member(s) and the General Meeting must be approved by the creditors' body in the case under review, given the justified facts outlined above. In light of this purpose, it is not relevant whether the court of first instance relied on the provision of Section 333 of the Insolvency Act, or whether it merely de facto adopted the notions set forth in this provision in its statement of decision on the preliminary injunction. As regards the appellant's

objection that the preliminary injunction infringes upon its shareholder rights, the appellate court concludes that the preliminary injunction does not prohibit the exercise of such rights, but merely conditions the effectiveness of corporate decisions on the consent of the interim creditors' committee. It is logical for the shareholder, after a final and enforceable decision on the insolvency of its company was made, to appear before the creditors (represented by the interim creditors' committee in the case on hand) with any proposals for corporate changes required, and to discuss same with the interim creditors' committee in a pragmatic manner. This is also due to the fact that creditors, rather than shareholders (given the amount of the debt and value of assets), will be satisfied out of the debtor's assets, and creditors thus inevitably have an interest in obtaining the highest satisfaction possible, without any diminishment of such satisfaction by transactions carried out by shareholders.

This conclusion reached by the appellate court was not changed in any way by the supplemented reply of the debtor on p. B-127, since the preliminary injunction restricts the effects of any corporate decision taken in the exercise of powers of the General Meeting of OKD, whoever may be the shareholder/member.

In conclusion, the appellate court notes that the resolution of the court of first instance is substantively correct, which is why the appellate court upheld same, although partly for reasons other than those proposed by the court of first instance in its *ratio decidendi* (Section 219 of the Rules of Civil Procedure, Section 7 of the Insolvency Act).

Notice: This resolution is **non-appealable**.

This resolution is deemed delivered upon its publication in the insolvency register, and shall be delivered to the debtor, insolvency trustee, appellant, creditors' body and the public prosecutor's office separately.

Olomouc, July 15, 2016

For accuracy:
Bc. Markéta Alková

JUDr. Ivana Waltrová, m.p.
Chairwoman of the Tribunal