

R e s o l u t i o n

In insolvency matters of the debtor **OKD, a. s., identification No. 26863154, Stonavská 2179, 735 06 Karviná - Doly, represented by Petr Kuhn, *advokát* (attorney)**, with his office at BADOKH - Kuhn Dostál advokátní kancelář, s. r. o., 28. října 12, 110 00 Prague 1 (the "Debtor"), the Regional Court in Ostrava, acting through single judge Mgr. Petr Kuba, has decided on the debtor's motion for **issuance of a temporary injunction**

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 Meetingis conditional upon the consent of the interim creditors' committee (or, until the interim creditors' committee has been appointed, the consent of the Insolvency Court).

Reasons:

Insolvency proceedings were initiated upon the Debtor's insolvency petition, which reached the Court on 3 May 2016. In its resolution KSOS 25 INS 10525/2016—A19 of 9 May 2016, the Court decided on the insolvency of the Debtor.

In its motion for a temporary injunction, which reached the Court on 25 May 2016, the Debtor asked that the court issue a temporary injunction pursuant to Section 74 et seq. of the Rules of Civil Procedure in conjunction with Section 82 and Section 61 of the Insolvency Act whereby an interim creditors' committee is to be established, and asked that the Court decide on its proposal for relief as contained in Ruling I and Ruling II of the present Resolution.

Pursuant to Section 61 of the Insolvency Act, the insolvency court appoints the interim creditors' committee promptly upon the debtor's pertinent motion. The Debtor argues that grounds are given for a decision pursuant to the said Section 61 of the Insolvency Act, primarily because of the need of the Debtor to negotiate credit financing under Section 41 of the Insolvency Act within the order of the next few weeks. The Debtor has also been exploring the possibilities for reestablishing factoring (i.e., financing through short-term loans provided for the supplies of goods and services) in negotiations with banks and trading partners, with whom the Debtor cooperated to ensure the payment of liabilities in this way on a long-term basis prior to filing the insolvency petition. The Debtor has also been negotiating potential standard credit financing. However, pursuant to Section 58 (2) (c) of the Insolvency Act, agreements on credit financing may only be executed with the consent of the creditors' committee or of the interim creditors' committee. Due to the urgent need of the Debtor to address the issue of operating financing and certain unexpected shortfalls in the debtor's cash flow (caused by outstanding receivables owed by the Debtor's debtors) it stands to reason to expect that credit financing will have to be urgently approved even before the creditors' committee has convened.

Entities controlling the Debtor are as follows: NWR Holdings B.V., organized and existing under the laws of the Netherlands, with its registered office at Herengracht 448, 1017 CA Amsterdam, Netherlands, Reg. No. 61294179 ("NWR Holdings BV") and New World Resources Plc., established and registered in England and Wales, with its registered office at c/o Hackwood Secretaries Limited, One Silk Street, London EC2Y 8HQ, Great Britain, Reg. No. 7584218 ("NWR Plc.") (a detailed description of the capital structure and assets of entities which control the Debtor or which form a group with the Debtor is contained in paras. 49 through 53 of the insolvency petition). Further, NWR Plc. is controlled by Ashmore Investment Management Limited, with its registered office at 61 Aldwych, London, WC2B 4AE, Great Britain, Reg. No. 03344281; M&G Investment Management Limited, with its registered office at Laurence Pountney Hill, London EC4R OHH, Great Britain, Reg. No. 00936683; and Gramercy Funds Management LLC, with its registered office at 20 Dayton Avenue, Greenwich, CT 06830, the United States of America, associated and jointly acting as Ad Hoc Group ("AHG Group"). AHG Group is the entity ultimately controlling NWR Plc. and thus indirectly controlling also the Debtor.

Members of AHG Group are also the Debtor's creditors under the €300,000,000 Senior Secured PIK Toggle Notes due 2020, issued by New World Resources N.V., dated October 7, 2014 (the "Bonds Issue"), or under the obligation of the Debtor as a guarantor for repayment of the Bonds Issue, as described in greater detail in para. 15 of the insolvency petition and in the registration of the receivable kept in the insolvency file under No. P33.

The receivable from the Bonds Issue was registered in the insolvency proceeding by Citibank N.A., London Branch, Reg. No. BR001018, with its registered office at Citigroup Centre, Canada Square 25, London E14 5LB, Great Britain ("Citibank"). Citibank moreover acts as the Security Agent for bondholders and as the joint and several creditor of all bondholders (see Article XIII., Section 13.06 of the Bonds Issue) who is authorized to enforce receivables corresponding to secured debts from the Debtor.

The majority of the bonds under the Bonds Issue is also owned by members of AHG Group, who are thus also the principal creditors of the Debtor on account of the debtor's guarantee for debts under the Bonds Issue. Members of AHG Group are also creditors of the Debtor under the €35,000,000 Super Senior Term Facility Agreement, concluded on September 9, 2014, or under the Debtor's guarantee for repayment of the obligations under the said agreement, as described in greater detail in para. 17 of the insolvency petition. This means that 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.

The Debtor is a guarantor for major obligations of NWR Holdings BV and those of the persons controlling NWR Holdings BV, arising from the Bonds Issue. As a consequence of being called upon to perform under the guarantee, the Debtor may, by taking recourse as a guarantor, become a major creditor of NWR Holdings BV and of the persons controlling NWR Holdings BV. The Debtor and its shareholders thus become each other's creditor and debtor. By their very nature, such relations are always conflicting, and the need to resolve them in a transparent manner is made even more urgent by the Debtor's insolvency.

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.

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).

With a view to the collision of interests between shareholders and creditors, Section 333 of the Insolvency Act suspends the performance of the debtor's corporate bodies. The provisions of Section 333(2) of the Insolvency Act make the effectiveness of decisions by the General Meeting or Supervisory Board conditional upon the consent of the creditors' committee. However, this suspension of the performance of corporate bodies or, as it were, postponement of the effectiveness of their decisions does not occur until the restructuring is approved.

Considering the gravity of the conflict of interest, the gravity of the insolvency situation of the Debtor, and the need to implement an expeditious solution, the Debtor seeks a temporary injunction with effects similar to the above-cited Section 333 of the Insolvency Act in order to bring order into the legal relations of the Debtor even before the restructuring is approved. The Debtor therefore asks that decisions of the debtor's General Meeting be subjected to the requirement of the common interest of creditors, and that the effectiveness of such decision be tied to an assenting decision by the interim creditors' committee.

Considering the potential far-reaching implications of the conflict of interest, it is necessary to immediately bring order into the legal relations between the Debtor and its controlling persons. The appointment of the interim creditors' committee may require a certain amount of time, in the order of several days. For this reason, the Debtor proposes that – until the interim creditors' committee has been installed – the effectiveness of decisions of the Debtor's General Meeting be made conditional upon the consent of the Insolvency Court. In certain situations, the Insolvency Act expressly anticipates that the duties of the creditors' committee will be performed by the insolvency court (for instance, Section 61(2) and Section 66 of the Insolvency Act).

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. 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. An application for a temporary injunction also concerns *per rollam* decisions, i.e., decisions of the Debtor's shareholders outside the General Meeting pursuant to Section 418 of the Corporations Act.

Pursuant to Section 76(1)(e) of the Rules of Civil Procedure, a temporary injunction may be used to order a party that it tolerate something. Pursuant to Section 82(1) and Section 113(1) of the Insolvency Act, the insolvency court may order a temporary injunction even without a petition. In other words, the Debtor proposes that it be ordered to tolerate the suspensive effects of a decision of its General Meeting (or similar decision) until the interim creditors' committee gives its consent (to such decision).

Pursuant to Sec. 111 (1) of the Insolvency Act, unless the insolvency court decides otherwise, the debtor is obliged to refrain from disposing of 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 Sec. 333 (1) of the Insolvency Act, unless stipulated otherwise in the Insolvency Act, the decision on the approval of reorganization results in the suspension of the exercise of rights and competencies of the general meeting of the debtor; in lieu of the general meeting, and assuming its competencies, it is the insolvency trustee who makes the decisions. Sec. 333 (2) stipulates that the general meeting of the debtor retains the right, even after the decision on the approval of reorganization, to nominate, elect, and recall members of the statutory body and of the supervisory board of the debtor; however, such decisions require the consent of the creditors' committee to be effective.

In the case at hand, the Court, upon assessing the factual situation on the ground as described by the Debtor, arrived at the decision to accommodate the motion for a temporary injunction. 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).

Regarding Ruling I, the Court merely confirms that the Debtor must, as of the moment in which the effects associated with the commencement of insolvency proceedings take hold, manage and administer its assets in such manner as described in Sec. 111 of the Insolvency Act. Given that the Debtor has declared its desire to resolve its insolvency by

way of reorganization, a discontinuation or restriction of the Debtor's enterprise's operations would clearly fall outside the ambit of the aforesaid provision.

Ruling II of this resolution provides rules to govern the present situation in the spirit of Sec. 333 of the Insolvency Act, but in a broader temporal scope as anticipated by Sec. 333, i.e., specifically, also during the time period before the decision on the approval of reorganization has been handed down.

As the Court has already declared in its previous resolutions, preserving the Debtor as a going concern is in the common interest of the creditors. The manner in which the Debtor's enterprise is being managed is governed, firstly, by the Corporations Act (Sections 398 et seq.) and, if the Debtor is in insolvency, also by the relevant provisions of the Insolvency Act. 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.

In this respect, the Court notes that the further course of the insolvency proceedings crucially relies upon the assumption that the Debtor, in discharging its obligations, will communicate with the insolvency trustee in a manner that will enable the latter to produce a complete and undistorted report on the Debtor's financial position and its operations based upon which the creditors will have sufficient information to make the fundamental decision on how the Debtor's insolvency will be resolved.

The Court arrived at its decision taking into account inter alia Sec. 76 (1) (f) of the Code of Civil Procedure, according to which a temporary injunction may be used to order a party that it tolerate something, and in particular the principles on which the Insolvency Act is based. Specifically, the issued decision reflects the provisions of Sec. 5 (a), (b), and (d) of the Insolvency Act.

For all the above-mentioned reasons, the Court decided to accommodate the Debtor's motion, whereas the decision on the appointment of an interim creditors' committee will be made within a few days, in the form of a separate resolution.

Instruction on remedies:

This resolution **may be appealed** in the Olomouc Upper Court, by filing a writ of appeal with the Ostrava Regional Court within **15 days** from the date of separate service of the resolution (within the meaning of Sec. 74 (2) and Sec. 75 of the Insolvency Act).

Ostrava, on 26 May 2016

For accuracy:

Mgr. Petr Kula m.p.

Petra Šimkovičová

single judge