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**The Role of the Interim Trustee in  
Dealing with the Debtor's Bankruptcy**

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**Faculty of International Relations  
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## **The Role of the Interim Trustee in Dealing with the Debtor's Bankruptcy**

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### **Summary:**

This paper deals with the role of the interim trustee, who plays an important role in resolving the debtor's insolvency while bankruptcy proceedings are underway. The main objective is to analyze the current Slovak legal system and the regulations pertaining to the interim trustee, and to outline the problems encountered in their practical application. Because the role of an interim trustee is not specific to Slovak law, but is also known in foreign legal systems, the aim of this paper is to compare Slovak legislation; and the role it assigns to the interim trustee; with Czech and German legislation in the same area. Comparing laws is to compare their individual identity and diversity. In conclusion, there are changes suggested, which it would be helpful to make and implement, from the point of view of De Lege Ferenda.

**Key words:** interim trustee, the appointment of the interim trustee, the role of the interim trustee, the interim trustee's fee

## **Úloha predbežného správcu pri riešení úpadku dlžníka**

Mária Veterníková (maria.veternikova@euba.sk)

### **Abstrakt:**

Práca sa zaoberá inštitútom predbežného správcu, ktorý zohráva dôležitú úlohu pri riešení úpadku dlžníka v rámci konkurzného, respektíve insolventného konania. Hlavným cieľom práce je analyzovať súčasnú slovenskú právnu reguláciu činnosti predbežného správcu a načrtnúť problémy vyskytujúce sa pri jej aplikácii v právnej praxi. Pretože inštitút predbežného správcu nie je špecifikom iba slovenského insolventného práva a poznajú ho aj iné právne poriadky, cieľom tejto práce je aj porovnanie slovenskej právnej úpravy inštitútu predbežného správcu, a to s českou a nemeckou predmetnou právnou úpravou. Porovnaním právnych úprav je poukázané na ich jednotlivé zhody a rozdielnosti. V závere práce sú formulované zmeny, ktoré by bolo vhodné urobiť de lege ferenda.

**Kľúčové slová:** predbežný správca, ustanovenie predbežného správcu, činnosť predbežného správcu, odmeňovanie predbežného správcu

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## **Content**

Introduction .....	7
1. The Role of the Interim Trustee in Slovak Law .....	8
1.1 Appointment or Removal of the Interim Trustee .....	9
1.2 Activities of the Interim Trustee .....	10
1.3 The Fee of the Interim Trustee .....	14
2. The Role of the Interim Trustee in Czech Legislation .....	15
3. The Role of the Interim Trustee in German Legislation .....	17
Conclusion .....	19
References .....	21

## Introduction

The bankruptcy of the debtor is connected with the existence of multiple claims of creditors against someone who is unable to meet his mature obligations due to insolvency, or over-indebtedness. The decline of the debtor, and the subsequent insolvency proceedings are addressed by Insolvency Law, which is an important part of the legal system of each economically developed country. The basic source of Slovak Insolvency Law is Act No. 7/2005 Coll., on Bankruptcy and Restructuring, and on the amendments to some acts (hereafter: the “Bankruptcy and Restructuring Act” or “BRA”), which came into force on 1st January 2006. This Act shall regulate the management of a debtor’s insolvency by the realization of the debtor’s assets, and the collective satisfaction of creditors’ claims, or, the creditors’ satisfaction agreed upon by the restructuring plan. The Act shall regulate also the impending insolvency of a debtor, as well as discharging the debts of a natural person (Section 1 BRA). Insolvency Law describes the very important role played by the interim trustee during the bankruptcy and restructuring proceedings. The role of the trustees, their rights and obligations, responsibilities, training and oversight of their activities is governed by Act No. 8/2005 Coll., on the Trustees and amendments to some acts (hereafter the “Act of Trustees”). A trustee is either a natural person or a legal entity (a general commercial partnership or a limited partnership), registered with the Ministry of Justice of the Slovak Republic, and is on the list of trustees according to the Act of Trustees; who acts and performs duties during the bankruptcy and restructuring proceedings, as well as the debt-clearance proceedings under the Bankruptcy and Restructuring Act. The trustee can perform any of the following functions:

- interim trustee
- bankruptcy trustee
- trustee in restructuring proceedings
- supervisory trustee
- trustee in debt-clearance proceedings

The function, or role, of an interim trustee and bankruptcy trustee is associated with the bankruptcy proceedings. Bankruptcy proceedings are proceedings, which deal with the insolvency of the debtor by selling (liquidation) off the debtor’s assets for the collective satisfaction of the creditors (Žitňanská, Ovečková 2009: 571). The role of the restructuring trustee and supervisory trustee is associated with the restructuring proceedings. The restructuring proceedings are proceedings of non liquidation type, and address the insolvency, or the impending insolvency, of the debtor’s assets in order to satisfy the creditors in a manner agreed upon in the restructuring plan (Žitňanská, Ovečková 2009: 581). The trustee’s debt-clearance function is associated with the debt-clearance proceedings. The debt-clearance proceedings are proceedings of the non liquidation type, which address the insolvency of the debtor as an

individual by the collective satisfaction of the claims of creditors of the debtor's assets in order to clear the debts of the individual debtor. Bankruptcy proceedings must precede the debt-clearance proceedings.

The main objective of this paper is to analyze the current Slovak legislation in the area, and the role of the interim trustee and to outline the problems encountered in its application within the legal system. However, the institution or the role, of the interim trustee is not peculiar to the Slovak legal system, it is known also in other foreign legal systems, such as those in England, Denmark, France, Germany and the Czech Republic. This paper compares the role of the interim trustee in Slovak law with the role of the interim trustee in the Czech and German legal systems.

## **1. The Role of the Interim Trustee in Slovak Law**

The role of the interim trustee had already been incorporated into the Slovak legal system by the since repealed Act No. 328/1991 Coll., on Bankruptcy and Composition; along with Amendment No. 12/1998 Coll., which entered into force on 1st of February 1998. The role of interim trustee was to determine the debtor's assets, especially for debtors who did not cooperate with the court. Experience shows clearly that the interim trustee not only facilitates the work of the court, but also accelerates bankruptcy proceedings. For these reasons, the appointment of the interim trustee was included in the Bankruptcy and Restructuring Act, which further defines and specifies the interim trustee's position as laid out in the previous legislation.

Bankruptcy proceedings have several different types of costs to be paid. Therefore, the court may declare bankruptcy only if the debtor has assets sufficient to cover the cost of bankruptcy proceedings.<sup>1</sup> The court must have found evidence of the existence of the debtor's assets, and evidence of the debtor's assets must be established. If the court has doubts about the debtor's assets, then the debtor is required to establish a provisional trustee, whose main task is to determine whether the debtor's assets will be sufficient to cover the costs of bankruptcy proceedings, and to immediately inform the court of this fact.

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<sup>1</sup> Ministry of Justice Decree No. 665/2005 Coll. determines the height of the advance payment to cover the cost of bankruptcy for a natural person to be 1,659.70 euro; for a legal entity it is 6,638.78 euro (Section 8 of the above decree). Therefore, the minimum value of the assets of a natural person needed to cover the costs of bankruptcy must be 1,659.70 euro; for a legal entity it is 6,638.78 euro.

The court does not appoint the interim trustee if the petition for bankruptcy was filed by the competent supervisory authority (NBS), or by the bankruptcy trustee for the assets of a financial institution.

### **1.1 Appointment or Removal of the Interim Trustee**

The court should appoint the interim trustee at random, using the technical and program tools provided, and approved, by the Ministry of Justice.<sup>2</sup> The interim trustee may only be a natural person, or legal entity, registered on the list of trustees, who has an office in the regional court district, where the bankruptcy (district) court is also situated. The court arranges publication of the resolution establishing the interim trustee in the Business Gazette and delivers it to the trustee and the debtor. The interim trustee needs a resolution demanding interoperability from third parties. The resolution shall enter into force upon its publication in the Business Gazette. The resolution shall be considered to be published on the day following the day of its actual publication in the Business Gazette.

The interim trustee shall notify the court of any facts which may cast doubt upon his impartiality. For these reasons, set out in the Act of Trustees, the interim trustee must (or may) file an application for his removal from the position.<sup>3</sup>

The court may also revoke the interim trustee's appointment when he/she repeatedly, or seriously, violates the obligations laid down by the Bankruptcy and Restructuring Act, or by the Act of Trustees, or if some legal barrier(s) prevent(s) him exercising the functions. In legal terms it is also considered a legal barrier if the interim trustee is excluded from holding the office according to the provisions of Section 4 of the Act of Trustees. Suspension of the trustee, or his/her deletion, from the list of trustees is also considered a legal barrier. A new interim trustee is appointed at random, using the technical and program tools approved by the Ministry of Justice. A resolution on the removal of the previous trustee and the appointment of the new one, by the court shall be published in the Business Gazette, and shall be immediately delivered to the removed trustee, and to the newly appointed one, as well as to the debtor. There is no appeal against the resolution. The resolution shall enter into force by publication in the Business Gazette. The Order shall be deemed to have been

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<sup>2</sup> Random trustees on a "blind rotation" or "fashion Rondon" (selected by computer, or a court employee on the principle of chance) is applied in the U.S. In most European countries, the trustee is selected by a judge, or presiding judge. See Lang-Dankov (2006), Pleva (2005).

<sup>3</sup> For more information, see the provisions of Section 3 (4), 7 and Section 4 (1) and (2) of Act No. 8/2005 Coll. on the Trustees. The Estoppel, which would prevent the interim trustee from executing his office, could be his bias, or serious health problems, or any other grave reason which hinders the proper performance of his/her management activities.

published on the day following the day of its actual publication in the Business Gazette.

The dismissed provisional trustee shall provide all necessary assistance to the new provisional trustee; he must submit to him the file with attachments, and a detailed report on its activities without undue delay.

## **1.2 Activities of the Interim Trustee**

The resolution appointing the interim trustee by the court imposes an obligation to ascertain the debtor's assets, to prepare and submit progress reports to the court about the debtor's assets discovery, as well as on any surveillance operations carried out, and to submit to the court the final report within the prescribed period.

The interim trustee shall submit to the court three detailed written reports on the status of the investigation into the debtor's assets, as well as on any acts performed. The first report shall be submitted within 10 days of having been appointed to the function; the second within 20 days of appointment to the function; and a third, within 28 days of having been appointed.<sup>4</sup> The period for the detection of the debtor's assets starts from the publication of a resolution establishing the interim trustee in the Business Gazette. The resolution shall be deemed to have been published on the day following the date on which it was de facto published in the Business Gazette.

Because the law regarding bankruptcy requires the court to declare bankruptcy on the debtor's assets within 30 days of the appointment of the interim trustee, the period for finding a debtor's property is short. In some cases, it is unrealistic to expect the interim trustee to establish whether the debtor's assets will be sufficient to cover at least the costs of bankruptcy in such a short time.

The interim trustee shall proceed, without undue delay (as soon as he is appointed to the function; with his appointment's publication in the Business Gazette), to start identifying the debtor's assets.

The interim trustee has to determine the exact amount of the debtor's property, as well as such assets as were transferred by the debtor from his property by legal acts which could be reasonably opposed in bankruptcy proceedings. For this purpose, interim trustee shall examine the legal activities undertaken by the debtor before filing the application to declare bankruptcy.

The court may, in relation to the identification of debtor's assets, impose certain instructions, which are binding for the interim trustee.

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<sup>4</sup> See provision of Section 11 (5) of the Decree of the Ministry of Justice No. 665/2005 Coll.

If the bankruptcy petition is filed by the debtor, the basis for the interim trustee in determining the debtor's assets is a list of assets compiled by the debtor included in the bankruptcy filings. If a bankruptcy petition is filed by someone other than the debtor, then the debtor is legally obliged to list assets and liabilities and deliver them to interim trustee within 15 days from the day of the appointment of the interim trustee. Listed assets and liabilities must bear the debtor's signature, and the debtor must declare that all information provided is true and complete. The signature of the debtor must be legalized.

Due to the fact that the interim trustee has the same powers as the bankruptcy trustee, he may demand cooperation from the debtor and third parties within the scope of Section 74 and 75 of the Bankruptcy and Restructuring Act.

The debtor is required to provide the provisional trustee with the requested cooperation, particularly in the form of explanations, and during the time set out by the trustee. The interim trustee may require the debtor, even repeatedly, to be present in his office for the purposes of cooperation. The interim trustee is always obliged to inform the debtor of the criminal liability incurred by failure to comply with his/her legal obligations, as well as other sanctions pursuant to Section 74 BRA in the trustee's demand for cooperation.

Cooperation with the interim trustee is required not only of the debtor, but also of other persons specified by the law: a statutory body or a member of a statutory body, the debtor's clerks, legal representatives, the debtor's liquidator, and the agent in charge of the debtor's business.<sup>5</sup> If the debtor has no legal representative, the last person to hold the position of a statutory body has to cooperate with the interim trustee.

If the debtor, or other person referred to, does not provide the required cooperation, an interim trustee may seek a decision from the court to order the required cooperation within 7 days of the receipt of the order; also containing a warning of the possibility of being brought before the court, or the imposition of fines on the defaulting person. Then, if the debtor or other legally established person, despite the court order, fails to provide the required cooperation, the court may order their being brought before the court on foot of an application by the trustee, or it may order the submission of an explanation to the court, or impose a fine up to 165,969.59 euro. As the time for determining the property is very short, it is rather a theoretical possibility.

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<sup>5</sup> The provision of Section 11 Act No. 455/1991 Coll. on Trade Licensing (Trade Licensing Act), as amended.

In determining the debtor's assets, the cooperation of third parties with the trustee is required by law.<sup>6</sup> BRA requires the courts, other state authorities, municipal authorities, other public authorities, notaries and judicial executors to provide the trustee with information necessary to perform his function according to his written request.

The Police is to provide protection for an interim trustee in the exercise of his function if so requested, in writing, by the trustee.<sup>7</sup>

The public, and other bodies and legal entities who, by virtue of their business, keep records of persons or property, are required to provide the required information upon receipt of a written request from the interim trustee (e.g. Central Securities Depository, Geodesy and Cartography, Regional Traffic Inspectorate).

The interim trustee has the authority to demand that anyone in possession of records or documents related to the debtor's property, or his own property, to inform him/her about this fact as soon as he/she becomes aware of the insolvency proceedings. Third parties should do it on their own initiative and without prompting from the interim trustee. In addition, third parties are obliged to allow the trustee to examine the preliminary records, documents and to do the property review.

Another group of third parties which is required to provide information and cooperation to the interim trustee are those who are in possession of such documents and items which may be used as evidence in the finding of the debtor's assets. They must release the documents, or their copies or other things such as records of rent upon written request of the interim trustee.

On the basis of a written request there shall also be provided to the trustee preliminary data on the debtor's accounts, the custody of securities, the bank cheque books and securities by banks, as well as by branches of foreign banks. The following will also be submitted to the trustee upon his requesting them in writing: the mail folders, incoming mail, plus the postal service rendered by the universal postal service provider; data on the telephone, telex and fax stations not listed in publicly available records by the telecommunications service providers; the payment of claims by insurance companies, any ads published under a name relating to the debtor's assets; information on the recipient who carried the debtor's cargo, as well as information about the cargo related to the debtor's assets transported by carriers.

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<sup>6</sup> The provision of Section 75 Act No. 7/2005 Coll. on Bankruptcy and Restructuring and on amendments to some acts.

<sup>7</sup> See provision of Section 73 of the Act No. 171/1993 Coll. on the Police , as amended.

This cooperation must be provided free of charge and without any delay (Section 75 (12) BRA).<sup>8</sup> In the event of failure to cooperate, the court may impose on the defaulting third party a fine up to 3,319.39 euro.

The debtor and a third party who is failing to provide preliminary cooperation to the trustee may, in addition, be accused of committing the crime of obstruction of bankruptcy.<sup>9</sup>

If it is necessary to secure the debtor's assets, the interim trustee may ask the court to issue a preliminary injunction in accordance with Section 203 BRA, and the court must decide within 15 days of its receipt.

On the basis of the information gathered, the interim trustee must make a complex estimate of the debtor's property, as well as deciding which part of the former debtor's property could be returned to his assets after conclusion of the bankruptcy proceedings. The interim trustee is not required to determine the full extent of the debtor's assets; it is sufficient, if only part of the property certifies that the debtor has assets sufficient to cover the cost of bankruptcy proceedings. The interim trustee must inform the court immediately of the findings.

In practice, the interim trustee normally encounters difficulties. The trustee has such problems as getting in touch with debtors because they do not live at the given address anymore, or the debtor simply refuses to cooperate with the interim trustee. This is particularly true in cases where a bankruptcy petition is filed by the creditor. There is also a problem with gaining the cooperation of third parties, which either do not cooperate at all,<sup>10</sup> or provide the requested information only later, after the deadline for the submission of the final report has expired.

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<sup>8</sup> The provisions of Section 92 (9) of the Act No. 483/2001 Coll. on Banks and on amendments to some acts, as amended, however, states that the bank or branch of a foreign bank is entitled to payment of the costs incurred by them in making the report to interim trustee. The costs for submitting a preliminary report to the trustee do not fall under the ambit of Section 75 (12) BRA.

<sup>9</sup> The provision of Section 242 and 243 of the Act No. 300/2005 Coll. Penal Code, as amended.

<sup>10</sup> For example, the provision of cooperation in determining the debtor's assets by making the tax returns, balance sheets or other documents available is rejected by the tax authorities despite the fact that this obligation can be implied from the provisions of Section 75 (1) of BRA. The tax authorities respond by referring to Section 23 of the Act No. 511/1992 Coll., stating that the interim trustee is not the person authorised to have access to confidential tax information.

### 1.3 The Fee of the Interim Trustee

The interim trustee shall carry out his duties until the expiration of the opening of bankruptcy proceedings takes effect; i.e. until the publication of a resolution on the cancellation of the bankruptcy proceedings owing to insufficient assets, or until the publication of a resolution of the declaration of bankruptcy in the Business Gazette. If the insolvency proceedings are suspended because of the commencement of the restructuring procedure, the interim trustee ceases to act. After the beginning of the restructuring procedure, the court terminates the bankruptcy proceedings.

The interim trustee is entitled to be paid a fee for his work, as well as reimbursement of documented expenses. If the debtor is a natural person, the interim trustee has the right to charge a fee of 165.97 euro, and if the debtor is a legal entity the fee is 663.88 euro. If the trustee is registered to pay value added tax, the fee is not increased by the amount of the value added tax. The trustee has to provide evidence of any expenses incurred. The maximum amount of expenses the trustee may charge in the case of the debtor being a natural person is 497.91 euro, and for a legal entity it is 995.82 euro.

The interim trustee is recommended to submit a claim for the fee and reimbursement of expenses along with the last status report on the property, and operations carried out, so that the court can decide on it within a period of 5 days from the cancellation of bankruptcy proceedings, or the declaration of bankruptcy.

The court decides on the fee and expenses of the interim trustee, as well as on the resolution. If the interim trustee breached the duties assigned him/her by law, or did not provide the required explanation to the court during the prescribed period, or did not properly comply with the orders of the court, then, the interim trustee is not entitled to a fee, or the fee is appropriately reduced according to the seriousness of his/her misconduct.

If the trustee does not make a detailed written report on the investigation of the debtor's assets and operations within the prescribed 10 days, the standard fee is reduced by 25% of the basic amount. If the interim trustee does not make a detailed report on these matters within 20 days of the provision of the service, the standard fee is reduced by 25% of the basic amount. If the interim trustee does not make a third comprehensive report on these matters within 28 days of the provision of the service, the standard fee is reduced by 50% of the basic amount (Section 11 (4) and (5) of the Ministry of Justice Decree No. 665/2005 Coll.)

The court decision is published in the Business Gazette and is served on the interim trustee, as well as on the debtor or his/her counsel. The interim trustee, the debtor or his/her counsel may appeal against the decision.<sup>11</sup>

Remuneration and expenses shall be reimbursed from the advance payment paid for the purpose of reimbursing the interim trustee's expenses and fee.

## **2. The Role of the Interim Trustee in Czech Legislation**

In the Czech Republic the role of the interim trustee (interim insolvency trustee) is regulated by Act No. 182/2006 Coll., on Insolvency and Its Resolutions (Insolvency Act) – hereafter referred to as the “Insolvency Act” or “IA”; which entered into force on 1st January, 2008. Simultaneously, with this Act there came into force the Act No. 312/2006 Coll., on Insolvency Trustees. The Insolvency Act shall regulate: a) the resolution of insolvency, and the impending insolvency of a debtor by judicial proceedings using one of the methods set out therein, so as to arrange property relations vis-à-vis persons affected by the debtor's creditors to the greatest extent possible, and essentially on a pro rata basis; b) discharge of the debtor's debts (Section 1 IA). The legal way of addressing and resolving the insolvency of the debtor includes bankruptcy, reorganization, discharge from debts and special methods of insolvency resolution (Petty bankruptcy, Insolvency of Financial Institutions). While the Slovak Bankruptcy and Restructuring Act provides for three separate insolvency proceedings, the Czech Insolvency Act provides for only one type of insolvency proceedings concerning the debtors' insolvency, or impending insolvency, and insolvency resolution methods. In the Czech Republic, the interim trustee may be a natural person or a legal entity (a general commercial partnership), registered in the list of insolvency trustees which is maintained by the Ministry of Justice of the Czech Republic. It can also be a natural person who is not on the list of insolvency trustees (Section 22 (2) IA).

The activities of the interim trustee are regulated in the IA to a greater extent than in the BRA. The appointment of an interim trustee in the insolvency proceedings may occur at any phase during the proceedings from its commencement right up to the declaration of insolvency.<sup>12</sup> Insolvency

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<sup>11</sup> If the bankruptcy petition was filed by a liquidator on the basis of the liquidation balance sheet, proving that the debtor's assets are insufficient to cover the advance fee and expenses for interim trustee, the liquidator is not obliged to effect the advance payment before the application for bankruptcy. In that case, the obligation to pay the fee and expenses of the interim trustee lies on statutory body or director. If the legal entity does not have statutory body or its member, obligation to pay advance payment for fee and expenses lies on the person, or entity, which was last statutory body, or its member.

<sup>12</sup> Insolvency proceedings have, in fact, two phases. The first phase is common to all insolvency resolution methods. It is the stage when the court determines whether the debtor

proceedings begin on the date when the court receives the proposal to open and hold insolvency proceedings with the appropriate (regional) court (the insolvency court). The interim trustee is appointed by the chairman of the court from a list of insolvency trustees maintained by the Ministry of Justice of the Czech Republic, or, exceptionally, may be chosen from among persons or entities which are not on this list. The interim trustee may be appointed either by a single decision, or by a decision taken on the interim measures under Section 113 IA (unless an interim trustee has already been appointed in the insolvency proceedings by a separate decision). The court appoints an interim trustee if the court already ordered a precautionary measure in the case of insolvency proceedings related to a debtor who is an entrepreneur and the Czech National Bank has suspended trading of all the debtor's investment instruments on a regulated market, in accordance to special regulation. The insolvency court may also appoint an interim trustee provided the extent of the debtor's estate justifies it, and it is appropriate to pre-determine and secure, the Property of the Estate, or if there are other equally serious reasons. This also applies in cases where the court declares a protection period (moratorium).<sup>13</sup>

The interim trustee shall carry out those activities which are provided for in the Insolvency Act and imposed on him by the insolvency court. The role of the interim trustee, particularly, is to take measures in order to find the property of the debtor, examination of the debtor's accounting books, or records kept under separate regulations. The interim trustee gives consent to the debtor in respect of acts related to the disposal of property, in whole or in part, supervises and accepts transactions from persons who have obligations to the debtor, or gives instructions to the debtor, or performs examination and evaluation of the property belonging to the estate which is in the possession of different persons.<sup>14</sup> The interim trustee shall be entitled to reimbursement of fees, and expenses incurred in the course of these procedures. If the interim trustee is appointed on the basis of an application, the court may order the applicant to pay a deposit to cover the expenditures of an interim trustee. In contrast to the Slovak legislation, advance payment of fees and expenses of the interim trustee is not obligatory. The height of the interim trustee's fee is mainly dependent on

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is already insolvent, or if there is danger of the debtor becoming insolvent. Only after the declaration of insolvency of debtor in the second phase is the insolvency resolution method applied.

<sup>13</sup> The institution of a protection period (moratorium) protects the debtor against the impending declaration on his/her insolvency. This is a temporary ban on the declaration of insolvency. The debtor who is an entrepreneur may suggest a moratorium; this right does not apply to the debtor who is not carrying on a business anymore; – such as a legal entity in liquidation. The moratorium is designed to protect the debtor (the entrepreneur), for a maximum period of four months, the purpose of which is to allow the debtor remedy the state of insolvency, or prevent the impending insolvency, by use of his/her own means.

<sup>14</sup> For more details see for example Zelenka (2007), Kotoučová (2007), Kozák, Buřín, Dadam, Páchl (2008).

the length of time, scope and complexity of the activities, it is determined by the court and may be paid by the state from the state budget.<sup>15</sup>

### **3. The Role of the Interim Trustee in German Legislation**

The role of the interim trustee in the Federal Republic of Germany is set by the Insolvency Regulation (Insolvenzordnung – InsO) dated 5th October, 1994, which came into force on 1st of January 1999. The Insolvency Regulation, similarly to the Czech Insolvency Act, governs insolvency proceedings (Insolvenzverfahren), which collectively serve to satisfy the debtor's creditors by means of selling the debtor's assets, and the yield distributed among the creditors. Or, a completely different approach may be taken according to the insolvency plan, mainly in order to save, or to maintain, the enterprise. This gives honest debtors a chance to get rid of their remaining obligations (Section 1 InsO). Insolvency proceedings may be initiated on the basis of an application by the debtor, or creditor, only.

There may elapse several weeks, or even months from the application for insolvency proceedings (Antrag auf Eröffnung des Insolvenzverfahrens) on the debtor's assets, until the insolvency court makes its decision on the proposal. During this time there is a danger that the debtor's situation will deteriorate even further. First of all, the continuing costs of the existing business can absorb the debtor's remaining assets, as well as the fact that the debtor's actions may have a negative impact on the further course of business and the assets. Therefore, the insolvency court shall take appropriate measures to ensure that the debtor's assets will be available for creditors. One possible course of action under Section 21 (2) InsO provision, is the appointment of an interim trustee (Vorläufiger Insolvenzverwalter), whose responsibilities are governed by Section 22 InsO provision.

In Germany, the court does not appoint an interim trustee from the list of insolvency trustees. The interim trustee can only be a natural person who is suitable for the particular case, and is knowledgeable about that branch of business, as well as being independent of the creditors and debtors. They are primarily lawyers, auditors and tax consultants. An interim trustee is appointed to the function by the relevant judge. The interim trustee receives the instrument of his/her appointment, which sets down the area(s) of his/her competence. A distinction is made between a “weak” and a “strong” interim trustee.

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<sup>15</sup> See the provisions of Section 5, 6 and 8 of Ministry of Justice of CR Decree No. 313/2007 Coll. on the Fee of Insolvency Trustee, on Reimbursement of his Expenses and the on Fee of Members and Alternate Creditors' Committee of Their Compensation and Necessary Expenses.

If the interim trustee is appointed, and the court does not take action which prohibits a debtor's entitlement to dispose of his/her property or to maintain the property; then, this is called a "weak" interim trustee. In this case, the debtor may maintain the property, but only with the consent of the trustee. This ensures that there cannot be a leakage of its assets. A "weak" interim trustee does not take any legal action; the scope of his duties is defined by the court.

If the interim trustee is appointed, and the court does take action which prohibits a debtor's entitlement to dispose of his/her property, or to maintain the property; then the interim trustee maintains the property and this is called a "strong" interim trustee. "Strong" interim trustees may continue to operate the debtor's business with the court's approval. With the permission of the court, the interim trustees may terminate the activity of the enterprise if the enterprise is loss-making and its closure will prevent further significant losses. The role of the interim trustee is to secure and preserve the assets of the debtor. His/her duties include investigating whether the debtor's assets will be sufficient to cover at least the cost of the insolvency proceedings. The court may also impose an obligation to determine whether there is any reason to open insolvency proceedings (Eröffnungsgrund)<sup>16</sup>, and what are the prospects for the continuation of the debtor's business.<sup>17</sup> The interim trustee may enter the debtor's business premises and carry out the inventory there. The debtor is obliged to allow inspection of the accounting books and business documents, to provide all relevant information and support to the interim trustee in his task.

It is usual that an interim trustee requests that the court starts the insolvency proceedings on an exact date and time.<sup>18</sup> If legal requirements are met, the court shall issue a decision commencing the insolvency proceedings (Eröffnungsbeschluss).<sup>19</sup> This ends the first phase of the insolvency proceedings (Eröffnungsverfahren).

The interim trustee shall be entitled to be paid remuneration and reimbursement of fees and expenses, but must submit a statement containing a precise breakdown of expenditure (Rechnungslegung), regardless of how long the interim proceedings have taken, or whether the insolvency proceedings have started. The interim trustee's fee is determined by the Federal Ministry of Justice Decree, Insolvenzrechtliche Vergütungsverordnung (InsVV, Section 11).

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<sup>16</sup> The reason for the initiation of insolvency proceedings is insolvency (Zahlungsunfähigkeit) over-indebtedness (Überschuldung) and impending insolvency (drohende Zahlungsunfähigkeit). See provisions of Section 17-19 InsO.

<sup>17</sup> See provisions of Section 22. (1) InsO.

<sup>18</sup> Insolvency procedure distinguishes the preliminary stage of insolvency proceedings that starts from the application for the opening of insolvency proceedings until the decision on the proposal (Insolvenzeröffnungsverfahren), and stage of the decision to open insolvency proceedings (eröffnete Insolvenzverfahren).

<sup>19</sup> For more details see for example Bintz, Hess (2004), Pohlmann (1998).

If the insolvency proceedings have been initiated already, the fee, the remuneration and reimbursement of the expenses of the interim trustee is part of the costs of the bankruptcy estate (Massekosten). If the proceedings are otherwise terminated, for example, by rejection of the application due to the lack of assets, an interim trustee is entitled, under the prevailing law, to be reimbursed by the debtor. It would be unfair to burden the creditors who filed an application for the preliminary insolvency proceedings only. There is a stronger tendency to push the view that in the absence of the property's solvency the remuneration and reimbursement of the interim trustee should be the responsibility of the State. The reason is that the establishment of an interim trustee is also in the public interest and for the public good during the insolvency proceedings (Holzer 2004: 124).

## **Conclusion**

The role of the interim trustee was introduced into Slovak law in 1998, and its implementation in legal practice in Slovak bankruptcy courts has clearly proved itself to be working. It facilitates the work of the bankruptcy court, and helps to speed up bankruptcy proceedings. Slovak bankruptcy courts appoint the interim trustee when they have doubts about the debtor's assets, and it is not clear whether the debtor in case of bankruptcy has the assets necessary to cover at least the costs of the bankruptcy proceedings. The court generally appoints an interim trustee if the debtor does not provide the necessary assistance, and does not submit evidence of the existence of the assets. The interim trustee is appointed even if the debtor has submitted evidence that proves he/she has insufficient assets, and it is necessary to verify this data. (Đurica 2006: 171). According to the statistics yearbook of the Ministry of Justice, the agenda shows that the bankruptcy district courts in 2009 in Slovak Republic started 600 insolvency proceedings and the interim trustee was appointed in 467 cases (MJ SR 2009). The disadvantage of Slovak legislation is that the interim trustee has a relatively short period of time in which to determine the debtor's assets and property. The interim trustee must act without undue delay. This obligation is based on the requirement of the rapid implementation of the trustee's activities and proceedings. The interim trustee is forced to act, without delay, also due to the sanctions imposed upon him by the court in the form of pay and remuneration cuts if the trustee does not write a timely report on the activities and proceedings required by the court. A significant factor in the process of the appointment of the interim trustee is the applicant's obligation to effect advance payment for purpose of covering the remuneration and expenses of the interim trustee. Such an obligation is not contained in the Czech or German legislation. A peculiarity of the Slovak legislation is the appointment of the interim trustee on a random basis using the techniques and programmes provided by the Ministry of Justice. As a result, some people are more frequently selected and appointed to the function of interim trustee. In the Czech and Slovak Republics,

as opposed to the German Federal Republic, the interim trustees, selected from the list of bankruptcy trustees, may also be legal entities. In Slovakia, this may be a public company or limited partnership, in the Czech Republic only a public company. According to Czech and German law, the interim trustee's function is regulated more broadly. The particularity of German law is that it distinguishes between "strong" and "weak" interim trustees. *De Lege Ferenda*, from the perspective of the Slovak interim trustee, it would be desirable to extend the time for finding the debtor's assets; by adding at least 30 more days. This change could prevent situations where bankruptcy is declared, in spite of there being found insufficient issues of fact, which results often to cancellation of the bankruptcy due to the lack of assets. Adopting the abovementioned regulation could save time and other creditor transaction costs related to debt recovery. Simultaneously we propose widening the circle of persons who are required to provide the interim trustee with the information, mainly the tax authorities. The provision of cooperation by third parties should be free of charge in all cases, even in the case where the cooperation is provided by the bank.

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