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CORPORATE INSOLVENCY LAW – A NECESSITY OF MARKET ECONOMY, LESSONS FROM HISTORY AND SLOVENIA

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ABSTRACT

Using comparative - historical analysis of the legal development of corporate insolvency law in the world and in Slovenia, with an emphasis on the development of insolvency reorganization procedures, the author developed a thesis, that corporate insolvency law is directly related to the country's economic system, it's economic development and the public relation to the fact of "failing a business." His thesis is additionally supported by the analysis of ex post (in)efficiency of the Slovenian corporate insolvency law, which is in the author's opinion directly comparable to the Slovenian level of economic development.

Key words: insolvency law, bankruptcy law, financial reorganization, history, Slovenia, efficiency

DIRITTO FALLIMENTARE (DELLE SOCIETÀ COMMERCIALI) – UN BISOGNO DI ECONOMIA DI MERCATO, LEZIONI DALLA STORIA E DALLA SLOVENIA

SINTESI

Mediante un'analisi storico-comparativa dell'evoluzione giuridica del diritto fallimentare societario nel mondo e in Slovenia, in particolare, ponendo l'accento sullo sviluppo e sulle caratteristiche delle procedure di riorganizzazione finanziaria, l'autore dimostra che il diritto fallimentare societario è direttamente correlato al sistema economico del paese e le norme di diritto fallimentare sono create e modificate a seconda dello sviluppo economico del singolo paese nonché dell'impatto che le situazioni di insolvenza hanno sulla collettività. La tesi dell'autore è ulteriormente suffragata da una breve analisi ex post sull'efficienza della legislazione slovena in materia di diritto fallimentare, in cui si dimostra che il livello di (in)efficienza della legislazione fallimentare societaria slovena è direttamente comparabile al livello di sviluppo dell'economia slovena ovvero del suo sistema economico.

Parole chiave: diritto fallimentare, riorganizzazione finanziaria, storia, Slovenia, efficienza

INTRODUCTION

The purpose of this paper is to show that the insolvency law is an integral part of the economic system and that it changes in accordance with countries economic development and the public relationship to the fact of "failing a business." Author supports its thesis with four connected arguments, using historical, comparative, descriptive and empirical methods. Each argument is presented in a separate chapter.

The chapter on the evolution of corporate insolvency law, shows the historic evolution of corporate insolvency law which can directly relate to the economic development and according to the needs of business practice. More focus was given to the evolution of the financial reorganization proceedings. Even though winding up[1] procedures are by far more often, it's the legislator's attitude towards saving insolvent debtors and/or their going concern value with preventing piecemeal liquidation that tells as much more about the relationship between economic development and the evolution of corporate insolvency law.

The second chapter strengthens the fundamental thesis with the case study of development and changes in corporate insolvency law on the territory of today's Slovenia. The development can be divided into three major parts. The first being the development until the Second World War in which Austrian legislation had a major role, with gradual development in accordance with the development in Europe. The second period was the time of SFRY and the socialist regime. As private companies more or less didn't exist in the socialist regime and market economy was replaced by administratively planned economy and later with the theory of associated labor and failing companies were a rare unwanted disorder in the system, insolvency law played a very marginal role. The third period represents the evolution of insolvency legislation of Slovenia after the Independence in 1991.

After using historical, comparative and descriptive methods in the first two chapters the third chapter is devoted to the comparative empirical analysis of *ex post* efficiency of insolvency law. Empirical results show that also efficiency of insolvency law can be linked with the economic development of countries.

The last chapter presents a positive analysis of the Supreme Court of Slovenia case law on corporate insolvency law. The findings can be summoned into a conclusion that the case law has been important, but that it rarely had any effect on the legislator to change the corporate insolvency policy.

EVOLUTION OF CORPORATE INSOLVENCY LAW – FROM WINDING UP TO FINANCIAL REORGANIZATION

Corporate insolvency law could not be developed prior to the development of modern limited liability companies (companies limited by shares, hereinafter company).[2] There-

1 Winding up is an English term for an insolvency procedure that ends with the liquidation of the company. In US terms this would be called liquidation, but that can be confusing, as liquidation in Europe can mean a regular ending of a company that can pay all its debt. Winding up is therefore a liquidation procedure of a company that cannot repay all its debt.

2 The basic characteristic being, that shareholder, members, are not responsible for the debts of the company.

fore the development of corporate insolvency law is directly linked to the development of modern companies. Even though the first companies were developed in medieval Italy (Company of Saint George, *Casa delle compere e dei banchi di San Giorgio)* or at least during the development of transatlantic maritime trade (for example: the English Muscovy Company[3] and *East India company* or the Dutch *Vereenigde Oostindische Compagnie*[4] *and the American Harvard University*[5]) the true development of modern companies began from mid-18th century.[6] Before that, companies had many distinctive features, (especially the royal powers and monopoly entitlements) so they simply cannot be compared with modern companies. The breakthrough was made in 1844 when the English Parliament enacted the Joint Stock Companies Act and later in 1862 with the Companies Act of 1862 (Goode, 2011, 11). Both Acts removed the concession system of establishing companies and enabled free establishment of companies.[7] Even though France,[8] Germany and some other countries from the Continental Europe adopted commercial codes before England, the English Act, with the abolition of the concession system of establishing companies and a relatively rapid increase in the number of companies, represented a significant evolutionary change.[9]

The English example was followed by France in 1867 and Germany in 1870, both of which introduced a regulatory system for setting up limited liability companies. The evolution of limited liability companies through Europe was primarily linked to the need

3 According to Micklethwait and Wooldridge, 2005, the English Muscovy Company, established by Royal Decree in 1555 was the first company with a limited liability of its members. The company had a monopoly on trade with the Russia respectively Russian ports.

4 V.O.C. was the first company that has been established for more consecutive commercial ship operations (the members made an agreement to participate on financing twenty one commercial fleets) and also the first company which articles of associations clearly stated that the shareholders are not liable for the debt. It is also the first company whose shares (shares) were admitted to trading on a regulated market. Micklethwait, Wooldridge, 2005.

5 *Harvard University* was established in 1634. It was the first established limited liability company on American soil (Micklethwait, Wooldridge, 2005, 42).

6 Similarly Micklethwait, Wooldridge, 2005. They think that the modern limited liability company was developed after 1820 in England. They referred to Robert Lowe, English and Australian statesman as the father of modern company law.

7 Limited Liability Company could be established by at least seven persons. The company had to state in its name that it is a limited liability company, which warned business partners on the fact that the members are not liable for the debts of the company (Micklethwait, Wooldridge, 2005, XVI).

8 Under *Code de Commerce* adopted in 1808 Frenchman could establish either: *societe anonymes* – Company limited by shares or *commandite par action – partnership limited by shares. Societe anonyme* could be established only with an authorization of the government. Between 1807 and 1867 less than 650 companies were registered. The *société en commandite* could be established without an authorization of the government and could take two different forms: simple or with shares. In both configurations, it was composed by two types of partners: the managing partners (*commandités*) who were in charge of the administration of the firm and bore unlimited liability, and the sleeping partners (*commanditaires*) who only invested money but were not allowed to intervene in the management. If they respected this disposition, their liability was limited to their initial contribution (Rochat, 2009, 6–10).

9 From 1856 till 1862 more than 25.000 companies were established in UK. From 1856 to 1883 more than one third of companies established in that period went bankrupt. The average life span of a company was less than five years.

for large quantities of capital due to the maritime trade and especially the development of railroad infrastructure (Pretnar, 1990, 25–26). In the same period a significant development occurred also in the United States. In 1830, the Supreme Court of the State of Massachusetts ruled that corporations with limited liability do not necessarily need to perform operations associated with public services. The Supreme Court of the State of Connecticut in 1837 ruled that corporations with limited liability can be set up without specific statutory basis or permission (Micklethwait, Wooldridge, 2005, 47–50).

The French Commercial Code (Code de Commerce) from 1808 contained the first modern codification of insolvency law. Virtually all other European countries, with the exception of England, introduced a system of insolvency law modeled after the French Code (Hautcoeur, Di Martino, 2010, 6). Code de Commerce based its insolvency law on the tradition of Roman law and the rules of bankruptcy procedures from medieval Italy. Insolvency law was under the responsibility of the judiciary. The commencement of the insolvency procedure by a court, led to a suspension of the rights of individual creditors to individually collect the debt. This is a rule known as "automatic stay." It's aimed at avoiding a debt collection run on any debtor suspected of suffering liquidity problems. At the same time, in order to protect creditors, the debtor lost his rights to dispose of his property and was often dispossessed of them. The basic objective of insolvency procedures was to obtain information about the amount of debt and the number of creditors. The public procedures thus resulted into lists of bankrupted debtors which were made public by the courts and subsequently published, so creditors could claim their claims. Claims were already at that period divided into secured, preferential and ordinary (Hautcoeur, Di Martino, 2010, 6).

In England the enactment of the Joint Stock Companies Act in 1844 was followed by the Joint Stock Companies Winding-Up Act 1844, which enabled a company to be made bankrupt in the same way as an individual. Corporate insolvency law got a truly distinctive status at the advent of limited liability for members of a company with the enactment of the Limited Liability Act 1855 and especially with the enactment of the first modern company law statute the Companies Act 1862, which contained detailed winding up provisions, including a provision for *pari passu* distribution (Goode, 2011, 11–12). In the famous English case Salomon A. v. Salomon & Co Ltd [1897] AC 22, the House of Lords confirmed, at the time a revolutionary view, that a company is a separate legal personality from its members and that consequently debts of even a single member limited liability company are separate from the assets of its members (shareholders) and as a result, members (shareholders) and managers are not liable for the debts of an insolvent company.[10]

10 Lord Herschell, expressed this view in the following terms: »It may be that a company constituted like that under consideration was not in the contemplation of the legislature at the time when the Act authorizing limited liability was passed; that if what is possible under the enactments as they stand had been foreseen a minimum sum would have been fixed as the least denomination of share permissible; and that it would have been made a condition that each of the seven persons should have a substantial interest in the company. But we have to interpret the law, not to make it; and it must be remembered that no one need trust a limited liability company unless he so please, and that before he does so, he can ascertain, if he so please, what is the capital of the company and how it is held.«

This very significant moment in corporate law history meant, that the financial burdens of corporate failure would be thrown on to the creditors (Rajak, 2008, 36).

Although all the development was made, repressive instruments were still very often used. Failed debtors were still jailed at least for a short exemplary period, and rehabilitation was highly conditional. Shame and infamy were part and parcel of contractual discipline. At that time, many argued (in today's language) that due to limited liability moral hazard would become uncontrollable and that credit markets would decline. Even though in most countries it was finally agreed that the unconditional, hard–headed defense of creditors' rights – whatever the instruments – might not always be consistent with economic development. Whereas no country in 1866 had yet suppressed prison for debt, thirteen countries, of all legal traditions, had taken that step in 1877 (Sgard, 2006, 399). This was due to a new wave of reforms beginning in 1870's. The goal of these reforms was to find alternative procedures to liquidations of over-indebted companies. The reforms were a consequence of awareness that market economy has economic cycles and that over-indebtedness can also occur through no fault or fraud of the debtor. The reforms were also a result of awareness that the going concern value of a company may be worth substantially more than its piecemeal liquidation value. Therefore, for the benefit of creditors and the economy as a whole, a new procedure, that could help to preserve the companies going concern value and that could help efficient companies to overcome temporary financial difficulties with some kind of a financial restructuring, was needed.[11]

The financial reorganization procedure was "born" in the United States after a severe financial crisis caused by the railroad companies.[12] The railroad network had grown exponentially in the mid-19th century. The railroads were not built by the states or federation but by private companies. Due to vast amount of capital needed for financing the railroad network, almost every company involved in the construction of the railroad system ran into liquidity problems. The only legal solution for companies who were not able to meet their financial obligations was winding up (liquidation), which soon proved to be completely inefficient in the case of railroad systems. Liquidation means that the debtor's assets are sold piecemeal. Selling railroad tracks piecemeal makes no sense since piles and piles of unconnected tracks have no real value respectively the value is much lower than a connected system of railroads. Additionally, the issue of the "to big to fail" problem arose. The whole railroad business of U.S. was simply too important for the national economy to be just left to collapse. Since legislation was not yet familiar with the concept of financial reorganization, the solution was found by the commercial practice supported by the U.S. courts. The management of the debtor negotiated with the creditors and shareholders of the debtor an agreement, a plan for financial reorganization of the debtor. The interested parties were formed into different groups (shareholders, bondholders, suppliers, subcon-

11 England 1883, France 1889, Italy 1903 etc. These Acts were relatively very different, but they share a common denominator, a system of a financial reorganization with the goal that the company does not cease to exist.

12 The first U.S. insolvency act, The Bankruptcy Act of 1800 was a direct copy from the Statute of Anne in English law. The Act was repealed three years later by Congress. Between 1803 and 1898 there were at least six major reforms of the U.S. insolvency law before in 1898 a more lasting Bankruptcy Act was enacted.

tractors etc.) and each group had an active role in the preparing of the reorganization plan. The plan was mainly based on a partial remission of debt and extending the maturity of repayment. After the plan was prepared the management of the debtor, in accordance with the law, filled an application for the commencement of the insolvency procedure (winding up). In the winding up process the whole business was sold on a public auction. Since the debtor, its shareholders and creditors had an agreement for a financial reorganization (partial remission of debt and extension of the maturity of repayment) they (as a whole group) were the best bidders for buying the business, since other bidders could not count on the partial remission and maturity extension. The court upheld the scheme, since it was an efficient solution for a temporary problem of otherwise sound business models of railroads, and a model for a financial reorganization was born.[13] The Congress, backed by the commercial practice and Court decisions, enacted a new Bankruptcy Act in 1898 which was in force until 1978. The Bankruptcy Act of 1898 was in the three central dimensions of debtor-creditor law an opposite of English law. While English insolvency law was creditor-oriented (creditor friendly) with a particularly favorable treatment of banks and with a potential liquidation bias, the U.S. act was debtor-friendly and reorganization prone with a strong bias against banks (Berglof et al., 2001, 17). It became a model law for debtor friendly insolvency regulations and a model of how to introduce financial reorganization plans into insolvency laws.

At the end of the 19th Century some kind of financial restructuring procedure was adopted in almost all insolvency laws of the major legal systems.[14] The new insolvency procedures (various kinds of financial reorganizations) had some common characteristics. The basic mechanism for resolving insolvency of the debtor was a partial remission of his debt. The debtor had to obtain creditors consent. The required majority of creditors was measured both by the number of creditors and the percentage of the debt they represented. The required majority was usually more the half of the creditors and between ½ and ¾ of the creditor's claims. If the majority was reached, the financial reorganization had to be approved by the court. Another common feature was that the reorganization procedures could be in principle proposed only by the debtors themselves (Sgard, 2006, 398).[15]

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13 For more on this topic see Skeel, 2011, 58–61. For a detailed overview of U.S. Insolvency law evolution and history see Skeel, 2011 or Noel, 1919.

14 England 1883, France 1889, Italy 1903 etc. These Acts were relatively very different, but they share a common denominator, a system of a financial reorganization with the goal that the company does not cease to exist.

15 Countries, that's insolvency law system was based on German Law (Germany, Austria, Hungary, Sweden, The Netherlands) didn't use two separate procedures but used a single procedure technique within which either winding up or reorganization was possible (Sgard, 2006, 407). German Insolvency Act (*Konkursordnung*) from 1877 was a very modern Act, relatively debtor friendly, without any repressive features and modelled as an almost purely procedural and problem-solving instrument. It had an early form of a debtor-in-possession provision ("*Eigentumsvorbehalt*"). The debtor remained owner of his property in bankruptcy, and only lost his rights to manage it freely. Due to modern techniques it was considered as a model for other insolvency laws across Europe (Sgard, 2006, 402). *Konkursordnung* was based on the premise that insolvency usually occurred due to unexpected events, external factors and bad luck and not because of deception, fraud or moral hazard of the debtor. The insolvency procedure was basically a system of a single procedure within which the court could decide, upon the proposal of the debtor, if the procedure should

EVOLUTION OF CORPORATE INSOLVENCY LAW IN SLOVENIA

In 19th century when Corporate Insolvency Law was born, the majority of today's Slovenia was under the government of the Habsurg monarchy. The development of corporate insolvency law on the territory of Slovenia was accordingly until the end of the First World War in 1918 directly linked to the development of the corporate insolvency law in the Habsburg monarchy.

The first Insolvency Act (*Konkursordnung)* in the Habsburg Monarchy (further one Austria) was introduced in 1781. In 1868 the first modern Insolvency act was introduced and it was in force until 1914 (Prelič, 1999, 34). The Austrian code was widely regarded as highly creditor-friendly. It strived to minimize the involvement of courts on the insolvency procedure and to maximize creditor autonomy. The Code was much influenced by the ancient Italian statutory (Berglof et al., 2001, 29). Austrians believed that Insolvency law is a part of civil law and the guiding principle of civil law is that everybody shall look after his own rights: "The state does not make up their minds for responsible citizens." (Berglof et al., 2001, 6).[16] Austria implemented a new insolvency Law in 1914. It was codified with two statutes: (a) the Insolvency Act (*Konkursordnung*) and (b) the Settlement and Recomposition of Debts Act (*Ausgleichsordnung*).[17] The *Konkursordnung* was primarily creditor oriented and had regulated the liquidation (winding – up) procedure, which was basically a proceeding involving the realization of the debtor's assets and the subsequent distribution of the proceeds among the creditors. The proceeding regulated in the *Ausgleichsordnung*, on the other hand, provided for court controlled reorganization (*Ausgleich*) of the debtor (Klauser, 2002, 8). Its goal was to rescue the insolvent debtor's business by enabling the debtor to continue its business activities and eventually to be discharged from a part of its debt. The conditions for a discharge of residual debts were quite strict. The main requirements were that (1) the debtor undertook to pay to its creditors, over a maximum period of two years, a minimum of 40 percent of its debt, and that (2) the creditors accepted the debtor's plan by a majority vote. A similar reorganization proceeding was available under the *Konkursordnung*. A proceeding that originally began as a bankruptcy proceeding could be converted into a reorganization proceeding (1) if the debtor undertook to pay to its creditors over a maximum period of two years, a minimum of 20 percent of its debt and (2) if the creditors accepted this by a majority vote. This special type of reor-

end with liquidation or financial reorganization. The debtor was allowed to propose a financial reorganization (more or less a compulsory settlement - *Zwangsvergleich).* The proposal had to be accepted by the debtors whose debt accounted for at least ¾ of the whole debt and upon that by the court (Konkursordnung 1877, par. 169). The major role was attributed to the bankruptcy court and to the bankruptcy administrator ("Konkursverwalter"). The creditors had a minor role. The *Konkursordnung* was, compared to its predecessors, relatively debtor-friendly. In fact, the main criticism leveled against the code at the time of its enactment was that it was "a child of Manchesterian ideas" and tailored to the needs of big business. Until the code's repeal in 1998, the extremely low recovery rates in German bankruptcies were often blamed on its debtor-friendliness (Berglof et al., 2001, 28).

16 Berglof cited an Austrian scholar Rudolf Pollak.

17 Both statutes have been amended many times since, but they are still valid.

ganization proceeding was – if translated literally - called “compulsory reorganization” (*Zwangsausgleich*) (Klauser, 2002, 8–9).

After 1918 the territory of today’s Republic of Slovenia became part of the State of Slovenes, Croats and Serbs and after a month joined with the Kingdom of Serbia to form the Kingdom of Serbs, Croats and Slovenes (renamed in 1929 into Kingdom of Yugoslavia). After 1918 Slovenians continued to use the Austrian law of 1914 (Politeo, 1929, 6). The Austrian Law was transferred to the whole territory of the Kingdom in 1921. Due to harsh resistance of economy as well as legal theory the rules of debt discharge (*Ausgleich* and *Zwangsausgleich*) were abolished in 1925. The Belgrade Chamber of Commerce had thought that debt discharge was expanding economic immorality, the Serbian and Croat associations of lawyers had meant that rules of debt discharge could be useful but that they cause too much fraud and immorality (Politeo, 1929, 174). After the abolishment of debt discharge procedure the number of winding up procedures rose very quickly from 106 in 1924 to 384 in 1925 and up to 823 in 1926. The Legislator was faced with the reality that a certain amount of abuse of the debt discharge procedure is still better than to have no procedure at all, so they started to prepare a new insolvency Act (Politeo, 1929, 176).

The first Insolvency Act of the Kingdom of Yugoslavia was enacted in 1930. The insolvency law was following the example of Austrian law of 1914 and was composed of two Statues: (a) the Insolvency Act (*Stečajni zakon za kraljevinu Jugoslaviju)* and (b) Settlement and Recomposition of Debts outside of bankruptcy Act (*Zakon o prinudnom poravnanju van stečaja, further one Settlement Act*). Both Statutes were modeled on the Austrian insolvency law and were extremely similar to it. The winding – up proceeding was more or less a creditor friendly procedure that consisted out of proceedings involving the realization of the debtor’s assets and the subsequent distribution of the proceeds among the creditors. The debt discharge proceeding could be initiated by a petition of an insolvent debtor (par. 1 of Settlement Act) until the court’s decision to start the winding up. In the petition the debtor had to submit a list of all creditors and their claims and make a proposal of the percentage of repayment and the extension of the maturity of repayment. The debtor’s proposal had to offer to pay to its creditors at least 40 percent of its debt in a maximum period of one year or a minimum of 50 percent of its debts in a maximum period of a year and a half (par. 4; see also Politeo, 1929, 196). Secured and preferred debt could not be discharged. With the court’s decision to allow the beginning of the proceeding the court named a bankruptcy administrator whose basic duty was to monitor debtor’s acts and to give consensus to debtor acts and running its business. Central moment of the proceeding was a hearing at which the debtor explained the reasons for his insolvency, presented his accounting and other business books and gave a sworn statement, that all accounting data is true, complete and accurate (par. 34 and 36). Debt discharge proposal was accepted if it was accepted by the majority of creditor whose claims represented more than ¾ of the whole debt. If debtor proposed to pay more than 50 percent of claims proposal was accepted by the majority of creditors present at the hearing whose claims represented at least 2/3 of the whole debt (par. 46).[18] If only majority of creditors was

18 Only creditors whose debt could get discharge had voting rights. This meant that secured and preferred

achieved but they did not represent majority of debt, the court could decide to postpone the hearing for 15 days. In the meantime the court urged creditors to vote. Debtor could also improve the proposal of repayment to improve chances of success.[19] If required majority was reached debt discharge had to be confirmed by the court.

After the Second World War, Slovenia became a federal part of the Socialist federative Republic of Yugoslavia. SFRJ had a federal Insolvency law (Prelič, 1999, 36). Until 1952 the SFRY economy was based on the idea of centrally Planned Economy and administrative management which meant, that insolvency of businesses was conceptually not possible. In 1951 a federal Regulation on winding up of enterprises was adopted according to which companies could only cease to operate on the basis of a decision of the economic administration authority.

With the transition to a new economic system (planned market socialism) in which companies became independent economic units, a need of insolvency law emerged. Consequently in 1953 a federal Regulation of liquidation of companies and establishments was enacted. The Regulation enabled two ways of companies dissolution. It could be liquidated via a voluntary liquidation, which was ordered and carried out by the competent municipality or via compulsory liquidation carried out by the competent district court (Prelič, 1999, 37–38). In 1965 the first Insolvency Act of SFRY (Zakon o prisilni poravnavi in stečaju) was enacted (Official Gazette of SFRY No.15/65). The Act regulated two procedures: winding up and debt discharge reorganization procedure. Winding up was allowed only if the company was unable to make a financial rehabilitation or if the debt discharge reorganization wasn't successful (article 4 of SFRY Insolvency Act). This provision was abolished by amendments of the law in 1969, but they were re-established in 1972. If petitioner (creditor, debtor, municipality, Social Accounting Service) filed a request for the beginning of a winding up procedure, the court had to introduce a pre-procedure with a court hearing. The court hearing was intended to check if financial rehabilitation or the debt discharge reorganization would be possible. The Court could even hire an expert witness to determine whether reorganization is feasible (articles 58 to 67 of SFRY Insolvency Act).[20]

The debt discharge reorganization procedure of 1969 was very similar to the Insolvency Act of 1930. The debtor had to offer to pay his creditors at least 50 percent of its debt in a maximum period of one year or a minimum of 60 percent of its debt in a maximum period of two years. Secured and preferred debt could not be discharged (article 12 of SFRY Insolvency Act). The debt discharge proposal had to be accepted by a majority of creditors whose claims amounted for more than on half of all claims.[21] In following decades four more Acts were enacted, each of them more or less as a reaction to changing socio-economic conditions in SFRY. In the 1970s economy was reorganized according

creditors could not vote.

19 For details see also Politeo, 1929, 263.

20 More on the topic of Insolvency Act of 1965 for example in: Gamberger and Juhart, 1971.

21 Not counting the secured and preferred debt. Of course only creditors whose debt could get discharge had voting rights. This meant that secured and preferred creditors could not vote.

to Edvard Kardelj's theory of associated labor in which the right to decision-making and a share in profits of workers-run companies was based on the investment of labor. All companies were transformed into organizations of associated labor. The smallest, basic organization of associated labor roughly corresponded to a small company or a department in a large company. These were organized into enterprises which in turn associated into composite organizations of associated labor. Following this idea meant that the ordinary insolvency procedures are insufficient and new law had to be enacted. In 1972 Act on the conditions and procedure for rehabilitation of organizations of associated labor was adopted (Official Gazette of SFRY No. 39/72), following by the Act on the conditions and procedure for rehabilitation in 1976 (Official Gazette of SFRY No. 58/76) and the Act on the procedure for rehabilitation and liquidation of organizations of associated labor in 1980 (Official Gazette of SFRY No. 41/80) and 1986 (Official Gazette of SFRY No. 72/86) respectively.[22]

The first modern Insolvency law (Zakon o prisilni poravnavi, stečaju in likvidaciji) based on market economy was enacted in 1989 (Official Gazette of SFRY No. 84/89). The new Act regulated two different proceedings, the winding up and the debt discharge proceeding. Both proceedings could be commenced only if the debtor was already insolvent (Šlibar, 1991, 9). The Act of 1989 was debtor friendly as debt discharge was intended to be the primary proceeding. Even in the winding up proceedings, the court had to examine whether there existed a possibility to save the company with a debt discharge proceedings and if it thought that it was plausible the court had to make a proposal to the debtor to prepare a debt discharge plan. The debt discharge proceeding could be proposed by the debtor, creditors or the court. The proposal had to be confirmed by creditors whose claims represented the majority of the whole debt, excluding the secured and preferential debt.[23] If debt discharge was not accepted the court could reschedule the voting hearing and allow the debtor to propose a new debt discharge plan. Even if the plan was not accepted and the winding up proceeding already begun, it could be stopped if the debtor made a new debt discharge proposal. The only condition being, that the plan had to be more favorable to the creditors that the previous one (Šlibar, 1991, 13–17). The debt discharge proceeding was not yet a modern financial reorganization procedure as only debt discharge and/or extension of the maturity of repayment were possible. Debt to equity transformation or other mechanisms for financial reorganization were still not possible (Šlibar, 1991, 6).

Due to declaration of independence of the Republic of Slovenia in 1991, the Act of 1989 was in force for only a short time. After the independence companies faced an extreme economic situation, since they basically lost their entire market of ex-Yugoslavia. Consequently the whole economy was faced with a major economic crisis which lasted until 1993 and was named a phase of transformative depression (Mencinger, 1997, 225). On 5th of July 1991 in order to prevent an avalanche of insolvency proceedings, the Slovenian government adopted a Decree on the moratorium on all insolvency proceedings. The Decree regulated that the Public Accounting Service of the Republic of Slovenia

22 More on the peculiarities and issues of the insolvency law in time of associated labor for example: Finžgar, 1977;

23 As secured and preferential debt was not discharged in those creditors were not included in the procedure.

shall not propose a commencement of an insolvency procedure even though companies were insolvent. Since the Public Accounting Service was by far the most common initiator of insolvency proceedings (84,2 % in 1991), the number of new insolvency proceedings was considerably lower than it would be without the adopted Decree (Tajnikar, 1997, 256; Žnidaršič Kranjc, 1992, 474).[24] Parallel to establishing new markets for Slovenian companies and resolving the crisis from 1991, Slovenian companies had also to deal with the issue of ownership transformation from social ownership in socialism to private ownership in the new economic system[25] which was in progress during the 90's. After the initial two years of Independence and after the big economic shock was over, the first Slovenian Insolvency Law (Zakon o prisilni poravnavi, stečaju in likvidaciji, Insolvency Act 1993, Official Gazette of RS, No. 67/1993) was adopted on the 23rd of November in 1993. The Insolvency Act of 1993 was amended twice in 1997 and in 1999. It was in force until October 1st 2008, when the current insolvency act The Financial Operations, Insolvency Proceedings, and Compulsory Dissolution Act (Zakon o finančnem poslovanju, postopkih zaradi insolventnosti in prisilnem prenehanju, Official Gazette of RS, No. 126/2007) entered into force.

The proposal of the Insolvency Act 1993 was very modern and based on German and Austrian Law, with a financial reorganization procedure, called compulsory settlement, which was considerably based on the U.S. Chapter 11 (Ude, 1992, 513). In the process of adopting the Act the proposal was substantially revised and at the end the adopted Insolvency act of 1993 was very similar to the Insolvency Act of 1989. The financial reorganization procedure was very debtor friendly, but still consisted more or less only out of debt discharge and extension of maturity of repayment.[26] Following the U.S. Chapter 11 procedure, the debtor had, after the commencement of the procedure, a two month moratorium on debt enforcement of his creditors. In this time he had to prepare the financial reorganization proposal. The debtor had to offer to pay the creditors at least 50 percent of its debt in a maximum period of one year or a minimum of 60 percent of its debts in a maximum period of two years.[27] The proposal had to be confirmed by creditors whose claims represented at least 60 percent of the whole debt. Since secured and preferred debt

24 At the end of 1991, almost 600 Slovenian companies, with almost 100.000 employees met the conditions for the commencement of an insolvency proceeding. To prevent the systematic failure of Slovenian economy the economic needs once more adopted insolvency law to its interests.

25 We have to differ between socialist ownership – the collective appropriation of ownership by all working people and private ownership, where also the State or a Community can be a private owner. This means that ownership transformation from the socialist ownership system to a capitalist – private property system, does not necessary mean also privatization in the sense of finding private owners for companies, which are State owned.

26 The reform of 1997 had finally brought a system of financial reorganization which enabled debt to equity transformation, company consolidations, mergers and acquisitions and all other forms and actions that can prevent a piecemeal winding up.

27 Prerequisites for the plan were a copy – paste from the 1969 Insolvency Act. The reform in 1997 further reduced requirements for the reorganization plan. Under the 1997 law, the debtor had to offer: (a) 20 percent repayment in a maximum period of 1 year, (b) 40 percent repayment in a maximum period of 2 years, (c) 60 percent repayment in a maximum period of 3 years, (d) 80 percent repayment in a maximum period of 4 years or (e) 100 percent repayment in a maximum period of 5 years.

could not be discharged, those creditors could not vote and their claims were not included (Plavšak, Prelič, 2000, 253–262).

Insolvency Act of 1993 also allowed for the commencement of financial reorganization once winding up procedure already begun. Article 172 stated that till the hearing for the main distribution of debtor's assets, the insolvency administrator, shareholders or creditors' committee could propose to commence a financial reorganization procedure. If the financial reorganization was carried out in the winding up procedure, the minimum repayment requirements stated above did not apply, which meant, that the debtor could offer to repay less or in longer periods (Prelič, 1999, 198).

After a thorough analysis of theoretical and expert articles, legal commentaries and jurisprudence I can conclude, that at the time of adoption of the Act of 1993 and in the years following the adoption of the Act, there was no noticeable mentioning or arguing that the ownership transformation from socialist to private ownership or the initial economic shock of losing the major market for Slovenian companies had any real impact on the design of the Insolvency Act of 1993 or its two amendments in 1997 and 1999.[28] The important exception to this statement was the reform of 1999 in the part where it abandoned the *ex offo* initiation (initiation by the court, without any requests form the debtor or its creditors) of a winding up.[29] Due to inter-enterprise indebtedness of Slovenian companies that meant, that more than 6.000 winding up proceedings would have to be initiated. Due to unforeseen consequences of such an avalanche of insolvency cases, the legislator, upon the urge of theory and experts, decided to abandon the possibility of an *ex offo* initiation of insolvency proceedings.[30]

In 2008 the new insolvency act, The financial Operations, Insolvency Proceedings, and Compulsory Dissolution Act came into force (further one Insolvency Act of 2008). The Insolvency Act of 2008 was until today already amended six times.[31] More or less each of the six reforms was turning the insolvency law into a more creditor friendly insolvency system. A comparison between the Insolvency Act of 1993 and today's valid law shows an extremely large shift from having a very debtor friendly insolvency law, into having very creditor friendly insolvency legislation.[32] The major points of a debtor

28 There were some specific provisions in the Act of 1993 about persons who may propose the initiation of proceedings but otherwise, nonprivatized companies were legally treaty equally to already privatized ones.

29 The court had to initiate a winding up proceeding if a company was unable to pay salaries for a period of three months or if the company has had blocked banking accounts for a period of at least twelve months.

30 See more in Plavšak, Prelič, 2000, 823–829.

31 For an overview of the reforms first for reforms see for example Zajc, Cepec, 2012. The main reasons for the reforms were: (a) Constitutional court decision and protection of personal data (Amendment Act A); (b) public pressure (Amendment Acts D and partially E); (c) strengthening the position of creditor (Amendment Acts C, D, E, F), (d) enabling more flexible financial restructuring proceedings (Amendment Act F) and (e) as a reaction to the global financial crisis and consequently an economic crisis in Slovenia (Amendment Acts E and F).

32 The modern trends in the World are contrary. All major legal systems are trying to find a more flexible insolvency law that would enable more financial reorganizations. Following these international trends two reforms of the Slovenian financial reorganization have to be mentioned. One is the simplified financial reorganization of small and micro companies, that's less expensive and less complex as the regular financial reorganization procedure. The other is a preventive financial reorganization procedure for medium and big companies that for the first time in the Slovenian history allow a formal procedure for companies that are

friendly insolvency law are: (a) exemptions of the absolute priority rule, (b) debtor in possession principle and (c) preservation of the company as a separate goal that is equally important or has even priority to the repayment of creditors (Blazy, Chopard in Fimayer, 2008, 258).[33] The main points of the reforms that in my opinion shifted the whole paradigm of the Slovenian insolvency law in a creditor friendly insolvency law are:

- the absolute priority rule also governing the financial reorganization proceedings,[34]
- the possibilities of creditors to change the management of the debtor,[35]
- because of reasons (a) and (b) managers and shareholders have no incentives to initiate a financial reorganization proceeding,
- no more possibility of a financial reorganization in the winding up proceeding[36] and
- minimum repayment requirements.[37]

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only in danger of becoming insolvent (See Amendments to the Insolvency Act »E« in May 2013 and »F« in December 2013)

33 See below for more explanations on these three points.

34 The absolute priority rule (APR) is a rule which insists that a creditor's claim have an absolute priority over a shareholder's claim and that senior class of creditor have absolute priority before any payments can be made to junior creditors. Until the reform in 2014 APR was in use only in the winding up procedure, while in the financial reorganization proceeding APR principle did not apply and the existing shareholders of the debtor could remain shareholders after the reorganization was successfully accomplished. The transformation was graduate and begun with the regulation on debt to equity swap in 2010. Insolvency Act of 2008 regulated the debt to equity swap relatively the same as the previous act allowing the debtor to propose to its creditors that a part or the whole debt can be transformed in companies equity. The 2010 reform enabled the creditors to make an increase in the share capital from new contributions without the consent of debtor's shareholders. The reform in May 2013 enabled creditors to make a forced debt to equity swap transforming part or all of the debt in equity of the debtor without consent of debtor's shareholders. The forced debt to equity also allows a simplified reduction in subscribed capital to zero. This means that the creditors can expropriate the old shareholders, thus eliminating all incentives for management and/or shareholders to even propose to commence a financial reorganization procedure (See also: Plavšak, 2013 or Ilić, Jan, Bratina, 2013). If the reform of 2013 stopped at the point of enabling creditors to make a forced debt to equity swap with a prior simplified reduction in subscribed capital to zero, the reform of 2014 made this as an absolute rule. Article 136 of Insolvency Act of 2014 states that an existing shareholder of the debtor may retain only such share of capital of the debtor, which corresponds to the value of the share, they would have received if the debtor would go into a winding up procedure.

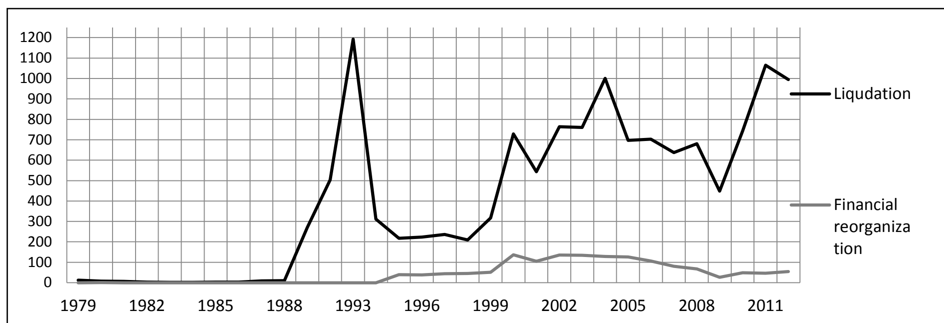
35 Prior to reforms in 2013 and 2014, Slovenian insolvency law in the financial reorganization proceeding had the US debtor in possession system, which means, that the existing managers of the debtor stayed in position and they cooperate and lead the negotiations and the whole process of debtors financial reorganization. Under the new rule in Article 199b each creditor, who has paid for new shares of the debtor or made a debt to equity swap, can request the court to grant him the authority to conduct the business of the insolvent debtor. This means that an active creditor can always demand from the court to replace the old management with new, elected by the creditor.

36 Once the winding up procedure begun there is no more possibility to request for a financial reorganization procedure inside the winding up proceedings.

37 Insolvency Act of 2008 abandoned the minimal repayment requirements and instead introduced a rule, that debtor has to show, that creditors will be paid better as they would be in a winding up. This very sensible rule was amended in 2011 due to pressure of public and especially the Chamber of craft and small business of Slovenia who thought that the lack of minimum repayment requirements causes economic immorality and fraud. They even called this rule: "a legalized theft" (The arguments were very similar to the arguments of the Belgrade Chamber of Commerce and the Serbian and Croat associations of lawyers in 1925! At again it took almost three years for the legislator to realize that he made a mistake). The amended Article 143 stated

EVALUATION OF *EX POST* EFFICIENCY OF SLOVENIAN CORPORATE INSOLVENCY LAW

For a better assessment of Slovenian insolvency law this chapter is devoted to a brief empirical analysis of *ex post efficiency*[38] of Slovenian insolvency law. Firstly I will present data on the number of insolvency cases and on the "success" rate[39] of insolvency cases. Further a comparison of ex *post* efficiency of Slovenian insolvency law based on comparing the Doing business rankings for different legal systems will be done and finally, I will present a more detailed empirical assessment of *ex post* efficiency of Slovenian insolvency proceedings based on a primary data set gathered from different publicly available data. All data is gathered from the Court statistics yearbooks,[40] publically accessible e-portal AJPES[41] and from The Doing business report.



Source: Judicial statistical yearbooks; Own calculations.

Figure 1: Number of insolvency procedures per year from 1979 till 2012

that the debtor must offer a minimum repayment of 50 percent of claims in a maximum period of four years. The same Article has been again amended in May 2013 with an even harder rule on the debtor now requiring a minimum repayment of 50 percent in a maximum period of four years with an additional rule, that creditors have to receive at least a quarter of the whole repayment in each of those four years. Already in December 2013 the rules have been completely turned around for the third time in three years. The current version is back to the original law of 2008, which means that no minimum repayment requirements are necessary any more, but management and shareholders are bound by the absolute priority rule (explained above).

38 *Ex post* efficiency is mainly concerned with the maximization of debtor's total value available to be divided between creditors, which can be achieved through an efficient bankruptcy proceeding. It raises question about the relationship between reorganization and liquidation proceedings, the costs induced by the proceeding, the best way of selling debtors assets, especially the question of keeping the going concern value compared to piecemeal selling of assets etc. *Ex post efficiency* is empirically measured with three basic criteria: (a) length of the procedure, (b) rate of return for creditors and (c) costs of the proceedings. See more on *ex post* efficiency: Cabrillo, Depoorter, 1999; Hart, 1999; White, 2005; Rasmussen, Skeel 1995; Armour, 2001; Jackson, 2001; Baird, 1996, etc.

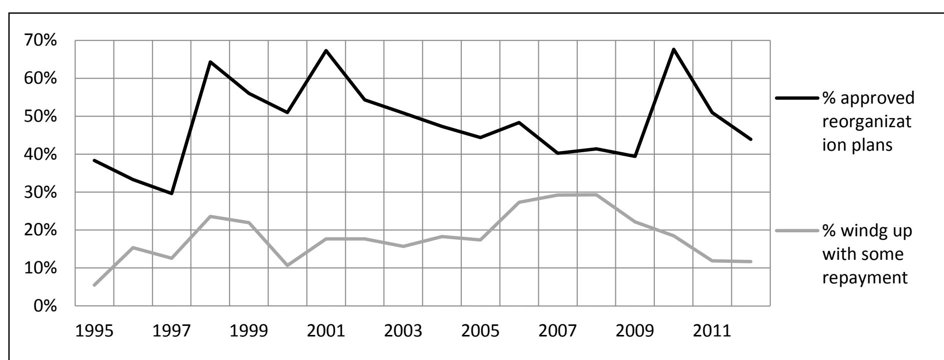
39 For the purpose of this paper a successful procedure is either a confirmed financial reorganization procedure or a winding up, where creditors ended up with at least some payment.

40 Supreme Court of Slovenian, Judicial statistical yearbook 1991 – 2013.

41 The web page of the Agency of the Republic of Slovenia for Public Legal Records and Related Services.

The Figure 1 shows that insolvency cases before the independence of Slovenian in 1991 were extremely rare, as the total number of procedures between 1979 and 1991 was only 60.[42] The other characteristic feature of the Figure 1 is the proof of the correlation of economic crisis and number of insolvency cases. The peaks 1993 and 2011 show that the number of insolvency procedures dramatically raises in times of financial crises but that the peak comes with a short delay.[43]

The figure also shows the relationship between the numbers of both kinds of proceedings. It can be seen that winding up proceedings are by far more common that the financial reorganization proceedings, which on average represent only 12 per cent of all proceedings.[44] The percentage is steadily decreasing from 1998 on and amounted to only five percent in 2012.



Source: Judicial statistical yearbooks; Own calculations.

Figure 2: Percentage of "successful" proceedings

Figure 2 shows the relation between successful reorganization and winding up proceedings. From the graph we can see, that until 2000 the relationship of success was more or less proportional, but this started to change and became more inversely proportional from 2001 on, with an exception in the period between 2005 and 2006. After the new Act in 2008 reorganizations started to get more successful until 2011 when the law was changed in the favor of creditors which, combined with the major financial crisis, obviously lowered the chance of a successful reorganizations. Due to presented data, the new act of 2008 and the global financial crisis combined had a very negative effect on the

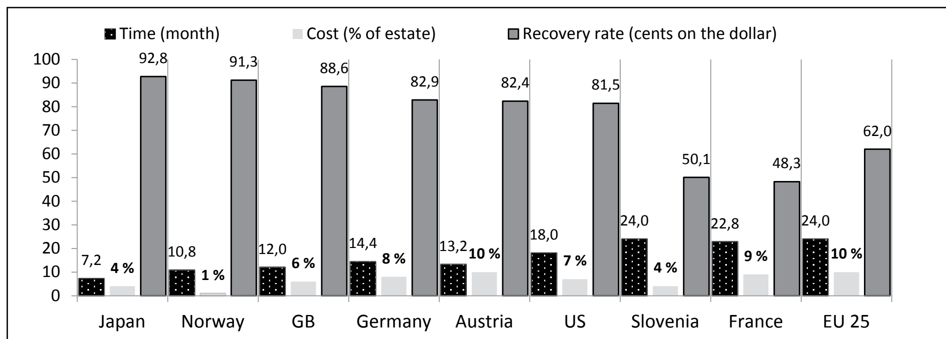
42 Out of those 60 only one was a financial reorganization proceeding.

43 The 1993 peak was even bigger because of the mentioned "moratorium" on initiation of insolvency proceedings by the Slovenian government in July 1991, which lasted until 1993.

44 The average in France is 33 per cent in US 20 per cent, Germany only 1 per cent and England about 12 percent.

winding up procedure, since the number of procedures with some repayment of creditors is steadily decreasing.

For a comparative analysis of the efficiency of insolvency laws of different countries around the world we can use the *Doing business report.* The *Doing business report* founded by The World Bank and International Finance Corporation (IFC) which measures the "ease of doing business" in 189 countries around the world,[45] has also developed an index of measuring *ex post* efficiency of insolvency procedures.[46] The index is very often used, because it is basically the only comparative index on insolvency efficiency in the world. But the index has a very serious drawback. The data about time, costs and recovery rate of insolvency proceedings is not gathered on real life cases in different countries but upon a simulation case. This means that the presented data does not represent the actual happening in different insolvency procedures around the world, but is based upon the opinions of different experts on insolvency law in each country about how the simulated case would finish.[47]



Source: doingbusiness.com

Figure 3: Doing business Resolving Insolvency Index

Figure 3 presents the results of the Doing Business Resolving Insolvency Index for all major legal systems,[48] including also Japan with the best index and EU 25 for a better comparison with Slovenia. The figure shows, that creditors in Japan and Norway would get paid most and creditors in Slovenia and France at least. The costs would be the highest in Austria and France and lowest in Norway, Japan and Slovenia. The duration of the case would be shortest in Japan and Norway and longest in Slovenia and France.

45 See more on www.doingbuisness.org.

46 The main three criteria for *ex post* efficiency of insolvency procedures are: (a) duration of the case, (b) costs of the procedure as a percentage of the estate and (c) the recovery rates for creditors.

47 See more on methodology on http://www.doingbusiness.org/methodology/resolving-insolvency.

48 I used US and UK as representatives of Common law legal family, Germany and Austria as representatives of German legal family, France as the representative of Roman legal family and Norway for the Nordic legal family. For more on the definition of legal families see Zweigert, Kötz, 1998.

I also made a comparison of *Doing business* data for a group of central and east European countries,[49] that joined EU in last 10 year. The correlation between the result of *ex post* efficiency of insolvency law and the GDP per capita for this countries, shows a very high correlation factor (r=0,8) between this two variables. This means that the efficiency of the insolvency law system in a country and its level of GDP per capita are importantly connected and positively related.

Table 1: Correlation between efficiency of insolvency law and GDP per Capita

	CZ	PL	SK	SI	LV	LT	EE	HU	BG	HR	RO
Doing business insolvency ranking	29	37	38	41	43	44	66	70	92	98	99
GDP per capita world ranking	37	46	40	36	52	44	41	49	69	55	61
Pearson correlation Factor[50]	0,802										

Source: doingbusiness.com; World Development Indicators database, World Bank[50]

Since data on insolvency proceedings in the Doing Business Index is not gathered with the analysis of real cases, I made an additional *ex post* efficiency analysis of Slovenian winding up procedures. I analyzed all 1251 liquidation insolvency cases in Slovenia that were finished in a time frame from 22nd of October 2008 and 28th of March 2013.[51] The average length of an actual insolvency procedure in Slovenia in the analyzed period was 739,2 days (2 years and 19 days; median 370 days). If creditors got paid at least one cent on the dollar the average length of the procedure was 1.564 days or four years, four months and four days (median 901 days).[52] The average rate of return for creditors was 6,8 percent.[53] The most unfavorable is the data on costs of the winding up proceedings which on average amounted 86 percent of all debtors' assets.[54]

49 Analyzed countries are: Czech Republic, Poland, Slovakia, Slovenia, Latvia, Lithuania, Estonia, Hungary, Bulgaria, Croatia and Romania.

50 Pearson correlation Factor is a measure of the linear correlation (dependence) between two variables X and Y, giving a value between +1 and −1 inclusive, where 1 is total positive correlation, 0 is no correlation, and −1 is total negative correlation.

51 The analysis was made as a part of my PhD thesis on Law and Economics of Insolvency law. The data was obtained on the publicly available website AJPES, using eINSOLV and eOBJAVE databases.

52 An average case in German lasts four years and a half (Kramer, Peter, 2012, 12).

53 71,5 percent of winding up cases were cases with no payment for creditors, which means, that the debtor did not have enough assets to cover the costs of the proceeding.

54 If we consider only cases where creditors got paid at least something (full proceedings) the average costs were one half (50 per cent) of all debtors assets.

Using linear regression I tested how different independent variables affect the duration of a wind up proceeding.[55] The results show, that the fact of a lawsuit connected with the insolvency procedure, on average, extended the duration of the bankruptcy proceedings for 1.140 days, with all other things being equal (ceteris paribus). The regression coefficient (β) is 1.140,4. Adjusted R square equals 0,339.[56]

Table 2: Linear regressions of the determinants of the length of bankruptcy proceedings

Independent variables	β (regression coefficient)	**Standard error**	**R square**	**Adjusted R square**
Lawsuits (Yes ,No)	1140,39***	63,124	0,599	0,59
Number of creditors	2,793***	0,260		
Division of assets (Yes/No)	545,192***	63,509		
Amount of bankruptcy estate	0,000***	0,000		
Recovery rate	3,367**	1,428		
Constant	257,126	/		

Legend: n=917; linear regression, *stepwise method*; *p≤0,05; **p≤0,01; ***p≤0.000

The presented model relatively very well explains the reasons and determinants of the duration of the winding up proceedings, as the adjusted R squared equals to 0.597. The main determinants of the length of the proceedings are the lawsuits and the fact of division of assets among creditors.[57] The number of creditors, the amount of the bankruptcy estate and recovery rate do not really affect the duration of the procedure.[58]

The linear regression analysis of costs in the winding up procedure proved that the duration of the proceedings does not affect the recovery rate of creditors and since regres-

55 Analyzed independent variables were (a) lawsuit connected with the insolvency procedure (Yes/No), (b) number of creditors, (c) division of assets (Yes/No), (d) recovery rate of all creditors and (e) the absolute amount of the bankruptcy estate.

56 In regression, the R square coefficient of determination is a statistical measure of how well the regression line approximates the real data points. An R square of 1 indicates that the regression line perfectly fits the data. Adjusted R square differs from the classical R square in that the adjusted R square eliminates the effect of increasing the number of independent variables in a potentially higher value of the index. All independent variables were checked for multicollinearity and they all fulfill the criteria for being used in a regression analysis (tolerance values are above 0.9).

57 Division of assets includes selling the debtor's assets and dividing the proceedings to creditors.

58 The comparison of the R square and adjusted R square demonstrate that the variables are relatively independent, and only increase the number of variables, does not increase the predictive power of the model

sion coefficient is 0. The main variable that defines costs is the fact of dividing the assets among creditors. The adjusted R square of the whole model equals 0,75.[59]

Table 4: The influence of variables on the proportion of the costs of the bankrupt estate

Independent variables	β (regression coefficient)	**Standard error**	**R square**	**Adjusted R square**
Division of assets	-0,426***	0,009	0,751	0,750
Length of the procedure	-0***	0,000		
Amount of bankruptcy estate	-0***	0,000		
Constant	0,998	/		

Legend: n=1097; ; linear regression, *stepwise method*; *p≤0,05; **p≤0,01; ***p≤0.000

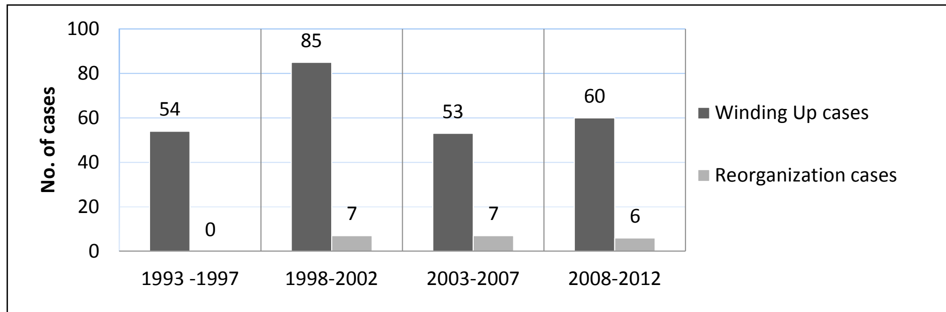
SLOVENIAN SUPREME COURT CASE LAW ON INSOLVENCY LAW

In order to analyze the role of case law for development of insolvency law I analyzed all judgments of the Supreme Court of Slovenia concerning corporate insolvency law from 1993 till 2013 that were published on the web page sodnapraksa.si.[60] I collected the judgments by searching judgments on the field of insolvency law, published by commercial or civil departments of the Supreme Court of Slovenia. Using these technic I collected 284 judgments. Out of 284 judgments 264 were related to winding up procedures and 20 on the financial reorganization procedure. Out of 264 judgments on winding up procedure the majority of cases (100) were on the topic of voidable transactions, 55 on the questions about creditors' claims, 26 judgments were purely on procedural questions, 16 were on the topic of selling the property of the debtor, eight on the topic of insolvency administrators, six on the topic of set off and so on. If we divide the 20 years of case law into four five year periods, we can see, that from 1993 till 1997 the Supreme Court dealt with 54 cases (none about financial reorganization), from 1998 till 2002 with 92 cases (7 on the topic of financial reorganization), in the period from 2003 till 2007 with 60 cases (7 on the topic of financial reorganization) and in the period from 2012 till 2012 with 66 cases (6 on the topic of financial reorganization). In 2013 the Supreme Court published 12 judgments (none on the topic of the financial reorganization). The trend on the number of cases before the Supreme Court of Slovenia can be shown in a chart.

59 The results are a bit surprising but they can be explained with the rules of the insolvency law which determines the dynamics of payments to the creditors. Creditors are getting paid every time a certain amount of money accumulates and the payments are not postponed until the end of the procedure.

60 Sodnapraksa.si is a web search machine for all published judgments of Slovenian appellate courts and the Supreme Court of Slovenia. It contains 151.374 judgments.

Table 6: Total number of cases on insolvency law before the Supreme Court of Slovenia



Source: Sodnapraksa.si; Own calculations.

An evident conclusion can be that the Supreme Court case law on reorganization procedures is very rare. The first financial reorganization case before the Supreme Court of Slovenian didn't appear until 2000. First three cases have been on the question of limitation of individual enforcement of debt once financial reorganization procedure has begun respectively the relationship between those two procedures.[61] The next 17 cases from 2001 to 2013 have been very different topics, most of them more or less procedural question. Among the case law we can find questions about the effect of confirmed reorganization procedure[62] on different claims, about the role of the financial reorganization plan[63] etc.

Figure 4 shows the frequency of the four most common dispute topics of the Supreme Court case law in winding up procedure. Interesting but logical fact is that the percentage of cases which primary subject of dispute is a procedural question sharply rose after the adoption of new laws in 1993 and 2008 respectively. From the chart we can also see that the legal questions of the Supreme Court case law were more heterogeneous after the adoption of both new laws, especially after the adoption of the new law in 2008.[64]

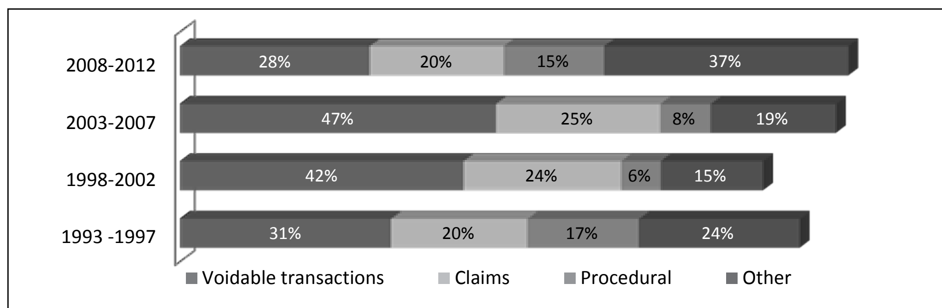
61 Supreme Court cases: Sklep II Ips 363/99, Sklep III Ips 188/99 and Sklep III Ips 46/2000, all from year 2000.

62 Supreme Court cases: Sklep III Ips 37/2001, Sklep II Ips 565/2002, Sklep II Ips 718/2005 and Sodba III Ips 120/2006.

63 Supreme Court cases: Sklep III Ips 37/2000, Sodba III Ips 27/2002, Sklep III Ips 38/2005 and Sodba G 52/2011.

64 In the 1998 – 2002 period only 15 per cent case were not connected with the most common four questions. In the period 2008 –2012 those case represented already 37 percent. In 2013 fifty per cent cases were not connected with the most common issues presented in the charts.

Table 7: Distribution of "liquidation cases" based on the issue (subject of dispute)



Source: Sodnapraksa.si; Own calculations

The most common disputes were about the voidable transactions. Generally voidable transaction are transactions made prior to the commencement of an insolvency procedure with which the debtor has given priority to repayment of claims of certain creditors or made a transaction for the benefit of certain creditors that harmed others. Since defining voidable transactions in connected with objective and subjective criteria and both of these criteria are designed as legal standards it's reasonable that case law is very important. Since voidable transaction can represent an important part of debtor's assets and debtors circumventions were quite often used, it even more explanatory, why the majority of case were on this topic.[65]

CONCLUSION

In this article, using four different arguments, I was able to prove that insolvency law is an integral part of the economic system and that it changes in accordance with countries economic development and the public relationship to the fact of "failing a business."

In the first chapter I presented the main reasons for and the dynamics of the evolution of corporate insolvency law with an emphasis on financial reorganization proceedings. I showed that European countries have traditionally considered business failure as an immoral act. As they considered merchants to "make Bankrupt" and not "to become Bankrupt" (Levinthal, 1919) they were traditionally oriented toward a creditor oriented system of insolvency law. On the other side US has traditionally seen bankruptcy as a normal step in a life of an entrepreneur and as something that is often out of the entrepreneurs control and failing was not considered as immoral. As a consequence the development of Insolvency law was more debtor friendly oriented.

The presented case study of Slovenia has also shown that the development of insolvency law was directly linked to the economic system of various countries that ruled

65 For more on the topic of voidable transactions see Đorđević, 2003.

the territory of today's Slovenia. This reasoning continued also after the Independence in 1991. As a new country full of hope and dreams and with confidence in our economy and the market system after the phase of transformative depression from 1991 until 1993, we adopted a quite modern and fairly debtor friendly insolvency law. But as years have gone by and we gradually started to lose confidence in our national economy accelerated with unsuccessful manager takeovers and especially with the consequences of the financial crisis that started in 2008, public, different associations and especially the Chamber of Craft and Small Business of Slovenia, demanded a change in insolvency law system towards a more creditor friendly system. This shift of paradigm from a debtor friendly to a creditor friendly system of insolvency law happened as a result of the public pressure, who thought, that most of insolvent debtors became insolvent due to fraud or abuse of corporate law and that as a consequence they do not do not deserve to have any active role in the insolvency proceedings. Additionally the existing system of financial reorganization was often perceived or accounted for as a legalized theft. The additional reason for the paradigm shift was in the inefficiency of the existing (debtor friendly) system.

In the last five years because of a permanent pressure of the deteriorating economy and changing public attitude towards insolvency, six reforms were made in a very short period of time, with no space for proper scientific and expert debate and under a considerable public pressure. Since we basically had none empirical studies on Slovenian insolvency law the legislator was also not able to base the reforms upon empirical data and facts, but had to trust the judgment of ad hoc appointed groups of experts which had very little or no time to prepare the reforms.[66]

The comparative evaluation of the *ex post* efficiency of Slovenian insolvency law proved a very significant correlation between efficiency of insolvency systems and the GDP per capita, which directly supports the thesis of the connection between insolvency law and the economic development. It has also shown that the basic problems of Slovenian Insolvency law are the lawsuits connected with the insolvency proceedings and extremely high costs, which are surprisingly not directly connected with the length of the procedure.

The overview of the case law on corporate insolvency law of the Supreme Court of Slovenia was made to additionally prove, that development and characteristic of corporate insolvency law are directly linked to economic conditions and political development. The findings can be summoned into a conclusion that the Case Law has been important, but that it rarely had any effect on the legislator to change the corporate insolvency policy.

66 Even though the insolvency law reforms in comparative legal systems are relatively rare and almost always prepared in a longer time frame (US Bankruptcy Act from 1898 was in act until 1978 when the new Bankruptcy act, which is still valid, was adopted; German Konkursordnung was in force from 1877 till 1999, when the new Insolvenzurdnung was adopted after 21 years of preparation; the UK Insolvency Act of 1986 was adopted after decade long debate and different reports; etc.) the last two decades were very special, since almost all countries made at least one important reform and almost all of them were in the direction of creating a more flexible financial reorganization proceeding (Germany in 2001 and 2013; France in 2006 and 2012; UK in 2002 and 2010 etc.).

KORPORACIJSKO INSOLVENČNO PRAVO – NUJEN ELEMENT TRŽNE EKONOMIJE, NAUKI IZ ZGODOVINE IN SLOVENIJE

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POVZETEK

Članek preučuje vlogo korporacijskega insolvenčnega prava v gospodarskem sistemu in postavlja tezo, da je korporacijsko insolvenčno pravo integralni del gospodarskega sistema ter da se razvija v skladu z ekonomskim razvojem posamezne države in javnim odnosom do insolventnosti. Avtor svojo tezo dokazuje s tremi povezanimi argumenti.

Uvodni argument je zgodovinski razvoj in evolucija korporativnega insolvenčnega prava, ki je bilo neposredno povezano z ekonomskimi potrebami gospodarskih družb in odnosom do dejstva neuspeha oziroma prezadolženosti. Avtorjev drugi argument je študija primera razvoja korporacijskega insolvenčnega prava na današnjem ozemlju Slovenije. Od nastanka korporacijskega insolvenčnega prava v 19. stoletju do danes je bilo današnje ozemlje Slovenije pod jurisdikcijo številnih različnih držav z zelo različnim pravno ekonomskim sistemom: razvoj insolvenčnega prava je možno za vsako izmed teh zgodovinskih obdobjih neposredno povezati z ekonomskim sistemom in gospodarskim razvojem. Razvoj insolvenčnega prava v Sloveniji je mogoče razdeliti na tri obdobja. Prvo obdobje traja od nastanka insolvenčnega prava do druge svetovne vojne in je povezano s postopnim razvojem insolvenčnega prava pod okriljem avstrijskega pravnega sistema. Drugo obdobje je obdobje Socialistične federativne Republike Jugoslavije, v katerem zasebne gospodarske družbe bolj ali manj niso obstajale, tržno ekonomijo pa je nadomestilo plansko gospodarstvo in kasneje samoupravljanje. V tem obdobju je bil propad (insolventnost) gospodarske družbe redka in nezaželjena motnja v sistemu in insolvenčno pravo je imelo zelo marginalno vlogo. Tretje obdobje razvoja je povezano z nastankom samostojne Republike Slovenije, ponovno uveljavitvijo tržnega gospodarstva in postopnimi reformami insolvenčnega prava v smer modernih ureditev.

Tretji argument izhaja iz analize ex post učinkovitosti slovenskega insolvenčnega prava in iz primerjave ex post učinkovitosti med izbranimi tujimi pravnimi redi. Empirična analiza dokazuje, da obstaja zelo močna korelacija med razvitostjo gospodarstva posamezne države in učinkovitostjo njenega insolvenčnega prava. Avtorjev zadnji argument je analiza sodne prakse Vrhovnega sodišča Republike Slovenije, iz katere izhaja, da čeprav je sodna praksa pomemben element v insolvenčnem pravu, vendarle ni imela pretiranega vpliva na pripravo reform insolvenčnega prava, saj je sodna praksa Vrhovnega sodišča povezana predvsem s tehnično – procesnimi vprašanji insolvenčnega prava.

Ključne besede: insolvenčno pravo, finančna reorganizacija, zgodovina, Slovenija, učinkovitost

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