The Latest Amendments to the Bank Insolvency Act and the Introduction of the Legal Concept of a Provisional Trustee in Bank Insolvency Proceedings

On 24 March 2015, the latest amendments to the Bank Insolvency Act entered into force, making it possible for the court to rule on preliminary measures, at the request of the Bulgarian National Bank (BNB) and the Bank Deposits Insurance Fund (the Fund), to safeguard the available property of the bank, e.g. rulings on a general distraint and freezing of the bank property, suspension of litigation and arbitration procedures involving property of the bank and others, even prior the court judgment on the BNB petition to open insolvency proceedings. The main argument underlying the amendments is the protection of the bank's creditors.

The amendments empower the Fund to nominate a provisional trustee even before the court rules on the opening of the insolvency proceedings; the court has the obligation to appoint the provisional trustee not later than the day following the day on which the petition of the Fund was filed. The discretionary powers of the court are confined only to the assessment whether the nominee of the Fund meets the statutory requirements for a trustee, i.e. the selection, appointment and dismissal of the provisional trustee are entirely within the purview of the Bank Deposits Insurance Fund.

After the appointment, the provisional trustee is expected to perform his or her functions pending the appointment of a trustee upon the court judgment on the opening of the bank insolvency proceedings. The provisional trustee has extensive powers in connection with the gathering of the bank's property to collect accounts receivable, to bring cases to court on behalf of the bank, to request the termination, cancellation or invalidation of transactions to which the bank is a party, and to dispose, with the consent of the Fund, of the cash assets of the bank, including the amounts in the bank accounts opened in the name of the bank in case this becomes necessary in view of the management and protection of the bank's property or the payment of other costs.

The provisional trustee is also entitled to request suspension of actions and transactions violating the terms and conditions of the conservatorship or the bans under Article 3, paragraph 2 of the Bank Insolvency Act, in accordance with which no disposal of the property of the bank is allowed as from the date of the revocation of the banking license, except for the usual costs incurred in the protection and management of the property. As from the same date, no actions or transactions are allowed for the collection, re-negotiation or provision of

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collateral of debts of the banks, or the execution of its debts, regardless of the manner of execution.

The powers of the provisional trustee include the filing of suspension claims under Article 59, paragraphs 3 or 5 and Article 60 of the Bank Insolvency Act and Article 135 of the Obligations and Contracts Act, as well as requests to provide collateral in that respect, whereby the time limits under Article 60, paragraphs 1 and 2 are calculated as from the date on which the bank was placed under conservatorship.

The latest amendments introduce an entirely new possibility for the provisional trustee or the trustee or the Fund respectively to file claims with the insolvency court for the return of property originating from the bank against any third party in the following cases: (i) the third party has failed to fulfill a counter consideration or the value of the counter consideration is substantially lower than that of what was received, or (ii) what the third party received was in the form of a cash and/or non-cash contribution to the capital. The legal definition of the term “originating from the bank” is given in the amendments. In accordance with paragraph 2 of the Additional Provisions of the Bank Insolvency Act “originating from the bank” are monies and/or property rights originally given by the bank to a debtor, including the collater! al thereof, which are incorporated, either in the same form or in a modified form, in the patrimony of any third party, regardless of the number of the transfers in between and the legal form of these transfers.

Thus the property offered as collateral removed by the Corporate Commercial Bank as a result of the massive setoffs through debt netting may be claimed back to the insolvency mass under the terms and conditions laid down in the new Article 60a of the Bank Insolvency Act, notwithstanding the number of its subsequent transfers.

No state fee will be charged in advance for the suspension claims. This means that if the suspension claims are filed by the provisional trustee prior to the opening of the insolvency proceedings of the Corporate Commercial Bank and then no insolvency proceedings are opened, the state fees due will be at the expense of the Corporate Commercial Bank.

On the day following the date of entry into force of the latest amendments, the Bank Deposits Insurance Fund exercised its right to request the appointment of a provisional

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trustee and to nominate such provisional trustee. The Sofia City Court issued a ruling on that day to appoint the nominees of the Fund as provisional trustees of the Corporate Commercial Bank.

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