DECISION-MAKING ON THE MONETISATION OF THE COLLATERAL IN THE COURSE OF DEBT RELIEF IN THE CZECH REPUBLIC

ROZHODOVÁNÍ O ZPENĚŽENÍ PŘEDMĚTU ZAJIŠTĚNÍ PŘI ODDLUŽENÍ V ČESKÉ REPUBLICE

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https://doi.org/10.33542/SIC2025-1-04

ABSTRACT

The topic of this article is the legal regulation of the monetisation of collateral in insolvency proceedings under Czech law. The emphasis is on the initiator of the monetisation. In connection with a major amendment to the insolvency law, with effect from 1 June 2019, there has been a change in the view on the issue of the person entitled to initiate the monetisation of the collateral within the framework of the instalment plan. In recent months, there has been a trend, unknown until then, of insolvency courts ordering insolvency administrators to monetise secured assets, even against the will of secured creditors. This article presents readers with both the current background of the legislation and attempts to point out the lines of argumentation justifying or refuting the possibility of such a procedure.

ABSTRAKT

Tématem předkládaného článku je právní úprava zpeněžování předmětu zajištění v insolvenčním řízení dle české právní úpravy. Důraz je kladen na iniciátora zpeněžování. V souvislosti s velkou novelou úpadkového práva došlo s účinností od 1. června 2019 ke změně v nazírání na problematiku osoby oprávněné iniciovat zpeněžení předmětu zajištění v rámci oddlužení plněním splátkového kalendáře. V posledních měsících dochází k trendu do té doby neznámému, že insolvenční soudy, i proti vůli zajištěných věřitelů, ukládají insolvenčním správcům zajištěný majetek zpeněžovat. Tento článek přináší čtenářům jak dosavadní východiska právní úpravy, tak se snaží poukázat na argumentační směry ospravedlňující či naopak vyvracející možnost takového postupu.

I. INTRODUCTION

This article deals with the issue of deciding on the monetisation of a registered secured creditor's collateral in the context of the current debt relief regime under the Czech Bankruptcy Act.[2] Despite the fact that the Insolvency Act has been in force in the Czech Republic since 1 January 2008, the issue of the secured creditor's powers in the case of a debt relief resolved by insolvency has only arisen with the amendment to the Insolvency Act effective as of 1 June 2019,[3] which has changed the existing view of the secured creditor's power to decide whether

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2 Act No. 182/2006 Coll., the Act on Bankruptcy and Methods of its Resolution (Insolvency Act).

3 Act No. 31/2019 Coll., Act amending Act No. 182/2006 Coll., on bankruptcy and methods of its resolution (Insolvency Act), as amended, Act No. 120/2001 Coll., on bailiffs and enforcement activities (Enforcement Code) and on amendments to other acts, as amended, Act No. 6/2002 Coll, No. 312/2006 Coll., on insolvency administrators, as amended, and Act No. 296/2017 Coll., amending Act No. 99/1963 Coll., the Code of Civil Procedure, as amended, Act No. 292/2013 Coll.,

and under what conditions to monetise the collateral.

Until the adoption of the amendment just described, only the secured creditor was entitled to initiate the monetisation of the collateral, regardless of the value of the collateral. The above rule applied to instalment plan debt relief. In the case of debt relief in the form of monetisation of assets, it was also a secured creditor, but only on the condition that there were no other sufficient assets that would enable unsecured creditors to satisfy 100% of their claims. However, with the entry into force of the amendment to the Insolvency Act made by Act No. 31/2019 Coll., the content and naming of the individual methods of solving the debt relief has changed. There is still a separate debt relief only by monetisation of the asset, for which the rules have not changed, except for the rule that the object of the security is always monetised if the secured creditor does not request that the secured property not be monetised and at the same time the other assets are sufficient to fully satisfy the unsecured creditors or the secured claim clearly exceeds the value of the collateral[4] and as a second way of solving debt relief, debt relief by fulfilling the installment plan combined with the realisation of assets. In connection with the second variant, a question arose that is the subject of this article, namely who is entitled to decide on the realisation of the collateral. Whether it is still only the secured creditor or whether, if other conditions are met, it may be someone else.

The problem described above has significant implications for the rights of secured creditors, both domestically and in cross-border insolvencies. This is linked to globalisation in legal relations and therefore to international trade. International relations are not exempt from the problems associated with the insolvency of one of the contracting parties. It often happens that a creditor has to pursue its claim against a debtor in foreign insolvency proceedings. This is usually the case if the debtor's main economic interests are located in another EU Member State. In the case of legal persons, this is most often the registered office, and in the case of natural persons, the place of permanent residence.[5] However, insolvency proceedings also acquire a cross-border character if the debtor is the owner of real estate that is the subject of insolvency proceedings outside the centre of main interests and is located in another country.[6] For entities from EU Member States, the situation is to some extent alleviated, at least as regards the need to be informed of the insolvency of a partner in another Member State and the possibility of using a standardised form to assert their claims in foreign insolvency proceedings.[7] However, this is essentially the end of any facilitation for creditors. As Article 7 of the European Regulation makes clear, insolvency proceedings are governed by the rules in force in the State which has opened the insolvency proceedings. It is therefore essential for creditors to know the law applicable in the state where the insolvency proceedings are pending. This also affects creditors whose claims are favoured by the fact that they can be satisfied out of specific assets of the debtor (secured creditors). The opening of insolvency proceedings in another EU Member State does not affect the substantive rights of creditors over the debtor's assets.[8] t is a rule that plays an essential role in the system of financing and protection of significant and, in particular, institutionalised creditors. It is therefore a matter of protecting the good faith of creditors that

on Special Court Proceedings, as amended, and some other acts.

4 Cf. § Section 408 (3) of the Insolvency Act:„The property used as collateral is monetized by the insolvency administrator after approval of debt relief by monetization of the assets, unless the secured creditor requests that this property not be monetized, and the monetization of the other property results in full satisfaction of the claims of unsecured creditors or the secured claim clearly exceeds the value of the collateral.“

5 For the purposes of this paper, it is not necessary to elaborate on the question of the debtor's main economic interests, so this concept will not be discussed further.

6 SPROGE, D.: The Debtor’s Property Selling in the Cross-Border Insolvency Proceedings. In: Economics and Culture, 2016, vol. 13, no. 1, DOI: https://doi.org/10.1515/jec-2016-0010, p. 76.

7 Cf. Article 55 of Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings („Regulation”).

8 Cf. Article 8 of the Regulation.

their security will continue to be governed by the same law under which it was created even if insolvency proceedings are opened in respect of the debtor's assets in another State.[9] In the light of what has just been described, the question of the authority to decide on the fate of the subject of collateral is not only national, but also international in the case of foreign creditors. A well-functioning credit system without adequate protection of the collateral associated with such credit is unthinkable.[10] The property constituting the subject-matter of the collateral can only be property owned by the debtor.[11] In such a case, it is subject to the effects of the insolvency rules in the *lex fori concursus* State. In the case of insolvency proceedings under the Czech Insolvency Act, it is overwhelmingly property located in the Czech Republic and subject to Czech law. In view of the above, the author believes that the conclusions will also be of benefit to foreign readers dealing with insolvency proceedings.

The methods of interpretation of legal norms, grammatical interpretation, teleological interpretation and historical interpretation were mainly used in the treatment of the issues studied. The method of comparison and description was also used. The starting point for the use of research methods was the analysis of the basic concepts, i.e. debt settlement by instalment plan, debt settlement by realisation of assets and debt settlement by instalment plan with realisation of assets. The author draws on an analysis of relevant case law, commentary and journal literature as well as relevant legal provisions. At the same time, however, it must be noted that even with regard to the fact that the presented article concerns a relatively new issue that has only arisen through new legislation since June 1, 2019, it is not an area that has been significantly elaborated so far.

From the examined sources, it can be concluded that there are two conflicting views as to whether, according to the current insolvency regulation, only the secured creditor may decide on the monetisation of the collateral or whether someone else may do so. One imaginary camp, represented by the majority of insolvency courts and the literature, is inclined to the conclusion that the monetisation of the collateral should always take place if there is a potential for surplus that could accrue to unsecured creditors. In such a case, the monetisation should take place even without the secured creditor's instruction or even against his will. The second imaginary camp is represented with regard to their interests by debtors and secured creditors, who, on the other hand, proceed from the conclusion that it is still the secured creditor who is the only one to initiate the monetisation of the collateral. The arguments of both sides are analysed in this article, with the author leaning towards one of them at the end.

The article focuses exclusively on the area of the non-liquidation method of solving a debtor’s bankruptcy[12], namely, the repayment of the debtor’s debt by an instalment plan with the monetisation of the property, which currently represents the vast majority of all insolvency proceedings in the Czech Republic.[13] Despite the fact that the Insolvency Act also allows legal persons (non-business) to apply for debt relief,[14] the absolute majority of all applications for debt relief are filed by natural persons.[15] They are, in fact, targeted for insolvency to enable them to return to a proper life, to escape the grey zone in which they do not contribute in any way to the running of the state through their taxes while also relieving them of the burden of

9 BĚLOHLÁVEK, A., J. Evropské a mezinárodní insolvenční řízení: Nařízení Evropského parlamentu a Rady (EU) č. 2015/848 o insolvenčním řízení. Komentář. Praha: C. H. Beck, 2020, p. 277.

10 OCHOCIŃSKA, K.: Creditors' and Third Parties' Rights In Rem under European Union Regulations and the UNCITRAL Legislative Guide on Insolvency Law. In: Comparative Law Review, vol. 27, 2021, DOI 10.12775/CLR.2021.015, p. 355.

11 SPRINZ, P. - NOVOPACKÝ, L.: (Strastiplná cesta zajištěného věřitele k vydání výtěžku zpeněžení v konkursu. In Právní rozhledy, 2019, vol. 27, no. 22, p. 763.

12 Cf. e.g. SMOLÍK, P.: *Oddlužení v právním řádu ČR*. 1st. edition 2016. Praha: C. H. Beck, 2016, p. 11.

13 Cf. e.g. https://www.insolcentrum.cz/analyzy/.

14 HÁSOVÁ, J. - MORAVEC, T. *Insolvenční řízení*. 2nd edition. Praha: C. H. Beck, 2018, p. 225.

15 The author, as an insolvency trustee, has not yet encountered a corporate debt relief in his 12 years of practice.

their debts.[16]

For the purpose of clarity and better orientation of the reader in the issue discussed, the author will first describe the individual methods of debt settlement, given that currently, debtors can be subject to debt settlement under two valid legal frameworks. The reader will thus be able to gain a better insight into the conditions under which the claims of secured creditors are satisfied.

II. LEGISLATION IN FORCE UNTIL 31.5.2019

1. Debt relief by instalment plan

The legislation of the Insolvency Act in force from 1 January 2008 to 30 May 2019 provides for two methods of debt settlement by debtors[17] Debt relief can take place either simply by fulfilling the instalment plan or by monetising the asset. In accordance with Section 402(3) and (5) of the Insolvency Act, the creditors themselves may decide on the method of solving the insolvency, and may vote for one of the variants of the method of solving the debt relief.[18] That is, either for debt relief by fulfilling the instalment plan or for debt relief by monetising the assets. If they resign from this (or none of the variants obtains the necessary majority), the creditors must accept the debt relief solution in the form determined by the insolvency court. However, the law does not provide any binding rules that court should follow. However, it can be inferred that it should take into account the fastest and highest possible satisfaction of creditors in its decision.

In the case of an instalment plan, the debtor retains their assets, which remain part of the estate or are acquired after the approval of the instalment plan. An exception, and a *sui generis* sanction, is the situation where the debtor, either intentionally or negligently, fails to disclose certain assets in the insolvency petition. In such cases, even undisclosed assets are subject to realisation after the approval of the insolvency arrangement. Another exception to the rule that the debtor's assets are not monetised in this form of debt relief, but not of a punitive nature, is the case where the debtor acquires new assets by gift, inheritance, ineffective legal act or any other extraordinary income after the approval of debt relief in this form.[19] In such instances, the debt relief is carried out through successive payments made as deductions from the debtor's income, which are used exclusively to repay the claims of unsecured creditors. The final satisfaction level of creditors is thus dependent not on the debtor's assets but on their income, whether from employment, pension, business, or contributions from third parties (including

16 E.g. the Explanatory Report to Act No. 31/2019 Coll., amending Act No. 182/2006 Coll., on Bankruptcy and Methods of its Resolution (Insolvency Act), as amended, Act No. 120/2001 Coll., on Bailiffs and Enforcement Activity (Enforcement Code), General Part.

17 Despite the fact that the new legislation on insolvency applies from 1 June 2019, owing to the unlawful retroactivity of the adopted legislation, insolvency under the legislation in force until 30 May 2019 and insolvency under the legislation in force from 1 June 2019 are currently running concurrently, taking into account the transitional provisions of the amendment to the Insolvency Act made by Act No. 31/2019 Coll., where the determining factor as to which version of the Insolvency Act governs the insolvency proceedings is whether the insolvency proceedings were initiated before 1 June 2019 or on or after 1 June 2019.

18 Cf. § Section 403(3) of the Insolvency Act:„*The method of debt relief shall be decided by the meeting of creditors by a simple majority of votes of unsecured creditors calculated according to the amount of their claims; the same applies to creditors' voting outside the creditors' meeting."*, par. 5:„*If none of the methods of debt relief receives a simple majority of the votes of unsecured creditors according to paragraph 3, the insolvency court will decide on the method of debt relief in the decision approving the debt relief (§ 406)."*

19 According to the Resolution of the Supreme Court, Case No. 29 NSČR 100/2020 of 27 October 2021, extraordinary income refers to: "*...Only such income as the debtor has acquired during the duration of the effects of the approved instalment plan, and which is not excluded from the debtor's estate by the regulation contained in Section 207 of the Insolvency Act, shall be eligible. Income other than 'extraordinary' income, i.e., ordinary or regular income, is already eligible (usable for the purposes of satisfying the debtor's unsecured creditors) pursuant to the provisions of Section 398(3) of the Insolvency Act during the duration of the effects of the approved instalment plan*." Any unusual or irregular income of the debtor, such as winnings from a betting shop, an income tax refund, etc., can be considered as extraordinary income.

income acquired through the exceptions described above).[20]

Claims secured by the debtor's property[21] are treated separately depending on the method of debt resolution. Under an instalment plan, the claims of secured creditors are satisfied solely through the realisation of assets securing the creditor's claim (only from assets owned by the debtor), and only if the secured creditor so requests.[22] The secured creditor is given the choice whether to request that the secured object be monetised in the insolvency proceedings in accordance with the Insolvency Act, or not to request monetisation and after the end of the insolvency proceedings, such creditor retains the possibility to claim its claim from the monetisation of the secured object in accordance with the enforcement procedure pursuant to Section 414(7) of the Insolvency Act.[23,24] However, such a creditor may, after the end of the insolvency proceedings, demand satisfaction of his claim only from the monetisation of the subject of collateral and not from any other property of the debtor. It is also necessary to distinguish between segregation, i.e. the right to exclude assets that do not belong to the estate, and satisfaction from their sale outside the insolvency proceedings, as this procedure is regulated, for example, by the German Insolvency Act (Insolvenzordnung).[25] The consequence of this is that even if there is any surplus left after the secured creditor's claim is satisfied after the realisation of the secured asset (if the secured creditor has instructed it to do so), it is not released to the unsecured creditors in excess of the repayments, but is released to the debtor.[26] The insolvency court, creditors' orders or other procedural entities cannot interfere in any way with the secured creditor's decision on whether or not to monetise the collateral.[27] This is justified because even if such interference occurred, the surplus after full payment of the secured creditor's claim would still accrue to the debtor, offering no pecuniary benefit to unsecured creditors through the realisation. Instalment plan debt relief is based on the premise that the unsecured creditors will be satisfied only within the framework of the instalment plan, i.e. from the debtor's income and not from the debtor's assets (with the exceptions described above - undisclosed assets, inheritance, etc.).

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20 § 412(1)(a). b) of the Insolvency Act:„*From the day when the effects of the approval of debt settlement by instalment plan with realisation of assets took place, until the day when the prerequisites for exemption according to § 412a were met or when the debt relief was canceled for the debtor, the debtor is obliged to hand over the values obtained by inheritance, gift and from an ineffective legal act, as well as property that the debtor did not list in the list of assets, even if he had this obligation, to the insolvency administrator monetisation and proceeds, as well as other extraordinary income and part of the proceeds of the monetisation of assets belonging to the common property of the spouses, to use for extraordinary installments beyond the repayment schedule; payments from insurance contracts on damage insurance and payments from the right to compensation for property and non-property damage are not considered extraordinary income.*"

21 POHL, T.: Základní principy nové právní úpravy řešení úpadku v České republice. In: *Bulletin advokacie*, 2007, vol. 2007, no. 11, p. 20.

22 If a creditor's claim is secured by the property of a third party, the creditor is treated as an unsecured creditor in insolvency proceedings and may seek satisfaction of its claim outside the insolvency proceedings through the realisation of the secured property. Conversely, if the debtor is only the pledgee and not also the obligor, the creditor may pursue its claim in the insolvency proceedings as a secured creditor, but only against the assets constituting the subject matter of the collateral.

23 Cf. § Section 414(7) of the Insolvency Act:„*When the debtor is released according to paragraph 1, the secured creditor, if the property used to secure the claim has not been monetised, retains the right to demand satisfaction of the claim from the proceeds of the monetization of this property.*"

24 CHALUPA, R.: Pokyn zajištěného věřitele v insolvenčním řízení. In: *Komorní listy*, 2022, vol. 14, no. 2, p. 19.

25 SCHLUCK-AMEND, A. - WOLFF, J.: Aus- und Absonderungsrechte in der Insolvenz. In: CMS [online]. [cited 17 December 2024]. Available from: https://www.cmshs-bloggt.de/insolvenzrecht/aus-und-absonderungsrechte-in-der-insolvenz/.

26 E.g. the Resolution of the Supreme Court, Case No. 29 NSČR 97/2016 of 26 April 2018 or the Resolution of the Supreme Court, Case No. 29 NSČR 176/2022 of 25 April 2023 when the Supreme Court concluded:„I*n the case of insolvency proceedings involving the secured party (subject to the deduction of the secured party's interest and the payment of the amount due to the secured party, in accordance with Article 2 of the Insolvency Act), the surplus proceeds (hyperocha) shall be delivered to the debtor. Such proceeds do not constitute extraordinary income to be distributed by means of an instalment plan."*

27 HOROVÁ, H. - SOMOL, K.: Postavení zajištěných věřitelů v insolvenčním řízení. In: *Bulletin advokacie*, 2012, vol. 2012, no. 9, p. 24.

In its judgment of 27 February 2020, Case No. 29 ICdo 8/2018, the Supreme Court dealt with the conditions that must be met for collateral to be realised in a repayment plan. First, it is necessary that the creditor assert its claim as secured in the application. Without this assertion, the debtor's assets, which may be used to secure the claim but are not recognised as such in the insolvency proceedings, must be regarded as unsecured assets and treated accordingly. In such a situation, the creditor's claim is treated as unsecured.

A further condition is that the secured creditor's claim is finally established. If the claim is denied - whether in terms of authenticity, amount, or ranking - it is necessary to await the final determination of the claim. In the meantime, it is not possible to monetise the collateral, even if the denial relates only to the amount, i.e., in part. Only once the claim has been finally established can monetisation proceed.

The third condition is that the collateral belongs to the debtor's estate. In this context, the Supreme Court addressed the question whether the insolvency administrator may monetise property belonging to the debtor but which the insolvency administrator has not entered into the estate. Ultimately, the Supreme Court held that the inventory of the estate does not address the circumstance of the authorisation to dispose of the assets subject to insolvency proceedings, but is only intended to provide external evidence of who is authorised to dispose of specific assets. However, this authority does not constitutionally arise from the entry of the property in the inventory. It is not the entry in the inventory that determines whether an asset is part of the estate, but the insolvency law itself determines whether or not an asset is part of the estate. In other words, if a debtor's property fulfils the conditions set out in that provision, it automatically becomes part of the estate without further delay and may be disposed of only in accordance with the Insolvency Act, regardless of whether the insolvency administrator has entered it in the inventory.

The last condition necessary for the realisation of collateral in an instalment plan is the instruction to realise by the secured creditor. Such an instruction has the nature of a procedural act, as the Supreme Court held in its decision. This means that the instruction is based on how it is expressed externally. What the secured creditor actually intended but expressed in a different way is irrelevant in this context. The internal motive or intention of the creditor is not taken into account. [28]

The conditions outlined above must be met cumulatively. If any of them is not met, the collateral cannot be realised. In this connection, the author draws attention directly to the last condition described, namely the secured creditor's instruction. Whether this is a *conditio sine qua non in* proceedings commenced after 31 May 2019 and whether the secured creditor's instruction can be replaced by a decision of the insolvency court will be discussed below and is the main topic of this article.

2. Securitisation by Realisation of Assets

In addition to the instalment plan, the second way of solving the debt relief is the monetisation of the property. In this method of solving insolvency, the debtor's property that belonged to the debtor at the time of the court decision on the approval of insolvency by means of a property sale is automatically monetised in the proceedings.[29] Assets and income acquired by the debtor after that point in time are left for their use (including assets acquired by

28 Cf. Supreme Court judgment, Case No. 29 ICdo 137/2022 of 31 July 2023: "*The secured creditor's instruction to monetise the collateral pursuant to Section 293(1) of the Insolvency Act is a procedural act, the effects of which are assessed by the insolvency court based on its outward manifestation, rather than on whether there is actual alignment between the manifested procedural act and the internal will of the actor*."

29 As the Supreme Court concluded in the aforementioned judgment of 27 February 2020 in Case No. 29 ICdo 8/2018, it was not necessary for the property to be included in the inventory.

inheritance and gift). There are no repayments from the debtor's income under this arrangement.

Both assets that are not subject to security rights and assets that secure the claim of the registered creditor are subject to seizure. Without further delay, the secured asset is only monetised if the debtor's remaining assets are insufficient to satisfy the claims of unsecured creditors in full, regardless of the fact that the secured creditor has not instructed the monetisation or has even explicitly stated that he does not wish the asset to be monetised. If the unsecured property is sufficient to cover the claims of unsecured creditors, the secured creditor still retains the right to decide whether or not the object of the security is to be monetised.[30,31] It should be added that even in the event that the secured property is monetized without anything else, the secured creditor is left with the option of choosing the method of monetising the object of the collateral. If such a method or further set conditions of monetisation do not deviate from the principles on which the insolvency law is based, the insolvency administrator proceeds according to the method of monetisation chosen by the secured creditor. If, on the other hand, the method of monetisation or other conditions set for it do not coincide with the common interest of the creditors, it is up to the insolvency court to correct the solution chosen by the secured creditor.[32] In the same way, if the secured creditor does not cooperate and does not use the right to issue the relevant instruction, the insolvency court will replace it with its decision.

It is necessary to note the different approach in the possibility of the insolvency court to substitute the instruction of the secured creditor according to the method of debt relief. This is not possible in debt relief by fulfilling the instalment plan, while in debt relief by monetising the property, the court can do so. This is due to the fact that in case of debt relief by monetisation of the asset, the proceeds of the monetisation of the security, which will remain after the satisfaction of the secured creditor's claim, are to be used to pay the claims of unsecured creditors. In case of debt relief by fulfilling the instalment plan, on the other hand, this surplus remains with the debtor and unsecured creditors cannot profit from it in any way.

3. Transition to current legislation

With effect from 1 July 2017, as a result of the adoption of Act No.64/2017 Coll., which amended, among other things, Section 398(1) of the Insolvency Act, the legislator has allowed, on the basis of an explicit declaration of the debtor and upon the proposal of the insolvency administrator, a combination of both of the above-described methods of repayment, i.e. an instalment plan with the monetisation of the estate or a part thereof.[33] However, this was not a special method of solving insolvency but only a potential option available to the debtor, provided that they would not be able to fulfil the insolvency (i.e., achieve at least 30% satisfaction of their unsecured creditors) under either method of solving the insolvency. The legislator has already replaced this potential possibility of combining the two methods of solving insolvency with a mandatory combination (unless the creditors decide otherwise) in connection with the adoption of the amendment to the Insolvency Act by Act No. 31/2019 Coll.

30 Cf. § Section 408(3) of the Insolvency Act:„*The property used as collateral is monetised by the insolvency administrator after approval of debt relief by monetisation of the assets, unless the secured creditor requests that this property not be monetised, and the monetisation of the other property results in full satisfaction of the claims of unsecured creditors or the secured claim clearly exceeds the value of the collateral.“*

31 SPRINZ, P. - CHYTIL, P. Commentary to § 408 In: SPRINZ, P. - JIRMÁSEK, T. et al.: *Insolvenční zákon. Komentář.* 1st edition. Prague: C. H. Beck, 2019, p. 1104.

32 SPRINZ, P. - NOVOPACKÝ, L. Commentary to § 293 In: SPRINZ, P. - JIRMÁSEK, T. et al.: *Insolvenční zákon. Komentář.* 1st edition (4th update) [online database]. Praha: C. H. Beck, 2023 [cited 19 November 2024]. Available from: beck-online.cz.

33 Cf. § Section 398(1) of the Insolvency Act, as amended by Act No 64/2017 Coll.:„*Debt relief can be done by monetising the assets or by fulfilling the instalment plan. On the basis of the debtor's express declaration, at the proposal of the insolvency administrator, debt relief can be carried out by fulfilling the instalment plan with the monetisation of the asset or part of it.“*

Until 31 May 2019, the debtor could have proposed one of the above-mentioned methods of implementation of the debt relief in the petition for authorisation of the debt relief (the court and the creditors were not bound by the debtor's proposal), or the decision could have been left to the will of the creditors or the insolvency court. In the event that the creditors did not choose one of the options, the insolvency court decided on the method of resolving the debt relief on the basis of the information from the insolvency administrator on the expected creditor satisfaction rates under the individual methods of resolving the debt relief. The court should have chosen the option that would give the creditors the highest possible satisfaction in the shortest possible time.

In cases where the creditors did not vote on the method of repayment or none of the options won a majority and the insolvency court decided to approve the repayment only by means of an instalment plan, it remained entirely up to the secured creditor's will what instructions it would give for the management of the collateral and whether and how it would monetise the collateral (of course, within the limits allowed by the Insolvency Act).[34] A certain safeguard in this respect is the insolvency administrator's power under Sections 230(2) and 293(1) of the Insolvency Act[35] to refuse the secured creditor's instruction to administer or monetise the secured property, provided that the instruction would not lead to proper administration, i.e., that the secured property could be monetised more profitably.[36] ,[37] In this manner, the insolvency administrator can protect the legitimate interests of the debtor, who could be harmed by the secured creditor's instructions.[38] The instruction of the secured creditor must subsequently be decided by the insolvency court. The above procedure also applies to the legislation in force as of 1 June 2019 so far. A secured creditor may decide not to give any instruction, either for administration or for monetisation, in proceedings in which a bankruptcy decision was made before 1 June 2019. Therefore, if there is no such instruction, the collateral is not monetised even if there is an anticipated surplus remaining after monetisation.

III. LEGAL REGULATION EFFECTIVE FROM 1.6.2019

1. General overview

With the adoption of the so-called Debt Relief Amendment, Act No. 31/2019 Coll., a completely new concept for methods of resolving debt relief was introduced with effect from 1 June 2019. From now on, it is possible to decide only on repayment by realisation of assets or

34 Cf. § Section 286(1) of the Insolvency Act: "*The assets may be monetised*
- *a) by public auction according to a special legal regulation,*
- *b) tby selling movable property and real estate in accordance with the provisions of the Code of Civil Procedure on the enforcement of decisions,*
- *c) by selling property outside of auction,*
- *d) in an auction conducted by a bailiff in accordance with a special legal regulation."*

35 Cf. Section 293(1) of the Insolvency Act, which is identical in content to Section 230(2) of the Insolvency Act. The only difference is that Section 230 concerns the administration of assets, whereas Section 293 concerns the monetisation:*„If it concerns the monetisation of a thing, right, claim or other property value that is used to secure the claim, the insolvency administrator is bound by the instructions of the secured creditor aimed at monetisation; if there are more secured creditors, these instructions are given by the secured creditor whose claim is satisfied from the security first in order. If the secured creditor does not give the relevant instructions even within the time limit set by the insolvency court, the secured creditor, whose claim is satisfied from the security as the next in line, has the right to give them. The insolvency administrator may reject these instructions if he considers that the collateral can be monetised more advantageously; in such a case, the insolvency court will request their review as part of the supervisory activity."*

36 E.g. Supreme Court Resolution No. 29 NSČR 176/2022 of 25 April 2023.

37 SEDLÁČEK, M. - MATUŠKA, D.: Pokyn zajištěného věřitele v insolvenčním řízení. In: *Bulletin advokacie*, 2021, vol. 2021, no. 10, p. 40.

38 As an example, a secured creditor with a receivable of CZK 1 million might instruct that the secured asset be monetised by sale outside an auction to a specifically selected bidder for an amount below the value of the secured asset. If the debtor had not been released from their debts, the debtor would have been required to pay the remaining unpaid portion of the secured creditor's claim from the proceeds of the sale after the conclusion of the insolvency proceedings.

on repayment by instalment plan with realisation of assets.

At the outset, it should be observed that the designation of the new method of debt settlement as "debt relief by instalment plan with realisation of assets" is regrettable. If there exists a separate insolvency process by way of realisation of assets alone, one cannot avoid questioning why creditors (as the parties entitled to decide on the method of insolvency) would prefer this method of insolvency. The name itself implies that in the case of insolvency by realisation of assets, creditors will be satisfied only from the realisation of the debtor's assets, whereas in the case of insolvency by instalment plan with realisation of assets, creditors will be satisfied not only from the realisation of the debtor's assets but also from the debtor's regular monthly instalments.[39] The fundamental distinction, and the rationale for creditors potentially opting for the sole realisation of assets, lies in the fact that this method does not apply the protection of the debtor's residence, which the debtor is otherwise not obliged to surrender for realisation. The institution of a so-called protected dwelling - i.e., a residence that the debtor is not required to surrender for realisation and which remains available for their use - is a novel concept, previously unknown in Czech insolvency law before 1 June 2019. A protected dwelling is located in the debtor's place of residence where he or she predominantly resides and means any property used to provide for the housing needs of the debtor and his or her family.[40] A protected dwelling refers to a debtor's residence (e.g., a flat, house, or even a tent or caravan) whose value exceeds the threshold determined in accordance with implementing regulations by multiplying the prescribed amount necessary for securing housing at the debtor's residence.[41] A dwelling is situated in the debtor's place of residence, where he or she predominantly resides, and means any thing used to provide for the housing needs of the debtor and his or her family. To simplify this matter for the purposes of this article, there is no need to elaborate further on this concept. In essence, if the debtor's residence can be monetised for a value higher than the prescribed threshold, the debtor is obliged to surrender the residence for realisation, and it will be monetised during the insolvency proceedings. Conversely, if the value is lower, the debtor retains the residence, and no realisation takes place. However, the protection afforded to the debtor's residence in the form of a protected dwelling applies exclusively in cases of an instalment plan combined with realisation of assets. Only under this type of debt relief resolution is it necessary to determine the value of the debtor's protected dwelling.[42] In other words, the distinction between debt relief resolved solely through the realisation of assets and

39 MALÝ, M.: Problematika rozdělení hyperochy vzniklé při zpeněžení zajištěného majetku dlužníka v oddlužení plněním splátkového kalendáře se zpeněžením majetkové podstat. In: epravo.cz [online]. [cited 18 December 2024]. Available from: https://www.epravo.cz/top/clanky/problematika-rozdeleni-hyperochy-vznikle-pri-zpenezeni-zajisteneho-majetku-dluznika-v-oddluzeni-plnenim-splatkoveho-kalendare-se-zpenezenim-majetkove-podstaty-110751.html?mail.

40 HAFNER, J.: Ochrana obydlí dlužníka. In: Právní prostor [online]. [cited 18 December 2024]. Available from: https://www.pravniprostor.cz/clanky/ostatni-pravo/ochrana-obydli-dluznika.

41 According to a special legal regulation, namely Government Regulation No. 189/2019 Coll., the Government Regulation on the method of determining the value of a dwelling that the debtor is not obliged to surrender for monetisation, the amount is determined based on statistical data and other variables reflecting the sum required for the debtor, together with their family, to secure housing in their place of residence. This value is then compared with the value at which the debtor's dwelling could actually be monetised.

42 The author sets aside the absurdity of the concept in question (protected dwelling), as it leads to incongruous results. For instance, if the value of a protected dwelling is, for example, CZK 1,000,000, and the debtor's residence is worth CZK 999,000, the debtor is not obliged to surrender such a residence for monetisation. Conversely, if the residence is worth CZK 1,000,001 or more, the debtor must surrender it for monetisation. Thus, the difference of a single crown (albeit exaggerated for illustrative purposes) could result in the debtor losing their residence and valuable assets. Moreover, when the debtor surrenders the residence for realisation, they are not left with an amount equivalent to the value of the protected dwelling; instead, all proceeds are applied to satisfy creditors' claims. Why a debtor should be permitted to retain a dwelling worth hundreds of thousands or even millions in one case, but not in another, is a matter of debate. The author argues that the correct procedure or interpretation should ensure that the debtor is always left with an amount equivalent to the value of the protected dwelling, even if the dwelling is realised, with only the amount exceeding this value being used to satisfy creditors' claims. Otherwise, in the author's view, this represents an entirely unjustified disparity in the treatment of debtors and constitutes a breach of the principles of insolvency proceedings.

debt relief resolved through an instalment plan with realisation of assets lies in the application of the legal framework governing the protected dwelling, which applies solely to the latter. In cases of debt relief resolved through realisation of assets alone, the debtor is invariably required to surrender their residence for realisation, irrespective of whether it would have qualified as a protected dwelling under an instalment plan with realisation of assets.

It is still valid that the creditors themselves can decide on the method of solving the debt relief solution within the meaning of Section 402(3) and (5) of the Insolvency Act, and they can vote for one of the variants of the method of solving the debt relief solution. However, there has been a change in the text of Section 402(5) of the Insolvency Act, whereby if none of the insolvency resolution options obtains a majority of creditor votes, it is no longer at the discretion of the court which form of debtor's insolvency resolution it will approve, but the court must obligatorily decide on insolvency resolution by means of an instalment plan with the realisation of the assets.[43] Therefore, right from the start, creditors can influence the amount of satisfaction of their claims by choosing a more favorable option for them, in which they will receive higher satisfaction. If they resign their right to this (or if the necessary majority is not reached), they must accept the solution of debt relief in the form of debt relief by fulfilling the instalment plan with the realisation of the assets, even in a situation where they could get higher satisfaction from the debt relief by monetising the property.

Instalment plan debt relief with realisation of assets is a kind of special hybrid between instalment plan debt relief and debt relief with realisation of assets. However, the question remains as to which rules govern the monetisation of collateral in cases involving instalments and asset realisation. Does the analogous regulation from the debt relief arrangement by instalment plan only apply or, conversely, only the regulation applicable to the debt relief arrangement by realisation of the assets only, or is there a special combination?

2. Non/monetisation of the collateral in a repayment plan with property monetisation

With effect from 1 June 2019, the separate instalment plan insolvency has been abolished and replaced by instalment plan insolvency with realisation of the assets. The differences in the monetisation of collateral in asset relief and instalment plan insolvency have been described above, particularly in terms of who has the authority to decide whether the collateral is monetised. In cases of instalment plans, this decision has always rested with the secured creditor. In cases involving the realisation of assets, the decision also rested with the secured creditor, provided that sufficient other assets existed to satisfy the claims of unsecured creditors in full. With the adoption of the new hybrid insolvency method, it becomes necessary to address whether the secured creditor retains the sole authority to decide whether the secured asset is to be monetised - potentially opting not to monetise it at all - or whether this right is limited to determining the method of realisation, with monetisation of the secured asset being obligatory wherever a surplus can be foreseen that could be used to satisfy the claims of unsecured creditors. Under the statutory provisions, it remains the secured creditor’s decision whether or not to monetise the secured property in a repayment arrangement combined with the realisation of assets. The wording of the Act as regards the secured creditor's decision on monetisation of the secured property has not been amended. Even after the end of the insolvency proceedings and the debtor's release, the secured creditor retains the right to satisfy its claim from the proceeds of the monetisation if the collateral has not been monetised in the insolvency proceedings. The relevant provisions of the bankruptcy law apply to any subsequent realisation

43 Cf. § Section 402(5) of the Insolvency Act: *„If none of the methods of debt relief receives a simple majority of the votes of unsecured creditors according to paragraph 3, the insolvency court will decide in the decision on the approval of the debt relief (§ 406) to carry out the debt relief by instalment plan with realisation of assets.“*

procedure.[44] Despite the fact that the relevant wording of the Act has not been changed by the so-called Debt Relief Amendment, the interpretations applied by the courts differ from those applied prior to its adoption. It is therefore necessary to ask what is the specific content of the legal provision.[45]

In proceedings where it cannot be assumed that a surplus will exist after the satisfaction of the secured creditor's claims, the prevailing practice remains that the secured creditor decides whether to request the realisation of the secured asset. This is because the proceeds will continue to benefit only the secured creditor. There is, therefore, no justification for the insolvency court or any other party to interfere with this right of the secured creditor.

This hypothetical issue arises in cases where it is apparent in advance that a surplus would remain after satisfying the secured creditor's claims, which could then be used to satisfy the claims of unsecured creditors. The legislature has not introduced any amendments to address this scenario. It is therefore necessary to ask the question: Does the legislation that would apply to a separate arrangement by means of an instalment plan, i.e. that it is still up to the secured creditor to decide whether or not to monetise the secured asset,[46] apply in such a case, or does the legislation that applies to a separate arrangement by means of a realisation of the assets, i.e. that the secured asset is always monetised if there are no other assets that would be sufficient to satisfy the claims of the unsecured creditors or if the value of the collateral is clearly lower than the secured creditor's claim?

The answer to this question has a significant impact on the secured creditor's right to decide on the realisation of the collateral. At first glance, this might appear to be a relatively minor right, as the creditor's primary interest would ostensibly be the prompt and maximum satisfaction of its claims. However, it is not uncommon in insolvency proceedings for secured creditors to have little interest in the realisation of collateral or the satisfaction of their claims within the insolvency proceedings. The reason for this is straightforward: secured creditors frequently enter into contracts of accession with third parties, who undertake to repay the debt in place of the debtor on the condition that the secured creditor does not demand the realisation of the collateral.[47] In such instances, the creditor not only gains an additional potential debtor but also retains the ability to accrue interest on the claim against this new debtor. The creditor's objective is not solely to recover the nominal value of its claim but also to generate reasonable profit. This opportunity is forfeited when the collateral is monetised during insolvency proceedings. Conversely, if the creditor refrains from requesting the realisation of the collateral and another party assumes the debt, the creditor can anticipate additional income through accrued interest. Much of the extant literature on structural (contingent claims) models of debt pricing implicitly makes two assumptions. Firstly, most of the models assume that there exist one class of creditors who interact with debtors during the reorganization process. Secondly, the models assume that debtors dominate the restructuring process. While the first assumption simplifies the modeling of the reorganization process, it ignores the fact that the interests of secured creditors may not be aligned with those of unsecured creditors. In practice, secured and unsecured creditors may have different preferences regarding the timing of liquidation.[48]

44 SPRINZ, P. - CHYTIL, P. Commentary to § 409 In: SPRINZ, P. - JIRMÁSEK, T. et al.: *Insolvenční zákon. Komentář.* 1st edition (4th update) [online database]. Praha: C. H. Beck, 2023 [cited 19 November 2024]. Available from: beck-online.cz.

45 MELZER, Filip. Metodologie nalézání práva. Úvod do právní argumentace. 2nd edition. Praha: C.H. Beck, 2011, p. 80.

46 SPRINZ, P. - CHYTIL, P. Commentary to § 408 In. SPRINZ, P. - JIRMÁSEK, T. et al.: *Insolvenční zákon. Komentář.* 1st edition (4th update) [online database]. Praha: C. H. Beck, 2023 [cited 19 November 2024]. Available from: beck-online.cz.

47 Most often, these are family members who enter into a contract with the secured creditor so that the borrower does not lose his or her dwelling mortgaged to the secured creditor.

48 FRANCOIS, P. - NAQVI, H.: Secured and unsecured debt in creditor-friendly bankruptcy. In: *Journal of Corporate Finance*. vol. 80, June 2023, https://doi.org/10.1016/j.jcorpfin.2023.102413. p. 1.

The contentious issue, therefore, is whether it is permissible to effectively impose on a secured creditor the obligation to monetise the collateral, thereby depriving the creditor of the potential for further profit,[49] in favour of satisfying the claims of unsecured creditors.

2.1. Argumentation for Realisation of the Collateral without the Consent/Instruction of the Secured Creditor

The question of the realisation of the collateral without the secured creditor's instruction or contrary to their express will has already been addressed, albeit "marginally," by both the doctrine and the decisions of the High Courts. Neither the Supreme Court nor the Constitutional Court has yet provided commentary on this issue. The jurisprudence of the regional and high courts is beginning to lean towards the conclusion that if there is an expectation of surplus after the secured creditor's claims have been paid, the collateral should always be monetised in insolvency proceedings by means of an instalment plan with the realisation of the assets. In the event that the secured creditor, who retains the right to provide instructions regarding the realisation of the collateral, fails to issue such instructions to the trustee within the time limit prescribed by the court, the insolvency court is entitled to replace such instructions by its own decision.[50] This conclusion is justified by the principle that, in addition to the instalment plan, insolvency proceedings also involve the realisation of assets, under which the debtor is obligated to surrender all assets for realisation (subject to specific exceptions). However, these exceptions do not encompass property that is subject to security. For instance, the High Court in Prague has held that any surplus remaining after the secured creditor's claim has been satisfied constitute property that remains the subject of the security. In other words, if any surplus represents property that has also been utilised to satisfy the secured creditor's claim, such property must be surrendered by the debtor for monetisation. The professional literature[51] addresses this issue in the context that the protection afforded to the secured creditor (arising from the ability to decide on the monetisation or non-monetisation of the collateral) must yield to the collective interest of creditors, namely the maximisation of the satisfaction of all claims.[52]

Another argument for monetisation even in the absence of the secured creditor's instruction is the legal regulation governing the right of disposition over the property constituting the subject of the security. From the moment the repayment plan with monetisation of the assets is approved, this right vests in the insolvency administrator.[53] If the trustee has the authority to dispose of the property, they can and should monetise such property to satisfy the claims of both secured and unsecured creditors. Closely related to this is the principle that when assets are monetised in a bankruptcy insolvency estate, the legislation applicable to the monetisation

49 It should be noted that in the Czech legislation, the claims of secured creditors are not further interest-bearing in the course of a bankruptcy. They are satisfied only up to the amount that was established at the review hearing.

50 Resolution of the High Court in Prague, No. 3 VSPH 1264/2021-B-52 of 29 April 2022.

51 SPRINZ, P. - CHYTIL, P. Commentary to § 409 In: SPRINZ, P. - JIRMÁSEK, T. et al.: *Insolvenční zákon. Komentář.* 1st edition (4th update) [online database]. Praha: C. H. Beck, 2023 [cited 19 November 2024]. Available from: beck-online.cz.

52 Resolution of the High Court in Olomouc, Case No. 2 VSOL 26/2024 of 23 January 2024.

53 Cf. § Section 409(3) of the Insolvency Act:„*The debtor has the right to dispose of property belonging to the property at the time of approval of the debt relief, with the exception of the property that was affected as part of the execution of the decision or execution, from the legal authority of the decision to approve the debt relief by fulfilling the debt relief by instalment plan with realisation of assets; this does not apply if it is property that serves as security or that the insolvency court has ordered to be released for cashing in...*"

of assets in bankruptcy is followed.[54,55] In bankruptcy, all the debtor's assets, including secured assets, are subject to monetisation. The secured creditor may provide instructions regarding the realisation and the method thereof; however, if they fail to do so, the court shall determine the realisation. This situation is analogous to that of insolvency repayment through realisation of assets, with the distinction that, in bankruptcy, the secured creditor cannot satisfy their claims from the collateral after the conclusion of the insolvency proceedings. The monetisation of the collateral will, therefore, always occur during the course of the insolvency proceedings.

Furthermore, one may invoke a fundamental principle of insolvency law, namely the principle of the common interest. Within the meaning of the Insolvency Act,[56] the common interest of creditors takes precedence over their individual interests. For insolvency proceedings to effectively address the issue of the common good or *common* pool - one of their primary objectives - they must prohibit individual creditor actions and substitute them with collective action.[57]

As a final argument supporting the authorisation to monetise secured property without the secured creditor's instruction, reference is made to Sections 408 and 409 of the Insolvency Act. According to the conclusions of the High Court in Prague, whenever the surplus rule contained applies, Section 409(4) of the Insolvency Act[58] is to be interpreted in light of the provision in Section 408(3) of the Insolvency Act[59] as meaning that the secured property is monetised at the request of the secured creditor and on the basis of his instruction, but if the secured creditor does not request the monetisation of the secured property, it will still be monetised.[60]

The reasoning supporting the conclusion that the secured object can be monetised in a repayment arrangement with the realisation of the assets even without the secured creditor's instruction (if surplus is foreseen) can be summarised by the fact that the purpose of the legal regulation of repayment arrangement, regardless of the method of its solution, is the highest possible satisfaction of all creditors. The interest of the secured creditor must not override this principle. In insolvency proceedings, the individual interests of creditors are subordinate to the collective interests. Furthermore, if the debtor is obligated to surrender assets for realisation - an obligation that applies even in the absence of an express court order - such assets are subject to realisation to satisfy creditors' claims. These assets do not constitute property exempt from recovery in insolvency proceedings.

2.2 Arguments against the Realisation of the Collateral without the Consent/Instruction of the Secured Creditor

As a reason for monetisation of the collateral only on the basis of the secured creditor's

54 Cf. § 398(3) of the Insolvency Act:„*In the case of debt relief by instalment plan with realisation of assets, the debtor is obliged to hand over the assets belonging to the assets to the insolvency administrator for monetisation in a similar procedure according to the provisions on the monetisation of the assets in bankruptcy, and further, until the time of filing the report for exemption, to repay to unsecured creditors a monthly amount from his income to the same extent as they may be in the execution of the decision or execution satisfied priority claims.*"

55 ERBSOVÁ, H. Commentary to § 408 In: MORAVEC, T. - KOTOUČOVÁ, J. et al.: *Insolvenční zákon. Komentář.* 4th edition. Praha: C. H. Beck, 2021, pp. 1591-1592.

56 Cf. § 2(j) of the Insolvency Act:„*For the purposes of this Act, the common interest of creditors is understood to be an interest superior to their individual interests, if its goal is that the chosen method of solving bankruptcy is fair and more profitable for them than other methods of solving bankruptcy; this does not affect the special status of certain creditors guaranteed by law."*

57 RICHTER, T.: Základní zásady insolvenčního řízení. In: *Právník*, 2016, roč. 155, č. 9, s. 721-722.

58 Cf. § Section 409(4) of the Insolvency Act:„*Assets that are used as security will be monetised by the insolvency administrator after approval of debt relief by instalment plan with realisation of assets, but first after establishing the authenticity of the amount and order of the secured claim, if requested by the secured creditor. He issues the monetisation proceeds to the secured creditor; at the same time, it proceeds similarly according to the provisions on the monetisation of collateral in bankruptcy.*"

59 Cf. footnote no. 53.

60 Resolution of the High Court in Prague, Case No. 3 VSPH 558/2023 of 26 July 2023.

instruction, it is undoubtedly possible to argue that the creditors have the right to decide on the method of resolution as described above. Only the creditors of unsecured claims can vote. They can therefore decide themselves that the insolvency arrangement will be effected only by realisation of the assets, in which case the collateral will be monetised even without the secured creditor's instruction/consent, i.e. only on the basis of a court decision (unless the other assets are sufficient to satisfy the claims of the unsecured creditors in full or the value of the collateral is clearly lower than the secured claim). The High Court in Prague,[61] addressed this issue when it concluded:„*The assessment of the method of satisfaction of creditors in the given case consists in the choice of the method of execution of the repayment, where the execution of the repayment through the monetisation of assets in the estate is based on the provisions of Sec. 408 (3) of the Insolvency Act and the secured creditor has less scope to prevent the satisfaction of unsecured creditors by refusing to grant consent to the monetisation. Conversely, in the case of the method of repayment by instalment plan with the monetisation of the assets (in which the debtor is significantly more burdened by the extent of the assets that they are obliged to offer to satisfy creditors), the possibility of monetisation of the debtor's secured assets is assessed pursuant to Sec. 409 (3) of the Insolvency Act. For unsecured creditors, the question of possible satisfaction from the sale of the secured property depends, in principle, on the secured creditor's opinion."* In the decision in question, the High Court in Prague also considered the question of the nature of the insolvency court's instruction/decision to monetise the secured property. The Court of First Instance (Regional Court) decided on monetisation within the framework of the court's supervisory activity. However, there is no appeal against such a decision. The High Court in Prague, deciding on the debtors' appeal, concluded that in the present case the decision was not a decision within the court's supervisory activity (i.e. it was not a decision against which no appeal would be admissible), but was in fact a decision pursuant to Section 406 of the Insolvency Act, which ordered the debtor (upon approval of the insolvency arrangement) to hand over specific assets for monetisation. An appeal is admissible against such a decision within the meaning of paragraph 4 of that provision. The debtor is obliged to surrender for realisation the assets designated by the court in its decision. Assets not included in the court's decision and not ordered to be surrendered for realisation are not subject to the debtor's obligation to surrender and will not be realised in the insolvency proceedings. This does not apply in respect of property over which the insolvency administrator has the right of disposal without further delay after the approval of the insolvency proceedings. Such property includes, for example, property affected by enforcement of a judgment or execution or property which is the subject of a security interest in a claim of a registered creditor. In the case of such property, it is not necessary for the court to order the debtor to surrender it for realisation, as the insolvency administrator is entitled to dispose of it and may realise it (except for the property constituting the subject matter of the security) without being explicitly specified in the court's order.[62] The ability of creditors to decide on the method of insolvency resolution and, indeed, on the sources from which their claims will be satisfied is a manifestation of the principle of the autonomy of creditors' will.[63] According to the author, the court's intervention, which replaces this expression of will with its own decision without the appropriate authorisation, violates this principle.

It should be added that insolvency courts have sometimes included a statement in the resolution approving debt relief, stipulating that the debtor is obliged to surrender not only the property constituting the subject of the collateral but also any surplus (the balance remaining

61 Resolution of the High Court in Prague, Case No. 5 VSPH 437/2023 of 27 June 2023. Author's note - the decision was challenged and the proceedings before the Supreme Court are still pending, Case No. 29 NSCR 102/2023.

62 Cf. footnote no. 53.

63 RICHTER, T.: Základní zásady insolvenčního řízení. In: *Právník*, 2016, vol. 155, no. 9, p. 723.

after satisfaction of the secured creditor's claim) that would arise if the subject of the collateral were monetised.[64] The High Court in Prague concluded as follows:„*...property not serving as collateral (which has not been affected by the enforcement of a judgment or execution) may be monetised (for the purpose of satisfying unsecured creditors) only if the insolvency court stipulates, in the decision approving the arrangement pursuant to Sections 398(3) and 406(3) (e) of the Insolvency Act, that the insolvency administrator is ordered by the debtor to deliver the property for realisation to the insolvency administrator, who then carries out the realisation (subject to the application of Section 408(1) and, consequently, Section 398(2) of the Insolvency Act) and to whom, therefore, the power of disposal of the property in question passes at the same time, which the debtor thereby loses (section 409(3), first clause after the semicolon of the Insolvency Act)."*[65] In the decision in question, the High Court in Prague further concluded that:„*If, after the realisation of real estate serving as collateral, and after the secured creditor's claim has been satisfied (by releasing the relevant part of the proceeds in accordance with Section 298 of the Insolvency Act), a surplus remains from the proceeds of such realisation, then this surplus shall be used (without further delay) to satisfy unsecured creditors within the framework of the approved repayment plan involving the monetisation of the estate."* It can be concluded from the above that the surplus that may remain after the realisation of the collateral constitutes part of the collateral. Therefore, it is not addressed in the resolution approving the insolvency arrangement, as the insolvency administrator is entitled to dispose of it without further legal entitlement. This also means that the court is not obliged to explicitly designate any surplus in the order approving the insolvency arrangement as assets to be realised.[66] Consequently, it can be monetised even without a decree to that effect.

Another argument supporting the claim of the necessity for the secured creditor's instruction to monetise the collateral is the protection of the debtor's social interests.**[67]** The protection of the debtor's protected dwelling does not apply in a repayment arrangement involving the realisation of assets where the debtor's residence is subject to a security interest. Consequently, the debtor must tolerate the sale of their residence even if it would otherwise qualify as a protected dwelling. Conversely, the insolvency arrangement is also intended to preserve the debtor's social circumstances. The loss of their dwelling could make it impossible or significantly more difficult for the debtor to meet the repayment schedule, as they would inevitably incur additional expenses associated with acquiring a new residence. If the debtor's dwelling would otherwise meet the criteria of a protected dwelling (i.e., if it were not subject to a security interest), the debtor would not be required to surrender it for realisation. This reflects the principle of the protected dwelling as a means of safeguarding the debtor's social circumstances. Therefore, if the debtor is not required to surrender a protected dwelling for realisation (when it is not subject to a security interest), why should they be compelled to do so if it is subject to a security interest but the secured creditor does not insist on its realisation?

64 E.g. Resolution of the Regional Court in Prague, No. KSPH 61 INS 24033/201-B-7 of 27 March 2020.

65 Resolution of the High Court in Prague No.2 VSPH 1355/2020-B-30 of 9 February 2021.

66 MARŠÍKOVÁ, J.: Zdroje plnění v oddlužení plněním splátkového kalendáře se zpeněžením majetkové podstaty. In : *Bulletin advokacie*, 2020, vol. 2020, no. 1-2, p. 45.

67 *"Another fundamental difference* (author's note: understand the difference from debt relief by monetization of property) *is the fact that debt relief by instalment plan with realisation of assets fundamentally excludes the possibility of unsecured creditors to be satisfied with the monetisation of the debtor's residence (section § 398, paragraph 6, second sentence). The creditors' interest in the highest possible satisfaction of claims is balanced here by the debtor's and society's interest in returning the debtor to normal socio-economic relations. The consequence of such consideration is the intention to maintain a certain material background for the debtor during debt relief - either the debtor will lose his home and will be forced to procure a replacement home, or there will be a long-term impact on income. The disposition of one's own real estate (dwelling) reduces the fixed monthly costs of maintaining a minimum standard of living, while the borrower's income above these costs can be distributed among unsecured creditors."* In. 31/2019 Coll., amending Act No. 182/2006 Coll., on Bankruptcy and Methods of its Resolution (Insolvency Act), as amended, Act No. 120/2001 Coll., on Bailiffs and Enforcement Activity (Enforcement Code), General Part.

According to the author, the approach whereby the debtor is obliged to tolerate the realisation of their residence on the court's instruction, despite the secured creditor not requesting it, constitutes a violation of the fundamental principles of insolvency proceedings.[68] *These principles include the requirement that insolvency proceedings must be conducted in such a manner as to ensure that no party is unfairly prejudiced or unduly favoured, while achieving the prompt, economical, and maximum satisfaction of creditors.* If insolvency law grants the benefit of a protected dwelling to a debtor whose residence is not subject to a security interest, then, in the author's view, this benefit should not be forfeited merely because the dwelling is subject to a security interest when the secured creditor has no interest in its realisation. To conclude otherwise, thereby denying the protection afforded by a protected dwelling, would contradict the purpose of the legislation as articulated in the explanatory memorandum to Act No. 31/2019 Coll., which introduced the regulation of debt settlement by means of a payment plan with the monetisation of property.[69]

The final argument supporting the conclusion that secured property can only be monetised in insolvency proceedings involving the realisation of assets on the basis of the secured creditor's instruction is the wording of the Insolvency Act itself, specifically Section 293(1) of the Insolvency Act,[70] which regulates the conditions for the monetisation of secured property. This provision has not been amended by Amendment No. 31/2019 Coll., and therefore the interpretation of this provision should remain unchanged despite the modifications to the methods of resolving insolvency proceedings. The established interpretation is that, in the case of an instalment plan arrangement, collateral is monetised only if the secured creditor issues the relevant instruction.[71] This interpretation is consistent with the unchanged wording of Section 414(7) of the Insolvency Act, which grants the secured creditor the right to claim its debt from the realisation of the collateral after the conclusion of the arrangement (if no realisation occurred during the insolvency proceedings). If we were to accept an interpretation whereby collateral could be monetised irrespective of the secured creditor's instruction, the provision in question would become irrelevant and obsolete, contrary to the legislator's intent. However, that was not the intention of the legislator. The statutory wording of the Insolvency Act is also supported by part of the legal doctrine.[72] However, some commentators argue against this interpretation, suggesting it could enable potential abuse by debtors. According to Sprinz and Chytil, debtors might deliberately establish liens on their dwellings to prevent their realisation (in collusion with the secured creditor).[73] The author, however, considers such an interpretation

68 Cf. § Section 5(a) and (b) of the Insolvency Act:„*Insolvency proceedings are based in particular on the following principles:*
a) the insolvency proceedings must be conducted in such a way as to ensure that no party is unfairly prejudiced or unduly favoured and to achieve the prompt, economical and maximum satisfaction of creditors;
b) creditors who have, in principle, the same or similar status under this Act have equal opportunities in insolvency proceedings."

69 Explanatory report to Act no. 31/2019 Coll. amending Act no. 182/2006 Coll., on bankruptcy and ways of solving it (Insolvency Act), as amended, Act No. 120/2001 Coll., on bailiffs and execution activities (execution order), General part.

70 Cf. § Section 293(1) of the Insolvency Act:„*If it concerns the monetization of a thing, right, claim or other property value that is used to secure the claim, the insolvency administrator is bound by the instructions of the secured creditor aimed at monetization; if there are more secured creditors, these instructions are given by the secured creditor whose claim is satisfied from the security first in order. If the secured creditor does not give the relevant instructions even within the time limit set by the insolvency court, the secured creditor, whose claim is satisfied from the security as the next in line, has the right to give them. The insolvency administrator may reject these instructions if he considers that the collateral can be monetized more advantageously; in such a case, the insolvency court will request their review as part of the supervisory activity.*"

71 E.g. Supreme Court Judgment, Case No. 29 ICdo 8/2018 of 27 February 2020.

72 SPRINZ, P. - CHYTIL, P. Commentary to § 409 In: SPRINZ, P. - JIRMÁSEK, T. et al.: *Insolvenční zákon. Komentář.* 1st edition (4th update) [online database]. Praha: C. H. Beck, 2023 [cited 19 November 2024]. Available from: beck-online.cz.

73 Ibid.

overly speculative. It is difficult to imagine a scenario where a debtor would voluntarily create a lien on their dwelling without certainty that it would not be realised. Such an action could be detrimental to the debtor, exposing them to additional debt obligations. Furthermore, such a strategy would have to be executed while the debtor was not yet insolvent. In addition to the argument based on grammatical interpretation, i.e. the statutory wording, Section 409(4) of the Insolvency Act explicitly provides:„*The property used as collateral shall be monetised by the insolvency administrator after the approval of the instalment plan with the monetisation of the assets, but only after the authenticity, amount, and order of the secured claim have been established, if the secured creditor so requests."* This provision unequivocally states that the realisation of the secured asset is conditional on the secured creditor's instruction. *A contrario*, in the absence of such an instruction, the collateral should not be monetised.

On the basis of the above, it can be summarised, and a partial conclusion can be drawn, that the interpretation whereby the realisation of the secured property in the case of a repayment plan involving the monetization of assets is contingent upon the relevant instruction of the secured creditor is supported by the explicit wording of Sections 293(1) and 409(4) of the Insolvency Act. Furthermore, this interpretation ensures that the new legal regulation concerning the debtor's protected dwelling does not become irrelevant. It also takes into account the protection of the debtor's social interests. Moreover, this interpretation aligns with the fundamental principles of the Insolvency Act, most notably the principle that creditors have the ability to influence the sources of repayment for their claims. This is a manifestation of the legal maxim *vigilantibus iura*. If creditors fail to exercise this right by voting on the arrangement, their inaction cannot be substituted by the insolvency court.

IV. CONCLUSION

The amendment to the Insolvency Act by Act No. 31/2019 Coll. not only introduced a number of changes to the legal regulation of the debtor's bankruptcy resolution through debt relief but also created several issues, including the question of whether it is permissible to monetize the object of the secured creditor's claim in debt relief through a payment plan with the monetization of the estate (which replaced the previous debt relief solely through a payment plan) without the secured creditor's consent or even against their will. The author has outlined above the arguments in favour of both positions: one that holds that the secured property may only be monetized with the secured creditor's consent or instruction, and the opposite view, which prioritises the maximisation of creditors' satisfaction and their common interest over the individual interest, thereby justifying the authorisation to monetize the secured property even against the secured creditor's will. Until the Supreme Court unifies the divergent case law on this matter, arguments can be found for both positions. The author is inclined towards the interpretation that the realisation of the collateral in a repayment plan involving the realisation of assets is only permissible on the instruction of or with the consent of the secured creditor. This interpretation relies on the wording of the Insolvency Act, particularly Section 293(1) and Section 409(4), which explicitly states that secured property shall be realised on the instruction of the secured creditor. From the author's perspective, the ability of unsecured creditors to decide on the method of resolving insolvency is crucial. Unsecured creditors may influence the source of satisfaction for their claims in advance, and nothing prevents them from voting for an arrangement involving the realisation of assets, where, with the exception of a special circumstance (which is not detrimental to unsecured creditors), the secured asset is always realised. This option represents both an expression of the autonomy of will and the principle of *vigilantibus iura.* According to the author, the insolvency court cannot interfere with these rights and cannot decide whether or not to monetise the collateral without the consent of the unsecured creditors, as this authority is otherwise vested solely in the secured creditor.

KEYWORDS
insolvency proceedings, debt relief, debt relief by instalment plan, debt relief by realisation of assets, debt relief by instalment plan with realisation of assets, realisation of collateral

KLÍČOVÁ SLOVA
insolvenční řízení, oddlužení, oddlužení plněním splátkového kalendáře, oddlužení zpeněžením majetkové podstaty, oddlužení plněním splátkového kalendáře se zpeněžením majetkové podstaty, zpeněžení předmětu zajištění

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22. Resolution of the High Court in Olomouc, Case No. 2 VSOL 26/2024 of 23 January 2024
23. Resolution of the High Court in Prague No. 2 VSPH 1355/2020-B-30 of 9 February 2021
24. Resolution of the High Court in Prague, No. 3 VSPH 1264/2021-B-52 of 29 April 2022
25. Resolution of the High Court in Prague, Case No. 3 VSPH 558/2023 of 26 July 2023
26. Resolution of the High Court in Prague, Case No. 5 VSPH 437/2023 of 27 June 2023
27. Resolution of the Supreme Court, Case No. 29 NSČR 100/2020 of 27 October 2021
28. Resolution of the Supreme Court, Case No. 29 NSČR 97/2016 of 26 April 2018
29. Resolution of the Supreme Court, Case No. 29 NSČR 176/2022 of 25 April 2023
30. Judgment of the Supreme Court, Case No. 29 ICdo 8/2018 of 27 February 2020
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