Conclusions of the summary report on the status of liquidators in proceedings instituted upon a complaint under section 51 of the Act on bankruptcy and liquidation procedures

The jurisprudence-analysing working group was set up because the courts had adopted different approaches regarding the status of the liquidator in proceedings instituted under section 51 of the Act on bankruptcy and liquidation procedures (Insolvency Act), which gives insolvent debtors and insolvent debtors' individual creditors and the creditors' committees a right to challenge a liquidator's actions (acts or omissions). According to the majority of the regional courts of appeal, liquidators act in their own name and therefore they themselves must bear the costs and expenses of the litigation, without a right of indemnity against the insolvency estate. According to the Curia, liquidators act in the name and for the account of the insolvent debtor, namely as its agent (representative), hence their costs and expenses qualify as expenses of the liquidation, therefore these costs and expenses are to be paid from the insolvent company's assets. (For a more detailed discussion of the problem see kuria-birosag.hu/sites/default/files/fsc_tanulmany_en/fsc_torok_judit_osszefoglalo_en.pdf)

The judicial decisions analysed by the working group have revealed that, save for the Curia, the courts did not address, at a theoretical level, the question of who the party was to the proceedings, therefore the jurisprudence analysis itself could not resolve this debate.

Nor could the question be unambiguously answered on the basis of the interpretation of the provisions of the Insolvency Act. Based on the interpretation of the legal provisions the members of the working group came to different conclusions. Some members (including most of the members representing the regional courts of appeal) took the view that the liquidator acted in his own name in proceedings conducted under section 51. Other members took the opposite view, namely that in such proceedings, too, the liquidator acted in the name and as the agent of the insolvent debtor.

Nor did an examination of the Hungarian academic literature on insolvency law identify any new aspect of the disputed question. Unfortunately, the academic literature addressed the issue analysed by the working group only marginally, if at all.

As the members of the working group were unable to reach a consensus on the correct interpretation of the legal provisions in force but agreed on the fact that the provisions could give rise to contradictory interpretations, the working group concluded that the only way to resolve the debate in a satisfactory manner was to amend the Insolvency Act. Therefore the representatives of the two opposite views prepared two separate proposals regarding the amendment of the Insolvency Act. The proposals (which form part of the report) were accompanied by explanatory notes.

The members of the working group also agreed that the primary practical relevance of the debated issue was the question of costs: who was to bear the costs of proceedings that were conducted upon a complaint against an act or omission of the liquidator (including the costs of appeal): the liquidator or the insolvent debtor (i.e. the insolvency estate). This is not a doctrinal, but a policy issue and as such, it should be decided by the legislator.

The representatives of both views were of the opinion that the courts should have discretionary power to depart from the rule whichever that will be (i.e. whichever solution the legislator will choose). According to one view, the courts should be able to, exceptionally, order the liquidator itself to bear the costs of the proceedings. According to the other view, courts should be able to, exceptionally, give the liquidator a right of indemnity (recoupment) against the insolvency estate. Such discretionary power can, however, be conferred on the courts only by the legislature, this being one more reason to resolve the debated issue by amending the Insolvency Act.