eurofenix®

The journal of INSOL Europe
Autumn 2019

INSOL EUROPE

New toolbox, new questions

Interpreting the EU Directive

Also in this edition:

- The Directive and the Recast EIR
- Combatting insolvency fraud
- Legal tech & digital assets
- Conference reports, news & more

€30 ISSUE 77
ISSN 1752-5187
9 771752 518006 77

eurofenix®

Autumn 2019

Printed by: MRP Print
www.mrp.uk.com

NEXT ISSUE PUBLISHED: Jan. 2020
Copy deadlines available on request.

Correspondence and ideas for articles should be sent to: Paul Newson,
paulnewson@insol-europe.org

Welcome from the Editors

FRANK HEEMANN

CATARINA SERRA

September sees the end of the holiday season, in many countries, not just in France, the *rentrée* to school, the usual acceleration of business life, and – this year – also the gathering of the INSOL Europe community at its Annual Congress in Copenhagen. Chances are that it is in this wonderful Danish capital that you are thumbing through the pages of this freshly printed edition.

While *change* continues to be a buzzword, it is striking how little change we have seen since our last Congress in Athens, at least with respect to what appear to be the two predominant topics for our members. Looking at the title and the programme of this year's Congress, as well as at this edition of eurofenix, the Brexit and the Directive on Insolvency and Restructuring continue to dominate. At least in the realm of the Directive things are progressing.

After the Directive's recent adoption, we can now focus on I&I, i.e. interpretation and implementation. Both are in full swing. Dominik Skauradszun and Walter Nijnens present the Directive's new toolbox and raise new questions (*p.19*) while Lorenzo Stanghellini and Andrea Zorzi look into the interplay of the Directive and the EIR recast (*p.22*). The implementation process has commenced and INSOL Europe endeavors to help you keep track. To stay informed, INSOL Europe's new website is a valuable tool as rightly pointed out by our president in his column (*p.6*) and as further explained by Myriam Mailly in her technical update (*p.42*). Implementing the Directive, some countries, like the Netherlands, seem to have a head start while others are clearly still in the early stages of the implementation process (cf. country reports from the Netherlands, Lithuania, France).

Looking at our second perennial topic, the Brexit discussion, I am not sure if *progress* is the fitting word of what we have been witnessing during the past months. This certainly depends on how you would like to understand the meaning of progress. Merriam-Webster, for instance, offers *inter alia*, two meanings of to progress, the first one being to *move forward (as to an objective or goal)*, the second one *to develop to a higher, better, or more advanced stage*. I leave it up to you, my dear reader, to square the reality with these definitions. Come rain or shine, we cannot ignore the implications of a Brexit. Read Paul Omar's and Chris Laughton's conference reports (*p.10* and *p.16*) and, if you would like to continue using schemes of arrangements within the EU after the UK has left the Union, then Ruairi Rynn's report (*p.30*) of the Irish landmark case should merit your attention.

Returning to our buzzword, INSOL Europe has repeatedly shown that it is capable of adapting in order to stay abreast of *changes*. So are we at *eurofenix*. Starting with this edition, we will have a column for Legal Tech & Digital Assets (*p.12*), where we will publish topical articles as well as useful information on technical developments, solutions and service providers. For this, we will work in close with the recently established working group (wing) with the same name.

What has not changed and will not change is the variety of high-quality articles and reports on various topics other than our two perennial ones, as for instance the articles on international approaches to combatting fraud (*p.25*), on the new Italian Code of Business Crisis (*p.34*) and on Russia's Bankruptcy Ecosystem (*p.36*).

Change has in my humble opinion become an overused buzzword. Still, I cannot deny the need to constantly assess the necessity of adapting to a changing environment. To keep the content of eurofenix aligned to your interests and every-day challenges, the editorial board depends on your feedback, your suggestions and your contributions. So do not be shy and address your criticism and suggestions to me or my fellow editors.

See you in Copenhagen!

Cheers

Frank

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& R3 JOINT
CONFERENCE

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NEW TOOLBOX,
NEW QUESTIONS

eurofenix
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Thoughts of the future, remembering the past

ALASTAIR BEVERIDGE
INSOL Europe President

Alastair Beveridge rounds up his year as President

"WE HAVE A LONG AND SUCCESSFUL RECORD OF WORKING CLOSELY WITH OTHER ORGANISATIONS WHO OPERATE IN THE SAME INSOLVENCY OR RESTRUCTURING FIELD"

As we head towards Autumn and what will be a fantastic conference in Copenhagen, my thoughts have turned toward the future, but I am reminded that it is also important to remember the past.

For the future I believe that our organisation is well positioned and with some great plans already in progress at a time when we also have a changing environment. Legislative focus in recent times has been much more on pre-insolvency or restructuring approaches and less about pure insolvency. This doesn't mean that there won't be insolvencies any more as these will always be required but it is a change and shift in emphasis which over time will affect us all – we, as INSOL Europe, need to be at the forefront of those changes and ready to play our part. Raising these issues with our members, inputting on proposed changes and making sure changes result in improvements not problems are at the heart of our objectives as an organisation. As for the past, I can't quite believe that my year as President has passed so quickly and is almost finished.

Development Committee

As you may recall, the setting up of the Development Committee and appointment of Country Co-ordinators formed a key part of our longer-term strategic plan to expand the organisation and to be more active in a focused and appropriate way in the individual countries in Europe. I am pleased to say that we have successfully identified and appointed 22 country co-ordinators and 18 more are being identified to go through the approval process. The next step is for plans to be prepared for each country and I know some of these are already underway. This is a multi-year programme and I expect it to build further and start to bear fruit over the next 2-3 years. I would like to thank Alice Van Der Schee, Alberto Nunez-Lagos and Radu Lotrean for their extensive efforts in getting this endeavour up and properly running since our Athens conference.

Working with kindred organisations

We have a long and successful record of working closely with other organisations who operate in the same insolvency or restructuring field. Over the past year we have started to expand this and develop closer relationships with a number of relevant organisations. As a consequence, the Executive have agreed to allocate one of the members of Council to each organisation for a 3-year term and a paper ("Cooperation Guidelines") explaining the approach is now included on our website for Council members.

The table below includes details of the events we have already run in 2019 and those we will be running for the balance of 2019 – these are in addition to our own events.

Ethics in Insolvency

INSOL International have recently undertaken some analysis on Ethical Principles for Insolvency Professionals. The idea being that members in

INSOL Europe joint events 2019

Date	Partner	Country
22 May	INSOL International	Stockholm, Sweden
13-15 June	AIJA (International Association of Young Lawyers)	Mallorca, Spain
27-28 June	DAV (German Bar Association)	Brussels, Belgium
11 July	R3 (Association of Business Recovery Professionals)	London, UK
9 September	International Women's Insolvency & Restructuring Confederation	London, UK
7-8 November	ERA (Academy of European Law)	Trier, Germany (TBC)
2 December	INSOL International Financiers Group	London, UK
6-7 December	International Bankruptcy Fraud Centre	Amsterdam, The Netherlands

different jurisdictions will link up with local bodies and legislators in the hope (but not expectation) that they may be adopted as part of professional guidance and conduct and ultimately included in updated legislation. It strikes me that there are some similarities with the Second Chance Directive – which also wants to promote improvements and some common approaches. Change is not always easy but it is one of life's few certainties.

I think it is worth considering the principles at a high level as having consistent standards of behaviour ought to foster broader support for our industry and our practitioners who have a very important role to play.

The principles are grouped into the following headings:

- **Integrity:** meaning they should be honest, fair dealing and truthful.
- **Objectivity, independence and impartiality:** avoiding conflicts, not taking kick-backs or hidden commissions, not self-dealing (or "family and friends" dealing).
- **Professional/Technical competence:** staying current with changes in law and practice.
- **Professional behaviour:** being clear, succinct and timely with communications.
- **Remuneration:** be able to be properly paid for work done in accordance with an appropriate approvals and having records to support the request.
- **Practice Management:** have appropriate procedures in place as well as professional indemnity insurance.

As Europeans we are rightly proud of our many different languages, cultures and way of doing things. These should be encouraged and supported but when dealing with troubled companies or individuals these principles make sense and should make dealing with other practitioners easier and more predictable.

Website updates

I am pleased and excited to let you know that our website has been completely re-designed and has been launched – a huge thank you to Paul Newson, our Communications Manager, for his hard work and persistence in driving this to conclusion. As this site is the window for the outside world to find out about and interact more closely with our organisation it is important that it is modern, functionally capable and interesting – I think you will find it is all of these things. All feedback on the website is welcome.

Social media is increasingly becoming part of the fabric of everyday life and as an organisation we can ill-afford to ignore it, although personally I would be pleased if my children spent less time on it than they currently do.

The Executive believe that one way to address our need to be visible and active is to identify Social Media Guest Editors for both Twitter and LinkedIn who will be responsible for activity for a short period – between 1-3 months – and will be rotated regularly. We also anticipate that our Younger Members will be at the forefront of this development (although all participants are of course welcome) and have already found our first editors: Jose Carles who is currently covering LinkedIn for us and Jenny Gant who will take the reins on Twitter. We are actively looking for members who might be willing to help with either Twitter or LinkedIn in the future and would ask that those interested contact Paul Newson (paulnewson@insol-europe.org) or your new President.

Book reviews

Following on from the comments on ethics my first book selection this time is Moneyland by Oliver Bullough. It is a fascinating and slightly terrifying look at the use of what are legitimate offshore finance centres and the ways in which they are being used. The ultra-wealthy repatriate money to

these locations and then use the rule of law to hide or prevent its return to what may be its legitimate home.

I have also become a convert of talking books and have found they are ideal for long drives or for long walks. I was, during my recent summer break, walking through a beautiful mountain forest in Switzerland listening to Doughnut Economics by Kate Raworth. The book takes aim at the prevalent economic theories of the 20th century which assume growth is a given – the hypothesis here is that this may no longer be the right assumption, given the strains being put on our people and planet and that we need to look at things differently. It certainly gave me something to think about.

I have really enjoyed my time as President and hope I have been able to make a difference. I wish Piya and Marcel – your next two Presidents – every success and am sure they will also enjoy supporting our members over the coming years. Finally, I would like to thank Caroline Taylor and her team for their tireless help during my term and enormous contribution to the success of INSOL Europe. ■

> **"SOCIAL MEDIA IS INCREASINGLY BECOMING PART OF THE FABRIC OF EVERYDAY LIFE AND AS AN ORGANISATION WE CAN ILL-AFFORD TO IGNORE IT"**

We welcome proposals for future articles and relevant news stories at any time. For further details of copy requirements and a production schedule for the forthcoming issues, please contact Paul Newson, Publication Manager: paulnewson@insol-europe.org

Are you a regular tweeter?

INSOL Europe would like to appoint a 'Social Media Guest Editor' for LinkedIn and Twitter, to help develop traffic to and from these platforms and generally increase the number of posts on a regular basis. The intention is to develop a rota of 'editors' drawn from a pool of younger members.

If you would like to be added to the rota, please contact Paul Newson (paulnewson@insol-europe.org)

Find us and follow us here:

www.linkedin.com/company/insol-europe/

twitter.com/INSOLEurope

New-look website and Congress app

Streamlined website

INSOL Europe's website (*www.insol-europe.org)* has been in redevelopment this year and was launched in July with a new look and streamlined menu structure. The main aim was to refresh the visual appeal of the home-page to engage visitors and encourage them to dig deeper into the site, with a more dynamic header to attract attention and set tone. Time was taken to simplify the navigation and the visitor journey by regrouping the key pages into more relevant sections: 'Be Informed' for resources, news and publications ; and 'Get Involved' for membership info, events and working groups etc.

New app for Congress delegates

After several versions trying out different approaches, the new style conference app was launched at the EECC Conference in Slovenia. The app for Copenhagen has just been launched to delegates which has details of the programme, sponsors, speakers and delegates and allows attendees to contact each other via internal messaging. Printed delegate workpacks are a thing of the past now that most of the information is available on the app at the touch of a button or downloadable as a PDF. *Registered delegates can search 'INSOL Europe' in the Apple or Google stores to download the app.*

RICHARD TURTON AWARD 2019

Richard Turton had a unique role in the formation and management of INSOL Europe, INSOL International, The Insolvency Practitioners Association and R3, the Association of Business Recovery Professionals in the UK. In recognition of his achievements these four organisations jointly created an award in his memory. The Richard Turton Award is an annual award providing an educational opportunity for a qualifying participant to attend the annual INSOL Europe Congress and have a technical paper published.

In recognition of those aspects, in which Richard had a special interest, the award for 2019 was open to applicants who fulfilled all of the following:

- Are a national of a developing or emerging nation;
- Work in or are actively studying insolvency & restructuring law and practice;
- Be under 35 years of age at the date of the application;
- Have sufficient command of spoken English to benefit from the congress technical programme.

Applicants for the award were invited to write a statement detailing why they should be chosen, and a brief synopsis of their proposed paper.

A panel representing the four associations adjudicated the applications. The panel members are as follows: Robert van Galen – INSOL Europe, Neil Cooper – INSOL International, Patricia Godfrey – R3 and Maurice Moses – IPA.

The committee received outstanding number of applications for this year's award and it was a very close run decision. We are delighted that the award has attracted such enthusiasm and response from the younger members of the profession, and know that Richard would also be extremely pleased that there had been such interest.

The committee is delighted to announce that the winner of this year's award is **Odwa Ngxingo** from South Africa. Odwa is currently working at ASOC Management Company (Pty) Ltd. as a portfolio manager dealing with business rescue and distressed private equity funds, and is active in promotion of insolvency and business rescue awareness in South Africa.

He will be writing a paper on *"Attitudes towards investing capital in restructuring and turnaround situations, and the multiplier effects deriving therefrom"*, which will be published in summary in one or more of the Member Associations' journals and in full on their websites.

As part of the award, Odwa is invited to attend the INSOL Europe Congress on 26-29 September 2019 in Copenhagen, Denmark.

We would like to congratulate Odwa on his excellent application, and also thank all the candidates who applied for the award this year and wish them successful career in their chosen field.

The details of the Turton Award and papers of the previous winners can be found at **https://www.insol.org/turton-award**.

Sponsored by:

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Heatwave and hot topics in Brussels

Paul Omar reports from the 8th European Insolvency and Restructuring Congress, 27-28 June

EU Commissioner Vera Jourova speaking on the Directive

Late June saw the annual outing by the Deutscher Anwaltverein (DAV) in Brussels at their 8th European Insolvency and Restructuring Congress, co-sponsored for the second year running by INSOL Europe. Thursday 27 and Friday 28 coincided with a Europe-wide heatwave, sending temperatures soaring into the high 30s and low 40s.

In Belgium, the airconditioned confines of the Stanhope Hotel helped keep the 80 speakers and delegates cool, though the items on the agenda were just as hot as the external temperature, the two key items on the programme being the recently adopted Directive on restructuring and insolvency (the "Directive") and the almost eternal question of Brexit.

Leading off the debate on the Directive, outgoing EU Commissioner Vera Jourova thought the text was a singular achievement with a coordinated European approach being all the more necessary in the face of US and Chinese aggressive behaviour on the markets. Though full harmonisation is unlikely to be achievable, the Commissioner thought that Member States still needed to review the stigmatising focus of traditional European approaches. Joining in on the future of European initiatives in insolvency, Salla Saastamoinen (DG Justice) brought attention to the influence of the EU on the work of UNCITRAL in the field of conflict of laws, perhaps even leading to a recommendation to Member States to adopt the Model Law.

The focus of the morning panel was on how Member States should approach the process of adopting the Directive, Commissioner Jourova having warned against gold-plating the text to avoid complicating its simplicity and its purpose. Salla Saastamoinen suggested that the main result of the Directive being adopted was to offer Member States a further tool for the toolkit, one that should prove useful. Members of the panel also contributed views on how French law will adapt to the Directive and how Denmark will fare as an outsider to these initiatives.

The Thursday afternoon workshops divided the delegates up into two groups, one hearing practical experiences with the Recast European Insolvency Regulation, the other focusing on the thorny issue of Brexit and its impact on cross-border restructurings. In the Brexit workshop, Andrew Shore (UK Insolvency Service) outlined some of the challenges facing the country with not only Brexit and possibly adapting to the loss of one of the many cross-border regimes, but also due to changes being signalled to domestic law. Key issues for the Government are how to continue to promote rescue of business and employment, while reducing the risk to efficiency of cross-border instances. Members of the panel helped illustrate this by analysing the *Gibbs* rule and the impact on selected industries in the absence of a dedicated framework for cross-border restructurings with Europe.

Implementing the Directive

Friday dawned equally hot on the temperature plan, while news came in that the UK Supreme Court had declined leave to appeal in *Gibbs*, thus preserving the effect of the rule, in the absence of any legislative intervention. Summaries of the workshops were delivered to conference before the morning panel embarked on an exploration of how the Directive will be implemented across Europe.

Members of the panel contributed comparisons between existing pre-insolvency procedures in selected European jurisdictions, with a particular focus on the position in the Netherlands, Spain and Germany, where Ben Dany (German Ministry of Justice) informed the audience a new minister had just taken up the portfolio and would be determining the timeline for the implementation process once the transposition period begins in late July.

Wrapping up the morning, Lucas Kortmann (Resor) delivered his annual summary of the caselaw of the Court of Justice, looking at the recent cases on scope: *Wiemer und Trachte* (14 November 2018), *NK/Fortis* (6 February 2019); TUPE: *Plessers* (16 May 2019) and a curiosity in the area of clawback: *Feniks/Azteca* (4 October 2018), which has incited some debate. This was followed by the final panel involving a novel approach to looking at the international insolvency framework through the eyes of the stakeholders, using a number of arresting visuals to illustrate the diversity of potential players and views, all of which have an impact on the outcomes of any restructuring process.

A roundup of practice changes that may occur after Brexit saw Jennifer Marshall (Allen and Overy) deliver a talk on the changing identities and roles of lenders and other financing bodies with increasingly complex financial structures continuing to pose essential questions on governing laws, especially the choice of restructure jurisdictions to have the benefit of cram-down and recognition in all affected jurisdictions. With a short envoi from conference chairs, the Brussels event then came to a close.

Photos © Andreas Burkhardt 2019.

The panel debated how the Directive will be implemented across Europe

INSOL Europe join AIJA in Mallorca

Report by Georges-Louis Harang and Anne Bach, Co-Chairs of the Young Members Group

A new era has been born this year for the INSOL Europe Young Members Group (YMG). An era of cooperation with another international association of young practitioners: The International association of young lawyers – AIJA, especially its Insolvency Commission.

The challenge was important as it was the first cooperation to be put in place between both associations. Beside the discussions of a long-term partnership, it was vital to rapidly test this cooperation. The idea was to co-organise a seminar.

The inaugural event took place from 13–15 June on the beautiful island of Mallorca. More than 80 attendees were present, coming from both associations and from everywhere in the world.

Around the topic of "Make twilight a new dawn: defensive and offensive strategies in insolvency matters", different panels were co-organised, mixing members of each association, moderated by the co-chairs of the AIJA Insolvency commission and the co-chairs of the YMG.

Testing the new format of interventions, some panels were co-organised around debates. Speakers were defending the pros and cons of topics such as "*Should companies be allowed to sail abroad to avoid national insolvency regulation?*". The audience was invited to vote at the end of the debate, challenging the speakers on their force of convictions.

All the speakers were captivated by their subjects, making them very interesting and, finally, contributing to the success of the event as well as the audience, which was attentive and impressively concerned by all the topics. So intense that the beach, the sun and the sand did not disturb the concentration of all the attendees… who had the opportunity to benefit from the charm of the island with a beautiful dinner on Friday evening, by the sea.

INSOL Europe's Deputy President Piya Mukherjee was delighted to address the delegates

Following the technical programme, which ended at noon on Saturday, participants had the chance to join a tour through a local vinery including – of course – a tasting of famous Majorcan vines as well as a farewell dinner on Porto Petro Marina on Saturday evening.

All attendees were so enthusiastic at the end of the seminar that the YMG and the AIJA Insolvency Commission are already working on the next joint event which should take place during the first semester of 2020… *stay tuned!*

INSOL Europe in New York for UNCITRAL Working Group V

Florian Bruder reports from the 55th session of UNCITRAL's Working Group V (Insolvency Law)

UNCITRAL's Working Group V (Insolvency Law), in its 55th session, made huge progress and now also completed its work on the Draft Guide to Enactment of what is expected to become the UNCITRAL Model Law on Enterprise Group Insolvency.

Both the Draft Model Law and the Draft Guide to Enactment were submitted to the UNCITRAL Commission for finalisation and adoption in its next session. States will be invited to incorporate the Model Law into their national laws with the purpose to equip them with modern legislation addressing the domestic and cross-border insolvency of enterprise groups.

This Model Law, like the Model Law on recognition and enforcement of insolvency-related judgments adopted in the last session, is also designed to complement the existing 1997 UNCITRAL Model Law on Cross-Border Insolvency (MLCBI) and the UNCITRAL Legislative Guide on Insolvency Law, in particular its part three. Legislation based on the MLCBI has been adopted by many jurisdictions, including certain of the EU Member States: United Kingdom, Poland, Slovenia and Greece.

Further, the Working Group continued to discuss a draft text on a simplified insolvency regime for micro, small and medium-sized companies and suggested revisions to the text as well as inter-sessional informal consultations in order to progress with this project.

Finally, the Working Group discussed two proposals for possible future work. The proposal of the European Union on harmonising applicable law in insolvency proceedings received large support recommending the Commission to take this up and allocate the project to Working Group V. As regards the proposal of the United States of America on asset tracing and recovery the Working Group recommended to hold a colloquium on whether the work should be taken up and with which scope.

INSOL Europe was honoured to have been invited to send a delegation to the 55th session which was held in May 2019 in New York.

This new section of *eurofenix* will bring you the most relevant news in the field of legal tech and digital assets. To contribute an article to a future edition, please send your proposal to the Chairs: Frank Heemann *frank.heemann@bnt.eu* José Carles *j.carles@carlescuesta.es* or Laurent Le Pajolec *lpa@exco.pl*

Increasing efficiency in insolvency proceedings: The appointment of IPs

Frank Heemann considers legal tech in the public sector and asks, "what is the practical relevance of IT-based selection?"

The recently adopted Directive on restructuring and insolvency (the 'Directive') seems to indicate that IT might help running proceedings more efficiently. For example, in connection with the selection of practitioners, the Directive's Recital 88 reads:

> *"Member States should not be prevented from providing for a practitioner to be selected by other methods, such as random selection by a software programme, provided that it is ensured that in using those methods due consideration is given to the practitioner's experience and expertise."*

Survey

In preparation of a panel at this June's EECC conference in Slovenia the panellists[1] and I with the help of other insolvency professionals conducted a survey in order to get a picture of the practical relevance of IT based tools for the selection of IPs.[2] The survey spanned 18 jurisdictions, listed here:

Austria	France	Poland
Belarus	Germany	Portugal
Bulgaria	Hungary	Russia
Czech Republic	Italy	Slovakia
England	Latvia	Spain
Estonia	Lithuania	Ukraine

Questions

Insolvency professionals from these jurisdictions were asked to respond to the following three questions:

1. Does selection of IPs by software already exists in your jurisdiction?
2. If IT selection does exist – does it meet the criteria set in the Directive's Recital 88?
3. If IT selection does not exist – are there any legislative initiatives to introduce it?

Findings

Here are the findings from the responses to the survey's questions and additional explanations:

- In 7[3] out of 18 polled jurisdictions, IT based selection of IPs already exists or is expected to be introduced shortly (see table opposite).[4]
- IT selection is most common in Central and Eastern Europe, Portugal being the notable exception in Western Europe.[5]
- All mechanisms but one use IT driven randomisers to select the IP for a particular case, thus certainly not meeting the requirements set out in Recital 88 of the Directive. Lithuania seems to be the only exception, where a more complex algorithm applying a number of selection categories and criteria attempts to match the most suitable IP for the particular debtor.[6] Even here, it is disputable if the system would be in line with the Directive's idea.
- The scope of application of the IT based selection varies considerably. While in some jurisdictions it is used for all proceedings,[7] in others IT selection is limited to particular types of proceedings.[8] In all relevant jurisdictions, judges are still charged to appoint by formal decision the IP selected by the system. Yet, jurisdictions vary with regard to the leeway the judge has for deviations from the IP that is proposed by the system. While in some jurisdictions, the IT-selected IP must be appointed save for very few exceptions,[9] in other jurisdictions, judges seem to have rather broad discretion to appoint an IP which they deem more suitable for the case than the IT-selected one.[10]
- In CEE jurisdictions, the overarching motive for introducing IT based selection of IP appears to be or at least have been the lack of trust – justified or not – of society in public institutions, including judges and the profession of IPs. The core motive in Portugal for the use IT, to achieve a more just distribution of cases among IPs, also plays a role in CEE, though significantly less pronounced.

Conclusion

In conclusion the survey found that IT driven selection of IPs is not merely a theoretical topic or a fancy idea invented during the process of adoption of the

IT based selection of IPs

Directive. Rather, IT driven selection has significant practical relevance, as ca. 40% of the polled jurisdictions already use or will in the near future use software solutions to select IPs. As the panel discussion at the EECC conference showed, this example of using legal tech in the public sector has the potential to trigger also in the future very intense and emotional discussions going to the core of our legal system and the underlying foundations and ethical questions.

Footnotes:

1 Kersti Kerstna-Vaks, Tartu Circuit Court (Estonia), Dmitry Konstantinov, Ilyashev & Partners (Russia), Hans-Georg Kantner, Kreditschutzverband von 1870 (Austria).
2 The survey with all contributors can be requested from the author at frank.heemann@bnt.eu
3 Hungary, Latvia, Lithuania, Portugal, Russia, Slovakia, Ukraine; in Belarus Parliament is debating a Bill that would introduce IT selection of IP.
4 In addition, it turned out, that some jurisdictions like Estonia use IT to allocate cases to insolvency judges. This related topic was not further analyzed in the survey.
5 Hungary, Latvia, Lithuania, Russia, Slovakia, Ukraine, Belarus (Bill).
6 Cf also Heemann/Stonys/Pikaly/Bodis 'IP Appointment Lottery: Experiences in Lithuania, Slovakia and Hungary with random IP selection systems', Eurofenix, Spring Edition 2018; Heemann/Gasparke 'Lottery and liability', Eurofenix 2015, Spring Edition.
7 E.g. Slovakia, Portugal; Belarus (bill).
8 E.g. Lithuania, Russia.
9 E.g. Lithuania.
10 E.g. Portugal.

A closer look at... the INSOL Europe High-Level Course on Insolvency

EMMANUELLE INACIO
INSOL Europe Technical Officer

> "THE OBJECTIVE IS TO DEVELOP A SYSTEMATIC AND COMPLEX PROGRAMME OF TRAINING FOR ALL THE ACTORS INVOLVED IN THE INSOLVENCY PRACTICE OF THE CONCERNED JURISDICTION"

One of the primary goals of INSOL Europe is to assist and participate in the education and training of members interested in European business reconstruction and recovery and insolvency issues.

To this end, the INSOL Europe High-Level Course on Insolvency project was designed by Professor Ignacio Tirado, professor of corporate and insolvency law at the Universidad Autónoma de Madrid and Secretary-General of UNIDROIT since 2018. This ambitious educational project aims to assist Central Eastern Europe and Eastern Mediterranean European Jurisdictions' transition to a fully modern, efficient and best practice-compliant insolvency system.

The objective is to develop a systematic and complex programme of training for all the actors involved in the insolvency practice of the concerned jurisdiction, with special focus on high-level lawyers and insolvency practitioners. Thus, the INSOL Europe High-Level Course on Insolvency puts together prominent academics, judges and various experts who deliver information on international best practice and also offers the participants the possibility of sharing local know-how with their peer group.

Romania

For its first edition, the INSOL Europe High-Level Course on Insolvency was launched in Romania in 2017 for a one-year programme, with three on-site training rounds in Bucharest (February and July 2017 and January 2018).

Romania was chosen both in view of the jurisdiction's legal tradition and for its recent reforms in the insolvency area. Indeed, Romania has made significant progress in enhancing its insolvency mechanisms. The Insolvency Code, adopted in June 2014, is considered a modern law, as it assimilated the best legislative standards and practice and integrated the domestic and European (CJEU and ECHR) case-law, the UNCITRAL Model Law on Cross-Border Insolvency, the EC Recommendation of 2014 on a new approach to business failure and insolvency and the OECD principles. If a coherent legal framework is a prerequisite for a functional insolvency mechanism, Romania still faces significant implementation challenges. Indeed, steps to achieve a greater uniformity in application are still needed. The divergent case law and the different interpretation on particular topics are indicative for the need to continue efforts towards a unitary implementation of the insolvency legislation.

The High-Level Course received the full support and cooperation of the Minister of Justice, the National Institute of Magistracy and the National Institute for the Training of Insolvency Practitioners - which are respectively responsible for the initial and continuous training of judges and insolvency practitioners – and the sponsorship of CITR.

International experts and local experts combined their knowledge in an interactive and rewarding course for 61 high-level Romanian lawyers, lenders, insolvency practitioners, auditors and judges. The Educational Course also received the support of Mihaela Carpus-Carcea, Legislative Officer of the European Commission, who provided the audience with an analysis of the compliance of the current Romanian insolvency system with the EC Proposal of Directive on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 which gave birth to the new European Directive 2019/1023 on Restructuring and Insolvency of 20 June 2019.

Driven by the success of the course in Romania which offered the participants an efficient training course on modern approaches in insolvency, INSOL Europe decided to reiterate the INSOL Europe High-Level Course on Insolvency in another jurisdiction.

Cyprus

Cyprus was selected as the course provided an opportunity for the local insolvency professionals to analyse in depth, through an international best-standards lens, their legislation's recent changes. Indeed, the 2016 reform of the insolvency statutory framework was one of the terms of the Memorandum of Understanding between the government of Cyrus, the International Monetary Fund, the European Central Bank and the European Commission, agreed upon in 2013, during the banking crisis. The new insolvency framework is largely inspired on the model which was adopted by Ireland and thus, does not function in practice. Moreover, Cyprus has a large number of insolvencies and a very active non-performing loan market.

The course was successfully run in Nicosia in September and October 2018 and March 2019 with a great turnout of over 100 attendees and received the support of the Insolvency Service and the sponsorship of CRI Group and CITR Cyprus.

The course was another success as it brought together local experience and international expertise to create a powerful set of messages and the input of excellent speakers. Therefore, INSOL Europe is going to continue the story.

Future steps

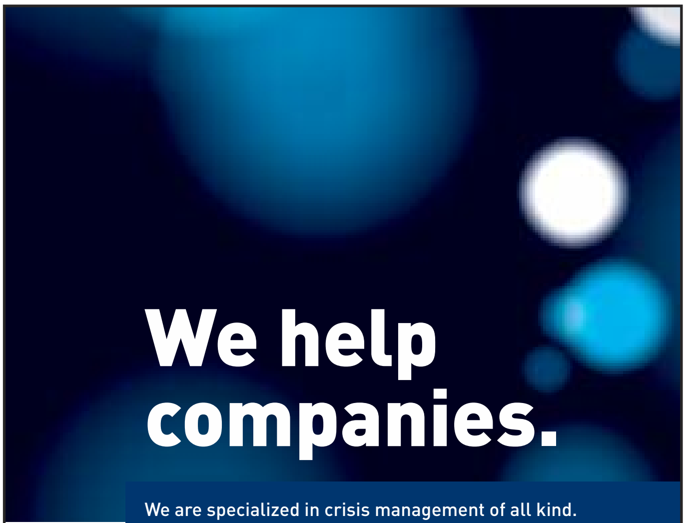
The third edition of the INSOL Europe High-Level Course on Insolvency will be run in Athens, Greece with the support of the Athens Bar Association – dates will be provided once finalised. This jurisdiction, which adopted the UNCITRAL Model Law on Cross-Border Insolvency and assimilated the EC Recommendation of 2014 on a new approach to business failure and insolvency, carried on recent reforms regarding insolvency proceedings because of the financial crisis in Greece, which lead to an increased number of businesses in financial distress. Greece has also a very active non-performing loan market.

With this High-Level Course on Insolvency, INSOL Europe underlines its leadership in the field of education, as it has already taken leadership in many other areas before.

Moreover, our educational course is in line with the new European Directive 2019/1023 on Restructuring and Insolvency of 20 June 2019. Indeed, one of its objectives is to bring the professionalism of insolvency practitioners and members of the judiciary and administrative authorities to comparable high levels across the Union. To that purpose, Member States should ensure inter alia that insolvency practitioners and members of the judicial and administrative authorities are suitably trained and have the necessary expertise for their responsibilities. If the Directive on Restructuring and Insolvency will lead to the harmonisation of rules on the education of insolvency practitioners and judges in the European Union, the Directive will not lead to the harmonisation of the quality of training of the insolvency practitioners and judges across the EU. The High-Level Course appears as a landmark in INSOL Europe's mission to assist jurisdictions in developing their insolvency system and their insolvency professionals' skills.

We are looking forward to another successful course in Greece and further on, in other European jurisdictions. *If you wish to find out more about the INSOL Europe High-Level Course on Insolvency or are interested in exploring whether or not it could be brought to your jurisdiction please let me (emmanuelleinacio@insol-europe.org) or Radu Lotrean (radu.lotrean@citr.ro) know.* ■

> **THE THIRD EDITION OF THE INSOL EUROPE HIGH-LEVEL COURSE ON INSOLVENCY WILL BE RUN IN ATHENS, GREECE WITH THE SUPPORT OF THE ATHENS BAR ASSOCIATION**



Cross-border restructuring: At a crossroads in the wake of Brexit?

Chris Laughton reports from the 16th joint conference between R3 and INSOL Europe which took place on 11 July 2019 in London

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"THE ENGLISH SCHEME IS TO BE AUGMENTED BY CORPORATE INSOLVENCY REFORMS NOT DISSIMILAR TO THE EU DIRECTIVE"

However Brexit evolves – something that remains impossible to predict – cross-border restructuring and insolvency in and between the UK and European countries will continue to develop. The question is, what will that development look like?

The EU Harmonisation Directive, which came into force on 16 July 2019, requires Member State implementation within two years and is assumed in this report not to have any direct effect in the UK as a result of Brexit. A significant part of the Directive's focus is pre-insolvency procedures. As well as outlining the Directive (sufficiently explored elsewhere to not need repeating in this report) Jennifer Marshall and Nico Tollenaar debated pre-insolvency procedures by comparing the English Scheme of Arrangement and the new Dutch Scheme.

The English Scheme is to be augmented, when necessary, by corporate insolvency reforms not dissimilar to the EU Directive provisions, including for example a stand-alone moratorium. The Dutch Scheme is yet to be tested in practice. Although skilled practitioners in the respective jurisdictions will develop the constructive use of these tools, they may remain the preserve of the larger and more complex cases that will bear the implementation costs. A straw poll suggested that delegates found the Dutch Scheme marginally more attractive.

New legal landscape

John Willcock of Global Turnaround chaired a panel that discussed the new legal landscape for NPLs. Amo Chalal set the scene with statistics about the size and development of the NPL markets. European NPL transactions are likely to exceed €200 billion in 2019, as they did in 2018; NPLs account for some €750 billion on banks' balance sheets in Europe and are up to 45% of loans in Greece; the most popular assets involved are commercial real estate (especially in the UK, Ireland and Spain), followed by SMEs in Southern Europe; major sellers include UK Asset Resolution, NAMA, Santander and Unicredit; and major buyers include Cerberus, Blackstone and Lone Star. Antonio Payan Martins saw banks now being able, after years of "zombie restructurings", to offload NPLs as underlying asset markets improve. This trend will continue as the EC seeks to harmonise and encourage NPL deals. A new Directive is anticipated in 2021 to achieve this through focus on a framework for acquisition of NPLs, credit servicing provisions and regulation of collateral enforcement. Richard Tett concluded that the direction of travel is for NPLs to come off bank balance sheets, de-risking the banks and freeing up capital flows and lending. The acquiring funds will deal actively, rather than leaving the NPLs as zombies as they had been on banks' balance sheets. Although most will be worked out or dealt, there will be an increase in restructuring.

Agrokor

Christiaan Zijderveld led the discussion of a case study of *Agrokor*. In 2017 Alastair Beveridge, INSOL Europe's President, was appointed CRO of the largest business in Croatia. Agrokor was the backbone of the Croatian food industry and, with revenues of over €6 billion representing some 13% of the country's GDP, it was too big to fail, especially at the beginning of the tourist season. To provide a mechanism for the restructuring, the Croatian government introduced an Extraordinary Administration Act almost overnight. In addition to a local extraordinary administrator and a restructuring team from Alix Partners, Houlihan Lokey (financial) and Kirkland & Ellis (legal) were fundamental to the success of the restructuring. The challenges included an almost complete lack of cash, no management structure and significant political and media interest. Within 15 months, over 80% creditor support was gained for a plan that saw an average

return of 50% to creditors (including 100% for local micro suppliers).

Gibbs

Felicity Toube QC and Riz Mokal gave a legal update which began by considering the Gibbs principle whereby in English law, based on a Court of Appeal decision dating from 1890, a foreign liquidation only discharges foreign law debts. In 2017 the Azeri insolvency proceedings of the International Bank of Azerbaijan were recognised in England under the Cross-Border Insolvency Regulations ("CBIR"), which implement the UNCITRAL Model Law. The English Court of Appeal confirmed that the resulting moratorium ended when the main proceedings ended. Extending the moratorium indefinitely to overcome the Gibbs principle was not permitted and the Supreme Court has refused permission to appeal.

In a related vein, the use of Irish schemes of arrangement to restructure New York law-governed debt was explored in the context of *Ballantyne Re plc*. In another transatlantic case, *Videology Limited*, US Chapter 11 proceedings were recognised in England not as main proceedings but as non-main proceedings under the CBIR; the English court nevertheless granted an extensive moratorium in the interests of creditors.

In a wholly European matter, the English courts declined jurisdiction in *Lady Moon SPV SRL*'s claim against a London-based fund manager in relation to the winding-up of a collective investment undertaking; the claim fell within the insolvency exception to the Recast Brussels Judgments Regulation, but the Italian courts were a more appropriate forum. Other cases mentioned were the English High Court's decision that a German tax authority claim in MF Global should be determined in the German fiscal courts, but that other claims from Deutsche Bank should be dealt with within the administration in the normal way; and the annulment of a German dentist's fraudulent "COMI-shift" bankruptcy.

Steinhoff

The day's second case study was *Steinhoff*, presented by Rob Lewis, James Lewin and Richard Hodgson. With €19 billion turnover and 600 entities in 30 countries the *Steinhoff* restructuring was even larger and more international than that of *Agrokor* and was yet to be finalised. Stabilising the conglomerate group that was in imminent danger of collapse was the first priority. Austrian intermediate holding companies were a particular problem for those trying to identify procedures to use in order to support the restructuring. Not only was there a risk that the Austrian directors would file for insolvency in the event of over-indebtedness, but if a Chapter 11 route was followed for the group as a whole, the worldwide stay

> "THE STEINHOFF RESTRUCTURING WAS EVEN LARGER AND MORE INTERNATIONAL THAN THAT OF AGROKOR"

> **COMPETITION IS CLEARLY DEVELOPING FOR THE ENGLISH AND US COURTS IN THE ARENA OF INTERNATIONAL COMMERCIAL PROCEEDINGS**

might not have been effective in Austria: many of the potential issues were untested in Austria. Support letters were obtained from key creditors to avoid over-indebtedness and a Lock-Up Agreement was entered into to limit creditors' recourse and impose standstill obligations. These steps allowed a going concern prognosis, which was another requirement to avoid precipitate filing.

A quick Chapter 11 pre-pack of the US business, and an English scheme with Chapter 15 recognition for the US holdco were featured in the restructuring. Finally there were English CVAs, after COMI-shifts to English establishments from Austria for two of the principal intermediate companies. The CVAs have been agreed since the conference.

Commercial courts

In the final session a panel of judges discussed International Commercial Courts and their operation in Ireland, the Netherlands, France and Germany.

In Ireland the Commercial Court was established in 2004 as part of the High Court and can deal, *inter alia*, with Schemes and Examinership applications; there is a high rate of appeals but this is ameliorated by a panel for commercial cases and an increasing number of Court of Appeal judges; 160 cases were opened and 120 resolved in 2018; there are 300-400 cases in the system and there have been more Schemes and cross-border mergers through the Irish Commercial Court since the UK referendum in June 2016.

The Netherlands Commercial Court opened in 2019 as a chamber of the Amsterdam District Court and Court of Appeal; its hearings and decisions are in English, there are few appeals and summary decisions are common; insolvency proceedings are opened in the "normal" courts; parties have to agree to be heard in the Commercial Court; there are costs of €15,000 per party at first instance and there have been 3 cases this year.

In France the Commercial Court at first instance has lay judges, who are usually international General Counsel and are elected annually by the chambers of commerce, with professional judges sitting in the Court of Appeal; English is used except, for constitutional reasons, by French advocates; insolvency proceedings can be opened and use of the Commercial Court is by agreement of the parties; the court fee is only €35; there are 50 cases per year and currently there are 33 cases pending at the Court of Appeal; and the French Commercial Court is seen as a centre for civil law dispute resolution, rather than as competition for arbitration or common law courts.

In Germany, the Chamber for International Commercial Disputes opened in 2018 at the District Court in Frankfurt with two lay judges and one professional judge and a Court of Appeal is expected to be established when case numbers require it; if agreed by the parties, hearings are in English and although decisions are currently in German, a move to English is anticipated; the Chamber does not open insolvency cases; there has been one case so far but some 50 per year could be accommodated.

Competition is clearly developing for the English and US courts in the arena of international commercial proceedings, but arbitration may also prove increasingly popular in international commercial dispute resolution.

Enthusiastic networking

Other features of the day were the enthusiastic networking and the engagement of delegates throughout the day, Sebastiaan van den Berg's and Morgan Bowen's able chairing of the conference and – not least – Marcel Groenewegen's reminder, as Vice President, of the benefits of membership of INSOL Europe, explaining the work and reach of the association and encouraging delegates who were not already members to join us.

Future developments

So what will the development of European cross-border restructuring look like? The harmonisation trend will definitely continue and as jurisdictions introduce new or revised procedures, particularly pre-insolvency, they are likely to refine the implementation of common themes. Skilled professionals throughout Europe will apply the tools available to them innovatively (as evidenced by case law developments), which will add value to the restructuring and insolvency matters in which they are involved. That there will be plenty of opportunity for international restructuring is demonstrated by the growth of NPL transactions as banks continue to de-risk. The internationalist trend is echoed in the courts and demonstrated in the case studies, which delegate feedback indicated were the most popular part of the conference. ■

New toolbox, new questions

Professor Dr Dominik Skauradszun and Walter Nijnens, LL.M., outline their first interpretations of the brand new Directive on Preventive Restructuring Frameworks

The brand new Directive on Preventive Restructuring Frameworks (EU No 2019/1023 of 20 June 2019) presents a promising toolbox for restructuring debtor companies, containing features such as a very early starting point, the debtor-in-possession-approach, a flexible stay, the restructuring plan's adoption out-of-court and the cross-class cram-down.

However, all that glitters is not gold. Therefore, this overview points out challenges regarding two tools that have not yet been sufficiently reviewed in the legal literature. The first is about the restriction of equity holders' rights, the second about the stay. Furthermore, the paper demonstrates the problems arising from the question of international jurisdiction over the new frameworks.

The stay as a mere paper tiger?

At least from the starting point, the purpose and mechanism of a stay is clear. This tool can support the negotiations for a preventive restructuring plan in a preventive restructuring framework. It goes without saying that the numerous flexibility clauses just regarding the stay may create a quite different level playing field. This is why it is recommendable to use the flexibility clause in Article 7(3) Directive so that a granted stay must end if illiquidity occurs. This is caused by the widely accepted principle that the debtor's estate needs to be protected then and, therefore, payments shall be prohibited after illiquidity occurs. It would not be logical if a debtor, on the one hand, is protected by a stay and, on the other hand, can dispose of the estate although illiquidity occurred. Moreover, if the stay does not end, creditors will not be able to request the opening of insolvency proceedings (Article 7(2) Directive).[1]

Furthermore, the stay has not only effects on enforcement proceedings, but also on several important contracts.[2] It also blocks all termination rights and rights to withhold performance by virtue of a contractual clause (Article 7(5) Directive). Having said that, the stay with its termination blocker could turn out to be a mere paper tiger.[3]

At this point, the prospective Brexit could play a special role: contractual partners with a strong market power and in-depth knowledge about non-performing contracts could force the debtor to enter into contracts with choice-of-law clauses and prorogation clauses both in favour of non-EU law and non-EU courts. If a contract is governed by the law of a non-EU state and if the parties agreed on a non-EU court in the event of a dispute, it is highly likely that this contractual party can enforce its rights before a non-EU court. Since the contract is governed by non-EU law, the non-EU court does not have to respect the granted stay and, therefore, will not have to allow the termination blocker.[4] Post-Brexit, this could apply to English law and London courts.

The analogous situation in banking recovery and resolution law based on the Single Resolution Mechanism Regulation[5] has shown that this concern is not a theoretical one. In 2018, both the European and national resolution authorities realised that choice-of-law clauses and prorogations in favour of non-EU law and non-EU courts give rise to many problems since non-EU courts most likely will not respect a termination blocker based on European law.[6]

Equity holder rights: misty Article 12 Directive

Restructurings under the Directive can be divided into three phases:

(1) Preparation, negotiation and drafting of the restructuring plan;
(2) Adoption and confirmation; and finally
(3) The plan's implementation.

In all three phases, conflicts between directors and equity holders are possible. These conflicts are foreseeable and

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> **DUE TO THE VAGUE WORDING, WHICH STARTS WITH AN EXCEPTION WITHOUT STATING THE BASIC PRINCIPLES, THE PROVISION NEEDS TO BE INTERPRETED**

hardly surprising since restructuring measures based on the Directive cover all kinds of corporate measures and these measures mostly affect equity holders heavily. This applies to capital decreases and increases, and especially debt-to-equity-swaps (cf Article 2(1)(1) and Recital 96).[7]

The only Article which explicitly covers equity holder rights is Article 12. Due to the vague wording, which starts with an *exception* without stating the *basic principles*, the provision needs to be interpreted. We have presented this interpretation in several comprehensive reviews[8] and found the following results.

If equity holders are included as affected parties in the adoption process of the restructuring plan (Articles 9-11 Directive), they do not have the powers usually provided to them by corporate law in the second and third phase. The European legislator saw corporate law as a counterpart to restructuring law (cf Recital 96) and, therefore, imagined that the danger caused by equity holder rights could be best handled with a *closed and final system*. This system only contains the adoption (Article 9), the plan's confirmation (Article 10), and the potential cross-class cram-down (Article 11).

Corporate instructions by the shareholders' meeting for the purpose of a non-adoption, a non-confirmation or a non-implementation may be lawful outside the preventive restructuring frameworks. However, these corporate measures are ineffective in the adoption and implementation phase of the restructuring plan in case equity holders were not excluded from Articles 9 to 11.[9]

Directors caught between two stools

As Article 12 Directive does not mention the preparatory phase and Chapter 3 restructuring plans only regulate the second and third phase, it does not conflict with the Directive if equity holders exercise their

influence in the preparatory phase. At this point, however, directors' obligations need to be examined as well. Hence, the balance between restructuring law and corporate law will be established by means of another Article, namely Article 19(a) of the Directive.[10] This provision stipulates that Member States need to ensure that the directors have due regard to the interests of creditors, equity holders, and other stakeholders. At least three things can be stated: first, Article 19(a) Directive does not establish the priority of creditors. It could be said that, as a result of this provision, directors are caught between two (or three) stools. Second, an instruction prohibiting directors from using the preventive restructuring frameworks, although such a framework could rescue the company, cannot be lawful.[11] Third, the preventive restructuring frameworks are not designed for strategically replacing equity holders. The difficulty is to assess all shades between these extremes.

Whilst the second and third phase are regulated by the (strict) closed system established by Article 12 Directive and the extremes relating to Article 19(a) Directive are clear, all cases between the extremes in phase 1 need to be examined. This will take some time.

International jurisdiction: a less technical, but strategic topic

Nowadays, most restructurings have cross-border aspects. The success of the stay and the restructuring plan, therefore, depends on whether the court judgments will be recognised and be enforceable in other Member States. The three key themes are "international jurisdiction", "recognition" and "enforcement". Surprisingly, the Directive does not regulate even one of these major features. Consequently, we reviewed two relevant EU Regulations, Brussels I[12] and the European Insolvency Regulation (EIR)[13], and can state the following:

Brussels I applies to preventive restructuring frameworks, as they are civil and commercial matters (Article 1(1) Brussels I) and do not fall under the insolvency exception of Article 1(2)(b) Brussels I as long as they are not within the scope

of the EIR.[14] As the frameworks are concerned with companies which are not yet insolvent, but only have a likelihood of insolvency, there is little room to view them as falling under bankruptcy or winding-up. The frameworks are not even analogous to insolvency proceedings since

(1) they shall prevent insolvency of the debtor,
(2) because of the contractual elements of the restructuring plan; and
(3) the out-of-court preparation and adoption.[15]

Consequently, recognition (Article 36(1) Brussels I) and enforcement (Article 39 Brussels I) of judgments under the Brussels I framework are both possible. The confirmation decision by judicial authorities, unlike those of administrative authorities, are judgments as defined by the Regulation (Article 2(a) Brussels I).

Unfortunately, jurisdiction under Brussels I is quite problematic. Article 24(1) Brussels I provides for exclusive jurisdiction for the forum rei sitae with regard to rights in rem in immovable property. The court of the Member State in which an employee is domiciled has jurisdiction over cases brought by an employer concerning individual contracts of employment (Article 22(1) Brussels I). The general rule (Article 4(1) Brussels I) entails a forum rei-provision. Brussels I is ill-equipped regarding jurisdiction for restructuring frameworks, as there is no real defendant. Therefore, it is best to view all affected parties as individual defendants. Their claims can then be concentrated at the court for the place where one of them is domiciled (Article 8(1) Brussels I). However, this will lead to forum shopping. As the possibility of concentration of claims does not exist for claims based on Articles 22(1) and 24(1) Brussels I, the result can be that more than one preventive restructuring framework is required.[16]

The EIR framework regarding jurisdiction (Article 3), recognition (Article 19(1)) and enforcement (Articles 19(1) and 32(1)) could apply if Member States decide to add their preventive restructuring frameworks to Annex A.[17] The frameworks will likely meet the conditions imposed by Article 1 EIR (public, collective proceedings, purpose etc.). Recognition and enforcement under the EIR would be possible too. Regarding jurisdiction, the COMI-principle would apply to the opening of (main) restructuring proceedings.

Conclusion

Although many questions remain unanswered, the Dutch have already presented their implementation of the Directive.[19] Dutch practitioners call it "a world leading restructuring tool".[20] Time will tell whether a more in-depth discussion of the unresolved questions would have been beneficial for both Dutch and foreign parties. Many other Member States, in any case, will have to make an effort not to miss the boat in this forward-looking restructuring culture. ■

Footnotes:

1 D. Skauradszun and W. Nijnens, 'The Toolbox for Cross-Border Restructurings Post-Brexit – Why, What & Where? ' [2019] NIBLeJ.
2 G. Kayser, 'Eingriffe des Richtlinienvorschlags der Europäischen Union in das deutsche Vertrags-, Insolvenz- und Gesellschaftsrecht' [2017] ZIP 1393, 1397 ("Massive impact").
3 D. Skauradszun, 'Ein Umsetzungskonzept für den präventiven Restrukturierungsrahmen' [2019] KTS 161, 175.
4 Skauradszun/Nijnens (n 1).
5 Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014.
6 Cf the consultation by the German Financial Supervisory Authority (BaFin) regarding section 60a of the German Sanierungs- und Abwicklungsgesetz ('Vertragliche Anerkennung der vorübergehenden Aussetzung von Beendigungsrechten'), BaFin Konsultation 11/2018, 1. See also Skauradszun (n 3) 176.
7 Ch. H. Seibt and A. Treuenfeld, 'Gesellschafts- und kapitalmarktrechtliche Aspekte der EU-Restrukturierungsrichtlinie' [2019] Der Betrieb 1190, 1196; F. Grell and U. Klockenbrink, 'Auswirkungen der Richtlinie über präventive Restrukturie-rungsrahmen auf Fremdkapitalgeber: Ausgewählte Themen von Cram Down bis Lender Liability' [2019] Der Betrieb 1489; D. Skauradszun, 'Anteilsinhaberrechte im präventiven Restrukturierungsrahmen' [2019] NZG 761, 762.
8 Skauradszun (n 7); Skauradszun/Nijnens (n 1); Skauradszun (n 3).
9 Skauradszun (n 7); Skauradszun/Nijnens (n 1). Cf Article 370(5) in the proposed Dutch Act on the Confirmation of Private Plans (WHOA, *Wet Homologatie Onderhands Akkoord*).
10 Skauradszun (n 7); Skauradszun/Nijnens (n 1).
11 Seibt/Treuenfeld (n 7) 1198; Skauradszun (n 7); Skauradszun/Nijnens (n 1).
12 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012.
13 Regulation (EU) No 2015/848 of the European Parliament and of the Council of 20 May 2015.
14 In depth D. Skauradszun, in B. Kübler, H. Prütting and R. Bork (eds), InsO (80th edn, RWS 2019) Art 32 EIR para 11; D. Skauradszun and W. Nijnens, 'Brussels Ia or EIR Recast? The Allocation of Preventive Restructuring Frameworks' [2019] ICR 193; Skauradszun/Nijnens (n 1).
15 Skauradszun/Nijnens (n 14); D. Skauradszun, 'Die Restrukturierungsrichtlinie und das "verschwitzte" internationale Zivilverfahrensrecht' [2019] ZIP 1501.
16 For a more elaborate discussion see Skauradszun (n 14); Skauradszun/Nijnens (n 1).
17 The Netherlands plan to ask the European Commission to initiate proceedings to add the *openbare akkoordprocedure buiten faillissement* (public pre-insolvency plan procedure) to Annex A EIR. See Kamerstukken II 2018/19, 35 249, nr. 3, 6.
18 Skauradszun (n 14); Skauradszun/Nijnens (n 1).
19 The preparation of the "Dutch scheme", however, started many years ago.
20 RESOR, press release dated 10 July 2019.

"

MANY MEMBER STATES WILL HAVE TO MAKE AN EFFORT NOT TO MISS THE BOAT IN THIS FORWARD-LOOKING RESTRUCTURING CULTURE

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Coordinating the Preventive Restructuring Directive and the Recast European Insolvency Regulation

Lorenzo Stanghellini and Andrea Zorzi highlight potential issues with the new Directive

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A problematic freedom for Member States

Issues arising from coordination among possible cross-border procedures seem underestimated in the Directive on Preventive Restructuring Frameworks (the "Directive"). The Directive purports to be almost indifferent to the Recast European Insolvency Regulation ("Recast EIR"). It cites the Recast EIR in various recitals and articles, but expressly takes into account the possibility that the restructuring framework which a Member State designs or selects from the existing ones in order to implement the Directive, will not be a procedure listed in Annex A of the Recast EIR, thereby leaving the Member States a freedom that, if fully used, may raise thorny issues.

Leaving aside the issue of debtor discharge, with reference to restructuring frameworks, Recital 12 refers to the Directive as a step towards the establishment of "substantive minimum standards for preventive restructuring procedures", vis-à-vis the procedural coordination sought by the Recast EIR.

That said, Recital 13 and its implications are the main focus below. In a somewhat ambiguous, if not contradictory, manner, this Recital states that:

(a) the Directive is "complementary" and "fully compatible" with the Recast EIR;

(b) the Directive can be implemented by means of procedures which do not satisfy "all conditions for notification" under Annex A of the Recast EIR (and are therefore outside the scope of the Recast EIR); but
(c) the Directive also seeks to "facilitate cross-border recognition" of procedures and judgments.

Finally, Recital 14 refers to the safeguards against abusive COMI relocation contained in the Recast EIR and mentions the need for "[c]ertain restrictions", also with regard to procedures not covered by the Recast EIR. This Recital serves as an introduction to the provision against forum shopping for a stay contained in the Directive (Article 6, para. 8, second part), which is the only substantive part of the Directive expressly mentioning the possibility of the implementation of the Directive by means of procedures that are not included in Annex A of the Recast EIR. Note also that Article 6 para. 8, second part of the Directive, takes into account the case of a debtor that relocates before (and, implicitly, with a view to) filing for the opening of a restructuring procedure, shortening, in this case, the allowed maximum duration of the stay to four months.

In light of the relative "indifference" between the Recast EIR and the Directive, Member States could keep in place their Recast EIR-compliant procedures without them being compliant with the Directive, as long as they do offer debtors *at least one* restructuring framework which is, in fact, compliant with the Directive. This could give rise to various issues, at least with regard to the recognition of a stay or of judgments. At a minimum, this is not exactly what Recital 13 envisages, when it states that the Directive facilitates cross-border recognition: it does so only inasmuch as the Member States decide to implement it with Annex A procedures, a decision which is left to their discretion.

Transposition through a non-Annex A Instrument: Issues

Let us assume that a Member State chooses to transpose the Directive through a non-Annex A instrument (and an instrument for which it does not demand an amendment of Annex A). If a procedure which is not listed in Annex A of the Recast EIR is opened in a Member State, there are various possibilities with regard to the recognition and enforcement of the opening decision, and especially of the possible stay obtained by the debtor with regard to assets located abroad. Whether the decision has any effect abroad mainly depends on the Member State where the decision is to be recognised and the stay enforced.

Case A: Coincidence of the Directive Forum and the Debtor's COMI

If the court petitioned by the debtor to open a procedure not listed in Annex A is located where the debtor has its COMI, the effects of the opening of the procedure on assets located abroad depend on whether or not the debtor has an establishment in the foreign Member State where the court order is to be recognised.

If there is an "establishment" in the "recognising" Member State, the debtor could petition the latter Member State's court to open a local proceeding (which would be a "territorial" proceeding in the words of the Recast EIR; it could never become a "secondary" proceeding because what would otherwise be the "main" procedure is not listed in Annex A). The effects of this procedure are of course limited to the assets in that Member State (Article 3(2), Recast EIR). Except when a creditor has petitioned the "local" court, if at all allowed, and thus has forced the choice of a particular procedure, it will be up to the debtor to choose whether to petition the local court for a procedure, and to choose which one (listed in Annex A or not).

However, if there is no "establishment" of the debtor in the other Member State, such a Member State is precluded from opening its own Annex-A proceedings and the debtor's choice would be restricted to non-Annex-A procedures. It should be noted, however, that, in some Member States, there are no restructuring frameworks which are *not* listed in Annex A (for example, both in Spain and in Italy, the procedures most similar to schemes of arrangement are listed in Annex A and could therefore be used as "local" procedures, but only if there is an "establishment" within the meaning of the Recast EIR).

Nonetheless, if there is no "establishment' in the Member State where the non-Annex A procedure is to be recognised, other venues may be tried. Recognition of the opening of the procedure, including the possible stay, may depend on whether the Member State where recognition is sought has adopted rules similar to those of the UNCITRAL Model Law on Cross-Border Insolvency (see, in

> IN LIGHT OF THE RELATIVE "INDIFFERENCE" BETWEEN THE RECAST EIR AND THE DIRECTIVE, MEMBER STATES COULD KEEP IN PLACE THEIR RECAST EIR-COMPLIANT PROCEDURES

"

MEMBER STATES SHOULD THINK TWICE BEFORE TRANSPOSING THE DIRECTIVE THROUGH A NON-ANNEX A INSTRUMENT

"

particular, Article 19).

If this is not the case, then a negative conflict of jurisdiction may occur: the non-Annex A procedure opened in the Member State where the COMI is located cannot be recognised in a Member State which does not follow UNCITRAL-style principles, but no autonomous proceedings could be opened in that Member State, if this Member State takes a COMI approach (perhaps, as mentioned, a local proceeding or a "territorial" one could be opened, depending on domestic law, if there is an establishment).

Case B: No coincidence of the Directive Forum and the Debtor's COMI

On the contrary, if the non-Annex A proceedings are opened in a State which is not the COMI State, the opening of the non-Annex A proceedings could not then prevent the opening of (main) proceedings in the COMI State, possibly on request of creditors. This could give rise to positive conflicts of jurisdiction, because the main proceedings could also seek recognition in the Member State where the non-Annex A proceedings were opened.

Possible avenues for recognition outside the EIR

Imagining that it is not possible to recognise the opening decisions and the connected possible stays on the basis of the Recast EIR, and that it is not possible (or is unsatisfactory) to open some sort of local procedure in a foreign Member State in order to protect assets located there, other ways to recognise the opening decision and the stay could be based upon the provisions traditionally used to such ends. Among the possibilities, the Brussels Regulation (Regulation (EU) No 1215/2012) and the Rome I Regulation (Regulation (EC) No 593/2008) are the most relevant.

The argument with the Rome I Regulation runs under its Article 12 (Scope of the Law Applicable), which states that the law applicable to a contract governs "the various ways of extinguishing obligations, and prescription and limitation of actions." This argument has been made for the recognition of the effects of schemes of arrangement, by Jennifer Payne for example, in her 2014 book published by The Cambridge University Press (Payne, 2014: 312-313). Without entering into the discussion about schemes, it seems very difficult to include a stay on individual actions in Article 12, given that a stay, by no means, causes the extinction of obligations.

The Brussels Regulation, on the other hand, does not seem *prima facie* a proper avenue either, since it excludes from its scope "*bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings*." (Article 1(2)(d)).

First of all, it should be noted that Recital 7 of the Recast EIR expressly states that, although general proceedings excluded by the Brussels Regulation should be covered by the Recast EIR, "*the mere fact that a national procedure is not listed in Annex A to this Regulation should not imply that it is covered by Regulation (EU) No 1215/2012.*"

It is therefore perfectly possible that a procedure is not included in Annex A *and* does not fall within the scope of the Brussels Regulation. The opening of a procedure which aims at implementing the Directive, but which is not listed in Annex A of the Recast EIR, may well be one of the cases in point, in which neither regulation applies.

One could argue that the "light touch" extra-judicial focus (see Recital 29) of the Directive may warrant a narrow reading of Article 1(2)(d) of the Brussels Regulation, with the consequence of allowing for recognition to take place under the Brussels Regulation, at least in some of the possible implementing frameworks (e.g. depending on the degree of pervasiveness of court control, etc.), but the result is far from guaranteed.

Finally, one possibility would be to resort to each Member State's private international law rules, outside the scope of the Rome I Regulation. In Italy, for example, one could think of applying Article 66 of Act 31 May 1995, No. 218, on private international law, according to which foreign judgements on non-contentious jurisdiction are recognised with no formality, subject to certain conditions. In any event, a huge area of uncertainty would open, as each Member State has its own tradition and approach to private international law (and to the related issue of "public order").

Conclusion

All this considered, we believe that Member States should think twice before transposing the Directive through a non-Annex A instrument, at least for the provisions of the Directive that aim to allow the debtor to bind third parties. This is certainly the nature of the provisions regarding the stay on individual enforcement actions (Article 6), the consequences of the stay on executory contracts (Article 7), and the binding effect of restructuring plans on creditors (Articles 10 and 11). Apart from the provisions on pure mediation, early warning and fully consensual restructuring plans, transposing the Directive through exclusively domestic instruments may bring debtors into uncharted international waters. ■

An international multi-disciplinary approach to combatting fraud in insolvency

To further an international multi-disciplinary approach to combatting fraud in insolvency, the INSOL Europe Anti-Fraud Forum and the International Expert Centre for Bankruptcy Fraud are combining forces. Carmel King and Willem van Nielen give us the UK and Dutch perspective.

An international multidisciplinary approach to combatting fraud in insolvency is a practical necessity. Where cases are multi-jurisdictional, it is essential to use innovative approaches with input across several disciplines. The INSOL Europe Anti-Fraud Forum ("AFF") was established with this as one of its aims. This working group currently has 69 members spanning 22 jurisdictions, all of whom specialise in using insolvency processes to assist with the tracing and recovery of assets.

To further the multi-disciplinary approach, the AFF has combined forces with the International Expert Centre for Bankruptcy Fraud ("IBF"). In December 2019 an INSOL Europe and IBF co-labelled conference on International Bankruptcy Fraud will be held in Amsterdam. The IBF aims to create an international community of professionals who deal with insolvency fraud, such as bankruptcy trustees, forensic accountants, criminal defense lawyers, law enforcement officers, (supervisory) judges, lawyers from the Ministry of Justice, representatives of the tax authority and the police departments. The way these professionals will work together to combat fraud in insolvency will differ by country. In this article we aim to show some of these differences from a Dutch and UK perspective.

Dutch approach

As previously reported in *eurofenix* (Autumn 2017), in 2012 the Minister for Security and Justice of the Netherlands announced a multidisciplinary approach to combat bankruptcy fraud. This has led to a legislative program which came into force in 2016 and 2017, wherein the duty of the trustee is explicitly extended to investigate and report irregularities to the bankruptcy judge. The trustee is also obliged to report bankruptcy fraud to the public prosecutor when he or the supervisory bankruptcy judge find such action necessary. It is common practice that the public prosecutor also considers the financial interests of the disadvantaged party who has suffered damage caused by the fraudulent acts. As the trustee can represent these interests, it is our experience that both the trustee and the public prosecutor may combine forces where possible.

Additionally, when confronted with irregularities that lead to a conclusion of mismanagement (e.g. fraud) by the director, the trustee is given the authority to request the director's disqualification in civil proceedings. As soon as this request is approved by the court, the director's disqualification (for a maximum period of five years) will be published in a public register. Although this authority is not focused on his primary task to retrieve assets for the creditors, several Dutch trustees have initiated such proceedings. For these proceedings, these trustees have often obtained finance by the tax authority, whose interest it is to ´get rid´ of fraudulent directors.

Furthermore, the obligation to provide the bankruptcy trustee with all relevant information regarding the bankrupt company has been reinforced, and non-compliance may lead to detention. However, in practice the obligation to provide information relating to fraudulent acts may lead to self-incrimination. In that case such a person will try to avoid detention by invoking the right not to incriminate oneself (*nemo tenetur* principle) with reference to Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR").

As described in *eurofenix* in Autumn 2014, the Supreme Court of the Netherlands has rendered two judgements that limit the possibilities to coerce the information duties to the trustee, based on the *nemo tenetur* principle. The Dutch judgements are based on earlier judgements of the European Court of Human Rights ("ECoHR") which has also an impact on the multidisciplinary approach to

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> IN THE UK, THE COURT CAN SUMMON TO APPEAR BEFORE IT ANY PERSON WHOM IT THINKS CAPABLE OF GIVING INFORMATION CONCERNING THE COMPANY

combat bankruptcy fraud in general and are relevant for all European Member States. According to these judgements of the ECoHR, if it cannot be ruled out that the information requested will be used in a criminal charge against this person and this information is obtained through methods of coercion, the Member States will have to have included a safeguard in their regulation that such information will not be used in criminal proceedings against this person (ECoHR 17 December 1996, no 19187/91 (Saunders/United Kingdom)). However, Article 6 ECHR is not violated regarding information that exists independently of the will of the person concerned.

As the Supreme Court of The Netherlands concludes that Dutch law does not include such a safeguard, it judged that the supervisory judge has to include such a safeguard in his order for remand in custody (to coerce the person concerned to comply with these information duties). As it is questionable if this safeguard meets the requirements of the ECHR, the Dutch legislator has recently drafted a Bill that includes a safeguard in Dutch law as required by the ECHR. This will certainly help the multidisciplinary approach to move on!

UK approach

In the UK, the insolvency practitioner is not usually a practicing solicitor. Accordingly, in circumstances where an application to Court is required, the IP requires the assistance of a solicitor and a barrister. This can arise for example in situations where certain parties fail in their duty to cooperate with the IP. Whilst the *nemo tenetur* principle is occasionally invoked, proceedings are not often contemplated by the prosecution authorities in tandem with civil procedures such as insolvency.

The Court can summon to appear before it any person whom it thinks capable of giving information concerning the company. This could ultimately result in the arrest of that person and the seizure of items in that person's possession. The IP will also as a minimum require the input of a solicitor and barrister when bringing claims of malpractice and fraud against target parties. Additional input may be required from a wide range of disciplines including forensic accountants, digital forensic experts, expert witnesses, investigators, valuation agents and property agents.

The IP can bring several different sorts of claim against directors or other parties found to have defrauded the company, for example wrongful trading and transactions in fraud of creditors. The IP will look at claims that have financial remedies in order that the task is consistent with the overarching duty of realising the assets of the company for the benefit of the creditors. We diverge slightly from the Dutch practice when it comes to director disqualification proceedings.

IPs are required to submit reports on the conduct of the company directors to the Secretary of State within three months of appointment. From there, the Insolvency Service investigates the director's conduct, often with the input of the IP. If it is in the public interest, the director can be disqualified for a period of between two and 15 years. Furthermore, certain actions undertaken by a disqualified director are criminal offences, for example, acting as a director during this period without leave of the Court.

The sorts of cases we see today are not often confined to one jurisdiction. The vast majority will involve related companies, individuals, assets or lines of investigation overseas. The UK (currently!) enjoys the degree of harmonisation across the EU that we have seen to date, as well as the Recast Insolvency Regulation and the UNCITRAL Model Law on Cross-Border Insolvency. Readers will be familiar with all of these.

In practical terms, these cases can be time and resource consuming, requiring applications to local Courts for recognition, with problems around the availability of documentation and information and a lack of cooperation or active obstruction by directors. In situations such as this, it is necessary to think differently and dynamically in order to achieve results for the victims of the fraud.

I am fortunate in that my firm has a dedicated offshore network. We regularly take joint cross-border appointments, enabling seamless delivery on complex cases. Although by no means new, we are increasingly seeing company structures whereby the parent company is incorporated in an offshore jurisdiction, with subsidiaries around the globe. One way to preserve the value is to take the insolvency appointment of the parent without putting the subsidiaries under. We have taken this approach, on one occasion taking the appointment in Jersey and selling the Guinean subsidiaries. This strategy is also useful where fraud is a factor and the directors are uncooperative.

It is possible to take the appointment over the parent company in the offshore jurisdiction, then appoint directors throughout the structure to ensure board control, enabling the collection of records and other investigations. This protects creditors' interests and maximises returns, whilst keeping the subsidiaries out of the immediate insolvency process. Our experience has been that identifying appropriate nominee directors can be rather difficult, and accordingly this is a function we have taken in-house.

Conclusion

Our country overview shows different approaches in the UK and in the Netherlands. What is commonly shared between the jurisdictions is a desire to innovate and be dynamic in the fight against fraud. We look forward to examining this further at the IBF and INSOL Europe Joint Conference on Bankruptcy Fraud in Amsterdam on 6 and 7 December 2019. ■

> **WE LOOK FORWARD TO EXAMINING THIS FURTHER AT THE IBF AND INSOL EUROPE JOINT CONFERENCE ON BANKRUPTCY FRAUD IN AMSTERDAM ON 6 AND 7 DECEMBER 2019**

Finnish Bankruptcy Act 2.0

Robert Peldán runs through the key amendments to the new Bankruptcy Act in Finland

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As several other countries in the European Union, Finland has also decided to modernise its insolvency legislation by means of updating its Bankruptcy Act in July this year.

The Finnish Bankruptcy Act, which entered into force in 2004 after a comprehensive reform of the outdated Bankruptcy Code from 1889, is fairly modern, functional and efficient. According to the World Bank's Doing Business Ranking 2018, Finland was ranked second best in the world in the category 'Resolving Insolvency', only after Japan[1]. Regardless of the fact that there is a consensus between the creditors, insolvency practitioners and the Finnish Ministry of Justice that the current Finnish Bankruptcy Act works well, minor streamlining and updating was required.

> THE MAIN OBJECTIVES OF THE NEWEST AMENDMENTS WERE TO SIMPLIFY, DIGITISE AND SPEED-UP BANKRUPTCY PROCEEDINGS

The main objectives of the newest amendments were to simplify, digitise and speed-up bankruptcy proceedings. This rather extensive process started already in 2015 when the Finnish Ministry of Justice appointed an expert group comprising specialists in insolvency law. The aim of this group was to solve bankruptcy-related environmental and efficiency problems and propose necessary legislative changes. Some changes to the current legislation were made due to the new EU regulation on insolvency proceedings. After this process, the Finnish Bankruptcy Act has now been amended, and the amendments took effect on 1 July 2019. Furthermore, the Advisory Board for Bankruptcy Affairs, an advisory board for the Bankruptcy Ombudsman's Office, has prepared written recommendations on how to implement the new amendments.

The key amendments will be discussed in more detail below.

Estate inventory and debtor's description

The content requirements for the estate inventory and debtor's description were alleviated in bankruptcies that lapse (total discontinuation) due to insufficiency of funds[2]. The general rule of thumb is that two thirds of the bankruptcies will lapse. Now, the minimum requirement is that the estate inventory must include at least the debtor's largest creditors and their receivables, the most significant other commitments and an estimate of the total amount of other debts and liabilities.

The purpose of the amendment is to improve the bankruptcy estate administrator's ability to concentrate on identifying the debtor's assets, screening for possible wrongdoings and drafting debtor description, which are usually the most important factors in the early stages of bankruptcy. The amendment will speed up the bankruptcy proceedings and the creditors are not required to disclose their debts.

However, the administrator may still include all the debtor's debts in the estate inventory. This would be appropriate when it is assumed that the bankruptcy proceedings will continue so that disbursement will be paid out.

Creditor's right to disbursement

Prior to these new amendments, bankruptcy claims were dealt in two stages: first in the drafting of the estate inventory and later, with some exceptions, in the lodgement of claim procedure. Such a redundant procedure often causes unnecessary costs and loss of time for both the creditors and the bankruptcy estate. From now on, the bankruptcy estate administrator must take into account certain claims without the lodgement of a claim. In practice, this means that a creditor has to inform the bankruptcy estate of their claims only once. The lodgement can be done by filing the standard claims form referred to in Article 55 of the EU Regulation on Insolvency Proceedings.

Shorter timeframes

The deadline for the draft disbursement list was cut into a half of its original length, which means that now the bankruptcy estate administrator must draw up the draft disbursement list within one, or, in extensive bankruptcies two, months from the lodgement date. In addition, once the estate inventory and debtor description have been finalised, the bankruptcy estate administrator must either file a request for the lapse of bankruptcy or set a lodgement date within a timeframe of one month.

Digitalised portal for bankruptcy and restructuring matters

In Finland, the Bankruptcy Ombudsman's Office, which is a public authority, supervises the administration of bankruptcy estates and restructuring proceedings[3]. The Bankruptcy Ombudsman's Office upholds a digital portal called "*konkurssi- ja yrityssaneerausasioiden asianhallintojärjestelmä*" or shortly "Kosti". Kosti provides a base for the estate administrator, the Bankruptcy Ombudsman's Office, debtor and creditors to communicate and share information relating to the on-going bankruptcy and restructuring proceedings. Not only does the digital portal enhance insolvency proceedings by improving communication and distribution of documents between parties, but it also provides valuable information and statistics for the monitoring insolvency proceedings in the Finnish economy on a larger scale.

Kosti was launched in 2013, but after the new reform it is now obligatory for the insolvency practitioners to save documents and distribute information via Kosti. The documents that are saved by the bankruptcy estate can be sent to all creditors, as long as they have been listed as a creditor in Kosti, at the same time as the document is filed in Kosti. Furthermore, the obligation to save and distribute information via Kosti eases the Bankruptcy Ombudsman's Office's tasks to supervise bankruptcy estate administrators. In addition, Kosti provides means to distribute and file documents solely to the creditors, so that the Bankruptcy Ombudsman does not have access to them by filing the documents into the private section of Kosti.

Kosti also eases the bankruptcy estate administrator's work in several ways. Firstly, it provides an easy way to stay in touch with the involved parties. Secondly, filing a document to the portal means the creditors will actually receive it (if they have registered to the portal). Ultimately, prolongations to the mandatory due dates are made straight via Kosti and only, if needed, informed to the District Court[4].

Public receivership

The Bankruptcy Ombudsman's office does not only have a pivotal role in supervising bankruptcy and restructuring proceedings, but it is in its sole discretion to take a bankruptcy proceedings into a public receivership, which is driven by a public receiver appointed by Ombudsman[5]. The public receivership is a method of scrutinising the pre-bankruptcy activities of the debtor and is an alternative to the lapse of bankruptcy. The public receiver has the same duties as the administrator and must meet the same qualifications (usually the administrator continues as the public receiver). The costs of the public receivership are covered from public funds whenever the assets of the bankruptcy estate run out.

By virtue of the new Bankruptcy Act, some amendments relating to the public receivership have been made. Firstly, to further enhance the creditors' rights, the public receiver has to, via Kosti, inform the creditors of the public receivership in its annual report. The new reform also gives a creditor a possibility to object to the final settlement of accounts, however, only for the part relating to the payment of disbursements.

The bankruptcy estate's liability for rental of premises

The bankruptcy estate's liability for payment in terms of rental premises was also further clarified in the Finnish Tenancy Act, the Act on Residential Leases, and the Act on Business Premises Leases.

Prior to the amended legislation, the bankruptcy estate shall be liable for the fulfilment of obligations arising from the lease agreement for any period during which it uses the premises, even if it has not assumed liability for their fulfilment. However, the new reform clearly states that if the bankruptcy estate solely leaves assets that have belonged to the debtor on the premises, this is not considered as usage of premises. The costs relating to the removing, cleaning or disposing of the discarded assets are debts that the lessor has to lodge in the bankruptcy proceedings.

Reform in the legislation was necessary, because the legislator wanted to clarify the existing practice among the bankruptcy estate administrators, who sell and clear out the assets that have an economic value, leaving the remainder of the assets inside the leased premises.

Environmental liabilities

One of the most important objectives of the reform was to clarify the bankruptcy estate's environmental responsibilities. Their legal status, which tends to have a massive economic significance, has been unclear, and the clash of environmental and bankruptcy legislation is apparent. The government bill proposed in this matter included a new chapter to the Finnish Bankruptcy Act regarding the bankruptcy estate's environmental liabilities, stipulating the extent to which the bankruptcy estate is required to bear environmental responsibility at its own expense, and to what extent there is no obligation to act or no liability for costs. However, the Parliament rejected the parts of the bill, due to a statement provided by the Constitutional Law Committee. Hopefully, the clarifying amendments to the bankruptcy estates' environmental liabilities will be made available in the near future. ■

Footnotes:

1 www.doingbusiness.org/en/data/exploretopics/resolving-insolvency. In brief, the category Resolving Insolvency Rank in the Doing Business ranking studies the time, cost and outcome of insolvency proceedings involving domestic legal entities.
2 The court will make an order on lapse of bankruptcy if the bankruptcy estate's funds are insufficient for the costs of the bankruptcy proceedings.
3 Additional information: www.konkurssiasiamies.fi/en/index.html
4 Until now, the Finnish courts have acted more or less as the rubber stamp granting the prolongations when the actual supervision power lays within the Office of the Bankruptcy Ombudsman.
5 Additional information: www.konkurssiasiamies.fi/en/index/responsibilities.html

"PUBLIC RECEIVERSHIP IS A METHOD OF SCRUTINISING THE PRE-BANKRUPTCY ACTIVITIES OF THE DEBTOR AND IS AN ALTERNATIVE TO THE LAPSE OF BANKRUPTCY"

Landmark scheme of arrangement in Ireland

Ruairi Rynn reports on the Irish High Court sanctioned scheme of arrangement to restructure US$1.65 billion of senior debt

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William Fry recently advised Ballantyne Re plc ("Ballantyne"), an Irish reinsurance SPV, on an Irish law scheme of arrangement to restructure its reinsurance obligations and outstanding New York law governed indebtedness, such that the residual value in the company could be distributed to its senior noteholders (the "Scheme").

The Scheme provided for, amongst other things, the restructuring of third party guaranteed senior debt, the commutation of the largest guarantor's obligations and the preservation of the second guarantor's obligations until the original maturity of Ballantyn's senior debt in 2036.

The sanction of the Scheme by the Irish High Court was opposed by a senior noteholder with a relatively minor holding. Following a contested hearing, Mr Justice Barniville delivered a detailed judgment rejecting all the grounds of objection and sanctioned the Scheme on 6 June 2019. Ballantyne subsequently sought and obtained recognition of the Scheme under Chapter 15 of the US Bankruptcy Code on 11 June 2019.

What is a scheme of arrangement under Irish law?

Part 9 of the Irish Companies Act 2014 (the "2014 Act"") provides for a "company" to enter into a compromise or arrangement with (a) its creditors or any class of them or (b) its members or any class of them.

In order for a scheme of arrangement under Part 9 of the 2014 Act to take effect:

(1) the scheme of arrangement must be approved by a special majority (a majority in number representing 75% or more in value of the creditors/members of each class present and voting) at the required meetings of classes of creditors/members;

(2) the publication of notices of the passing of such resolutions at the scheme meeting(s) and that an application will be made to the High Court to sanction the scheme of arrangement; and

(3) The High Court must sanction the scheme of arrangement.

A "company" in this context means any company liable to be wound-up under the 2014 Act and therefore includes any company, Irish or non-Irish, with a sufficient connection to Ireland.

The legislation and jurisdiction of the Irish High Court is broadly similar to the English legislation and jurisdiction re schemes of arrangement.

Background

Ballantyne was incorporated for the purpose of entering into and performing an indemnity reinsurance agreement (the "Reinsurance Agreement") relating to a defined block of life insurance policies. In order to fund its obligations under the Agreement, Ballantyne issued senior notes and junior notes in the total amount of c. US$ 1.92 billion and engaged a third party as investment manager (the "Investment Manager") for the funds raised from the issuance of the notes.

The scheduled interest and principal of certain senior notes was guaranteed by Ambac Assurance UK Limited ("Ambac") (par value US$ 900 million) and Assured Guaranty (UK) plc (and ultimately other Assured Guaranty group entities) ("Assured") (par value US$ 500 million).

Approximately 95% of these funds were invested in subprime and Alt-A securities which experienced c. US$ 1 billion of losses between May 2006 and October 2008. Following the settlement of litigation against the Investment Manager and discussions with certain senior noteholders, Ballantyne considered a restructuring proposal presented by Ambac and concluded that the proposed restructuring was in the best interests of Ballantyne's creditors in their entirety and determined to proceed with the Scheme.

Proposed restructuring of Ballantyne

The key elements of the proposed restructuring included:

(1) the novation of the Reinsurance Agreement to Swiss Re Life and Health America Inc.;

(2) the disbursement of residual assets following the novation to pay a dividend to senior noteholders (US$ 0.512 per US$ 1.00 of senior debt);

(3) the commutation of the guarantee obligations of Ambac in return for a commutation payment;

(4) the releases of any claims of the senior noteholders against the various released parties (including Ambac as financial guarantor); and

(5) the subsequent solvent liquidation of Ballantyne.

The sanction hearing

Resolutions to approve the Scheme were passed overwhelmingly by senior noteholders at two scheme meetings and Ballantyne subsequently issued an application to the Irish High Court for an order sanctioning the Scheme. That application was opposed by a single senior noteholder, ESM Fund I, LP ("ESM") who held US$ 5 million of the Ambac guaranteed senior notes, on the grounds set out below; each was rejected by The Irish High Court.

Judgment approving the Scheme

In the judgment approving the Scheme, Barniville J. reflected on longstanding Irish and international precedents applicable to schemes of arrangement. In particular, he noted that the judgment of Mr Justice Parker in *Re Ocean Rig UDW Inc* (18 September 2017, Grand Court of the Cayman Islands, Parker J) was of "considerable assistance".

The Court also cited with approval the leading Irish decision of Mr Justice Kelly in *Re Colonia Insurance (Ireland) Ltd* [2005] 1 IR 497 ("Colonia") which set out the following criteria to be satisfied when sanctioning a scheme:

(1) Sufficient steps have been taken to identify and notify all interested parties.
(2) The statutory requirements and all directions of the court have been complied with.
(3) The classes of creditors are properly constituted.
(4) No issue of coercion must arise.
(5) The scheme of arrangement is such that an intelligent and honest man, a member of the class concerned, acting in respect of his interest, might reasonably approve it.

Barniville J. noted that it would be extremely rare for a court to refuse to sanction a Scheme where it has been approved by the required special majority of correctly constituted classes and there is no suggestion that the majority did not represent the views of the class.

Grounds for objection

The court found that the real issue in this case concerned the fifth criterion and Barniville J. then went on to consider and reject each of the following objections put forward by ESM in that context.

Alleged material deficiencies

ESM alleged that the scheme circular was materially deficient, particularly with respect to Ambac's financial position. Whilst Barniville J. accepted that the financial position of Ambac was clearly of significance to the Scheme, he was not satisfied that there was any material deficiency in the information provided in the scheme circular and concluded that Ambac was clearly in a difficult or distressed financial position.

Third party releases

ESM argued that the applicable legislation could not be interpreted to enable the provision of third party releases in a scheme and that the court had no jurisdiction to sanction a scheme of arrangement providing for the release of claims. ESM argued that strict construction should be given to the relevant statutory provision insofar as it could interfere with an Irish constitutional right.

Barniville J. noted that third party releases are "fairly common" inclusions in such schemes in other jurisdictions. He accepted that the releases were necessary under the Scheme to give effect to the commutation of the Ambac guarantee and bring finality to the affairs of Ballantyne.

As to the constitutional point the Court (whilst not determining whether ESM as a non-Irish body corporate had the benefit of Irish constitutional rights) concluded that the involvement of the court in sanctioning a scheme of arrangement provided the appropriate protection and balance of any constitutional rights involved.

New York dimension

Barniville J. rejected any contention that the restructuring should have been pursued before the US courts and did not accept that fiduciary duties applicable to Ballantyne and its directors were governed by New York law. He accepted Ballantyne's submissions that an Irish scheme could be utilised to restructure New York law governed debt.

Finally, he concluded that ESM had not demonstrated any good reason for him not to sanction the Scheme based on the existence of a recently issued federal complaint against Ambac by ESM, that ESM asserted would have been compromised by the Scheme (in particular the third party release).

Decision

Barniville J. ultimately sanctioned the Scheme on the basis that:

1. the pre-conditions set out in Section 453 of the 2014 Act were satisfied;
2. the criterion set out in Colonia, that there was no coercion of the minority at the relevant scheme meetings, was met; and
3. an honest and intelligent person acting reasonably in his or her own interest would have supported the Scheme.

Chapter 15

An application was subsequently made to the US Bankruptcy Court to recognise the Scheme as a "foreign main proceedings" under Chapter 15 of the US Bankruptcy Code. Whilst that application was initially contested by ESM, that objection was not pursued at the hearing and an order was made on 11 June 2019 recognising the Scheme.

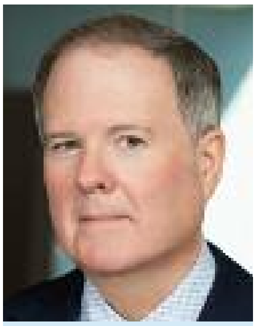
Key Points

This case demonstrates the effectiveness of an Irish law scheme of arrangement as a tool to implement complex international debt restructurings and it highlights the effectiveness and robustness of Ireland as a jurisdiction in which to pursue such restructurings. It also demonstrated the willingness of the Irish courts to consider the well-developed jurisprudence of other jurisdictions in evaluating and ultimately sanctioning a scheme of arrangement.

"THIS CASE DEMONSTRATES THE EFFECTIVENESS OF AN IRISH LAW SCHEME OF ARRANGEMENT AS A TOOL TO IMPLEMENT COMPLEX INTERNATIONAL DEBT RESTRUCTURINGS"

Selling claims in Chapter 11: A remedy with risks

David Conaway considers claims trading as a way of recovering payments in Chapter 11 cases



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Global impact

In 2018, the Chapter 11 claims trading market generated $45 billion of claims sales. Three Chapter 11 cases generated the highest volume of claims trading: Lehman Brothers, Westinghouse Electric and Toys R Us. Because of their global tentacles including physical locations, global financing and insurance, supply chain and affiliates, creditors around the globe held claims against these and many other Chapter 11 debtors. While non-U.S. creditors may have utilised traditional remedies and strategies to recover payment in Chapter 11, such creditors should also consider the highly-developed U.S. claims trading market as a potential solution.

Risks and remedies

When a contract counter-party files Chapter 11, the creditor's investment is at risk. High loan to collateral value ratios for the customer's secured debt have become the norm, such that value available to unsecured creditors is often minimal. Fortunately, unsecured creditors have a number of available strategies and "remedies" to be paid.

One such "remedy" is selling the pre-petition Chapter 11 claim to a claims purchaser, which can allow the creditor to monetise all or a portion of its claim, and avoid the vicissitudes of the Chapter 11 proceeding. The selling creditor may also have a tax deduction available and be able to remove the receivable from its balance sheet.

A recent New York case, *TRC Master Fund, LLC v. AP Gas & Electric (TX) LLC*, highlighted pitfalls of selling Chapter 11 arising from the claims sale contract.

> IN 2018, THERE WERE NEARLY 8,000 CLAIMS TRADED, WITH A DOLLAR VALUE APPROACHING $45 BILLION

Claims trading market

The claims trading market is an industry unto itself. In 2018, there were nearly 8,000 claims traded, with a dollar value approaching $45 billion. The buyers and sellers include investment banks, hedge funds, independent broker-dealers, corporations, pension funds and insurance companies. The bulk of the claims trades have values of $250,000 or less.

Buyers' motivations to purchase claims range from a buy low, sell high strategy (buy below par from a motivated seller and receive a higher Chapter 11 distribution) to a strategic investment in the Chapter 11 debtor's capital structure, to acquire an equity stake in the reorganised debtor or otherwise impact the Chapter 11 proceeding. The Chapter 11 Plan "distribution" to unsecured creditors is often equity in the reorganised debtor. In fact, a number of significant merger and acquisition transactions have occurred in Chapter 11. In 2003, Wilber Ross acquired Burlington Industries, Inc. and Eddie Lampert's ESL Investments acquired Kmart after purchasing a significant number of unsecured claims and bank debt before and during the Chapter 11 proceedings. Such purchased debt allowed Ross and Lampert to acquire controlling equity positions. In *Pacific Western Bank, et al. v. Fagerdala USA-Lompoc, Inc.*, 891 F. 3d 848 (9th Cir. 2018), the 9th Circuit U.S. Court of Appeals allowed a creditor to use purchased claims to block the vote in order to confirm a Chapter 11 plan.

The court ruling

In *TRC Master Fund, LLC v. AP Gas & Electric (TX) LLC*, a New York state appellate court ruled that the seller's claim was impaired and pursuant to the sales contract, the buyer could sue the seller for the return of the purchase price plus interest at 10%. The buyer seeks repayment of almost $250,000 plus interest and attorneys' fees.

In AP Gas, and as is customary in most claim sales, the buyer and seller were parties to the buyer's standard assignment of claim agreement. Typical of such agreements, the AP Gas contract had a repurchase provision:

- Assignee does not … assume the risk that all or any part of the claim … is … objected to … or impaired in any way … (an "Impairment").
- Assignor agrees to immediately repay, upon demand of Assignee … an amount equal to the … amount subject to Impairment …, plus interest thereon at 10% per annum.

The Chapter 7 trustee objected to the claim, and the buyer demanded repayment as the claim was impaired. The creditor refused and the buyer filed suit. The creditor filed a motion to dismiss because the claim objection was withdrawn 37 days after it was filed. The New York Appellate Court denied the creditor's motion to dismiss, and the suit against the creditor will proceed.

Likely, after the claim was purchased, the debtor converted to a Chapter 7 liquidation, rendering the claim worthless, which motivated the buyer to undo the purchase.

The AP Gas contract also provided that the seller was obligated to pay the buyer's attorneys' fees in enforcing its rights under the contract. In addition, the contract provided that New York law applied and any disputes would be resolved in New York courts. AP Gas is based in Texas, and the Chapter 7 case was in Texas. Because of the assignment contract, however, the seller/creditor was sued in New York.

Additional considerations

Seller's due diligence

Prior to any sale, the seller of a claim should undertake internal due diligence to verify the validity of its claim and that the underlying documentation supporting the claim is in order. Sellers should also understand the dynamics of the Chapter 11 proceedings as well as the identity and motivations of the buyer.

In AP Gas, with the one-sided claim assignment agreement, there was little downside to the buyer in purchasing the claim. It effectively had a "put" option for the claim if it was impaired.

Seller's cooperation obligations

Another provision in a typical claim assignment contract is the "cooperation" provision that obligates the seller to assist the buyer in realising on the claim. For example, the AP Gas agreement provided:

- Assignor agrees to execute, acknowledge and deliver … all such further instruments and other documents, and to take all such further action as may be necessary or appropriate to affect assignment of the Claim and all interests therein to Assignee, to fully assist Assignee in enforcing the Claim and to otherwise effectuate the intent of this Assignment.

Negotiate the terms

If the sale occurs to a "buy low, sell high" buyer, a motivated seller may have limited leverage to negotiate the key terms of the buyer's form contract. When buyers are purchasing blocks of claims for strategic reasons as indicated above, buyers are more willing to negotiate key terms.

Sellers should negotiate the terms of the assignment contract, including to limit the impairment provision, the seller's "cooperation" obligations, and the interest and attorneys' fees. A different venue may also be more favourable to the seller.

Scheduled claims

Generally, buyers will only agree to purchase a claim for the amount listed in the debtor's schedules of assets and liabilities, and provided the claim is not listed as "contingent, unliquidated or disputed", even if the seller has filed a proof of claim.

We have also seen cases where credit insurers have applied the same standard before paying on an insurance claim, even though such standard is not consistent with the terms of the insurance policy.

The price

The purchase price for claims offered by buyers can vary materially. We maintain working relationships with the major claims purchasers and in essence submit RFPs to a number of potential buyers to insure the highest possible purchase price. The "market" price often fluctuates during the course of the Chapter 11 proceeding.

If a seller has options, a motivated buyer may also be more willing to negotiate the terms of the agreement.

Claim priority

Claims buyers generally offer different amounts for general unsecured claims and administrative claims (which have a higher priority in payment under the Bankruptcy Code). Administrative priority claims can arise from post-petition sales, or under Section 503(b)(9), which grants an administrative priority claim for goods delivered to and received by the debtor within 20 days prior to its Chapter 11 filing.

Takeaways

Creditors holding claims against Chapter 11 debtors should consider the claims trading market as an opportunity to monetise their claims. In doing so, creditors should acknowledge the dynamics of the market and the potential pitfalls arising from the Chapter 11 case involved, the buyer and the claims assignment contract.

> "CREDITORS SHOULD ACKNOWLEDGE THE DYNAMICS OF THE MARKET AND THE POTENTIAL PITFALLS ARISING FROM THE CHAPTER 11 CASE INVOLVED"

The Italian Code of Business Crisis

Giorgio Cherubini and Giovanna Canale summarise the new Code which represents a revolution in the area of Italian restructuring law

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In our Country Report in the Winter Edition of *eurofenix* 2018/19, we anticipated that the Code of Business Crisis and Insolvency was in the process of being finally approved.

The Code of Business Crisis and Insolvency was introduced by Legislative Decree n°14 of January 12, 2019, published in the Official Gazette dated February 14, 2019, and implements the Law n°155 of October 19, 2017 - the contents of which was drafted by the "*Rordorf Commission*", established by the Minister of Justice by a Decree dated October 5 2017.

The final wording has taken into account the opinions expressed by the Competent Parliamentary Commissions.

The Legislative decree consists of 391 articles: a code of considerable complexity that almost paradoxically ends with the financial invariance clause: a reform to be carried out "*at no cost,*" "*without new or greater burdens for public finance*".

Undoubtedly, the new Code represents a revolution in the area of Italian restructuring law. The aim of the aforementioned Code is, first of all, to allow the timely detection of the crisis that could invest a company, and secondly, to protect the entrepreneurial business during the crisis.

The Corporate Crisis and Insolvency Code provides some provisions that have already came into force immediately, that is, 30 days after the publication of the Legislative Decree in the Official Gazette, while others – the most relevant part – will come into force in August 2020.

With reference to the provisions that came into force immediately, the most important and which deserve particular attention, are the following.

Register of experts

Article 356, which indicates the establishment at the Ministry of Justice of a Register of experts who will perform, if appointed by the Court, the functions of receiver, judicial commissioner or liquidator, in the procedures provided for in the Code. This provision is of particular importance because – differently from what has happened up to now – it introduces the establishment of a unique National Register of experts who will perform the aforementioned functions.

It also marks a requirement of integrity from the experts who will be introduced in the Register. In particular, paragraph 3 of the article specifies that "*the possession of the following requisites of integrity is a requirement for enrollment in the register*":

a) Not to be in one of the conditions of ineligibility or decadence provided for in Article 2382 of the Civil Code;
b) not to be subject to preventive measures ordered by the judicial authority pursuant to Legislative Decree September 6th 2011, n°159;
c) not have been sentenced by a final judgment for crimes specifically indicated, without prejudice to the effects of rehabilitation; and
d) not to have had, in the last five years, a disciplinary sanction more serious than the minimum required by the individual professional orders.

The requirements are aimed to ensure that the assigning of a mandate takes place in favour of experts of proven experience and integrity.

Organisational structure

Article 375, which introduces new provisions for the organisational structure of a company and reformulates the wording of article 2086 of the Civil Code on the management of the company.

In particular, a second paragraph is added to Article 2086 which, on the one hand, requires the entrepreneur to establish an organisational, administrative and accounting structure in order to favour the timely detection of the crisis; on the other hand, it forces the entrepreneur to take action without delay for the adoption and implementation of one of the instruments envisaged for overcoming the crisis and recovering the business continuity.

Regarding the director's liability, the new provisions aim to empower directors to use a higher degree of attention in a situation of company crisis, in order to exempt them from the criminal provisions foreseen by the legislator.

Directors' liability

Article 378, which introduces changes regarding the directors' liability as amendments to articles 2476[1] and 2486[2] of the Civil Code.

A new paragraph in article 2476 of the Civil Code introduces the provision by which the directors of limited liability companies are liable towards the company' s creditors when the assets of the company are insufficient to satisfy their claims; the action can be proposed by the creditors, who are entitled to act also in the case of waiver to the action by the company.

The objective of the new provision is to render the directors more responsible with regard to the obligations to preserve the company's assets.

Article 2486 of the Civil Code governs the directors' powers in the period between the occurrence of a dissolution and the time the assets of the company are delivered to the liquidators.

Article 378 of the Code of Business Crisis and Insolvency, with a new paragraph, foresees that the directors, should their liability be ascertained and failing evidence of an amount to compensate the damages, must pay an amount equal to the difference between the net worth at the time a cause for dissolution has occurred and

a) the net worth at the time the director ceases his/her duties; or
b) the net worth at the date of opening of the judicial liquidation procedure.

The costs incurred and to be incurred are deducted from this difference, according to a criteria of normality, in response to the occurrence of the cause of dissolution and until the completion of the liquidation and, if the accounting records are missing or the net worth cannot be determined on the basis of the irregularity of the same records or for other reasons, the damage is liquidated in an amount equal to the difference between the assets and the liabilities ascertained.

Appointment of the control body

Article 379 of the Code of Business Crisis and Insolvency introduces important news concerning the appointment of the control body or the auditor. With respect to the regulations in force, the cases in which limited liability companies are forced to appoint the controlling body or the auditor are extended.

With regard to the previous wording of Article 2477 of the Civil Code, the thresholds of total assets, revenues from sales and services, and average number of employees during the last year are reduced and, according to the new provisions, the appointment of the control body or the auditor indicated at article 379 becomes mandatory for companies which have exceeded at least one of the following limits for two consecutive years:

- €2 million of assets;
- €2 million of revenues;
- Ten employees employed during the year.

The objective of this change is to facilitate the detection and timely management of the crisis.

Thus, it is obvious that the real purpose of the reform is the preservation of company's activity and, for this reason, the provisions introduced allow to act in order to avoid that the crisis becomes insolvency. ■

Footnotes:

1 Article 2476 Civil Code: "*The directors are jointly liable towards the company for damages deriving from the non compliance with the duty imposed on them by law and the articles of association for the management of the company. However, the liability does not extend to those who prove to be without fault and, being aware that the act was to be carried out, have expressed their dissent.*

The shareholders who do not participate to management have the right to receive from the directors updated information about the trend of the business and to consult, even though professionals of their trust, the company's book and the documents relating to the management.

The liability action against the directors is promoted by each shareholder, who may also request, in the event of serious irregularities in the management of the company, that a precautionary order of revocation of the directors be adopted. Omissis ….

Unless otherwise provided in the articles of association, the liability action against the directors may be the object of a waiver or settlement by the company, provided the majority of the shareholders representing at least two thirds of the equity vote in favour and provided that members representing at least one tenth of the equity do not oppose.

The provisions of the preceding paragraphs do not prejudice the right to damages of each shareholder or a third party who have been directly damaged by willful or negligent acts of the directors. …omissis." Please note that this is the wording of the article before the reform.

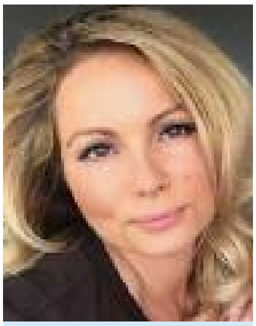
2 Article 2486 Civil Code – Directors' powers: "*Upon the occurrence of an event of dissolution and until time of the delivery referred to in Article 2487-bis, the directors maintain the power to manage the company for the sole purpose of maintenance of the integrity and value of the corporate assets.*

The directors are personally and jointly liable for the damages caused to the company, the shareholders, the creditors of the company and third parties for action or omissions in breach of the provisions of the previous paragraph."

"UNDOUBTEDLY, THE NEW CODE REPRESENTS A REVOLUTION IN THE AREA OF ITALIAN RESTRUCTURING LAW"

Russia's Bankruptcy "Ecosystem": The prevailing interests of the majority creditor

Olga Savina and Julia Shilova discuss the problems arising from the weak legal status of the Russian official receiver



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The realities of modern Russian bankruptcy boil down to the fact that the majority creditor in the bankruptcy case has unlimited possibilities with respect to the debtor. Moreover, the existing legal tools do not allow minority creditors to influence the bankruptcy procedure of a debtor.

The problem of the predominance of the interests of majority creditors in bankruptcy is largely due to the passive role of the arbitration manager (i.e., the bankruptcy trustee). Instead of acting as an independent third party in a bankruptcy case and serving the interests of the bankruptcy estate, in the Russian reality the arbitration manager is a mere tool, acting as a *de facto* representative of the interests of the majority creditor. Thus, the "ecosystem" in Russian bankruptcy is built around a majority creditor or affiliated group, who uses the legal tools to serve their own property interests.

If we look at the Russian judicial practice, it is obvious that the determining factors in the "management" of the current bankruptcy cases are the following:

Whose candidate has been approved by the court?

The legitimate interest of any creditor is to satisfy the claims to the maximum extent possible. All the rights and guarantees granted by the Bankruptcy Law[1] are aimed at achieving this goal. One such tool to achieve this goal is the right of the first bankruptcy petitioner to propose an insolvency arbitration manager or a self-regulatory organisation from among whose members the manager will be approved. However, in such a case, the arbitration manager is selected only for the supervision procedure, which, according Article 62 to the Bankruptcy Law, lasts seven months.

When implementing this procedure, it is important to have a friendly creditor with a claim of a sufficient amount to establish control within the framework of the debtor's bankruptcy procedure. This is necessary because the debtor will not be able to choose a bankruptcy administrator, due to a direct prohibition in Paragraph 5, Article 37 of the Bankruptcy Law. However, a friendly creditor with the highest percentage of votes is not limited by this rule. The bankruptcy of the debtor to be liquidated makes it possible to choose a friendly bankruptcy trustee and to establish control over the bankruptcy procedure.

In order to combat managed and controlled trustees and to prevent abuses by them, the issue of appointing trustees by random selection is constantly discussed, but the proposal is often criticised for the following reasons.

- There is currently no legislative regulation of multi-entity management in the bankruptcy system, which could help balance the rights and legitimate interests of the persons involved. Without such legislation, grounds persist for possibly unsupported conclusions about the concentration of management functions in one person, the arbitration manager.
- The proposal would result in the accumulation into the hands of self-regulating organisations of the main powers that allow those organisations to determine who will be appointed as arbitration manager.
- The emerging trend to the complete removal of the debtor and creditors from participation in the approval of the arbitration manager can lead to an imbalance of rights and legitimate interests of the main participants in the bankruptcy.
- Strengthening the role of self-regulating organisations in solving the issues of the removal of arbitration managers (by excluding the manager from self-regulating organisations), while reducing the manager's influence on decisions by the arbitration court (e.g., in the issues of approval of, and control over, the activities of the manager), could ultimately lead to a distortion and destabilisation of the system.

Who has the right to pledged property included in the bankruptcy estate?

According to Article 138 of the Bankruptcy Law, a secured creditor has an advantage over other creditors who seek to satisfy their claims in the bankruptcy case, since seventy percent of the funds received from the sale of the collateral is used to repay the creditor's claims on the secured obligation (eighty percent, if the claims of a bankruptcy creditor under the loan agreement are secured by the pledge of property). Consequently, the prospects of obtaining settlements from the debtor often depend on the availability of the collateral.

The principle of elasticity of pledge has recently been enshrined in the Russian court practice, as reflected in: Paragraph 1 of the Information Letter No. 90 of the Presidium of the Supreme Arbitration Court of the Russian Federation, *Review of the Practice of Consideration by Arbitration Courts of Disputes Related to the Mortgage Agreement* (28 January 2005); Paragraph 10 of the Resolution No. 10 of the Plenum of the Supreme Arbitration Court of the Russian Federation, *On Some Issues of Application of the Legislation on Pledge*; and Decree No. 902/11 of the Presidium of the Supreme Arbitration Court of the Russian Federation of 12 July 2011.

Pledge is defined as a “right to the value of the pledged object,” which should be preserved during various transformations of the pledged object” (elasticity of the pledge). Thus, a formal change in the collateral does not entail termination of the pledge. The most typical examples of the elasticity of collateral are the processing of the pledged movable object or the division of a building into separate premises. More complex examples of the elasticity of collateral are cases in which the subject’s collateral is replaced by money, such as the payment of insurance benefits. Thus, in the decision of the Supreme Court of the Russian Federation No. 304-ES18-1134 in the case A03-15338/2015 (9 July 2019), the court concluded that the bank is entitled to be a pledge creditor, as the subject of the pledge was transformed into a claim for damages, because the original subject of the pledge was lost. Therefore, the amount of the losses recovered in favour of the debtor is subject to the pledge regime.

Should the tax authority have priority in claims against assets pledged to other creditors?

With respect to bankruptcy, the current civil legislation proceeds from the principle of equality of persons (e.g., creditors and other authorised claimants), whose requirements fall into the same category of payments (Paragraph 1 of Article 1 of the Civil Code; Paragraph 4 of Article 134 of the Bankruptcy Law). It is assumed that this principle should be observed not only in the distribution of the bankruptcy estate, but also in the procedures for filing claims against the debtor and determining their relative status and priority.

At the same time, the Federal Tax Service of Russia does not agree with the current principle of equality of competing creditors in satisfying claims against the debtor. The Russian Union of Self-Regulatory Organisations of Arbitration Managers has prepared a draft federal law to amend the Bankruptcy Law (http://sozd.parliament.gov.ru/bill/239932-7). It was adopted in the first reading by the State Duma (the lower house of the Federal Assembly of Russia). The Federal Tax Service has proposed to supplement the draft law with a provision that the arbitration court shall recognise the claims of the tax authorities as being secured by the pledge. Thus, the tax authority would have an advantage not only over competing creditors, but also over secured creditors entered in the register.

The proposed moment of creation of a superior right to pledged property contradicts the current civil law in Russia, which provides for the principle of public reliability in the documentation of secured transactions. This principle means that the rights of a third party, such as the Federal Tax Service, to the debtor’s collateral pledged as security for a loan from a credit institution, for example, can be recognised only if the parties in the bankruptcy knew or

reasonably should have known about the existence of a competing tax claim, i.e. from the entry of such a pledge interest in the register. To allow a claim against the collateral, about which the creditor to whom the property was pledged did not know and could have known at the time of the pledge, is contrary to common sense. Nonetheless, the proposed changes would allow the previously unregistered claims by tax authorities to take precedence.

If the amendments are adopted, the number of business loans issued by banks will be sharply reduced, a result that is contrary to the objectives of a market economy and business development. Moreover, the State has an objective interest in the normal functioning of business entities and stability of their activities, because businesses drive the generation and distribution of the financial resources needed to address public needs. ■

> **THE FEDERAL TAX SERVICE OF RUSSIA DOES NOT AGREE WITH THE CURRENT PRINCIPLE OF EQUALITY OF COMPETING CREDITORS IN SATISFYING CLAIMS**

Footnotes:

1 Federal Law No. 127-FZ, *On Insolvency (Bankruptcy)* (26 October 2002), as amended (herein, “the Bankruptcy Law”).

Country Reports

Autumn 2019

A short selection of updates from Slovakia, Lithuania, the Netherlands and France

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Slovakia:

Business shares when travelling: Are you sure you are still a shareholder?

Success and failure often stand close to one another. Companies that are still drawing up expansion plans today may already be in economic turmoil tomorrow. For insolvent foreign companies with a Slovak subsidiary, Slovakian company law offers some a surprise.

According to the principle in §148 (2) of the Slovak Commercial Code, a Slovak subsidiary by law acquires its shares with the insolvency of the shareholder. In this way, an insolvent company 'loses' all shareholder rights and a claim remains for financial compensation. The share is transferred to the company itself (own share) according to the law. The company, i.e. the management, must either sell this share within six months or the general meeting, meaning the remaining shareholders, must resolve on a capital decrease with the value of the own share within the same statutory deadline. This rule was introduced to speed up insolvency proceedings, so that the insolvency administrator should not have to worry about exercising any shareholder rights, but could bring a concrete claim for money to the benefit of the insolvent estate. This rule does not apply to companies with only one shareholder, in order to prevent a *de facto* non-shareholder company.

However, this regulation is now becoming problematic – it can probably be assumed that this consequence has not been taken into account in the legislative process – if the insolvency of all shareholders is opened at the same time. There are many jurisdictions, where the competent court declares insolvency with effect at a particular time, e.g. 10:30a.m. In other jurisdictions, if no exact hour and minute is set in the court decision, the insolvency usually becomes effective at midnight of the next day or, if publishing is mandatory, the following day after the decision has been published. Either way, if all the shareholders belong to a group and the insolvency is opened at exactly the same minute, it is questionable whether the above exception is effective, since the company is'losing' all shareholders at the same time. The other way round would not be problematic if first one and then the other shareholder become insolvent, since the second shareholder in this case would already be the sole shareholder and consequently the exception would have to take effect.

However, §148 (2) of the Slovak Commercial Code (SCC) only develops a real impact in an international context. This is the case in the event that the German insolvency administrator of two group-affiliated shareholders sells the non-insolvent Slovak subsidiary to an investor via a share deal as part of a larger transaction. In our opinion, the share purchase agreements are null and void, since the shareholders lose their primary shareholder rights immediately on becoming insolvent.

This problem could best be solved by arranging a consultation with a Slovak lawyer in the run-up to an insolvency filing. With regard to this problem, it seems advantageous under Slovak law if the German insolvency court does not open the insolvencies at the same time, but one after the other, since in this case the aforementioned exemption regulation applies. Of course, foreign law may require opening the insolvency at the same time. There is, among other things, no elegant solution to this problem after conclusion of a contract, so that the share purchase agreement has to be re-concluded, and this time on the seller side it would be the company itself, represented by the management, that has to act and sell its own share within the above mentioned statutory requirements.

Incidentally, if the insolvency is lifted again because payment difficulties have been overcome, the share of the business will revert to the shareholder. ■

Lithuania:
The new corporate insolvency law

On 13 June 2019 the Parliament of Lithuania adopted the new Law on the Insolvency of Legal Entities ("Insolvency Law")[1]. The law will come into force on 1 January 2020[2] and will replace two current laws, the Enterprise Bankruptcy Law and the Law on Restructuring of Enterprises.

The need for insolvency policy reform has been discussed in Lithuania for more than ten years. Reasons for the new law are plenty, foremost the cumbersome and inefficient proceedings under the current legislation, the practical non-existence of restructuring proceedings and a miniscule satisfaction rate for unsecured creditors in the prevailing ('empty') bankruptcy proceedings. Fortunately, the current legislator reacted to the country's insolvency framework's low rankings in the surveys of organisations such as the World Bank[3] and passed the Insolvency Law with an aim to offer stakeholders a more attractive and efficient framework for corporate insolvencies with improved tools for businesses rescue. The scope of changes is broad, therefore this report can only touch on some of the core changes.

On a structural level, the Insolvency Law completely alters the organisation of the profession of insolvency practitioners (IPs). The law merges the two current separate types of bankruptcy and restructuring administrators into one. The new unified occupational title will be insolvency administrator (*nemokumo administratorius*). What is more, IPs will have their own self-governing body, the Chamber of Insolvency Administrators (*nemokumo administratorių rūmai*). Currently, administrators are still organised in various private associations without statutory self-governing rights and duties. The mandatory membership in the Chamber aims at ensuring higher qualification and ethical standards as well as more efficient administrations of insolvency procedures. The establishment of this new self-governing body with rights and duties can be seen as increased trust of the lawmaker and society in the profession of IPs.

With regard to the material law, some important changes relate to the tools for realising the debtor's assets. In this respect, the Insolvency Law provides more flexibility than its predecessors. This should help maximising the proceeds from the realisation of assets. For instance, the new law allows deviations from the general obligation to sell real-estate and other material assets only by public auction. In the future these assets may be sold on in the open market if the creditors approve this type of asset realisation and a higher sales price can be expected than in an auction. Another important novelty is the possibility to sell an insolvent legal entity as a complex of property or its substantial part, and without the pre-insolvency debt. This option might facilitate the sale of businesses as a going-concern which under the current legislation does not really happen at all.

The Insolvency Law is certainly to be welcomed as a long overdue and important step towards a more modern insolvency and restructuring framework in Lithuania. A number of tools and concepts have been newly introduced and it therefore comes as no surprise that they will have to be further shaped out by practice, like for examples the new definition of insolvency, the newly introduced voting on restructuring plans in creditor classes as well as the already mentioned sale of insolvent legal entities.

Unfortunately, it appears that the new law does not address one of the main flaws of the current legal framework for insolvencies, a flaw which is detrimental to any attempt of business rescue. Like under the current laws, the initiation of insolvency

proceedings under the Insolvency Law will most likely take much too long. Opening decisions and appointments of practitioners come into effect only after the appeal periods have expired or appeals been dismissed. Only then, in reality often many months after filing for insolvency, can the appointed IP commence the work. At this moment, the debtor usually has had to stop all business activities already.

The requirement to transpose into Lithuanian law the recently adopted Directive on Restructuring and Insolvency might be a good chance to remedy some shortcomings of the Insolvency Law and to further modernise the framework for insolvencies and restructurings in Lithuania. ■

Footnotes:

1 *Lietuvos Respublikos juridinių asmenų nemokumo įstatymas, No. XIII-2221*. See also a previous report on the bill by Ieva Strunkienė, *Draft Law on the Insolvency of Legal Entities*, in eurofenix no. 73 (Autumn 2018).

2 Some provisions will enter into force on 1 January 2021 and 1 January 2023.

3 According to the most recent insolvency index carried out by World Bank Lithuania is in the 85th place. See the results on site: www.doingbusiness.org/en/data/exploretopics/resolving-insolvency

4 Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019.

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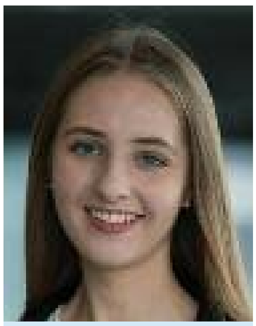

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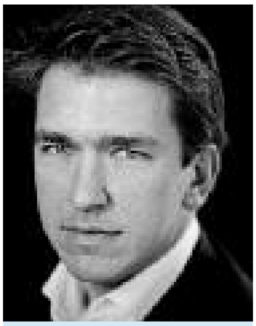

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"THE INSTRUMENT ENABLES CREDITORS TO PRESERVE AND REALISE THE VALUE OF THE BUSINESS ON A NON-DISTRESSED BASIS"

The Netherlands:

The proposed fast and flexible restructuring procedure

On 5 July 2019, the Dutch Ministry of Justice submitted to Parliament a bill, the Act on the Confirmation of Private Plans, seeking to introduce a pre-insolvency procedure in the Netherlands, which one might refer to as the "Dutch scheme". It is expected or hoped for that the bill will be adopted by Parliament this year and enter into force in January or July next year.

The Dutch scheme combines elements of the UK scheme, such as the ability to implement a plan outside formal insolvency proceedings, with elements of Chapter 11, such as a cram-down mechanism and a moratorium, whilst innovating on both. The result is a fast and flexible restructuring procedure. The Dutch scheme is compliant with, and as such the first procedure to give effect to, the recently adopted EU Restructuring Directive (EU 2019/1023).

In case the debtor company is or can reasonably be expected to become insolvent it may propose a restructuring plan. Alternatively, a creditor, a shareholder, the works' council or the workplace's representation may request the appointment of a restructuring expert, who is then entitled to propose a plan. The plan can be limited to a subset of the capital providers (creditors and/or shareholders). The voting takes place in classes and within a class, a two thirds majority (in value) can bind a minority. No head count applies. In contradistinction to the UK scheme, the Dutch court will have the power to impose the plan on dissenting classes (cram-down, or "cross-class" cram-down, as referred to in the EU Restructuring Directive). Where all classes have accepted the plan, no dissenting creditor may receive less in value, whether in the money or out of the money, than he would expect to receive in liquidation (best interest of creditors' test).

Where one or more classes have rejected the plan, the following cram-down provisions apply.

- At least one in the money class must have accepted the plan; and
- The members of the dissenting class must have the right to choose between either:
  - (i) a distribution with a value equal to their share, in accordance with their rank, of the reorganisation value (i.e. the value distributable if the plan succeeds), regardless of the form in which this distribution is made (cash or non-cash[1]), or
  - (ii) a distribution in the form of cash equal to their share, in accordance with their rank, of the liquidation value (i.e. what they would expect to receive if liquidation were to take place).

The court also has the ability to make binding determinations on any difficult issues at an early stage (i.e. before the vote) so that uncertainty can be removed as quickly as possible. This includes issues such as eligibility, jurisdiction, admission to the vote, class formation, valuation, etc. Also noteworthy is the possibility of choosing between a variant that falls within the European Insolvency Regulation and a variant that falls outside the European Insolvency Regulation.

In this latter scenario, any debtor may use this version, as long as the restructuring has a nexus to the Netherlands, irrespective of the debtor's COMI. The variant that falls within the European Insolvency Regulation offers the benefit of automatic recognition. The variant that falls outside of the European Insolvency Regulation can be used where the Insolvency Regulation is problematic because of the existence of security rights on foreign assets (rights in rem exception) or because of the COMI of the guarantors or other group members being located in different jurisdictions.

To conclude this brief country report, we note that the instrument is debtor friendly in that it offers debtor companies an effective business rescue tool. The fact that others than the debtor (controlled by out of the money equity holders) can also initiate the procedure enhances early intervention. The instrument is also creditor friendly in that it enables creditors to preserve and realise the value of the business on a non-distressed basis, without disruption and without value leakage to out of the money parties.

The instrument enables existing equity to inject new money into the business and thus to protect its investment by facilitating the elimination of unsupported debt. The instrument properly protects senior dissenting classes' exit rights; they cannot be forced to remain seated and to continue financing the business (i.e. taking non-cash) against the majority will of the class.

The bill provides for a fast, efficient and flexible instrument with all the powers required to reconfigure the capital structure as appropriate whilst protecting the interests of everyone involved and preserving the business.

More background information, including the translation of the bill and the explanatory notes, can be found at: https://eyesoninsolvency.com/documenten/. ■

Footnotes:

1 A non-cash charge is a write-down or accounting expense that does not involve a cash payment.

France:
An update of French Law on Insolvency

JEAN-LUC VALLENS
Honorary judge,
Professor emeritus, France

Amendments of the Commercial Code by the "Loi Pacte" of 22 May 2019.

With the adoption of the Law No. 2019-486 of May 22, 2019 (Action Plan for the growth and transformation of enterprises – "Loi Pacte"), some technical improvements should be mentioned.

Indeed, among several amendments introduced to the French commercial code, some provisions modify the current rules on insolvency. These changes are made before a major reform expected in the coming two years, as a consequence of the implementation of the Directive 2019/1023 of 20 June 2019.

- Middle-sized companies will be defined in consideration with the following criteria: an annual turnover of €40 million, a balance sheet of €20 million and 250 employees. Companies fulfilling two of these three criteria are considered as middle-sized companies.
- Tax claims will have to be definitively lodged within 12 months after the publication of the opening judgement (and no more defined by the court), except for challenged tax claims.
- The manager of an insolvent company filing for rescue proceedings will be free to propose the name of a practitioner (as it can currently be done, but only in safeguard proceedings, that is, before insolvency).
  During such rescue preventive proceedings, the manager keeps his executive compensation or wages, except if the delegate judge modifies it (by contrast with the former legal provisions which gave the judge the exclusive right to decide upon it).
- In case of a sale of a company as a going concern, any solidarity clause contained in a current commercial lease of the transferee with the transferor will be null and void: this creates a favourable framework for the transfer of financially-troubled businesses.
- In case of liquidation proceedings, the opening judgement will no more be registered; only disqualifications remain registered for the information of third parties.
- Legal provisions applicable to farmers have been extended to all kinds of individual or legal persons practising agricultural activities. That namely concerns rescue plans whose duration can be longer than for commercial debtors (15 years instead of 10 years).
- Lastly, the legislator has empowered the government to reform rules on securities and on enterprises in difficulty by means of ordinances, in order to balance the rights of creditors in both preventive and insolvency proceedings. In parallel, it has also empowered the government to introduce modifications to the Commercial Code for implementing the above-mentioned Directive. On these two points, a time-limit has been given: May 2021.

Relevant French case-law

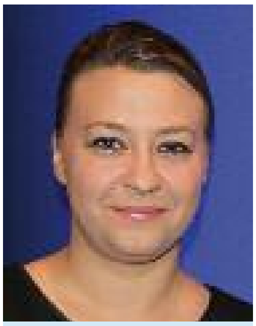
Several relevant decisions issued the past few months should be brought to the attention of both practitioners and creditors.

- Restructuring plans: the courts can take into consideration interests of the whole group before deciding upon the plan of each insolvent company: such a global approach is clearly approved by the 'Cour de cassation' (Cass. Com., 19 December 2018, n° 17-27.947).
- In case of a transfer plan, the secured creditor may claim payment of subsequent debts toward the transferee (Cass. Com., 20 March 2019, n° 17-29.009).
- The liquidator may exercise the rights of an insolvent debtor upon a real property located abroad, especially for agreeing with its sale (Cass. Com., 29 May 2019, n° 18-14.844).
- As soon as a secured claim is admitted by the delegate judge of the Court, the security cannot be anymore challenged by way of an avoidance action (Cass. Com., 19 December 2018, n° 17-19.309).
- A restructuring plan should take into account all financial lodged claims, even those the debtor or the liquidator may challenge, as registration of all claims into a plan is deemed necessary for building a realistic plan (Cass. Com., 20 March 2019, n°17-27.527).
- A French creditor who does not lodge its claim in proceedings opened in Italy cannot be authorised to participate in the distribution of the proceeds of an immovable property located in France, sold by the Italian liquidator (Cass. civ.1, 11 July 2019, n° 18-14.186).
- A retention right registered on a real estate property is not affected by the insolvency proceedings opened towards the holder. If the asset is sold by the liquidator, the retention right is just carried over the sale price in order to protect the interests of the secured creditor (Cass 30 January 2019, n° 2019, n° 17-22.223). ■

> "THESE CHANGES ARE MADE BEFORE A MAJOR REFORM EXPECTED IN THE COMING TWO YEARS, AS A CONSEQUENCE OF THE DIRECTIVE"

European Update... continued!

Myriam Mailly, Co-Technical Officer of INSOL Europe, writes about the recent European information that members should be aware of and that is now available on the INSOL Europe website



MYRIAM MAILLY
INSOL Europe Co-Technical Officer

"THE DIRECTIVE SHOULD ALLOW VIABLE BUSINESSES IN DISTRESS TO BE RESCUED AND HONEST BUT BANKRUPT INDIVIDUALS TO BE GIVEN A SECOND CHANCE"

The European Directive on restructuring and insolvency (2019)

The EU adopted on 20 June 2019 the Directive (EU) 2019/1023 of the European Parliament and of the Council on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (hereafter the 'Directive').

With that text (OJEU L 172 of 26.06.2019, p. 18-55), the European Union aimed at disseminating in all EU Member States modern and streamlined rules that should facilitate restructuring, give entrepreneurs a second chance and improve the efficiency of restructuring, insolvency and debt discharge procedures. In other words, among other provisions, the Directive would allow viable businesses in distress to be rescued and honest but bankrupt individuals to be given a second chance.

The final text of the Restructuring & Insolvency Directive as published in the official journal of the EU is now available from the INSOL Europe website at www.insol-europe.org/technical-content/introduction

According to its Article 34, Member States are required to adopt and publish by 17 July 2021, the laws, regulations and administrative provisions necessary to comply with the Directive (subject to several exceptions detailed into the same Article) by 17 July 2021.

Several EU Member States are already in the process of adopting such provisions. And as the success of the EU approach (which consists of ensuring minimum standards in the field of restructuring and insolvency in every EU Member States) would depend a lot on the way that they will implement these standards into domestic legislations, INSOL Europe members are strongly encouraged to share their views or to comment on their national draft implementing texts. To keep members of INSOL Europe informed, any document of interest can be sent to: mailly.myriam@orange.fr

More information and comments on the Restructuring & Insolvency Directive should then follow in the coming months!

A closer look to the EU proposal on securities and claims ownership

With the Proposal for a Regulation of the European Parliament and of the Council on the law applicable to the third-party effects of assignments of claims, COM/2018/096 final - 2018/044 (COD), the European Commission proposed the adoption of **common conflict-of-laws rules on the third- party effects of assignment of claims**.

The proposal complements the Rome I Regulation. It aims to introduce legal certainty, promote cross-border investment, enhance access to credit and contribute to market integration. To that end, it provides that the law of the country where the assignor has its habitual residence will govern the third-party effects of the assignment of claims.

The text is available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018PC0096

Taking into account the complexity of the proposal, its possible impact on financial markets and its interrelation with other pieces of Union law, it was however decided in May 2019 that further work at technical level was required before the Council can take any political decision.

More to follow in the forthcoming weeks…!

Call for contributions regarding national legislation created to deal with the concrete application of the European Insolvency Regulation 2015/848

As you were already informed in the last technical column, a new set of information has been made available to help the insolvency actors to find relevant information on the national laws applicable to cross-border insolvencies when applying the EIR Recast.

Indeed, the national texts adopted to deal with the (concrete) application of the EIR Recast are available for the following countries: Czech Republic, England & Wales, Finland, France, Hungary, Ireland, Latvia, Lithuania, Poland, Portugal, Romania, Slovakia, Spain and The Netherlands at: www.insol-europe.org/national-texts-dealing-with-the-eir-2015

If you want to contribute as well for non-covered countries, please do not hesitate to send me any relevant links, articles etc… at maillly.myriam@orange.fr ■

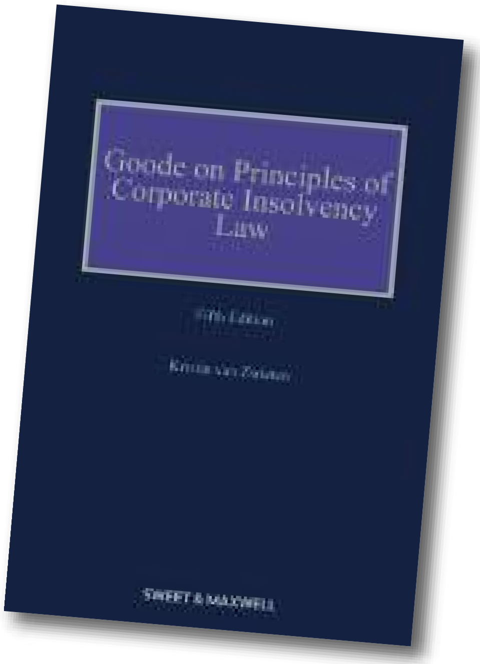
> "THE PROPOSAL AIMS TO INTRODUCE LEGAL CERTAINTY, PROMOTE CROSS-BORDER INVESTMENT, ENHANCE ACCESS TO CREDIT AND CONTRIBUTE TO MARKET INTEGRATION"

Books

Here we regularly review or preview books which we think are relevant and interesting to our readers.

If you would like to suggest a book for a future edition, please contact Paul Newson on: paulnewson@insol-europe.org

Goode on Principles of Corporate Insolvency Law



Kristin Van Zwieten, Sweet and Maxwell, 5th edition, 2018, cvi and 967 pages + appendices and index, ISBN 9780414034488, £259

This work, inaugurated by Professor Sir Roy Goode QC in 1990, is now in its 5th edition under the authorship of Professor Kristin van Zwieten. The text follows the orthodoxy of insolvency works and the predominance of the institutions of winding up, exploring the history, foundations, principles and concept of corporate insolvency. Later insolvency procedures, including administrative receivership, administration and other restructuring processes, such as company voluntary arrangements, then follow, joined by chapters devoted to two key topics: the avoidance of transactions and directors' liability. The text then ends with cross-border law, covering the European Insolvency Regulation and other international insolvency law frameworks.

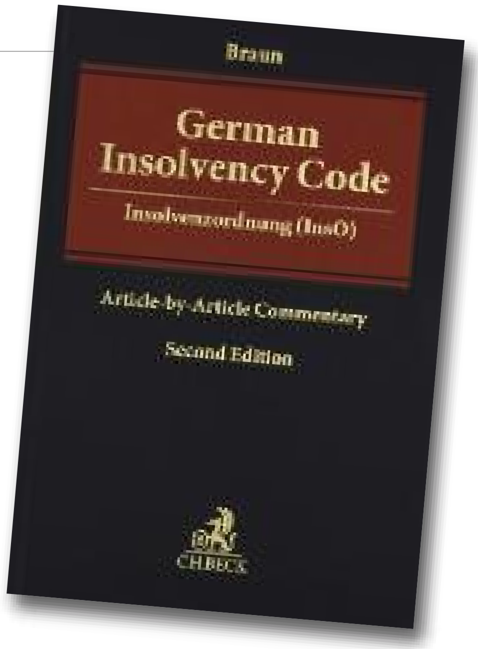
The changes in the Fifth Edition deal with structural changes brought in by the Small Business, Enterprise and Employment Act 2015, the consolidation and reshaping of the regulatory framework governing procedural matters in the Insolvency Rules 2016 and the impact on cross-border matters of the Recast European Insolvency Regulation. Overall, all parts of the work have reflected the profusion of jurisprudence since the last edition on issues such as liability behind the corporate veil (*Prest*),[1] cross-border judicial cooperation (*Singularis*)[2] and the adjustment of pre-insolvency entitlements (*Waterfall I*)[3].

In summary, this is a text that has great merit in presenting insolvency in a lucid and intelligible manner to the reader. There is a strong comparative law dimension to the work, while the tables and index are ample and well-presented. There is also a brief table of definitions at the front of the text, together with citations of sources for these definitions. The appendices at the end contain all the necessary and latest versions of the cross-border texts together with the Virgos-Schmit Report, used as an aid to the construction of the European Insolvency Regulation 2000 (and now the Recast).

Paul J. Omar
Technical Research Coordinator

1 *Prest v Petrodel Resources Ltd* [2013] UKSC 34.
2 *Singularis Holdings Ltd v PwC* [2014] UKPC 36.
3 *Re Lehman Brothers Ltd* [2017] UKSC 38.

German Insolvency Code
Article-by-Article Commentary



Eberhard Braun (ed) (2019, CH Beck, Munich), lxxviii and 1134pp, €199, ISBN 9783406722387

This hefty tome, now in its second edition, could be subtitled: "Everything you wanted to know about German insolvency law, but were afraid to ask". This would not do it justice, however, particularly as this work has now become the indispensable go to volume for detailed, insightful and up-to-date information about the workings of one of the world's better functioning insolvency systems. In addition, displaying a useful comparative law focus, the text juxtaposes information on other systems, including England and Wales, France, Italy, Japan, the Netherlands, Poland and the US, aiding the understanding of the German system.

The body of the work itself is easy to navigate, it being structured according to the sequence of the *Insolvenzordnung*. Under each article, there is a detailed dissection of key definitions, the purpose of the provision, the impact on procedure as well as related legislation needing to be taken into account. Some articles are, of course, longer than others, depending on the clarity of the provision and whether it has been interpreted with reference to case-law, relevant examples being cited in the text. Overall, this is a work of considerable achievement and practical nature, which has great utility for anyone needing to understand the German system.

Paul J. Omar
Technical Research Coordinator

Bond Debt Governance
A Comparative Analysis of Different Solutions to Financial Distress of Corporate Bond Debtors

David C. Ehmke (2019, Nomos, Baden-Baden), 322pp, €84, ISBN 9783848750177

Once a debtor is in or approaches financial distress, a crisis resolution regime is confronted with problems of severe collective action and players' strategy. Understanding these problems is the fundament for the design of a crisis resolution mechanism, addressing the challenges in both inter-creditor and debtor-creditor relationships. There are two different mechanisms on dealing with the debtor's distressed situation: the creditors rely on the public ordering legal framework for creditor protection, or the debtor invites creditors to ad hoc restructuring negotiations or designs a private ordering regime to pre-determine inter-creditor relations with its (voluntary) creditors.

Analysing public and private ordering schemes for corporate bond debt lending and restructuring and the interplay between both to achieve a win-win situation for debtors and creditors is the aim of this book. The comparative analysis of bond debt restructurings between the UK and the US offers insights into the differences in the institutional designs of private and public ordering bond debt lending and restructuring. The clear indications of the effective elements in UK and US law contribute to a theoretical framework. This framework could be a useful model for legislative reform in other jurisdiction and is exemplarily applied to Germany.

In general, the outline of the book and its composition of chapters are well-executed in 12 chapters dealing with issues such as private and public ordering, normative benchmarks, covenants in bond contract design, plan voting, circumvention strategies etc. with a final chapter providing a review and outlook anticipating future developments. The book is a great and very useful contribution to the existing literature and an important resource to anyone interested in the different approaches taken by the UK and the US in their design of public and private ordering bond debt lending and restructuring.

While there is generally the limitation that comparative law projects only provide snapshots of the national law discussed, this book is a rare exception. The author outlines the specific features of UK and US law in such informative and thoughtful details that even an ingenuous reader will gain a deep understanding from this first encounter with the foreign law. The author's remarks with proposals for reform at the end of the book will be a valuable read for both professionals and academics.

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2021

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2022

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