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The journal of INSOL Europe
Spring 2020

World in Lockdown

The impact of COVID-19 on (pre-)insolvency

Also in this edition:

- Cyber risks & corporate responsibilities
- 30 years of Examinership in Ireland
- Wiemer & Trachte: is the CJEU right?
- Steel: Environmental impact In Italy
- Conference updates *and more*

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Advertising & Sponsorship enquiries:
Hannah Denney
hannahdenney@insol-europe.org

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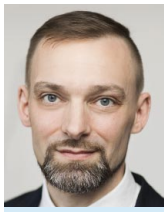
Welcome from the Editors


FRANK HEEMANN


CATARINA SERRA

Let us imagine we are in Spring 2021.

Our capacity for self-preservation and altruism was really put to the test last year.

At first, and for a while, we were mesmerised by the news – fast updated and more alarming every day. One topic dominated the world press, politics and conversation: the health crisis, soon to be considered the third major crisis of the 21st century, following the terrorist attacks of September 11, 2001, and the financial collapse of 2008. It was threatening to change our lifestyle, the way we lived, worked and interacted.

The stock markets were in a turmoil all over the world, facing unprecedented drops in indices. No matter the efforts of national and international organisations (US Federal Reserve, European Central Bank, European Commission and governments), no statement seemed firm enough to stop the financial and economic decline. The state of emergency, declared by countries, one by one, appeared as if it was going to last forever – the exception took the place of the rule for a long time.

Suddenly, everyone, except health professionals and other essential service providers, had restricted freedom of movement and loads of apparently free time. It was difficult to imagine right away what to do with this unexpected (sometimes self-inflicted) reclusion. But, in the end, everyone managed to give it good use. Work was caught up through telecommuting. Connections came in over virtual private networks. Remote collaboration tools (video conferencing, web conferencing, webinars), offered for free by Tech companies, were used like never before. Momentary lack of stimulation was tackled through the scheduling of virtual coffee breaks and the engaging in video chats with friends and family.

As to us, insolvency professionals, we were well aware of the need to *preserve and prepare ourselves* for the likely impact of the new crisis. A wave of worldwide restructurings and insolvencies, affecting all sectors of economy (apart from pharmaceutical and health care industries), had been foreseeable from the outset. The challenges ahead were enormous and several questions immediately arose. One of the first was whether companies could (and to what extent) be excused from contractual non-performance through *force majeure*. But, above all, the time had come to put the recent Restructuring and Insolvency Directive to a crucial test. The question was: would it be effective in such adverse circumstances?

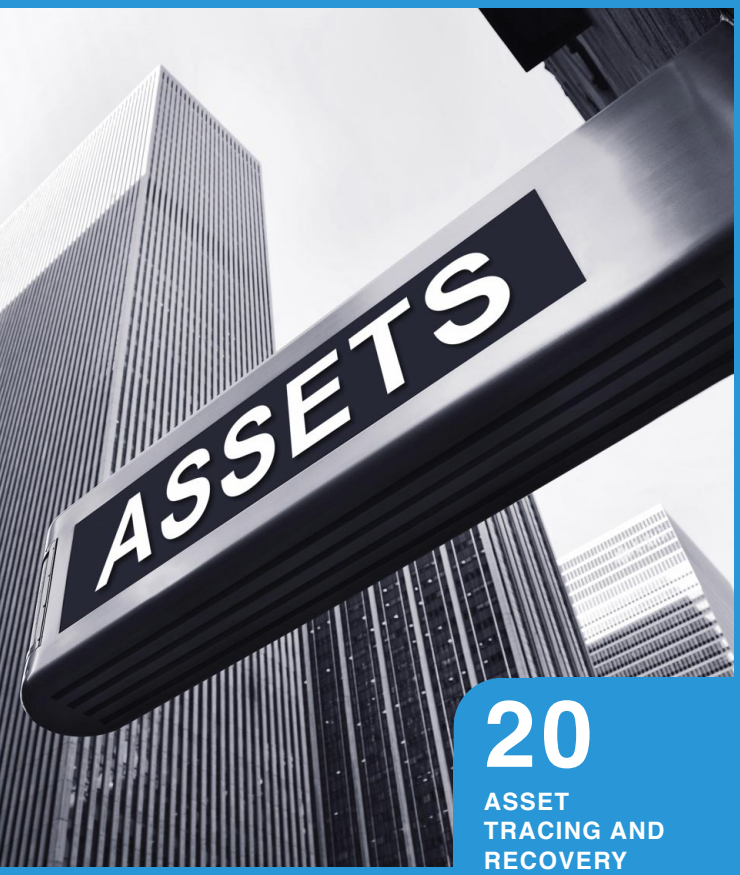
Needless to say, it was of vital importance that we could rely on the timely distribution of Journals such as Eurofenix. They allowed us to still be in touch with each other and to keep updated on what was happening in the insolvency world. As always, the capacity to provide a useful contribution in difficult times comes from the effort of self-improvement and enriching our knowledge.

Apart from this, there was one thing of which we never lost sight: in Italy, throughout the ordeal, hundreds of children painted rainbows on sheets and hung them up like banners on windows and balconies. "*Andrà tutto bene*", they wrote.

And in our makeshift quarantine bunkers, we did succeed to make ourselves useful. We always kept our spirits high. Maybe in Spring next year – we thought – banners will be hanging from windows and balconies, saying "*È andato tutto bene*".

Cheers and stay safe!

Catarina



20
ASSET TRACING AND RECOVERY

22
IRISH RESCUE PROCESS 30 YEARS ON

eurofenix

Edition 79 Spring 2020

CONTENTS

24
WIEMER & TRACHTE JUDGMENT

30
ENVIRONMENTAL IMPACT IN ITALY

Call to legislators across Europe

PIYA MUKHERJEE
INSOL Europe President

Piya Mukherjee reports on the new challenges for us all and how Member States are responding to COVID-19

> THERE IS NO DOUBT THAT THIS CRISIS AND SHUT-DOWN OF SOCIETY WILL HAVE A HUGE – AND NEGATIVE – IMPACT ON BUSINESSES AND ESPECIALLY THE SMEs

I am writing this column from my new place of work – the dining table in our summerhouse on the Northern coast of Zealand, Denmark. The transition from working in the office to working from home was surprisingly smooth. I might be tempted to work like this always!

Of course, I appreciate that I do not have to juggle work obligations and home-schooling at the same time. We are privileged to have ample space and a nice garden. My retired husband is more than happy to prepare and serve my breakfast, lunch and dinner and also do the dishes! He has also ensured that we have a state-of-the-art high-speed internet connection in the summerhouse. From my laptop I can access our office servers seamlessly and Skype is the new way of staying connected with my team. Most recently we also had our first (virtual) Friday afternoon staff get-together with 45+ colleagues on the line!

Other businesses have been able to make adaptions in light of the restrictions imposed by the Danish Government to limit further spread of COVID-19 and to make a general contribution to uphold the basic functioning of the society. Restaurants (also Michelin starred) are offering take-away meals. Hostels are offering discounted rooms to homeless citizens as shelters are closed down. Distilleries are now producing hand sanitiser.

An alarming number of businesses are experiencing huge losses of turnover all across Europe and beyond. Governments are putting together plans aimed at stretching out a safety net under the corporate sector. In Denmark, these plans are now coming into force and businesses can apply for aid under a range of compensation schemes.

However, there is no doubt that this crisis and shut-down of society will have a huge – and negative – impact on businesses and especially the SMEs who constitute the majority of the private sector of Europe.

The questions that spring to mind are whether restructuring regimes are available across Europe, whether the regimes available provide the required tools to bring businesses afloat again and whether the existing insolvency laws lead to liquidation of businesses that could have been rescued.

CERIL Executive Statement 2020-1 on COVID-19 and insolvency legislation

The Conference on European Restructuring and Insolvency Law (CERIL) shares these concerns and issued a statement addressed to legislators across Europe on 20 March 2020, noting that:

"… (CERIL) is deeply concerned with the ability of existing insolvency legislation to provide adequate responses to the extremely difficult situation in which many companies may find themselves in the COVID-19 (corona) crisis. In a CERIL Executive Statement, it calls upon EU and European national legislators to take immediate action and adapt insolvency legislations where necessary in light of the current extraordinary economic situation and to prevent unnecessary bankruptcies of entrepreneurs.

The Executive of CERIL recommends the following two steps to be taken immediately by European national legislators:

- **Step 1:** Suspend the duty to file for insolvency proceedings based on over-indebtedness
- **Step 2:** Respond to the illiquidity of businesses

In addition, the EU and national legislators are urged to consider measures regarding:

1. Interim financing;
2. Suspending the duty to file based on the inability to pay;
3. 'Hibernation' for (small) businesses; and
4. Supporting the livelihood of entrepreneurs and their employees."

The full CERIL Executive Statement 2020-1 can be read at: www.ceril.eu/news/ceril-statement-2020-1.

Member States' response

It is encouraging to see how Member States are responding to these challenges.

The French approach

In the Technical Insight in this edition of Eurofenix, Emmanuelle Inacio, INSOL Europe Conference Technical and Training Course Director, shares with us a French Emergency Bill of 18 March 2020. Under this Bill, the French Government is empowered to take any measure

modifying French insolvency law in order to facilitate the preventive treatment of the consequences of the COVID-19 pandemic.

The German approach

On 25 March 2020, a Bill was passed in Germany which, among other things, suspends the obligation on directors to file for insolvency no later than three weeks after the company became insolvent as a consequence of the COVID-19 pandemic. The Bill also provides relief from liability for managing directors for payments made after the company became insolvent.

The need for functioning restructuring systems across Europe

As Emmanuelle Inacio also points out, it appears to be now urgent to implement a rescue culture in all Member States.

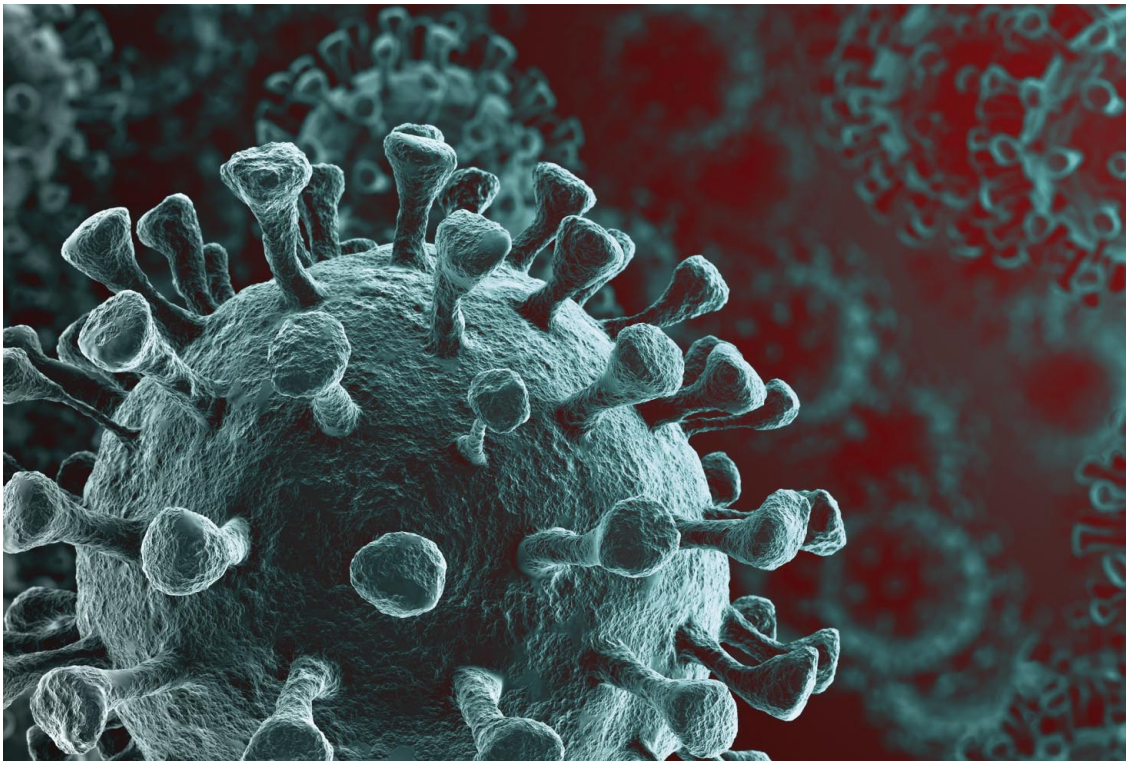
As you will recall, the Directive on Preventive Restructuring Frameworks was adopted in June 2019 and the Member States were tasked with transposing the Directive into national legislation within two years.

It is positive to see that the legislators in the Member States are conscious of the extraordinary situation for businesses caused by the restrictions imposed to contain the spread of the COVID-19 virus. The legislators also recognise the need to implement temporary measures to put out of force certain provisions under national insolvency law that otherwise might lead to a multitude of (unnecessary) liquidations.

It is my sincere hope that this does not distract the focus from the legislative preparations for the implementation of the Directive on Preventive Restructuring Frameworks which more than ever are needed across the Member States.

Directive Project

In March 2019, during Alastair Beveridge's presidency, the Council of INSOL Europe launched a "Directive Project" with the specific objective of preparing a helpful guide for legislators in the Member States who are in the process of turning the EU Directive into updated or brand new national legislation.



As you will be aware, the objectives of INSOL Europe are to take and maintain a leading role in European business recovery, turnaround and insolvency issues, to facilitate the exchange of information and ideas amongst its members and to discuss business recovery, turnaround and insolvency issues with official European and other international bodies who are affected by these procedures.

As the leading pan-European association of practitioners, academics and judiciary within the field of insolvency and restructuring, and whose members have between them thousands of years of experience, INSOL Europe is well-positioned to take a close look at and provide a pan-European perspective on those tools which would be beneficial in delivering successful restructurings and those tools which may be counter-productive.

The following INSOL Europe members bravely undertook the huge and highly important task of drafting the Guidance Notes: Adrian Thery (Chair), Jean Baron, Rita Gismondi, Alberto Nuñez-Lagos, Michael Quinn, Tomas Richter, Ben Schuijling, Michael Veder, and Evert Verwey.

The first Guidance Note is on the verge of being published and will deal with Claims, Classes, Voting, Confirmation and the Cross-Class Cram-Down. The main authors of this Note are Adrian Thery and Tomas Richter.

I would like to extend my immense gratitude to the members of the Directive Project and look forward to presenting the first Guidance Note to the members, as well as to the legislators in the Member States.

Stay home, stay safe and stay tuned! ■

> **IT APPEARS TO BE NOW URGENT TO IMPLEMENT A RESCUE CULTURE IN ALL MEMBER STATES**

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

COVID-19

As you are aware, the situation regarding the new coronavirus is changing on an almost daily basis. The health and well-being of the INSOL Europe community, as well as that of our local host community, are the priority.

INSOL Europe has been closely monitoring developments of the impact of COVID-19 at local and global levels. It has followed the advice provided by the World Health Organization (WHO), and European governments.

Taking into account the rapid increase of cases worldwide, the travel restrictions, the continuing difficulties for delegates to attend meetings and conferences, and the determination by the WHO, on 11 March, that the outbreak is now pandemic, INSOL Europe's Eastern European Committee Conference, organised in Kyiv, Ukraine, on 21-22 May is now postponed until the Autumn.

INSOL Europe will continue to monitor all developments related to COVID-19 and will advise as soon as possible on future developments.

The Leiden Insolvency Workshop: Nurturing European doctoral talent


Photo: Monique Shaw

Gert-Jan Boon, Axel Krohn and Chiara Lunetti, participants at the workshop, report from Leiden.

From 5 to 6 March 2020, the BWILC ("Bob Wessels Insolvency Law Collection") Foundation organised a second edition of the PhD Workshop on European and International Insolvency Law. The Foundation invited thirteen PhD candidates representing eleven universities from across Europe to present and discuss their current research in an environment tailored for furthering their academic talents.

The foundation was established in 2016, upon the donation by Emeritus Professor Bob Wessels of his extensive private book collection, which has now been made available in the library of the Leiden Law School. The board of the foundation is comprised of Professor Matthias Haentjens, Professor Reinout Vriesendorp, Professor Eric Dirix, Professor Stephan Madaus, and Dr. Paul Omar. Bob Wessels is the patron of the Foundation. The foundation has taken the initiative of organising a two-day PhD workshop in Leiden on an annual basis to enable PhD students to present and discuss their research with colleagues and eminent scholars.

The First Substantive Session (Directors, DIPs, Insurers and Insolvency Practitioners)

Georg Wabl (Vienna) gave the first presentation of the workshop addressing

directors' duties where there is a likelihood of insolvency. He showed the results of his cogent study on the meaning of likelihood of insolvency and the empirical analysis of director's liability in the Austrian context. Gert-Jan Boon (Leiden) presented a comparative review of the Debtor in Possession (DIP), comparing the rights, powers and duties of the DIP in the US under Chapters 11 and 15 with the EU position in the Recast European Insolvency Regulation (Recast EIR) and the Preventive Restructuring Directive (Directive). Geleite Xu (Essex) presented his research on reforming China's crisis management and market exit mechanism for insurers, exploring the approaches in China, the UK and the US to further the understanding of insolvency frameworks available for insurers. Walter Nijnens (Fulda) spoke on the tensions he identified between European data protection law and the duty of the insolvency practitioners to communicate under Article 41 of the Recast EIR.

Poster Presentations

The second day commenced with poster presentations, beginning with a review by Ilya Kokorin (Leiden) into how third-party releases may facilitate efficient group insolvency solutions. His suggestion was that, despite some challenges, third-party releases would minimise transaction costs and encourage the adoption of group-wide restructuring plans. Next up was Shuai Guo (Leiden), whose main idea was to determine what the issues of confidentiality, secrecy or privilege are and how they are affected by resolution, restructuring and insolvency proceedings. Following this, Svetla Kacharova (Bulgarian Academy of Sciences) discussed the Bulgarian legal framework for governing director's obligations in the period prior to insolvency. Chiara Lunetti (Milan and Paris I Pantheon-Sorbonne) continued the discussion with the results of her PhD research into the wording of Article 6(1) of the Recast EIR, contending for its inaccuracy and that the wording adopted can lead to inconsistencies regarding the scope of application of the jurisdictional regime of annex actions. The session ended with a presentation by Axel Krohn (Martin Luther University) on the new EU Relative Priority Rule in Article 11 of the Directive, highlighting the advantages of the flexible provision in theory, though with concerns regarding its practicability.

The Second Substantive Session (Maritime Insolvencies, Restructuring Frameworks and Foreign Insolvency-related Judgments)

The day continued with a presentation by Warren De Waegh (Erasmus University Rotterdam), who tackled the topic of maritime insolvency under the current European legal framework, focusing in particular on maritime liens and whether they fall under the scope of Article 8 of the Recast EIR's definition of rights in rem. Pride Chanakira (Wolverhampton) next focused on the corporate rescue approach adopted in the UK. As a key takeaway, he suggested that the UK tools on corporate rescue may not be effective to prevent insolvency, confronted with some of the principles set forth in the Directive. Next up was the presentation by Aleksandra Krawczyk (Opole) on restructuring agreements involving only a part of creditors, offering an overview of the pros and cons regarding processes provided through the prism of Polish insolvency law. Ioannis Bazinas (University College London) closed the second day of presentations with a spotlight on the topic of recognition and enforcement of foreign insolvency-related judgments and reorganisational plans under the US and UK systems, incidentally exploring the possibility that the recent UNCITRAL Model Law on Insolvency-related Judgments might create a framework facilitating the resolution of the current difficulties. At the end of the workshop, prizes were awarded by the BWILC board for the presentations by Ioannis Bazinas and Axel Krohn.

Platform for Academic Exchange

The participants much appreciated the venue provided by BWILC to present and discuss PhD research. The limited size of the workshop facilitated a welcoming environment for PhD students to meet peers who are at the same stage of their legal or academic career. It provided a valuable moment for academic growth, by allowing for engagement with colleagues and offering the opportunity to put new research ideas to the test. The next edition of the BWILC PhD Workshop will take place in February/March 2021.

INSOL Europe appoints new Co-Director of Administration

Catherine Dyke-Price joined INSOL Europe in February and will work alongside Caroline Taylor as Co-Director of Administration.

In her words: "I am very excited to be joining INSOL Europe. As has already been mentioned to me by several members, I have "big shoes to fill". I can in no way replace Caroline like-to-like with her 30+ years' experience and knowledge. Thank you for the warm welcome so far! What has already struck me from my small interaction with the Executive and INSOL Europe staff is the sense of a real team spirit and being part of a family. So I am very honoured that you have welcomed me into this family.

A little about me… I have come from Johnson Matthey, a FTSE 100 listed company. I worked as Executive Assistant to the Chief Executive of Clean Air and Project Manager Officer. Clean Air is one of JM's four businesses. Clean Air as a sector is a global business with turnover of £2.5bn, 6500 employees and 17 manufacturing sites. In the last year I have been formally qualifying for my project manager certifications which I now have and have spent the last 3.5 months in Poland as the Project Manager for a 1.5m Euro office fit out project. I hope to bring some of this experience to INSOL Europe and I am excited to see where the association will be in another 5-10 years. I have also had experience working for an association for search consultants so this is not completely unfamiliar territory!

I look forward working with you all and meeting some of you in later in the year at our Annual Congress in Sorrento."

The plight of small entrepreneurs: MSEs and insolvency on the agenda in Vienna

Florian Bruder, DLA Piper Munich and Paul Omar, Technical Research Coordinator, INSOL Europe, report from Vienna.

The 54th session of Working Group V began in Vienna with the nomination of a new Chair, Harold Foo from Singapore. The objective of the session was to consider the problem of insolvency in relation to Micro- and Small-Enterprises (MSEs). Delegates to Working Group I on business law rules joined the insolvency experts in the room for four days of deliberations. The aim was to provide a model law to help govern the position of enterprises that constitute, in many developing and developed countries, 90-95% of all businesses operating in the economy. Recommendations on the principle of a simplified insolvency regime and its treatment of all business debts were readily adopted at the end of the four days' work, though not without a great deal of scrutiny of the proposals. Overall, the right balance was sought between the UNCITRAL Legislative Guide framework and the simplified version that was to be recommended for adoption by UN Member States.

A great number of issues arose that required a resolution through the consensus model that UNCITRAL operates. Delegates were asked to determine, *inter alia*, whether a debt repayment plan as a condition for discharge should be an adjunct to or an outcome of simplified proceedings and whether the overall framework should refer to "competent authorities" or just "courts", with a view to being as embracing as possible with respect to the oversight authority for such proceedings. Other issues canvassed included whether there should be a cap on the number of times proceedings can be extended or instigated, avoiding the possibility of "repeat offenders", whether the principle of a "discharge" should be framed negatively or positively, by being attainable at a reduced cost and with limited formalities (as the World Bank Principles also foresee) and whether, in particular, secured creditors should be immune from any stay provided in such proceedings.

In addition, concerns were raised over what information should debtors have to provide for proceedings to begin or continue and whether the opening of proceedings could be "automatic" on filing or needs to be subject to control by a competent authority. Whether clawback rules needed to be expressly mentioned was also a theme debated in the group. The context for these issues, in particular, was how to avoid fraudulent filings and how to prevent abuse of process. Lastly, touching on the situation of No Income No Asset cases, delegates were of the view that guidance had to be given as to what elements of a simplified regime would be appropriate for these problematic, but increasingly prevalent cases. As such, a number of delegations volunteered to provide technical assistance should any UN Member States require help in transposing one or more of the series of Model Laws that have resulted from UNCITRAL's work since 1997.

INSOL Europe represented in Portugal

Portugal is one of the European countries with the lowest level of representation in INSOL Europe with currently only 24 members.

Accordingly, with the main objective of boosting INSOL Europe's activity in Portugal, Alberto Núñez-Lagos, partner of Uría Menendez, organised the first of a series of meetings that took place during last year. This group has grown in the meantime and it now includes some of Portugal's leading insolvency professionals. Among them are judges, consultants, insolvency administrators and lawyers. This group has held regular meetings in the offices of the most renowned law firms in Portugal.

On 17 January, Nuno Líbano Monteiro (partner and head of the Insolvency and Restructuring team at PLMJ, the largest law firm in Portugal) and Catarina Guedes de Carvalho (a PLMJ managing associate), both members of INSOL Europe, organised a meeting at their offices in Lisbon, which brought together 30 people, including lawyers from the leading law firms, partners from Deloitte and KPMG, and a number of top insolvency administrators.

The speakers were João Rodrigo Santos, CEO of Athena Equity Partners and Prof. Catarina Serra, a well-recognised academic the area of insolvency, judge of the Supreme Court of Justice and also a recognised member of INSOL Europe, in the Judicial and Academic Forum, and also co-editor of Eurofenix.

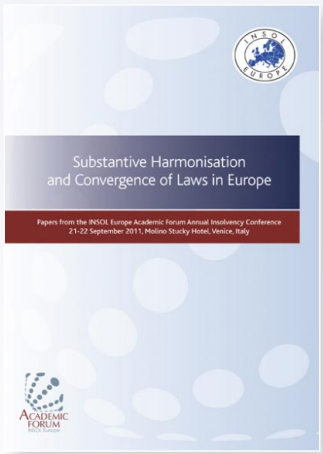
On the agenda was a discussion of the role of venture capital funds in the restructuring of companies and the implementation of Directive (EU) 2019/1023, on preventive restructuring

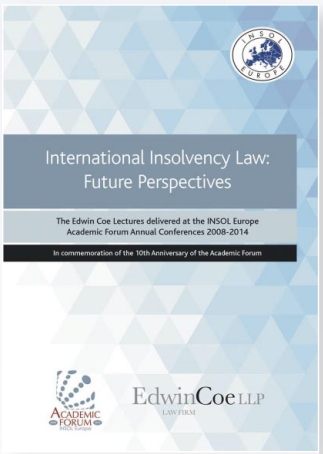
frameworks and on discharge of debt and disqualifications. A decision was also taken to make a commitment to the INSOL Europe group working actively to get the legislature to implement this Directive in Portugal.

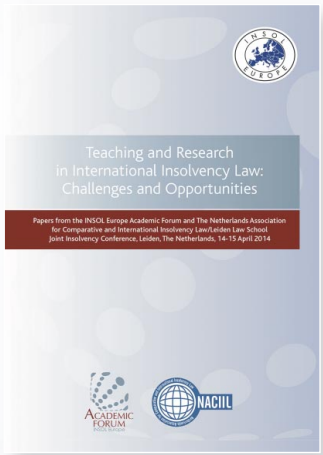
This group is planning to organise further initiatives to bring greater dynamism to the activities of INSOL Europe in Portugal.

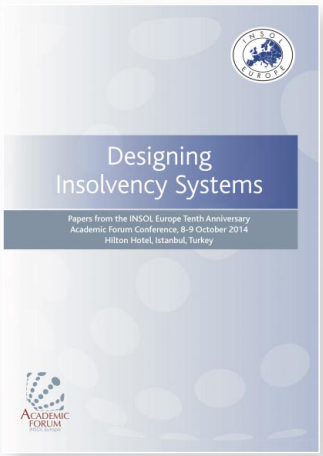
INSOL Europe Technical Series Publications

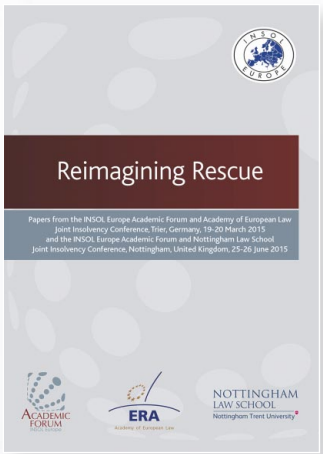
INSOL Europe are pleased to announce further additions to the current Technical Series, arising from events organised by INSOL Europe. The publications contain papers delivered by speakers and panellists at those conferences. Ancillary texts (draft laws and rules) debated at the conferences are also included. The texts form a comprehensive report of the conferences and contain accounts of recent research in the insolvency field that will be useful for academics and practitioners alike.

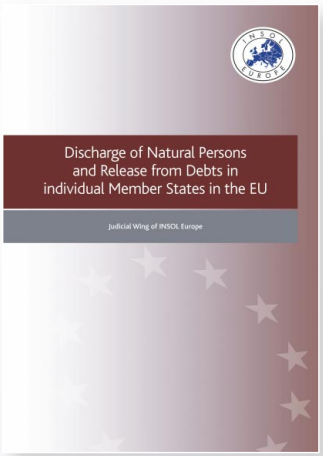


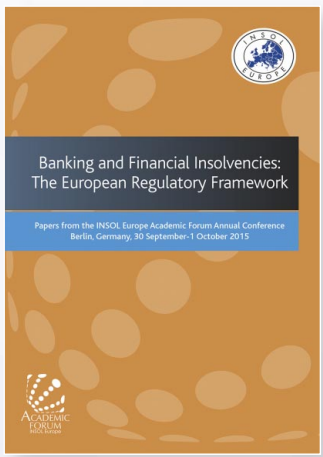


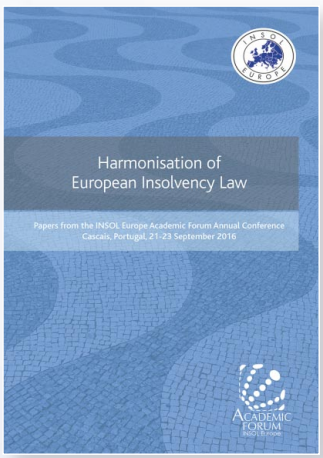


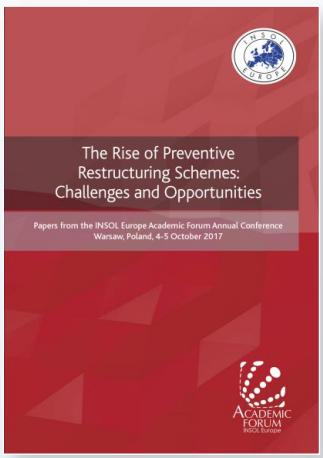


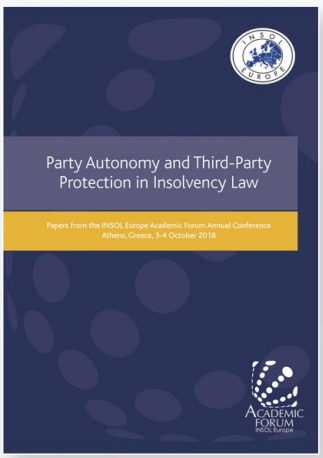












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This new section of ***eurofenix*** will bring you the most relevant news in the field of insolvency tech and digital assets. To contribute an article to a future edition, please send your proposal to: ***insolvencytech@insol-europe.org*** or the individual Chairs:
Dávid Oršula ***david.orsula@bnt.eu***
José Carles ***j.carles@carlescuesta.es***
Laurent Le Pajolec ***lpa@exco.pl***

Cyber risks, corporate responsibilities and international challenges

LUDOVIC VAN EGROO
Institut d'Etudes Politiques, Lille, France

Cyber risk[1] is increasingly present, with impacts that are not clearly identified, but very real and with potentially heavy consequences for a company's activities.

In the current context, interstate tensions in the cyber space are ever growing and the number of collateral victims – human and industrial – is increasing. As an illustration, the NotPetya malware, which originated from Ukraine and spread around the world, transited via widely used accounting software in Ukraine.

Cyber risks highlight the need to clarify the relationship between the law of war and the law of insurance covering claims and risks.

Potentially very heavy impacts, financially as well as humanely: An act of war?

In 2016, the North Atlantic Treaty Organization (NATO) wrote in article 5 that acts of state-sponsored cyber-attacks are acts of war. The UN characterises such a war as an "attack on computer systems carried out with malicious intent".

The origin and reasons for the attack can also be summed up in the questions who is attacking and why.

"Unfortunately, when you are being attacked in cyber space, the two things you often do not know are exactly who is attacking you and why. It is not that everything can be defined as a cyber-war, it is that we are increasingly seeing war-like tactics used in broader cyber conflicts. This makes defence and the national cyber-defence policy difficult."[2]

On the side of private actors, awareness of the need to cover this risk is real, as is the need to identify the limits and perimeters of coverage. In its annual report for 2020, the World Economic Forum places cyber risk among the five major risks for this year, by decoupling damage to infrastructure and the risk of fraud[3] via cyber space. *Allianz* insurer, in its "2020 barometer", places cyber risk as the number one priority for 2020.[4]

For its part, the Federal Reserve of the United States (FED), in its report of January 2020 on the risks weighing on the American economy, identifies cyber risk as a direct threat on the economy because of the interconnections generated by the interbank loans and other relationships with counterparties.[5]

Consequences can be serious for businesses and the economy of a country as a whole also because of the vagueness of insurance regulations, due to the difficulty to identify and then assess costs and losses with a view to their compensation.

For instance, acts of war[6] are among the exclusions from insurance contracts. Therefore, the non-consideration of this risk and the inability to provide security to guarantee it can be a way to argue that cyber risk is considered as an exclusion from the contract.

Furthermore, if cyber risk is reclassified as an act of war, you still need to know what it covers. The Maritime Insurance Code provides specific rights under the terms of article L172-17: "When it is not possible to establish whether the claim originates from a risk of war or a risk of sea, it is deemed to result from a sea event."[7]

By extension, a cyber-attack whose origin cannot be established will fall under the code of a disaster event, which is covered by insurance.

The legal vagueness associated with cyber-type attacks could generate a conflict between two actors who have no interest to have a conflict, this approach having been theorised as a 'Thucydides' trap[8] by Graham Allison. How can we clarify this problem, which can either be a conflict generator or generate an insurance vacuum for these risks?

Failing to be able to identify the reasons and origins of cyberattacks, the solution is to determine the responsibilities by identifying the breaches, as well as the event giving rise to them.

Professional awareness of a cyber risk

As part of their risk measurement activity, as an act of good management, management teams are responsible for ensuring that these risks do not degenerate into a crisis. The development of cyber risks has the consequence of increasing the responsibilities of companies both in the use of software and in the provision of services by its employees. A company should no longer care exclusively for its interests: it is now called upon to care for others. The conformity of activities gives rise to the concept of "social responsibility".

The *Agence nationale de la sécurité des systèmes d'information* (ANSSI) warns of the responsibility of private actors, a responsibility springing from the lack of security of their Information System (SI) in the same way as the use of company vehicles engages the responsibility of the company.

This warning targets indirect cyber-attacks, also known as bounce computer attacks. These consist in using one or more intermediate systems without the owner's knowledge (IoT / Smartphones, servers, etc.) in order to provide the malicious agent with the possibility:

- to hide the origin of the attack and its identity,
- to saturate the network of the target company and thus to destroy or block its information system (Denial of Service attack. DoS or DDoS), or
- to break into the business by devious means.

The company's ecosystem is of particular interest. Subcontractors, such as service providers connected to the company's IS, or even email correspondence through 'phishing' are at the heart of these vulnerabilities.

Just as a company is legally responsible for the goods and people who serve its activity, it is also responsible for its information systems. Several causes in using digital tools can be described:

- Human error, through negligence or unintentional omission, concerning an update and the maintenance of the IS.
- The attack on the IS, with the consequence of the cessation of activities.
- Loss, theft or leakage of personal or confidential data.
- The security of the IT system of the outsourcing provider.
- The diversion of the means of production and connected objects (IoT) that can serve a larger-scale attack aimed at another company in another sector, or a state service.

The event giving rise to responsibility can thus come from the company's shortcomings in terms of measures to protect it's IS, leading to the diversion of a company's systems and capacities towards another entity.

A regulatory framework to define and manage cyber risk

The GDPR compliance framework imposes the obligation to inform in the event of a data breach, but also the need to improve security devices in order to increase the level of protection and detection (Articles 32, 33, 34 of the GDPR[9]).

Thus, "*companies and organizations are obliged to inform the national supervisory authority without delay in the event of a serious data breach, so that users can take appropriate measures.*"[10]

The NIS Directive notes that the "Network and information systems and services play a vital role in society. Their reliability and security are essential to economic and societal activities and in particular to the functioning of the internal market."[11]

This regulatory framework is also reinforced by ISO standards 27001, 27701 **placing responsibilities on the professionals.**

Conclusion

A 'digital law' should lead to changes in the insurance law, as well as in the definitions proper to the law of war, by incorporating the concept of impacts likely to be identified as acts of war. For insurers, the challenge will be, like in the Maritime Law insurance code, to be able to look for compliance framework cyber security responsibilities and breaches.

For insolvency practitioners, the challenge will be "to carry out all acts necessary for the conservation of the rights of the company facing its creditors and the preservation of the production capacities" (L.622-4 of the commercial Code).

At the same time, the regulatory framework proposes the tools to build the jurisprudence and manage a protean risk generating collateral damage. ■

Footnotes:

1 Definition French Government: "attack on computer systems carried out with malicious intent" https://www.gouvernement.fr/risques/risques-cyber

2 Schneier, B. (2013), "Cyber conflicts and national security", *UN Chronicle*, vol. 50/2, https://doi.org/10.18356/5cbca97a-en.

3 World Economic Forum; "*The Global RisksReport 2020: Insight Report 15th Edition*", January 2020

4 Allianz Risk Barometer, Identifying The Major Business Risks For 2020: https://www.agcs.allianz.com/content/dam/onemarketing/agcs/agcs/reports/Allianz-Risk-Barometer-2020.pdf

5 Federal Reserve Bank of New York; "*Reports Cyber Risk and the U.S. Financial System: A Pre-Mortem Analysis*", January 2020

6 Légifrance, Code des assurances France; Article L121-8,

7 Légifrance, Code des assurances, Article L172-17: https://www.legifrance.gouv.fr/affichCodeArticle.do?idArticle=LEGIARTI000006792318&cidTexte=LEGITEXT000006073984&dateTexte=19760721

8 Graham Allison, 2017 "*Destined for War: can America and China escape Thucydides's Trap?*", Broché

9 Ludovic Van Egroo, "*Le cyber risque: nouveau facteur de défaillance pour les entreprises?*", Eurofenix INSOL Europe, printemps 2017.

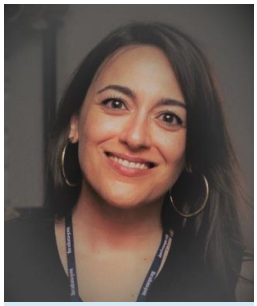
10 European Parlement, "*New EU data protection rules put citizens in control*", (10-03-2017)

11 European Commission, "*Directive (EU) 2016/1148 of the European Parliament and of the Council*"

> **JUST AS A COMPANY IS LEGALLY RESPONSIBLE FOR THE GOODS AND PEOPLE WHO SERVE ITS ACTIVITY, IT IS ALSO RESPONSIBLE FOR ITS INFORMATION SYSTEMS**

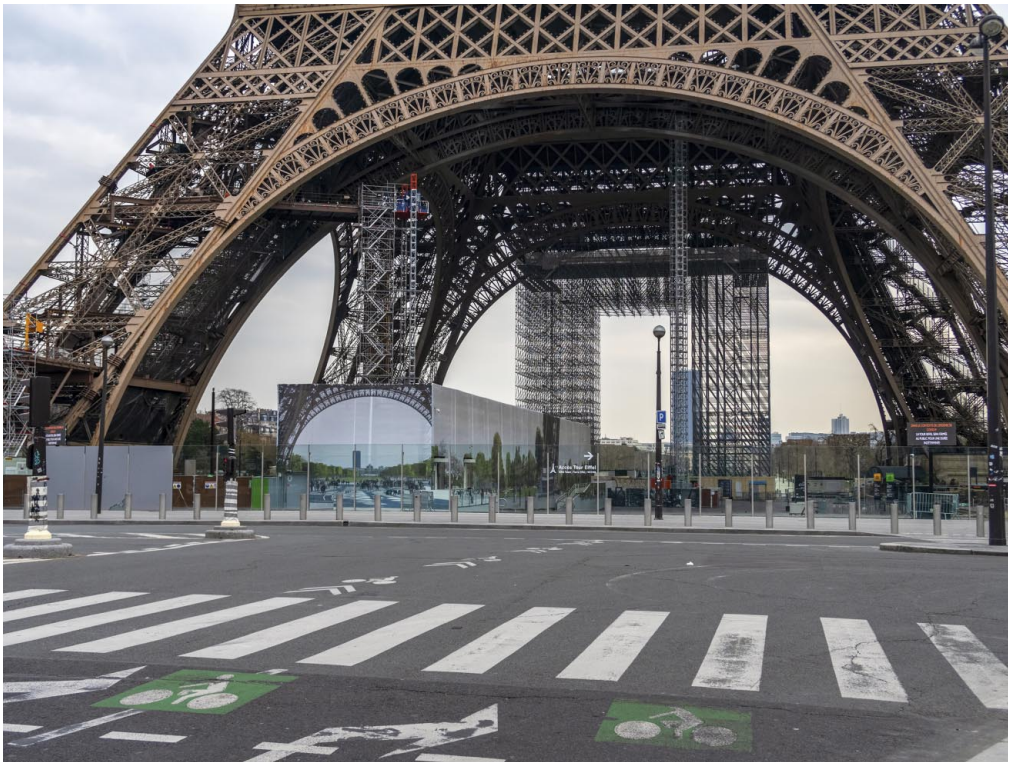
A closer look at...

The impact of COVID-19 on (pre-)insolvency



EMMANUELLE INACIO
INSOL Europe Conference Technical and Training Course Director

> **IF ALL COUNTRIES ARE TRYING TO PREVENT THE SPREADING OF THE COVID-19 WITH MASSIVE NATIONWIDE LOCKDOWNS, PREVENTING THE INSOLVENCY OF BUSINESSES IS ALSO ESSENTIAL**



At the time of writing, our personal and professional life has totally changed since the COVID-19 emerged. INSOL Europe has just announced that many of our events are postponed.

Countries, one after another, imposed restrictions on citizens' free movement and banned travels. Offices, courts, schools, and universities are being closed everywhere… Lockdowns spread across the world, including the US and India. In order to fight this highly contagious respiratory illness, the lockdowns are being extended and reinforced… In many countries, businesses are being closed… Only groceries and pharmacies are allowed to remain open. Italy shut down all non-essential factories and businesses on an attempt to slow down the rate at which COVID-19 is spreading… *Circa* one billion people are now on lockdown across the world…

COVID-19 has a severe impact on lives and on the economy. If all countries are trying to prevent the spreading of the COVID-19 with massive nationwide lockdowns, preventing the insolvency of businesses is also essential.

In the European Union, the European Commission is coordinating a common European response to the outbreak of COVID-19 not only in order to reinforce public health sectors, but also to mitigate its socio-economic impact, in particular to support firms and ensure that the liquidity of our financial sector can continue to support the economy.

The EU State Aid rules enable Member States to take swift and effective action to support companies, in particular SMEs, facing economic difficulties due to the COVID-19 outbreak. Member States can design ample support measures in line with existing EU rules. First, they can decide to take measures, such as wage subsidies,

suspension of payments of corporate and value added taxes or social contributions. In addition, Member States can grant financial support directly to consumers, for example for cancelled services or tickets that are not reimbursed by the operators concerned. Also, the EU State Aid rules enable Member States to help companies cope with liquidity shortages and especially those needing urgent rescue aid and to compensate companies for the damage directly caused by these exceptional circumstances, including measures in sectors such as aviation and tourism.

To bring immediate relief to hard-hit SMEs, the EU budget will deploy its existing instruments to support these companies with liquidity, complementing measures taken at national level. In the coming weeks, EUR1 billion will be redirected from the EU budget as a guarantee to the European Investment Fund to incentivise banks to provide liquidity to SMEs and midcaps. This will help at least 100,000 European SMEs and small mid-caps with about EUR 8 billion of financing. The EU budget will also provide credit holidays to the existing debtors that are negatively affected.

Member States are adopting aid packages to save companies affected by the COVID-19 related economic crisis.

For example, in France, aid measures to companies and employment reach 45 billion euros and an exceptional guarantee scheme to support bank financing for businesses, up to 300 billion euros, will be implemented.

These exceptional aid packages to companies affected by the COVID-19 related economic crisis should however be accompanied with new provisions amending the insolvency law.

For example, in France, an emergency bill of 18 March empowered the government to take, by ordinance, any measure modifying the insolvency law in order to facilitate the preventive treatment of the consequences of the COVID-19 epidemic.

On 19 March, the French commercial courts have been instructed by the Ministry of Justice not to open new insolvency proceedings although the economic survival of many companies is jeopardised by the COVID-19 crisis. In an email addressed to all presidents of commercial courts, the Ministry of Justice explained that the opening of insolvency proceedings does not appear to be urgent and would be unnecessary and ineffective as the courts are now closed and not working as before. This email should be followed by clear measures.

Indeed, in case of insolvency caused by the COVID-19 crisis, all Member States should suspend the obligation to file for insolvency and the correlative directors' liability rules but only if the restructuring of the company is not compromised.

However, commercial courts should be able to open insolvency proceedings using digital means in order to allow companies to pay wages and save employment.

In case of insolvency proceedings already opened, the French commercial courts have been instructed by the Ministry of Justice to rule only on transfer plans in reorganisation or liquidation proceedings, when transfer plans can have a significant impact on employment.

Regarding the confidential and informal procedure of *conciliation*, the Ministry of Justice deems that the time-limits imposed by this procedure are not compatible with the current emergency situation either, as only five months are granted to reach a restructuring plan. On the contrary, the confidential and informal procedure of *mandat ad hoc* which does not impose time-limits, can provide support to companies that have not ceased their activity due to the COVID-19 crisis.

If this incentive to prevention must be welcomed, it is insufficient. Further measures should be announced shortly.

Shouldn't this be the time for all Member States to implement the EU Directive on Restructuring and Insolvency as soon as possible?

Indeed, it appears to be urgent to implement a rescue culture in all Member States, as it is adapted to prevent the insolvency due to the current COVID-19 outbreak.

Preventive restructuring frameworks must be available for debtors to enable them to address their financial difficulties due to the COVID-19 outbreak when it appears likely that their insolvency can be prevented and the viability of the business can be ensured.

In order to enable the debtor to continue his business operations and preserve the value of his/her business during the pending negotiations on a restructuring plan, a general stay of individual enforcement actions should automatically be granted.

Majority-driven restructurings on pre-insolvency proceedings should also be facilitated.

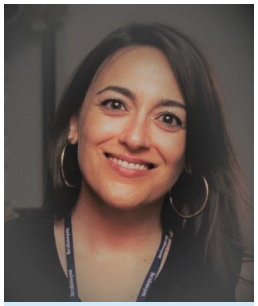
New financing and interim financing should always be protected if its aim is to prevent liquidity problems resulting from the COVID-19 epidemic.

Faced with the COVID-19 outbreak effects on the companies' health, Member States must seize the opportunity to give a harmonised insolvency and pre-insolvency response! ■

SHOULDN'T THIS BE THE TIME FOR ALL MEMBER STATES TO IMPLEMENT THE EU DIRECTIVE ON RESTRUCTURING AND INSOLVENCY AS SOON AS POSSIBLE?

Postponed Event:

Eastern European Countries' Committee (EECC) Conference 2020 in Kyiv, Ukraine



EMMANUELLE INACIO
INSOL Europe Conference Technical and Training Course Director

It is with a heavy heart that we inform you of the decision taken by the Executive of INSOL Europe to postpone the 2020 Kyiv EECC Conference until the autumn, due to the ongoing worldwide outbreak of the coronavirus (COVID-19).

As you can imagine, much deliberation has gone into taking this difficult decision. However, the health and safety of our delegates and team is our top priority. We will continue to monitor all developments related to COVID-19 and will let you know the new date of our Kyiv EECC Conference as soon as possible!

We are convinced that postponing our conference will not interfere with the quality of our technical programme. On the contrary, we will join our efforts to make our future EECC Conference the best event ever and to make our reunion unforgettable after this long period of lockdown!

The Eastern European Countries' Committee has chosen Kyiv, Ukraine for its 2020 EECC Conference hoping that you will be intrigued and that the mouthwatering content of the technical programme of the conference proposed will make you join us!

Our Conference programme was concocted by our Technical Committee members Jean Baron (CBF Associés, France), Sergey Boyarchukov (Alekseev, Boyarchukov and partners, Ukraine), Roman Marchenko (Ilyashev & Partners) and Anton Molchanov (Arzinger) with the attractive title: "**Tectonic Changes in Ukrainian and International Insolvency**".

Denys Maliuska, Minister of Justice of Ukraine has honoured us in accepting to be our keynote speaker and opening our EECC Conference.

> **WE ARE CONVINCED THAT POSTPONING OUR CONFERENCE WILL NOT INTERFERE WITH THE QUALITY OF OUR TECHNICAL PROGRAMME**

The panel titled "**Tectonic Changes in Ukrainian Insolvency Law**" will open the conference and be led by our INSOL Europe Technical Research Co-ordinator Paul Omar (De Montfort University, UK). As the title suggests, this panel will be devoted to the new Ukrainian Code on Bankruptcy Procedures adopted on 18 October 2018 which came into effect on 21 October 2019. The main goal of the Bankruptcy Code is to establish more transparent and efficient insolvency procedures by introducing important changes to insolvency procedures, such as the simplification of the commencement of insolvency proceedings and a better protection of the creditors' rights. The new Code also introduces a completely new legal concept in Ukrainian legal framework: personal bankruptcy. The new procedures are expected to reduce the high ratio of non-performing loans through the financial restoration of individual debtors or the liquidation of their assets. Under the guidance of Paul Omar, Sergey Boyarchukov (Alekseev, Boyarchukov and Partners, Ukraine), Oleg Malinevskiy (Equity, Ukraine), Gordon W. Johnson, (EMA Global, USA), Marc Brisset Foucault (Versailles Court of Appeal, France) and Judge Sergiy Zhukov (Supreme Court, Ukraine) will analyse the main features of the new Ukrainian insolvency law and compare it to the international standards, the EU Directive on Restructuring and Insolvency, and other national legislations.

Then, Oleksander Plotnikov (Arzinger, Ukraine) will open a discussion about the experience gained on recent, large Ukrainian restructuring cross-border cases. Together with Adrian Cohen (Clifford Chance, UK), the panel will explore "**Cross-border restructuring of underwater reefs**" in respect of Ukrainian loans, touching subjects such as the different strategies, the priorities of different stakeholders and the use of English law restructuring tools in Ukraine. Marina Snaith representing the EBRD will also join the discussion and share her experience of insolvency and restructuring in Central and Eastern Europe region among IFIs and international banks.

The third panel of the morning will focus on "**Litigation funding – new opportunities for Eastern Europe**" and will be chaired by Roman Marchenko (Ilyashev & Partners, Ukraine). Together with Ayse Lowe (Bench Walk Advisors, UK) and Marcel Wegmueller (Nivalion, Switzerland), the funding of disputes in Western and Eastern Europe will be compared.

After lunch, "**Recognition and enforcement of foreign insolvency judgments in Ukraine and vice versa**" will be discussed by Olha Stakheyeva-Bogovyk (Hillmont Partners, Ukraine) and Arne Engels (GÖRG, Germany) under the guidance of Gottfried Gassner (Binder Grösswang, Austria).

Andreas Weinberger (NetBid, Germany) will lead a panel titled "**Maximising the outcome of the insolvency public sales: AI vs hammer**". The panel session will focus on the transparent sales procedures introduced by the new Ukrainian Code on Bankruptcy Procedures. Indeed, debtor's assets are sold now through online auctions performed on freely accessible web portals that offer equal access to all potential investors.

The last panel of the conference will be devoted to "**The Practitioner in the field of restructuring and insolvency:**

A New Kid on the Block?" and will be led by Jean Baron (CBF Associés, France). As a matter of fact, the European Directive on Restructuring and Insolvency adopted on 20 June 2019 introduces, *inter alia*, the harmonisation of the regulation of the insolvency practitioners within the European Union, inspired by French standards. It also introduces, alongside the insolvency practitioner, the practitioner acting in the field of restructuring. Mykola Lukashuk, the president of the new self-regulated organisation of insolvency practitioners in Ukraine, Irina Misca (CITR Group, Cyprus) and Roman-Knut Seger (BDO Restructuring, Germany) will compare the Ukrainian regulation of the insolvency practitioners to the European standards and other jurisdictions and engage a discussion on the challenges encountered in this profession in Ukraine and beyond.

The conference will be preceded by an optional pre-conference drinks and dinner at the modern Publicist Restaurant in Kyiv, which seems to have everything needed for the perfect evening: it is a cosy place with a warm atmosphere, it offers great service and delicious food.

A drinks reception offering networking opportunities will close the Conference. After, if you are forever young and simultaneously under 45, we do hope you remain interested in sharing your experiences within the network of the Young Members Group.

Finally, INSOL Europe would like to thank very much indeed our Conference Main Sponsor BDO Restructuring and Conference Sponsors Arzinger, Alekseev, Boyarchukov & Partners Law Firm, NetBid AG, Schiebe und Collegen, bnt attorneys in CEE, Equity Law, PRAVO-Justice and Ilyashev & Partners Law Firm for their generous support of our 2020 Kyiv EECC Conference!

We are also very grateful to organise our Conference in conjunction with the Ukraine Advocate Association (UAA). We thank also our Conference Supporters the International Association of Young Lawyers (AIJA), the Ukraine Advocate Association (UBA) and the Independent Association of Ukrainian Banks (NABU) and our Media Partners Bankrutstvo ta Likvidatsiya and Yurydychna Gazeta for promoting our event in Ukraine.

Our EECC Co-Chairs Radu Lotrean (CITR, Romania) and Evert Verwey (Clifford Chance, The Netherlands) and our EECC Co-ordinator Niculina Somlea (STRIDE, Romania) join me in inviting all our regular followers of the Eastern European Countries' Committee to join us in Kyiv and we would be delighted to meet new delegates. The EECC Conference will bring you knowledge, widen your network, stimulate your innovative self and expand your vision while providing a relaxing and memorable time in this beautiful city. We are very excited about this event and look forward to welcoming you all warmly and personally in Kyiv! ■

> **INSOL EUROPE WOULD LIKE TO THANK VERY MUCH INDEED OUR CONFERENCE MAIN SPONSOR BDO AND ALL OTHER SPONSORS AND SUPPORTERS**

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If you are interested in sponsoring this conference, please contact Hannah Denney: hannahdenney@insol-europe.org

Opening corporate insolvency procedures in Ukraine: Easy-come, easy-go?

Ivanna Artemovych and Anton Molchanov answer the important questions in Ukraine insolvency law

IVANNA ARTEMOVYCH
Junior lawyer, Arzinger, Ukraine

ANTON MOLCHANOV
Counsel, bankruptcy trustee, Arzinger, Ukraine

The questions of *when* – and even a more important one – under *what* conditions – insolvency protection is to be granted to certain debtor companies are pivotal in determining the efficacy of any insolvency case.

By entering insolvency proceedings, a debtor might at least receive such benefits as,

a) stop the possible race of competing creditors against the debtor's assets and
b) obtain the right to court-governed restructuring based on the system of instalments, write-offs and haircuts, usually not accessible in situations when most of the creditors disapprove any plan.

In turn, from the creditors' perspective, a timely access to the insolvency procedures may result in:

a) protecting assets from other, potentially hostile creditors and thereby increasing the creditor's own debt recovery rate; and
b) proceeding with debt-to-equity swaps or other alternative repayment remedies which usually are not actively supported by the debtor in out-of-court liaison.

Hence, an easily accessible and fairly balanced access to insolvency is of crucial importance for both debtors and creditors in any severely distressed financial situation.

International approach in initiating insolvency action

Generally, there is no unified approach used by either EU or non-EU countries in determining grounds for opening of the insolvency proceedings.

The debtor's perspective

Most of the EU countries have already introduced two different approaches for initiation of insolvency procedures upon a debtor's request. The first approach corresponds to the existence of a likelihood (or threat) of insolvency, while the second one requires the company's actual illiquidity or over-indebtedness clearly shown by the cash flow and the balance sheet tests.

In most of the EU countries, for example in The Czech Republic and Estonia, insolvency proceedings may be opened, as shown in the second approach, in case the debtor companies are unable to pay their debts based on either a cash flow test (unable to pay debts as they fall due) or a balance sheet (liabilities outweigh assets) test[1]. In other Eastern-European jurisdictions, like Slovakia, the condition for insolvency is the debtor's inability to pay at least two obligations to more than one creditor after they have been due for 30 days.

Meanwhile, in a number of EU countries, some predictions of a debtor becoming insolvent (illiquid/over-indebted/ceasing to pay its debts) play a more crucial role, thereby constituting a more dynamic approach. Simultaneously with considering the debtor's over-indebtedness, a court should consider whether the debtor will be solvent and able to meet its debts as they fall due during the current and next year, as in Germany, or up to two years in Austria[2]. An imminently-prospective debt is considered in Denmark.

As a rule, debtors are not obliged to take any additional measures (as a mandatory out-of-court restructuring, for example) in order to be granted the opening of insolvency procedures.

The creditor's perspective

From the creditors' perspective, initiating insolvency proceedings against debtor companies might mean to face a more complex process. As a rule, a creditor seeking to initiate insolvency proceedings against a debtor should prove that:

- the debtor owes the creditor a certain amount to be paid (above a statutory threshold, if it exists). Some of the Eastern-Europe countries (as Hungary, Latvia, Romania) require only a minimum amount being owed by debtor. Quite a similar approach is used in the US where the insolvency proceedings may be grounded on either three or more creditors holding non-contingent claims of at least USD 15,325 in total (unless there are fewer than 12 creditors in respect of one debtor), or by one creditor with a non-contingent claim of at least USD 15,325 . In contrast, to open insolvency proceedings in the Russian Federation creditors are obliged to possess a duty-to-pay exceeding RUB 300,000 in default for at least three months.
- the debtor is facing insolvency or imminent insolvency (in either balance-sheet and cash flow form).

Neither of these countries require the initiating creditor to pre-litigate the claim against an insolvent debtor.

Evolution of the criteria for the opening of insolvency proceedings in Ukraine: past, present, future?

For decades, since Ukraine independence, the domestic insolvency legislation faced three major changes and all of them influenced the criteria for the opening of insolvency proceedings in a varying degree.

At the first stage – from 1991 to 2013 – insolvency proceedings could be opened if, after having received a demanding letter or a court writ, the debtor company failed to repay the matured debt within one month.

At the second stage – from 2013 to 2019 – a debtor company might be subject to insolvency procedures if:

- having a matured debt exceeding 300 minimal Ukrainian wages (app. USD 39,000 as of beginning of 2018),
- being in default for at least three months.

What is more, creditors had the additional obligation to pre-litigate the claim, to open court enforcement via a local bailiff and to wait for three months with no full debt repayment.

With the introduction of the very first Ukrainian Insolvency Code (UIC), from 21 October 2019 the third stage of access to insolvency procedures has begun. The UIC introduced a brand-new set of rules for opening insolvency proceedings – and did so by cancelling both the 300-wages debt threshold mandatory for pre-insolvency litigation and the court enforcement of the debt.

At the same time, in order to receive insolvency protection following either a creditor's or its own request, the debtor company must comply with the following rules:

- *There is a likelihood of insolvency (based on either balance sheet or cash flow analysis).*
  The principal criterion is whether repayment of one due debt would trigger inability of repaying other due debts. In parallel with that, a risk of insolvency also exists when the value of a company's liabilities outweighs the value of its assets.
  This raises a huge concern from the part of creditors who normally have no access to the debtors' financial statements (which, apart from joint-stock companies, are not subject to mandatory disclosure in Ukraine). Having no financial statements to analyse means that neither cash flow nor balance sheet insolvency can be proved by any evidence in court. A similar issue arises from not being aware that there are other claims and out-of-balance liabilities.
- *The debtor does not accept the creditor's claim.*
  If during the preliminary hearing in the insolvency proceedings the debtor refuses to recognize the claim (by referring to such facts as the written notice not duly served; goods at the origin of the debt not supplied, the principal contract between the creditor and the debtor being void, etc.), this would automatically lead to refusing the opening of the insolvency proceedings. Quite surprisingly, apart from the deformalisation benefits, this refusal of pre-litigation concerning the triggering debt has become an enormous ground for speculations among dishonest debtors, leading to mass refusals to open insolvency proceedings.

The court considering a request for insolvency proceedings has a key role in determining whether all these criteria are met. Under Article 35 (2) of UIC, this is to be done in a preliminary hearing to be held within 14-20 days from the date of receiving the insolvency petition.

Conclusions

The Ukrainian Insolvency Code's approach in easing access to insolvency proceedings is definitely a huge step towards harmonisation with the EU insolvency standards. Cancellation of the mandatory pre-litigation, which was for a long time a heritage from the post-Soviet legislation, is certainly welcomed by most of the Ukrainian major lenders as an effective time- and cost-saving tool.

At the same time, possible debtors' speculations with deliberate (or even manifestly ill-founded) challenging of the initial claim's merits may still be a huge issue for creditors. The Code's restrained wording is expected to be clarified by the Supreme Court in the nearest future.

Another issue still needing clarification is whether the Code should lay down concrete and precise economic criteria, describing both the threat of insolvency due to indebtedness and actual insolvency – or, at least, make a reference to certain bylaws determining that. This might be of extreme importance to keep insolvency procedures closer to their economic and financial roots rather than to any sort of excessive legalese. ■

Footnotes:

1 Gerard McCormack, Andrew Keay, Sarah Brown and Judith Dahlgreen, Study on a new approach to business failure and insolvency, European Commission/University of Leeds, 2016, page 184

2 Gerard McCormack, Andrew Keay, Sarah Brown and Judith Dahlgreen, Study on a new approach to business failure and insolvency, European Commission/University of Leeds, 2016, page 185

3 Gerard McCormack, Andrew Keay, Sarah Brown and Judith Dahlgreen, Study on a new approach to business failure and insolvency, European Commission/University of Leeds, 2016, page 187

> **THE UKRAINIAN INSOLVENCY CODE'S APPROACH IN EASING ACCESS TO INSOLVENCY PROCEEDINGS IS DEFINITELY A HUGE STEP TOWARDS HARMONISATION**

Asset tracing and recovery in insolvency contexts: An UNCITRAL approach?

Héctor Sbert reports on the recent colloquium in Vienna aiming to kick off a process of debate and analysis among practitioners and academics of different jurisdictions

HÉCTOR SBERT
Partner, LAWANTS Barcelona, Spain

Introduction

On 6 December 2019, the UNCITRAL held, in its Vienna Headquarters, a Colloquium on Asset Tracing and Recovery, under the auspices of its Working Group V (Insolvency Law). More than one hundred professionals dealing with asset tracing and recovery were in attendance (*See Paul Omar's report of the wider meeting in our News section of this edition*).

The purpose of the Colloquium was to kick off a process of debate and analysis among practitioners and academics of different jurisdictions.

They were to assist UNCITRAL in its decision as to whether or not to engage in the preparation of legal instruments dealing with asset tracing and recovery on an international level.

If yes, another important aspect to be determined was the angle that should be used in approaching the problem, in view of its complexity and its different ramifications.

After this first session, it is expected that the debate will continue in future meetings of the Working Group V, the next one being scheduled in New York during the course of 2020.

Asset tracing and recovery: what is it?

Asset tracing generally refers to a legal process of identifying and locating assets or their proceeds; *asset recovery* follows the asset tracing process and can be understood as the process of returning the asset to its legitimate claimant.[1]

While the concepts of asset tracing and recovery are used with respect to fraud and misappropriation conducts, the available instruments and the existing challenges are the same, whether the element of fraud exists or not.

As such, asset tracing and recovery tools are used in different jurisdictional backgrounds in criminal, insolvency or civil proceedings (e.g. family and succession matters), as well as in the enforcement of judgements and arbitral awards, among others.

Challenges arising out of asset tracing and recovery

In spite of being essential for the actual effectiveness of the rule of law, there are great disparities among jurisdictions on the regulation of asset tracing and recovery.

Significantly, many jurisdictions lack the proper tools for asset tracing and recovery.

Also, existing regulations show a stark contrast among civil law and common law traditions on some aspects of asset tracing and recovery, like, e.g., the obligations of the parties, the role of the court, discovery and evidentiary means, third-party obligations, the availability and efficiency of sanctions for non-compliance, etc.[2]

As a consequence, the extraterritorial effect of some asset tracing and recovery measures may prove challenging, and tools used in some jurisdictions may oppose to basic legal principles in others.

Finally, the issues arising around *digital assets* and *digital tracing of assets* (two concepts that need to be differentiated) must also be addressed in our current era of explosive technological change. In this respect, blockchain technology presents huge barriers for tracing and recovering certain digital assets (ad ex., crypto-currency).

The work of international organisations' asset tracing and recovery tools already existing in current international legal instruments

A highlight of the Colloquium was the opportunity to get to know the work being performed by several international organisations active in the different fields where asset tracing and recovery is relevant.

The presentations conducted made clear how the different tools of asset tracing and recovery existing in different contexts intertwine with each other in practice.

In fact, several of UNCITRAL's existing Model Laws already refer to measures that can be used in asset tracing and recovery in insolvency, arbitration and public procurement contexts, including its ongoing work on issues of beneficial ownership.

For example, Article 21 (1) (d) of the Model Law on Cross-Border Insolvency lists among possible relief available to a foreign representative, upon recognition of foreign proceedings, the examination of

> THERE ARE GREAT DISPARITIES AMONG JURISDICTIONS ON THE REGULATION OF ASSET TRACING AND RECOVERY

witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities.

Also, the publications of the *StaR (Stolen Assets Recovery) Initiative* - a partnership between the United Nations Office on Drugs and Crime (UNODC) and the World Bank Group - are of outmost significance in order to spread the knowledge around the best potential combined use of civil, criminal and insolvency asset tracing and recovery tools.

Those publications have such expressive titles as *The Asset Recovery Handbook* (2011), *The Puppet Masters: How the Corrupt Use Legal Structures to Hide Stolen Assets and What to Do About It* (2011), *Public Wrongs, and Private Action: Civil Lawsuits to Recover Stolen Assets* (2015) and *Going for Broke: Insolvency Tools to Support Cross-Border Asset Recovery* (2020),[3] the latter being presented during the Colloquium as a means to exemplify how insolvency proceedings can be used for asset tracing and recovery purposes, in combination with civil and, especially, criminal actions.

In addition, for civil and commercial law matters, the work of UNIDROIT and of the Hague Conference on Private International Law (HccH) was also discussed during the Colloquium.

In particular, *the 2001 Convention on International Interests in Mobile Equipment* (known as the "Cape Town Convention") and its Protocols, covers asset tracing and recovery tools aimed at seizing the leased or financed equipment and arranging for its de-registration and export.

Also, the *Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 18 March 1970* (the "Hague Evidence Convention") allows for evidentiary information on asset tracing to be exchanged by jurisdictions through the issuance of letters rogatory. Practical experiences based on the use of the Hague Evidence Convention were discussed during the Colloquium.

Furthermore, a number of European Union (EU) regulations enable taking evidence and other asset tracing and recovery measures in civil or commercial matters across EU Member States, i.e.,

- *Regulation (EC) No 1206/2001* on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters;
- *Regulation (EU) No 805/2004* creating a European Enforcement Order for uncontested claims;
- *Regulation (EC) No 1896/2006* creating a European order for payment procedure;
- *Regulation (EC) No 861/2007* establishing a European Small Claims Procedure; and
- *Regulation (EU) No 655/2014* establishing a European Account Preservation Order.

However, a uniform approach in the EU-wide application of the measures foreseen in such instruments remains a goal seemingly difficult to attain in some cases.

All in all, the Colloquium offered a comprehensive panorama of instruments currently available and of the common challenges faced in several jurisdictions, particularly in cross-border matters.

The Colloquium also gave the chance to discuss potential ways to move forward in the legal treatment of the topic at an international level with the support of UNCITRAL.

The way forward

The Colloquium finished with a general encouragement by attendees to UNCITRAL to continue its analysis of the topic, in view of undertaking future work in the field of civil asset tracing and recovery.

An electronic survey was answered by attendees at the end of the Colloquium, whereby the majority of them considered that possible work should start in the area of insolvency, and should subsequently be expanded to other areas, like those addressed during the Colloquium.

It will be interesting to observe future developments and specific activities performed in the near future, to be most likely announced at the next meeting of UNCITRAL's Working Group V in New York in July 2020. ■

> **THE COLLOQUIUM OFFERED A COMPREHENSIVE PANORAMA OF INSTRUMENTS CURRENTLY AVAILABLE AND OF THE COMMON CHALLENGES**

Footnotes:

1 See "Uncitral Colloquium on Civil Asset Tracing and Recovery (Vienna 6 December 2019)", *Concept Note*, p. 2, available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/concept_note_20191127.pdf, last accessed 20 February 2020.

2 *Id.*, p. 4

3 Generally available at https://star.worldbank.org/publications?keys=&sort_by=score&sort_order=DESC&items_per_page=10, last accessed on 20 February 2020.

Examinership: The Irish Rescue Process 30 years later

Professor Irene Lynch Fannon reports on the successful history of the process in Ireland which contains all of the key features in the new Directive

IRENE LYNCH FANNON
Professor of Law, University College Cork, Ireland

In 1990, Ireland introduced a rescue process[1] which reflects all of the main components of the Preventive Restructuring Directive (1023/2019) ("Directive").

This procedure was originally contained in a larger scheme of corporate law reform and consolidation designed in the late 1980s,[2] but the rescue process was extracted and passed hurriedly in September 1990 to respond to a crisis in the Irish beef industry. This first outing of what was called the Examinership process[3] was a spectacular success leading to the rescue of the Goodman Group.[4] The remainder of the original legislation was passed later in 1990.[5]

The Examinership process contains all of the key features in the Directive. It provides for a stay of 70 days with the possibility of extension. There is a threshold test where the court[6] must be satisfied that the company is insolvent or likely to be insolvent, that there is a 'reasonable prospect of survival'[7] and that no petition for the winding up of the company persists.[8] There is also a provision for intra- and cross-class cram down and a final confirmation of the plans by a judicial authority, namely the High Court. The legislation also provides for a test of fairness under the rubric of 'unfair prejudice' as also described in Article 11 of the Directive.

> THE EXAMINERSHIP PROCESS CONTAINS ALL OF THE KEY FEATURES IN THE DIRECTIVE

The three phases of the history of Examinership

A radical departure

Over the 30 years since its introduction, the use of the Examinership process can be divided into three periods. In the initial phase, the process represented quite a radical departure from the existing insolvency framework, which had been dominated in the 1980s by significant liquidations and the ever present possibility of receiverships – a significant right granted to secured creditors, which continues to be a feature of insolvency proceedings in most common law countries.[9] In this phase, a number of decisions of the Irish High Court and Supreme Court underlined the radical nature of the process, particularly when it provided for the compromise of existing creditor rights to facilitate new investment. Commentators on the Directive would do well to understand that the intent of a rescue process is to disrupt with a view to rescue and so, it is argued here, that some compromise of existing rights is absolutely necessary for rescue to work effectively.

Decisions in *Re Atlantic Magnetics Ltd.* and *Re Holidair*[10] underlined the important changes to the insolvency landscape introduced by examinerships. In *Atlantic Magnetics Ltd.*, McCarthy J. in the Supreme Court noted that examinership was introduced to provide for the protection of the company and its creditors as a whole, stating that the 'fate of the company and those who depend upon it' should not lie solely in the hands of secured creditors 'to the inevitable disadvantage of those less protected'.[11] In this phase, the courts supported a significant rearrangement of creditors' expectations, including a quite controversial ability of the examiner to disclaim pre-existing contractual agreements, which was subsequently amended in later legislation.[12] In addition, the use of the provisions allowing the examiner to borrow new funds, together with a certification of expenses, was used in a controversial manner to give additional priority to new financiers.[13] Now, however, a distinction is expressly made in the Companies Act 2014 between the certification of liabilities and expenses necessary to secure the survival of the company during the protection period and the question of new financing during the compromise period.

Settling down

In a second phase, following some amendments to the process in 1999,[14] in response to concerns from lenders, the examinership process settled down. That said, the period from 1999 to 2004 was a period of boom, sometimes referred to as the 'Celtic Tiger' years where there was not much need for formal corporate rescue.

Ongoing supervision and the Court's role

In the third phase, following the financial crisis, the importance of examinership again became apparent. A key feature of the process is the ongoing role of the courts which provides the benefits of ongoing supervision. This has become very important in terms of bringing the negotiation of a compromise to successful completion. Nevertheless, this characteristic adds to the cost of the process. In 2013, legislation was introduced to allow for the conduct of examinerships through

a lower court with a view to reducing costs and making the process more attractive to the SME sector. This legislation is now consolidated in the Companies Act 2014. As a strategy its success has been limited.

Also in the third phase, decisions such as *Re Vantive Holdings* and *McInerney*[15], have underlined the role of the court in ensuring that the examinership process is operated fairly. This observation sounds a note of caution regarding the options available in the Directive to adopt a rescue process, which does not include the supervision of a court or administrative authority. That said, the Directive does not envisage that this option is available where cram-down provisions are operated and as described, the examinership process includes cross-class and intra class cram-down provisions.

In *Vantive Holdings*, objecting creditors based their arguments on the threshold test which includes an assessment of whether there is a 'reasonable prospect of survival' of the entity. The court's refusal to allow the appointment of an examiner was extremely significant, not only in relation to the fate of that large construction enterprise, but also in relation to the recognition of the fact that the economy was in crisis and that the Irish property market had collapsed. Kelly J., in refusing to allow the appointment of the examiner, stated that the supporting projections for the company's recovery appeared "*to be lacking in reality, given the extraordinary collapse that has occurred and the lack of any indication of the revival of fortunes in the property market*".[16]

The later decision in *McInerney* similarly underlines the role of the court in approving a final compromise. The tests included in the legislation designed to ensure fairness between all creditors have been further developed.[17]

Going forward

The recognition that corporate rescue is not for all enterprises, nor indeed all situations, has led to a measured response to the ebullient early days of examinership and corporate rescue. A cautionary note to sound, following the 30-year period of examinership, is that, although rescue is an important part of the insolvency framework, it must not be overrated.[18] The policy objectives of rescue are reiterated but tempered with experience. In *Traffic Group*,[19] Clarke J. stated the original aims of examinership as facilitating the continuation of the enterprise "*for the benefit of the economy as a whole and, of equal, or indeed greater, importance to enable as many as possible of the jobs which may be at stake in such enterprise to be maintained*".

However, it was also stated that examinership was "*not designed to help shareholders whose investment has proved to be unsuccessful. It is to seek to save the enterprise and jobs.*"

A similar observation was also made by the same judge, who is now the Chief Justice, in *Re Vantive Holdings*. And similarly, in the later case of *McInerney*, it was observed by the Supreme Court[20] that the legislation is aimed at rescuing '*fundamentally sound businesses… in a manner that is not unfair to any party*'. In that later case, the principles of unfair prejudice were used to ground a refusal to accept a compromise.

In conclusion, the Irish experience as expressed through legislative amendments, but more importantly through an important range of cases and court decisions, provides a rich vein of study for those considering implementation of the Directive and its implications. ■

Footnotes:

1 Companies (Amendment) Act 1990. See generally Lynch, Marshall and O'Ferrall: *Corporate Insolvency and Rescue* (Butterworths, 1996) and Lynch Fannon and Murphy: *Corporate Insolvency and Rescue* (2nd Edition) (Bloomsbury Professional, 2012), Chapters 12 -14. O'Donnell and Nicholas: Examinerships (Londsdale Law Publishing, 2016).

2 Companies Bill 1987.

3 The examinership process is modelled on Chapter 11 of the US Federal Bankruptcy Code, but differs in some important respects. Interestingly, Chapter 11 includes the possibility of appointing a trustee or an examiner and it is from this that the unusual (and somewhat misleading) title of the Irish process is derived.

4 *Re Goodman International* (28 January 1991), HC, Hamilton P. (1963–1993) Irish Company Law Reports 623.

5 Companies Act 1990. Both pieces of legislation are now consolidated in the Companies Act 2014. The Examinership process is contained in Part 10 of that Act.

6 All references to 'the court' in the Irish context means the Irish High Court.

7 The original legislation provided for a prospect of survival. The requirement that this should be a 'reasonable prospect of survival' was added in the Companies (Amendment) Act 1999.

8 Section 509, Companies Act 2014.

9 See generally Companies Act 2014, Part 8 dealing with Receivers and Part 11 dealing with Liquidations. See supra n. 1 Chapters 4-7. See also Picarda: The Law of Receivers, Managers and Administrators (4th Edition) (Bloomsbury, 2006).

10 *Re Atlantic Magnetics Ltd* [1993] 2 IR 561; *Re Holidair Ltd* [1994] 1 IR 416.

11 *Re Atlantic Magnetics Ltd*, p. 578. This observation is cited with approval by Finlay CJ in the Supreme Court in *Re Holidair Ltd*, p. 439.

12 Companies (Amendment) Act 1999. All of these provisions are now included in the Companies Act 2014, Part 10. Sections 524 and 525 allow the examiner to exercise a power to repudiate certain kinds of contracts and terms of contracts. Before 1999, the examiner could repudiate contracts entered into by the company where the performance of the contract would be detrimental to the survival of the company. After 1999, the express power to repudiate was confined to contracts entered into during the period of the examinership. However, the examiner still has the power to repudiate particular types of contracts which might prohibit the exercise of the right to borrow or create additional charges.

13 *Idem*. A practice had emerged whereby borrowing to fund the rescue was certified as expenses, but this practise stopped, after changes made in the 1999 Act regarding priority of costs and following cases such as *Re UMP Dairies Ltd.* [2009] IEHC 34. See further Lynch Marshall and O' Ferrall, *supra* n. 1.

14 Companies (Amendment) Act 1999.

15 *Re Vantive Holdings* [2009] IEHC 384; [2009] IESC 66. *Re McInerney Homes Ltd* [2011] IESC 31.

16 *Supra* n. 15 in the High Court judgement.

17 Under s. 541 of the Companies Act 2014 which effectively re-enacts previous legislation, the court shall not confirm any proposals unless—

"(a) at least one class of creditors whose interests or claims would be impaired by implementation of the proposals has accepted the proposals, and

(b) the court is satisfied that—

(i) the proposals are fair and equitable in relation to any class of members or creditors that has not accepted the proposals and whose interests or claims would be impaired by implementation, and

(ii) the proposals are not unfairly prejudicial to the interests of any interested party, and in any case shall not confirm any proposals if the sole or primary purpose of them is the avoidance of payment of tax due."

18 Indeed, this is borne out by figures comparing the utilisation of insolvency processes in recent years. Deloitte monitors the use of the various insolvency processes. In recent years the number of examinerships is around 3% of all insolvencies as compared with figures for CVLs being over around 70% each year between 2017-2019. See: <www2.deloitte.com>.

19 *Re Traffic Group Ltd* [2007] IEHC 445, [2008] 3 IR 253, para 5.5.

20 *Re McInerney Homes Ltd* [2011] IESC 31.

THE IRISH EXPERIENCE PROVIDES A RICH VEIN OF STUDY FOR THOSE CONSIDERING IMPLEMENTATION OF THE DIRECTIVE

Judgment of 14 November 2018, C 296/17, Wiemer & Trachte – is the CJEU right?[1]

Angel Ganev, Simeon Simeonov, Valentin Bojilov present a case study on a 2018 judgment

ANGEL GANEV
Partner, Djingov, Gouginski, Kyutchukov & Velichkov, Bulgaria

SIMEON SIMEONOV
Senior Sssociate, Djingov, Gouginski, Kyutchukov & Velichkov, Bulgaria

VALENTIN BOJILOV
Counsel, Djingov, Gouginski, Kyutchukov & Velichkov, Bulgaria

The purpose of this article is to present and analyse a 2018 judgment of the Court of Justice of the European Union (hereinafter referred to as the "Court" or "CJEU")[2], delivered upon a referral for a preliminary ruling of the Bulgarian Supreme Court of Cassation and aimed at the interpretation of Article 3(1) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (hereinafter the "EIR 2000")[3] and, more specifically, the jurisdiction of the courts of the Member States to hear cases which derive directly from insolvency proceedings and which are closely connected to them.

The article briefly presents the factual background of the case and the CJEU judgment itself and offers some critical comments on certain serious flaws of the judgment in the light of the principles and provisions of EIR 2000.

Factual background

Wiemer & Trachte ("W&T") is a limited liability company whose registered office is in Dortmund, Germany. Since 2004, W&T had a registered branch in Sofia, Bulgaria. In 2007, the local court in Dortmund, Germany, in the context of opening insolvency proceedings against W&T, appointed a provisional liquidator and ordered that no disposals of assets by the company could be effected without the consent of that liquidator. By two more additional orders, made later on, the German court placed a general prohibition on W&T to dispose of its assets and the provisional liquidator acquired the status of a permanent one. All three orders were rendered and entered into the German register in 2007. After that, amounts of EUR 2 149.30 and EUR 40 000 were transferred from W&T's account by the managing director of the Bulgarian branch to a Bulgarian citizen, to satisfy a 'declaration of travel expenses' and an 'advance on business expenses', respectively.

The appointed liquidator of W&T therefore brought an action against that third person (the "**Defendant**") before the Sofia City Court in Bulgaria, claiming that those banking transactions were invalid because they had taken place without the consent of the provisional liquidator appointed in Germany, i.e. in contradiction to the preservation measures, ordered by the German court under the insolvency proceedings. It sought repayment of the amounts paid, together with statutory interest, to the insolvency estate of W&T.

The Defendant raised two main objections against the claim - that the Bulgarian courts of law *lacked jurisdiction* to hear the case and that the amount corresponding to the advance on business expenses had not been used and had been repaid to W&T on 25 April 2007. The objection of a lack of jurisdiction was rejected by the national court, affirming with *res judicata* that the Bulgarian courts of law have jurisdiction to hear such type of cases.

The case on the merits was initially favoured by the first instance court, but the Court of Appeal set aside that judgment and dismissed the claim as unfounded and unsubstantiated, on the grounds that the insolvency decision had not been published in the Commercial Register at the behest of W&T's Bulgarian branch within the relevant statutory term, so that the interim relief measures could not be presumed to have become known to third parties acting in good faith. Therefore, the court found that the Defendant should be discharged from liability for failing to reimburse the disputed money transfers.

The case was referred for a final review to the Supreme Court of Cassation. As part of its cassation appeal, W&T requested a referral to the CJEU for a preliminary ruling on questions concerning the interpretation and meaning of Articles 18(2), 21 and 24 of EIR 2000 in the light of the requirement to publish the decision for the opening of the main insolvency proceedings.[4]

Quite surprisingly, the Bulgarian Supreme Court itself added to the referral another question, namely whether Article 3(1) of EIR 2000 shall be interpreted as meaning that the jurisdiction of the courts of the Member State within the territory of which insolvency proceedings have been opened to hear and determine an action to set a transaction aside is exclusive[5], although it was indeed the same court that had already ruled very clearly on this issue in

the sense that the Bulgarian courts of law have jurisdiction to hear the case.

CJEU's judgment and reasoning

With a judgment dated 14 Nov 2018 the CJEU decided that "*Article 3(1) of Regulation No 1346/2000 must be interpreted as meaning that the jurisdiction of the courts of the Member State within the territory of which insolvency proceedings have been opened to hear and determine an action to set a transaction aside by virtue of the debtor's insolvency which has been brought against a defendant whose registered office or habitual residence is in another Member State is exclusive*."

As the rest of the questions assumed, contrary to the implications of the answer given to the first question, that an action to set a transaction aside may be brought before a court of the Member State in which the defendant has his registered office or habitual residence, the CJEU found that there is *no need* to answer those questions.

The core argument, set out by the CJEU, was that Article 3(1) must be interpreted as meaning that it also confers *exclusive* jurisdiction to hear and determine actions which derive directly from those proceedings and which are closely connected with them on the courts of the Member State which has jurisdiction to open insolvency proceedings. The Court referred, in support of this thesis, to its previous judgments under the *Seagon*[6] and *F-Tex*[7] cases, concluding that such concentration of jurisdiction was consistent with the objective of improving the effectiveness and efficiency of insolvency proceedings having cross-border effects, referred to in recitals 2 and 8 of EIR 2000.

Critical comments

The overall impression of the judgment is that it not only fails to fulfil the objectives of the preliminary ruling procedure due to the lack of answers to the more substantial questions asked by the national court, but also suggests a quite controversial answer to the main one, related to the exclusivity issue. In fact, the Court ruled on a *hypothetical* question, as it has been already decided by the national courts of law in Bulgaria in a final way.

The CJEU judgment in no way takes into account that the decision of the CJEU under the *Seagon* case should be interpreted in the sense that the competence of the court which opened the main insolvency proceedings is not exclusive, but only *optional*, so the liquidator has the choice to exercise its powers in the State of opening of the insolvency proceedings *or* in any other Member State upon fulfilment of the requirements set out in EIR 2000.

As the Advocate General under the *Seagon* case pointed out, in his opinion[8] the particular features of actions in the context of an insolvency to set a transaction aside show that jurisdiction for deciding such actions is rather *relatively* exclusive. It comes within the powers of the liquidator alone to bring the most appropriate actions in the course of the proceedings for the purposes of protecting the assets as a whole. The scope of the liquidator's power is consistent with the tasks he carries out during the insolvency proceedings, namely to administer or liquidate assets of which the debtor has been divested or to supervise the administration of his affairs. In line with the strategic decisions which the liquidator must take, he/she shall have the right to *choose* between different jurisdictions when it comes to bringing actions to protect the interests of the creditors and to add assets to the insolvency estate.

> **THE SCOPE OF THE LIQUIDATOR'S POWER IS CONSISTENT WITH THE TASKS HE CARRIES OUT DURING THE INSOLVENCY PROCEEDINGS**

> **IT IS VERY IMPORTANT THAT THE RULE OF JURISDICTION SHOULD NOT BE ABSOLUTE, BUT SHOULD DEPEND ON THE FACTUAL BACKGROUND OF EACH PARTICULAR CASE**

Strong arguments in support of the aforesaid position could also be derived from the provision of Article 6 of Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (the "**recast EIR**")[9], which now explicitly deals with the international jurisdiction for actions that are closely connected to insolvency proceedings. The interpretation of Article 6 of the recast EIR, leading to the conclusion of exclusive jurisdiction, should be rejected as this would limit the options of the insolvency practitioner unduly. At least, this could be the case where a particular avoidance action or another similar tool is not provided for by the law of the Member State which would have exclusive jurisdiction as per the CJEU's interpretation. In the latter case it would simply bar an equivalent action in the regular place where jurisdiction would otherwise exist.[10] The aim of both EIR 2000 and the recast EIR to improve the efficiency of insolvency proceedings could be hardly achieved if the insolvency practitioner is not in a position to choose which venue is best in a particular situation.[11]

Concluding remarks

While the CJEU Judgment brings some clarity with regard to the existing gap regarding the precise scope of international jurisdiction in both insolvency and civil/commercial matters, it also raises serious concerns about its further application by the national courts in terms of effectiveness.

Undoubtedly, concentrating different proceedings in one Member State may not always be in the interest of the creditors and the insolvency practitioner (as it seems at first glance) and does not necessarily facilitate the efficiency and acceleration of the insolvency proceedings, quite the contrary. This is why it is very important that the rule of jurisdiction should not be absolute, but should depend on the factual background of each particular case. Most importantly, as stated above, it should depend on the sole choice of the central figure in the administration of insolvency proceedings - the liquidator.

It is to be seen how such controversial judgment will be applied by the national courts on cross-border insolvency matters from now on, taking into account the missing answers to the more important and interesting questions of the referral. ■

Footnotes:

1 The Law Firm of Djingov, Gouginski, Kyutchukov & Velichkov represents the trustee of Wiemer & Trachte both before the CJEU and the Bulgarian courts of law

2 Judgment of 14 November 2018 under case C-296/17 *Wiemer & Trachte GmbH v Zhan Oved Tadzher* ECLI:EU:C:2018:902

3 OJ L 160/1, 30 June 2000

4 The original questions may be found here: https://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=uriserv%3AOJ.C_.2017.256.01.0014.01.ENG

5 ibid.

6 Judgment of 12 February 2009 under case C 339/07 *Christopher Seagon v Deko Marty Belgium NV* EU:C:2009:83

7 Judgment of 19 April 2012 under case C 213/10 *F Tex SIA v Lietuvos-Anglijos UAB "Jadecloud-Vilma"* EU:C:2012:215

8 Opinion of AG Ruiz-Jarabo Colomer, delivered on 16 October 2008 under the *Seagon* case, point 65, available at: http://curia.europa.eu/juris/liste.jsf?language=en&num=C-339/07

9 OJ L 141/19 June 2015

10 See Bork, *R.*, Van Zwieten, K., *Commentary on the European Insolvency Regulation,* (Oxford University Press, First Edition, 2016)

11 ibid. paras 6.37 - 6.38

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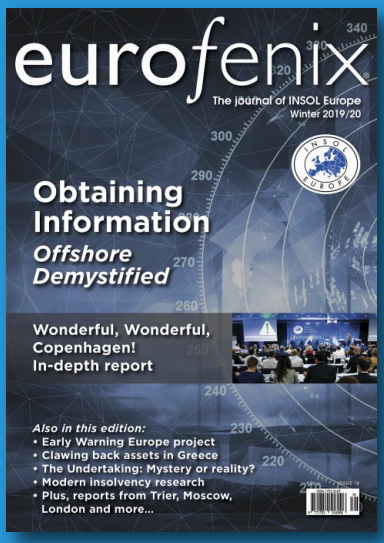

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Recent reforms to insolvency law in Serbia

Djuro Djuric and Vladimir Jovanovic report on changes in Serbia aimed to improve the provisions of the law on Insolvency already in force and introduce new processes

DJURO DJURIC
PhD., Professor, College of Economics and Administration, Belgrade, Serbia

VLADIMIR JOVANOVIC
PhD., Professor, University Business Academy, Novi Sad

In December 2017,[1] and in June[2] and December 2018,[3] the Serbian legislator adopted the amendments to the Law on Insolvency.[4] This was the fifth time amendments were brought to this Law since its entry into force in early 2010, but only the third time since 2017.

The purpose of the amendments presented by the legislator was to improve the provisions of the Law on Insolvency already in force, but also to introduce some new processes and to present the provisions concerning conditions for more adequate and better implementation of the existing legal processes, so as to more effectively carry out the insolvency procedure and improve creditor settlement. The most recent Amendments came into force on 9 December 2018 and the Amendments adopted in June 2018 came into force on 1 January 2019.

More control in the hands of the creditors

One of the main novelties is more creditor control over the appointment of the insolvency administrator. In the future, if an insolvency procedure is initiated at the creditor's request, the bankruptcy petition may also include a proposal for the appointment of an administrator from the list of active insolvency administrators within the jurisdiction of the competent court. The insolvency judge, when deciding upon the appointment of an insolvency administrator, will also consider the creditor's proposal if the insolvency procedure was initiated at the creditor's request and if the request contained such a suggestion.

At the first session of the creditors' assembly, the insolvency creditors, whose claims are likely to amount to more than 50% of the total claims of the insolvency creditors, can approve the election of the appointed insolvency administrator. Should they not approve, they may propose the dismissal of the nominated administrator and the simultaneous appointment of a new insolvency administrator. The insolvency judge will then dismiss the appointed insolvency administrator and, in the same decision, appoint the proposed new administrator from the list of active insolvency administrators within the jurisdiction of the court. An exception exists where a public organisation prescribed by a special law is designated to act as an insolvency administrator (e.g. the Deposit Insurance Agency for bank and insurance companies' insolvency).

Less expensive, but more precise and transparent procedure

The new amendments have reduced the down payment for initiation of the insolvency procedure and provided more precision and transparency. The amount is determined depending on the classification of the legal entity as a micro, small, medium or large one, in accordance with the regulations governing the criteria for classification of legal entities, and may not exceed:

1) RSD 50,000 for micro legal entities;
2) RSD 200,000 for small legal entities;
3) RSD 600,000 for medium-sized legal entities;
4) RSD 1,000,000 for large legal entities.[5]

Secured and pledge creditors

The implementation of the new provisions should improve the position of secured and pledge creditors. It acknowledges the right of the secured creditors to participate in the creditors' committee by appointing one of them. From now on both the secured and pledge creditors have the right to submit a proposal for the lifting of the prohibition on enforcement and collection regarding the debtor's pledged assets for the purpose of settlement of secured claims.

The court will rule on the lifting proposal and, if all prescribed conditions are fulfilled, it will allow separate claims settlement outwith? outside proceedings. These novelties will also relieve the insolvency administrator from having to carry out the sale of the debtor's assets encumbered by a pledge in the case, for example, where, based on the assessment of the value of the pledged asset, it is evident that the entire price will be used to settle the claim of the secured or pledge creditor. In practice, it should also help to avoid situations where there are large numbers of uncollectible loans.

Additional rules on compensation of secured claims, pre-emptive rights and the right to

give consent for a sale below 50% of the appraised value of the assets (in the case of the sale of the legal entity or debtor as a whole) have been introduced in order to improve the position of the creditors in accordance with a comparative assessment of international best practice. The new rules have simplified legal remedies related to the sale and extended the right of access to court for all interested parties, including participants in the sale process. This should provide greater legal security in the insolvency procedure for all participants.

Reorganisation – abolishing the threshold for submitting a plan

Furthermore, from now on, the reorganisation plan may be submitted by the insolvency administrator, the secured creditors, the non-secured creditors, as well as the persons who own at least 30% of the capital of the insolvent debtor, provided the option for bankruptcy has not been made at the first creditors' hearing. Besides this, the deadline for the submission of the reorganisation plan is now clearly prescribed and the possibility for (only one) amendment of the reorganisation plan is clearly stipulated (either under the insolvency or in a pre-packed plan procedure).

Considering current practice, these new legal solutions should eliminate the risk of the long duration of insolvency procedures in which the deadlines for submitting reorganisation plans have often been extended as well as where proposals for reorganisation plans have been repeatedly altered without a final decision on the proposals being made. Thus, the risk of delay to the adoption of a decision on bankruptcy and the realisation of assets (and thus the settlement of creditors) has been avoided. As such, the likelihood of failure of the reorganisation process or its adoption (albeit as only a formality), which is not in line with the aim of the legislator, will also be removed.

Conclusion

Generally, the new amendments are in line with the regulatory reform being implemented in the Republic of Serbia, especially in the area of improving the business environment and accelerating the domestic economy. The new provisions are also in line with the National Strategy for resolving non-collectable loans adopted in 2015 by the Government of the Republic of Serbia. In addition, these amendments to the Law on Insolvency follow the solutions in comparative legislation, taking into account the EU Directive No. 2000/1346/EC of 29 May 2000 on insolvency proceedings and Directive No. 2002/47/EC of 6 June 2002 on financial collateral arrangements, which the Republic of Serbia will be obliged to implement in the coming period as an EU candidate country. However, Serbian insolvency law is still not in line with EU Regulation No. 2015/848/EC of 20 May 2015 on insolvency proceedings (recast) because there is no obligation to comply until accession to the EU.

The amendments to the Serbian insolvency regulation have been adopted in order to direct the insolvency procedure towards becoming a more effective instrument for protection of creditors' rights, but also in order to provide protection of interests and safeguard the position of an insolvent debtor capable of undergoing reorganisation as an instrument of business recovery and fresh start. In that sense, the changes cumulatively introduced have provided creditors with more control over the appointment of the insolvency administrator, reduced the down payment for the initiation of the insolvency procedure and provided more precision and transparency in relation to the reorganisation plan, as well as easier submission of that plan. Consequently, it should increase the attractiveness of the Serbian insolvency procedure and provide a better instrument for collection of creditors' claims. The clearly prescribed deadline for the submitting of the reorganisation plan leaves less space for interpretation and avoids unnecessary delays. However, by introducing a new threshold for its submission, the Serbian legislator might have inadvertently opened the door for possible abuse. ■

> THESE NEW LEGAL SOLUTIONS SHOULD ELIMINATE THE RISK OF THE LONG DURATION OF INSOLVENCY PROCEDURES

Footnotes:

1 Law on Insolvency Amendments of 14.12.2017 (*Official Gazette of the RS*, No. 113/2017).
2 Law on Insolvency Amendments of 08.06.2018 (*Official Gazette of the RS*, No. 44/2018).
3 Law on Insolvency Amendments of 07.12.2018 (*Official Gazette of the RS*, No. 95/2018).
4 Law on Insolvency (*Official Gazette of the RS*, No. 104/09, 99/11 – other. law, 71/12 – CC, 83/14).
5 For comparison: 1 EUR = 117 RSD, Source: www1.oanda.com/currency/converter/.

Steel producer operating in Italy struggles to protect its activities

Giorgio Cherubini and Giancarlo Cherubini report on one of the most debated issues concerning companies in financial difficulties – the case of steel producers Ilva and its environmental impact

GIORGIO CHERUBINI
Founding Partner, EXPLegal, Rome & Milan, Italy

GIANCARLO CHERUBINI
Junior Associate, EXPLegal, Rome & Milan, Italy

Ilva is the largest steel plant in Europe with a factory in Taranto and a century-old history, which began in the early twentieth century on the initiative of a group of industrialists from Northern Italy.

The plant is one of the flagships of the Italian economic boom, giving jobs and creating wealth and employment.

In the eighties the steel market entered into a profound crisis and in 1995 the plant was bought by the steel group Riva and passed into private hands.

Shortly after the purchase by Riva group, the first problems related to environmental pollution caused by the steel plant with its activity began to appear and in 2012 the situation degenerated in an almost irreversible way when the public prosecutor of Taranto informed the Minister of the Environment and the local authorities about the alarming results of the epidemiological report prepared by the Judge for preliminary investigations, which confirmed the very high level of pollution in the area surrounding the Ilva plant, confirming the correlation between this situation and the emissions from the steel plant.

The top managers of the company were investigated for crimes of negligent and intentional disaster, poisoning of food substances, intentional omission of precautions against accidents at work, aggravated damage to public goods and atmospheric pollution.

On 26 July 2012, the entire area of the plants was seized by order of the investigating judge, without faculty of use, and house arrest was ordered for eight people accused of environmental disaster.

In the summer of 2019, the judge who presided over preliminary hearings of Milan acquitted Fabio Riva, previously vice president of the company, from bankruptcy charges. For the magistrate, the Riva family, in the management of the Ilva of Taranto between 1995 and the seizure in 2012, invested over a billion Euros in environmental matters and over three billion Euros for the modernisation and construction of new plants.

The Italian State tried in many ways to allow the continuation of the company's production, which was fundamental for the Italian industry, Ilva playing a fundamental role for the national economy.

For this reason, some ad hoc laws were issued to allow ILVA to circumvent the permitted levels of pollution, allowing the company itself to postpone the terms within which to comply with the environmental standards.

With the Ministerial Decree of 21 January 2015, before difficult financial conditions, an Extraordinary Administration Proceedings was opened and the Board of Commissioners of ILVA S.p.A. was appointed with the aim to restore the company, both environmentally and economically, and then sell it to potential interested buyers.

Extraordinary administration

'Extraordinary administration' means insolvency proceedings aimed at restoring the balance sheet of large commercial enterprises through the continuation, reactivation or conversion of entrepreneurial activities.

To be admitted to this kind of proceedings, the company shall comply with certain competing requirements, such as:

- having the insolvency status;
- employment should be equal to a number of employees going to 200 for at least one year, and debt values should not be lower than 2/3 both of the total assets of the balance sheet and of the revenues from sales and services in the last financial year. In case of a group of companies these requirements can be assessed overall; and
- concrete recovery possibilities, consisting of the real chance of consolidating the company alternately within one year through a programme for the sale of assets and/or business complexes, or within two years through a programme of economic and financial restructuring of the company.

Extraordinary administration can at any time be converted into bankruptcy proceedings if it appears that it can no longer follow the authorised programme or when, at the end of the proceedings, this has not been usefully implemented.

After the investigation launched in 2012 and after initiating the procedure of external administration of the company, the State launched an international tender, won by the French-Indian industrial giant Arcelor Mittal.

Environmental issue

Ilva is one of the most serious health and environmental disasters in Italian and European history.

The estimates of the experts appointed by the Taranto prosecutor's office count that many people died due to emissions, in particular from cardiovascular and respiratory complications.

In 2010, according to court reports and Ilva's declarations, more than four thousand tons of dust and eleven thousand tons of nitrogen dioxide and sulphur dioxide were released into the surrounding environment.

According to the data of the National Inventory of Emissions and their Sources, in recent years, 93% of all dioxin produced in Italy has been released into the atmosphere in Taranto, in addition to 67% of lead.

According to estimates by the National Asbestos Observatory, among the workers employed in the ex Ilva steel plant in Taranto, 500% more cases of cancer than the average of the general population of the town, not employed in the plant, are recorded. This is the latest estimate, published in 2018, confirming the alarming data released today by the Statistical Observatory of Labour Consultants, according to which the worst national statistics for the absolute number of carcinogenic diseases deriving from work activity is precisely in Taranto, with 70% of the cancers reported in relation to the metalworking sector.

The liaison with Arcelor Mittal

In January 2016, the tender notice was published with an invitation to apply in acquiring Ilva. The deadline was set at 30 days and the extraordinary commissioners chose the French-Indian group Arcelor-Mittal.

Arcelor Mittal asked as a *conditio sine qua non* for signing an agreement with the Italian State, to take advantage of a so-called "*Criminal Shield*", to protect itself from any criminal liability due to the behaviour of previous managements.

This provision was structured specifically to guarantee legal protection for both company managers, commissioners and future buyers, from any liability arising from the implementation of the factory environmental plan. Avoiding that, by implementing the environmental plan, regulated by a *Decree of the President of the Council of Ministers* of 2017, the commissioners or future buyers of the steel centre could not be involved in judicial vicissitudes deriving from past behaviour.

It was clear to the Italian government that no entrepreneur would be interested in running a company with a similar history of environmental pollution without having a minimum of safeguards.

In 2018 Arcelor-Mittal took the reins of the former Ilva with the aim of revitalise the iron and steel centre of Taranto, a very difficult goal to achieve, given the difficulties suffered during the years and the environmental disasters caused.

However, the new government composed of the Democratic Party (*Partito Democratico*) and the 5-Star Movement (*Movimento 5 Stelle*) did not share the position of the previous governments on the "*Criminal Shield*" and on 23 October 2019 voted for its elimination.

In relation to this step back from the Italian government, Arcelor Mittal, accusing the Italian government of not having respected the agreement made, filed an application with the court to be recognised as legitimate to the termination of the contract.

Subsequently, the extraordinary commissioners and Arcelor Mittal reached a basic agreement to negotiate the revision of the original contract for the plants and for the financial relaunch operation of the iron and steel centre based in Taranto. It is an agreement to renegotiate the terms of the commitment of the French-Indian multinational in the plant, in an attempt to a judicial dispute.

Negotiations are still ongoing despite strong opposition and scepticism from the trade unions. ■

ILVA IS ONE OF THE MOST SERIOUS HEALTH AND ENVIRONMENTAL DISASTERS IN ITALIAN AND EUROPEAN HISTORY

The Georgian Insolvency Law is on the move

Nana Amisulashvili reviews the recent changes in Georgia, expected to completely change the system

NANA AMISULASHVILI
Business Rehabilitation and Insolvency Practitioners Association, Georgia

Georgia's insolvency system is facing significant changes today. The new draft law is ready to be enforced and will completely change the system.

The current Insolvency Law of 2007 is appreciated as primarily oriented towards a rapid liquidation of insolvent corporate and private entrepreneurs' businesses with the subsequent distribution of remaining assets amongst the creditors. The number of insolvency cases dealt with by the local courts is fairly limited, most probably due to insufficient assets to cover the costs of the insolvency procedure. The law left many aspects of insolvency procedures either unclear or unregulated.

The need for reform

In 2016, an Insolvency Reform Sustainment Plan (hereinafter – the "Plan") was created within the framework of the project named Insolvency Reform Advocacy Campaign, implemented by The Association of Law Firms of Georgia (ALFG) and supported by The United State's Agency of International Development (USAID) project, named "Governing for Growth" (G4G).

The "Plan" provided an overview of the most significant problems and gave recommendations.

The most significant problems were:

- unreasonably high standards for commencement of proceedings;
- unusual long period before commencement of rehabilitation/reorganisation or bankruptcy/liquidation proceedings governed by the National Bureau of Enforcement, leaving no real chance for business;
- collateral issues, such as mortgage and pledge negated because all secured creditors, notwithstanding the ranking of their security right, were placed within the same rank, horizontally;
- no provisions for the rules of realisation of assets that have short shelf lives, are easily perishable or need to be sold immediately for any other objective reason, because the realisation of the assets was feasible only through public auction, which, in certain scenarios, diminished the recoverable amount and damaged the interests of creditors; and
- the rehabilitation plan could only be approved by the secured creditors, with 100% of votes.

> **THE NEW DRAFT LAW OFFERS MANY INCENTIVES FOR BUSINESS, WITH FLEXIBLE AND FAIR MECHANISMS MEANT TO ENCOURAGE EARLY APPLICATION**

The new draft law, developed on the initiative of the Ministry of Justice of Georgia, offers many incentives for business, with flexible and fair mechanisms meant to encourage early application. It also contains several truly bold new recommendations.

Commencement

Significant changes have been made regarding the commencement of insolvency proceedings. Due to the fact that the transitional period (trusteeship) appeared to be an obstruction, the new draft law will make rehabilitation/reorganisation or bankruptcy/liquidation proceedings accessible directly, without any such period. Also, procedures for opening the proceedings have become simpler and more easily accessible to creditors.

Secured creditors' rights

The mechanism of collateral will work in compliance with the principles and regulations of the Civil Code, meaning that the content of the right will not be materially altered due to the opening of the insolvency proceedings. Thus, the rights of secured creditors will be protected. In parallel, insolvency assets have been divided into two pools, thus creating an independent pool for unsecured creditors from assets that are not the object of security.

Approval of the rehabilitation plan

All unsecured creditors will have the right to vote. Secured creditors shall not have voting rights, except where, according to the rehabilitation plan, conditions of the agreement between debtor and secured creditor are to be changed. Nonetheless, secured and unsecured creditors are to vote on the rehabilitation plan separately. Also, a new cram-down mechanism has been inserted in the draft, which is a novelty for the Georgian insolvency system. Moreover, the court shall approve the rehabilitation plan, considering different circumstances and also the fact of whether compliance with the legal procedure for calling the creditors' meeting has been respected.

Deadline for and effect of the approval of the rehabilitation plan

The draft law strictly provides a maximum 12-month period for approving the rehabilitation plan. The automatic liquidation procedure will be initiated if the set deadline has been missed. This mechanism aims to motivate every participant and especially those in charge of the effectiveness of the rehabilitation plans. When the rehabilitation plan has been approved the official insolvency proceedings are closed. Under the current law, the formal insolvency procedure covers not only the improvement of the plan, but also the whole period of implementation.

Realisation of assets

The draft law provides a variety of mechanisms for the realisation of assets. In parallel, it contains safeguards for ensuring that the right to choose will not be abused in the process.

Trustees

A very dynamic political decision was made regarding the management of insolvent businesses. According to the draft law, this will be wholly entrusted to an experienced business manager (an insolvency practitioner) from the outset. As a result of this approach in the draft law, the first professional body of insolvency practitioners was founded by leading experts in this field. The Business Rehabilitation and Insolvency Practitioners Association's (BRIPA) purposes are to play the leading role in the regulation of profession, to promote the development of practice and to keep high professional standards in the insolvency system.

Ranking

The draft law offers a completely new ranking, in which the Revenue Service as a creditor is relegated to a lower priority so as to give a new chance to the business.

A new voluntary arrangement procedure

This is the most important change offered by the draft law, a new third procedure within the insolvency system, quite similar to pre-insolvency restructuring schemes. A voluntary arrangement is an agreement between the insolvent-to-be or already insolvent debtor and the creditors. The legal consequence of a voluntary arrangement is the full and irrevocable discharge of all liabilities of the debtor existing as at the moment of approving the voluntary arrangement and included in the arrangement. The procedure also includes a special moratorium. For the voluntary arrangement, it is not mandatory to meet the following conditions.

(a) To adhere to the proportionality principle throughout a distribution among non-secured creditors, in respect of those non-secured creditors who agreed to the voluntary arrangement, if the voluntary arrangement provides for a distribution;
(b) To identify creditors' claims and create a list of creditors in accordance with the rules established by the law. For the purposes of a voluntary arrangement, the debtor and the nominee of the voluntary arrangement can compile a list of creditors with simplified rules, which will fully allow the creditors to submit their claims.

A voluntary arrangement will be approved through a 75% majority of votes of voting creditors present at the meeting, provided they are not parties related to the debtor. A voluntary arrangement or a modification thereto may not be approved if:

(a) it affects the secured creditor's right of enforcement, except in cases when that creditor agrees to such a provision;
(b) a non-secured creditor is satisfied earlier than a preferential creditor, unless the preferential creditor agrees to such a provision; or
(c) a preferential creditor, in comparison to other preferential creditor(s), is satisfied in violation of the principle of proportionality, unless such satisfaction is approved by the relevant creditor.

Summary

These reforms are very welcome. Handing over insolvency management to private practitioners together with removing the transitional period for commencement and deadlines for approval of the rehabilitation plan are all measures that will drastically reduce the time and expense of insolvency proceedings. The new procedures and ranking system should serve as incentives for businesses to apply earlier for rescue. Thus, this brand new and innovative law will likely play a significant role in the development of the Georgian economy. ■

THE NEW PROCEDURES AND RANKING SYSTEM SHOULD SERVE AS INCENTIVES FOR BUSINESSES TO APPLY EARLIER FOR RESCUE

Sales incentives and setoff: Using rebates to recover receivables

David H. Conaway outlines the key setoff concepts and how they are applied in Chapter 11 and Chapter 15

DAVID H. CONAWAY
Attorney at Law, Shumaker, Loop & Kendrick, LLP

> MANY GLOBAL GROUPS OF COMPANIES DO BUSINESS THROUGH ONE OR MORE AFFILIATED LEGAL ENTITIES ... REQUIRING A "TRIANGULAR" SETOFF WITH THEIR CUSTOMERS

In assisting companies doing business with their customers and the supply chain, we have noted that companies increasingly propose to their customers incentives to purchase goods, often in the form of rebates and discounts.

There may be circumstances where setting off the obligation to pay such incentives owed *to* a customer against the customer's accounts receivable owed *by* the customer is necessary to avoid or reduce risk. The need for this "remedy" is exacerbated during periods of financial and market uncertainty.

Moreover, many global groups of companies do business through one or more affiliated legal entities, even though there is one corporate identity, requiring a "triangular" setoff with their customers.

Knowing the rules of setoff and how they are applied in Chapter 11 and Chapter 15 is essential.

Important Chapter 11 and Chapter 15 decisions on setoff

In January 2020, the Delaware Federal District Court affirmed a Delaware Bankruptcy Court ruling that "triangular" setoffs are not enforceable in Chapter 11. The rulings arise in the *Orexigen Therapeutics, Inc*. Chapter 11 case, where McKesson Corporation, Inc.'s ("McKesson") motion to allow a triangular setoff was denied. McKesson has appealed to the Third Circuit Court of Appeals, which will likely affirm the lower court rulings.

In the Chapter 15 proceedings of *Awal Bank BSC*, the London-based administrator of the Bahrain bank sued the HSBC Bank USA, one of Awal Bank's largest creditors. The issue in dispute was HSBC's setoff of almost $13 million of Awal Bank's money on deposit with HSBC against obligations owed to HSBC by Awal Bank, arising under a $75 million overdraft facility provided by HSBC. This is an import issue for a foreign administrator involved in U.S. Chapter 15 proceedings because Chapter 15 does not expressly provide for setoff as a remedy available to foreign representatives. The *Awal Bank* case addressed this issue.

Key setoff concepts

1. Setoff is a contractual or equitable right that allows entities that owe each other money to apply their mutual debts against the other, thereby avoiding the absurdity of making A pay B when B owes A (*Citizens Bank of Maryland v. Strumpf*, U.S. Supreme Court 1995).

2. Section 553 of the Bankruptcy Code does not create a federal law right of setoff; it merely recognises a right of setoff that exists under a U.S. state law. There must be a contractual or U.S. state law setoff right in the first instance.

3. Section 553 allows a creditor to offset "mutual" debts owed by the creditor and the debtor. Also, the mutual debts owed by the creditor and the debtor must both arise pre-petition, or both arise post-petition.

4. Section 553's mutuality requirement means that only obligations between the same legal entities may be setoff.

The "mutuality" requirement was the critical issue in the McKesson case. Orexigen was a biopharmaceutical company that manufactured Contrave, an obesity drug. Orexigen entered into a sales and distribution agreement with McKesson. Orexigen entered into a second contract with a McKesson subsidiary (the "Subsidiary") which managed Orexigen's loyalty script program. Customers could earn loyalty price discounts, which the Subsidiary paid. Orexigen was obligated to reimburse the Subsidiary for the discounts paid. When Orexigen filed Chapter 11, McKesson owed Orexigen about $7 million for goods purchased, and Orexigen owed the Subsidiary about $9 million for discounts paid.

McKesson filed a motion seeking court permission to exercise its setoff remedy, relying on the following provision in its contract:

"*Notwithstanding anything to the contrary in this Agreement, each of McKesson Corporation and its affiliates is hereby authorised to set-off, recoup and apply any amounts owed by it to Manufacturer's [the Debtor's] affiliates against any all [sic] amounts owed by Manufacturer or its affiliates to any of McKesson Corporation or its affiliates, without prior written notice[.]*"

As indicated above, the Delaware courts ruled against

McKesson's attempt to setoff these amounts. In doing so, the Delaware Bankruptcy Court noted that "mutuality is strictly construed against the party seeking setoff" (*SemCrude, LLP,* DE Bankr.Ct. 2009), and that the triangular setoff contract provision was not enforceable.

With setoff, McKesson could have setoff the $7 million it owed against the $9 million accounts receivable, reducing its general unsecured claim to $2 million. Without setoff, McKesson owed $7 million to the debtor's estate, and its Subsidiary had a $9 million general unsecured claim against Orexigen in Chapter 11.

There may be solutions to structure transactions to create mutuality, such as joint and several obligors or cross-corporate guarantees.

Or, for a material contract, why not use the same legal entities? Presumably there were business, accounting, or tax reasons to bifurcate the two McKesson contracts. However, McKesson could have been the counterparty to the loyalty script agreement and delegate its performance to the Subsidiary. In delegation of performance agreements, the original party normally remains obligated.

5. Section 506 of the Bankruptcy Code, "Determination of secured status," provides that the claim of a creditor that is subject to setoff under Section 553 is a **secured** claim to the extent of the amount subject to setoff.

For example, in the McKesson case, McKesson's $9 million claim would have been a secured claim of $7 million, and a general unsecured claim of $2 million.

6. Section 553(b) provides that a debtor may recover a pre-bankruptcy setoff where the creditor improved its position with respect to any "insufficiency" between the mutual debts between the parties within the 90 days prior to the bankruptcy filing. "Insufficiency" is defined as the "amount, if any, by which a claim against the debtor exceeds a mutual debt owed to the debtor by a holder of such claim." Because of the uncertainty created by this provision, creditors are well-advised to consider not exercising the setoff right during the 90-day period. Rather, wait until after the Chapter 11 filing and file a motion for relief from stay to exercise the setoff.

Though relief from the Section 363 automatic stay is required, courts will normally grant such relief if the requirements are met.

7. Outside of Chapter 11, triangular setoff provisions in contracts are generally enforceable under state law.

8. Recoupment. Creditors should take note of setoff's first cousin, recoupment. The key differences are that: (a) recoupment obligations can be pre-petition or post-petition obligations, (b) the obligations to be recouped must arise out of the same transaction (which is not required for setoff), and (c) exercise of recoupment does not require relief from stay.

Setoff under Chapter 15

As indicated above, in the *Awal Bank* case, HSBC experienced a "self-help" setoff of $13 million in an HSBC deposit account against obligations owed to HSBC.

On 30 July 2009, the Central Bank of Bahrain placed Awal Bank into administration in Bahrain. On 30 September 2009, the administrator for Awal Bank filed a Chapter 15 petition for recognition in the Southern District of New York. On 27 October 2009, the Bankruptcy Court entered an order recognising the administration in Bahrain.

On 24 February 2011, on behalf of Awal Bank, the administrator filed adversary proceedings against HSBC in order to recover the allegedly improper setoff under Section 553(b) of the Bankruptcy Code. HSBC filed a motion to dismiss the Awal Bank complaint, primarily because of its contention that Section 553(b) is not applicable in this case.

Specifically, Section 553(b) provides for the recovery of setoffs exercised within 90 days prior to the filing of a petition. The setoff was exercised within 90 days of the filing of the Chapter 15 petition. However, HSBC contends that the 90-day period should be calculated based upon Awal Bank's Chapter 11 proceedings (the history of the two proceedings is for another day), which was filed beyond 90 days of the exercise of the setoff.

In addressing HSBC's motion to dismiss, the Bankruptcy Court addressed the question of whether the Chapter 15 "tool-kit" of a foreign representative includes the ability to recover setoffs under Section 553(b). As most practitioners are aware, Section 1521(a)(7) of the Bankruptcy Code expressly excludes from a foreign representative's "tool-kit" avoidance powers for recoveries of transfers that constitute a preference (Section 547) or a fraudulent conveyance (Section 548). However, Section 1521(a)(7) does NOT expressly exclude Section 553(b).

The Bankruptcy Court ruled that the plain meaning of the statutory language must ordinarily govern when it does not lead to an absurd result. The Bankruptcy Court recognised a key distinction between Section 553(b), which provides for "recovery" of property, and Section 547 and 548, which provide for "avoidance" of transfers. Transfers avoided under Sections 547 and 548 are recovered under Section 550. The Bankruptcy Court concluded that applying Section 553(b) in Chapter 15 cases is a logical and appropriate result. Bottom line, the Bankruptcy Court agreed with Awal Bank, and denied HSBC's motion to dismiss. ■

THERE MAY BE SOLUTIONS TO STRUCTURE TRANSACTIONS TO CREATE MUTUALITY, SUCH AS JOINT AND SEVERAL OBLIGORS OR CROSS-CORPORATE GUARANTEES

In this section of *eurofenix* we bring you short updates about new laws, changes in legislation and insolvency related cases from our members' jurisdictions. To contribute to a future edition, please send your proposal to: *paulnewson@insol-europe.org* limiting your article to approx. 600 words.

Latvia: Compulsory liquidation of empty and high-risk companies on the rise

EDVĪNS DRABA
Senior Associate,
Sorainen, Latvia

Liquidation of companies has been at high tide in Latvia for the last two years. The tally for 2018 reached approx. 21,000 entities, thus setting an all-time record, while the statistics available for 2019 show that more than 18,000 companies have been liquidated in the first seven months alone.

One of the main reasons for the recent surge in liquidation of businesses is the increased activity of the tax administration and the Latvian Register of Enterprises winding up empty companies that have ceased trading (or have never traded since their formation) or companies which have violated certain obligations towards the state.

The tax administration is empowered to issue a decision on the compulsory liquidation of a company if the company has failed to submit annual or other financial reports or if its economic activity was suspended and the company has failed to rectify deficiencies at the tax administration's request. Furthermore, the Register of Enterprises, which is the institution in charge of maintaining the Commercial Register and other registers, may also issue a decision, where the company has not had directors with valid rights to represent it for more than three months or where the company cannot be reached at its legal address. In June 2019, the Register of Enterprises was also given powers to commence liquidation of a company in case the company has failed to provide information on its beneficiary owners. As a matter of policy, the Register of Enterprises has been encouraged to use these powers.

> NON-ACTIVE BUSINESSES ARE FREQUENTLY USED IN CRIMINAL ACTIVITY AND THUS POSE RISKS

The increase in activity mentioned should be perceived in the light of the recent report on Latvia produced by the monitoring body of the Council of Europe tasked with the evaluation of anti-money laundering and counter-terrorism financing (AML/CTF) measures, known as MONEYVAL. According to the report published in 2018, several weaknesses were identified in the field of AML/CTF in Latvia that needed to be rectified by the end of 2019. Until then, Latvia has been placed under the so-called "enhanced follow-up" procedures. As a result, a comprehensive plan aimed at rectifying the deficiencies was adopted by the Latvian Cabinet of Ministers in October 2018.

One of the weaknesses identified in the MONEYVAL report was the existence of high-risk companies that had not disclosed their beneficiary owners. The plan aims to address this deficiency by excluding such businesses from the Commercial Register. Furthermore, the plan notes that non-active businesses are frequently used in criminal activity and thus pose risks. As such, the exclusion of those businesses from the Commercial Register is desirable. ■

Pre-packs in Poland: Developments and amendments to Bankruptcy Law

There have recently been important changes to Bankruptcy Law in Poland. They mainly regard consumer bankruptcy but they also had an impact on other areas of insolvency. The pre-packs (pre-packaged administration) have also been affected as the Act of 30 August 2019 amending Bankruptcy Law and other legal acts[1] changes materially the pre-pack legislative framework.

KAROL TATARA
Tatara & Partners Restructuring & Insolvency Law Firm, Poland

MATEUSZ KALIŃSKI
Tatara & Partners Restructuring & Insolvency Law Firm, Poland

First of all, from this law's entering into force as of 24 March 2020, it will be clear that the pre-pack application may indicate more than one acquirer and the pre-pack is available also in consumer bankruptcy. At present these issues are not expressly regulated within Bankruptcy Law and courts issue inconsistent judgements in different regions of Poland.

Moreover, a mandatory bid bond (also called a security deposit) will apply to pre-pack applications in the amount of 1/10 of the proposed price (offer). This should eliminate offers submitted only to raise the price, with no real intention to actually finalise the transaction.

Additionally, secured creditors will be informed about a pre-pack application being submitted and the petitioner will have a duty to inform them about such an application by regular mail bearing their postal addresses, and besides, creditors will be asked for their opinion regarding the planned transaction. However, it seems that they will not be part of the proceedings within the meaning of Article 26 of Bankruptcy Law.

It will be also mandatory for the court to appoint a temporary court supervisor as soon as the bankruptcy petition with a pre-pack application is presented to the court. This change should be beneficial for the transparency of the proceedings and it should ensure a fair price, meeting the requirements stipulated in the law and allowing the court to thoroughly examine the pre-pack application.

Aiming to make the whole procedure more transparent, the fact of filing the pre-pack application will be announced in the official Court Gazette (*Monitor Sadowy i Gospodarczy*) until the electronic Bankruptcy Register will come into existence – hopefully on 1 December 2020.

A completely new auction procedure will apply when multiple offers are submitted from different acquirers, as stipulated in Article 56ca (also referred to as a tender), whose aim will be to quickly decide the winner and the final acquirer. An auction will be conducted in conformity with the Polish Civil Code[2], its terms will be accepted by the bankruptcy court composed of one judge and it will be held by the temporary court supervisor.

It is also important to mention that the acquirer will have an expressly stipulated right to file with the court an application requesting that the ruling approving the terms of the sale be set aside or amended if subsequently to the issuance of the ruling, some circumstances with a significant influence on the value of the property asset subject to sale have changed or have been revealed.

Summing up, the Polish Bankruptcy Law system will be significantly amended, and some changes will obviously enhance the pre-pack sale, thus making it more transparent and efficient. However, not all changes should be regarded as beneficial for the pre-pack procedure and the involved parties, but this problem can be overcome by a correct interpretation of the new law. ■

Footnotes:

1 Journal of Laws 2019, item 1802.

2 Uniform text: Journal of Laws 2019, items 1145 and 1495, as amended.

> **NOT ALL CHANGES SHOULD BE REGARDED AS BENEFICIAL FOR THE PRE-PACK PROCEDURE AND THE INVOLVED PARTIES**

Romania: Liability of Statutory Directors contributing to an insolvency

ALINA VALEANU
Senior Associate, GVP Gilescu Valeanu & Partners, Bucharest

ANDREI M. ZAMFIRESCU
Senior Associate, GVP Gilescu Valeanu & Partners, Bucharest

IT IS THE RESPONSIBLE PERSONS WHO CONTRIBUTED TO THE INSOLVENCY OF THE COMPANY THAT MAY BE HELD LIABLE FOR THE COMPANY'S DEBTS

Romanian insolvency proceedings are governed by a modern legal framework aimed at rescuing the insolvent debtor, while also ensuring (at least, partially) the payment of debts to creditors.

Sedes materiae in Romania is Law No. 85/2014 on insolvency prevention and procedures (Romanian Insolvency Code) which also covers special provisions for creditors (legal persons, insurance companies, groups of companies), and preventive measures and cross-border insolvency procedures.

Legal grounds for claiming the civil liability of the persons which contributed to the insolvency of the company

During an insolvency or bankruptcy procedure, creditors or the insolvency practitioner may claim this civil liability against such persons under certain legal requirements. Generally, the grounds are based on the report of the insolvency practitioner concerning the reasons and circumstances leading to the insolvency of the company.

In case the report did not mention any liable persons for the insolvency of the company and/or decided that there were no grounds for filing the civil liability claim, such a claim may be filed by the president of the creditors' committee, by an appointed creditor, or by the creditor who holds more than 50% of the total amount of receivables entered on the table of creditors.

As a general rule, the characteristic of a Romanian limited liability company (the most common type of company) is that all the debts incurred are the company's liabilities and not the liabilities of its shareholders, the company being a separate entity from the shareholders.

On the other hand, under certain circumstances, it is the responsible persons who contributed to the insolvency of the company that may be held liable for the company's debts, according to the Romanian Insolvency Code which provides that, for such specific cases, the competent court may decide that part of the company's liabilities are borne by any person (including the shareholders) who caused the bankruptcy by performing any of the following:

a) Use of the company's assets or credits for personal gain or for the benefit of third parties;
b) Performing trade activities for personal benefit under the coverage of the company;
c) Decision to further continue the activity of the company for personal benefit, which obviously led the company to suspending payments;
d) Fictitious bookkeeping, the removal of certain accounting documents or the failure to conduct bookkeeping according to the law;
e) The misappropriation or removal of part of the company's assets or the fictitious increase of the company's liabilities;
f) The use of inappropriate methods to obtain company funds with a view to delaying the suspension of payments; and
g) The payment or the approval of the payment to a preferential creditor against the other creditors, in the month preceding the suspension of payments.

In case such a claim is admitted by the competent court, the creditors of the company may seize the assets of the respective persons who shall have to cover with their own funds all or part of the company's liabilities.

In practice, however, there are few claims admitted by the courts. Most of the time, the creditors, having insufficient evidence for the claim to be admitted, merely invoke the text of the law and base their claim on the assumption of fault.

In conclusion, this is a complex process and more acts and facts must be taken into consideration by the initiator of such a claim. ■

The Netherlands: Multi-stakeholder view on valuations under the WHOA

The proposed new Dutch *restructuring law:Wet Homologatie Onderhands Akkoord*, or WHOA in short, is expected to be enacted in the second half of 2020. The WHOA will enable debtors to offer a tailor-made, court-sanctioned restructuring plan to all or some of their creditors and shareholders, while remaining in control of the company. We expect it will be a better restructuring tool than the UK Scheme of Arrangements or the US Chapter 11.

In today's Dutch restructurings, individual shareholders or creditors can currently hinder the process by refusing to consent to a restructuring plan. By retaining their right to seek (full or partial) repayment of their claim, they can disrupt a restructuring plan and force other, more senior creditors to take a disproportionate haircut on their respective claims or even render the restructuring plan infeasible and force the company into insolvency proceedings. The WHOA aims to resolve this problem.

An important element of the WHOA is that the restructuring plan can be imposed on individual creditors or shareholders that have voted against it. This will strengthen the reorganisation capacity of companies, by offering parties an alternative restructuring instrument, thereby reducing the number of bankruptcies and improving the value distribution to stakeholders. Given the potential significant impact, the proposed law includes certain safeguards to protect the claims of the stakeholders involved. For example:

- **Best interest of creditors:** A creditor or shareholder class should, under the restructuring plan, receive at least the same value compared to what it would receive in case of an insolvency.
- **The Dutch absolute priority rule:** The value distribution to the various classes under the restructuring plan should be in line with the economic entitlement of the various claims, based on the ranking provided by law or contract. Any deviation from the ranking is only allowed in exceptional circumstances.
- **Cash-out option:** The plan must allow any creditor that is part of a dissenting class to opt for an immediate cash-out for the amount equal to the expected recovery in case of insolvency.

These safeguards demonstrate that the reorganisation and liquidation values are fundamental in the context of the WHOA.

The **reorganisation value** represents the value of the company once the restructuring plan has been sanctioned by the court, considering any new money requirements and the execution risk of the restructuring plan. It should be adjusted for non-operating assets and liabilities, as well as claims by any operational creditors that are part of the restructuring plan.

The **liquidation value** comprises the most likely (cash) proceeds that would be realised for the orderly (but distressed) sale of the business (or parts thereof) and/or assets of the company in an insolvency process.

Although these valuation concepts appear straightforward, it is important to note that valuations are not simple calculation exercises that come to a single undisputable outcome, given that they can be driven by subjective assumptions dependent on each stakeholder's position and incentives. For example, from a senior debt holders' perspective (i.e. a party who has the first claim on the reorganisation value), there is an incentive to argue a lower value. This would increase the chances that more junior debt holders will be (partially) forced out of the envisaged capital structure and reduces the risk of another future financial distress. From the junior debt holders' perspective, however, the opposite holds true: there is an incentive to argue a higher value limiting the impact on their outstanding debt. Shareholders that are initially out of the money but contribute new capital also have an incentive to argue a lower valuation to increase the write-off of existing debt and the shareholder's potential upside if the company would outperform its restructuring plan.

The extent to which these conflicting interests will materialise in a WHOA procedure depends on the degree to which individual stakeholders are (expected to be) in- or out-of-the-money versus other stakeholders. The fact that multiple stakeholders are involved, however, can still make a restructuring process under the WHOA rather complex and difficult to manage. This emphasises the need for the involvement of professional valuation and restructuring experts. A well substantiated business plan including the impact of resolving the operational distress needs to be the objective cornerstone for the reorganisation value.

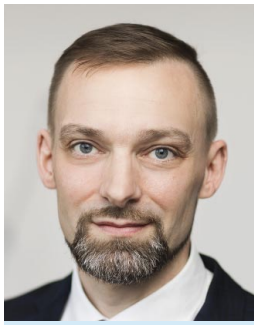
We believe that the WHOA provides for a welcome and much needed alternative to the current restructuring framework in the Netherlands, and will be key to solving problems following the COVID-19 crisis. The WHOA provides for an additional instrument for distressed firms and their creditors. If properly implemented, this will not only result in increased value preservation, but also improved value distribution and therefore it benefits the broad set of stakeholders involved in a restructuring process. ■

JOHN PETERS
Partner, Valuations leader,
PwC The Netherlands

KOOS BEKE
Senior Manager,
Business Restructuring Services,
PwC The Netherlands

> **INDIVIDUAL SHAREHOLDERS OR CREDITORS CAN CURRENTLY HINDER THE PROCESS BY REFUSING TO CONSENT TO A RESTRUCTURING PLAN**

Lithuania: New definition of insolvency



FRANK HEEMANN
Partner, bnt attorneys in CEE,
Vilnius, Lithuania

AUŠRA ZABULIONYTĖ
Associate, bnt attorneys in CEE,
Vilnius, Lithuania

> **IT IS NOW SUFFICIENT FOR A COMPANY TO BE REGARDED AS INSOLVENT IF IT FAILS TO MEET EITHER THE LIQUIDITY TEST OR THE BALANCE SHEET TEST**

As explained in previous editions[1], a new Insolvency Law has come into force in Lithuania since 1 January 2020.[2] This article looks at one of the law's most essential changes, i.e. the new definition of insolvency.

Under the new law, a company is insolvent if (i) it is unable to fulfil its proprietary obligations in due time or (ii) its liabilities exceed the value of its assets. In contrast to this, the definition of insolvency under the previous Enterprise Bankruptcy Law required that a company had (i) defaulted on its obligations *and* (ii) the value of overdue liabilities of the company had exceeded half the value of the assets included in the company's balance sheet.

The new definition of insolvency is notably broader than the old one. Whereas previously the requirements of a combined liquidity and balance sheet test had to be met, it is now sufficient for a company to be regarded as insolvent if it fails to meet either the liquidity test or the balance sheet test. The latter test threatens a company with insolvency because of its liabilities exceeding their assets, even if it has no overdue liabilities at all. This concept is completely new to Lithuanian businesses.

The legislative aim of the broader definition has been to prompt managers and other responsible persons to initiate insolvency proceedings at an earlier stage than before and thus to improve the chances for rescuing businesses and increasing satisfaction rates for creditors in restructuring and insolvency proceedings. The broader definition of insolvency might indeed achieve this goal. First, it extends the scope of financial distress situations that would qualify as insolvency and would justify the opening of insolvency proceedings. Second, it has a direct impact on managers and other persons entitled to file for insolvency, as the broader definition of insolvency increases the risk of personal civil and administrative liability for failing to file in due time.

Some criticism has been levelled against the new definition of insolvency. One fear is that it might affect companies with only temporary liquidity problems. Another concern is that it might inadequately disadvantage start-ups, balance sheets of which usually show few assets but heavy indebtedness. Against this background some critics are afraid that that new definition might lead to an increase in insolvency cases and potentially have an effect detrimental to the general purpose of rescue and of granting of a second chance as expressed i.a. in the Restructuring and Insolvency Directive.

Managers will have to come to terms with the broader concept of insolvency, not least in order to avoid personal liability. For this, they should look attentively at how courts will interpret the new definition. We can expect courts to apply the new statutory criteria for insolvency not just formally but also looking at the facts of the case at hand and continuing to apply and further develop additional criteria, such as: is the company continuing its business operations? How do the current and future profitability figures look? What is the real value of the assets (as compared to the book value? What is the chance to recover trade receivables? ■

Footnotes:

1 See Heemann/Zabulionytė, *The new corporate insolvency law*, in Eurofenix No. 77 (Autumn 2019) and *Change in organisation of the profession of the insolvency practitioners: Chamber of Insolvency Administrators established*, in Eurofenix No. 78 (Winter 2019/20).

2 Law on the Insolvency of Legal Entities ("Insolvency Law"); *Lietuvos Respublikos juridinių asmenų nemokumo įstatymas, No. XIII-2221.*

Belarus: Improvements on property sale in insolvency proceedings

On November 13, 2019, the Resolution of the Ministry of Economy of the Republic of Belarus dated April 01, 2019 No. 9 "On electronic auction for the sale of property in economic insolvency (bankruptcy) proceedings" entered into force (the "Resolution").

The Resolution does not contain transitional provisions so that it shall be applied to any auction in insolvency held from November 13 (including the property transferred for sale earlier, or rebidding).

This Resolution enshrined the so-called "Dutch" auction - for decrease. Auctions in such a format help to attract more bidders, quickly sell poorly sold property, involve unused objects in the economic turnover, which will improve business in the country as a whole. It will also increase and improve the turnover of bankruptcy assets (i.e. the debtor's property) since even the most expensive low-liquid asset will find its buyer with a price reduction of 80%. Electronic auction also ensures transparency of the bidding process itself.

The essence of such an auction in Belarussian insolvency proceedings is that the initial and minimum prices (below which the object cannot be sold) are set and starting from the second hour, in the absence of bids, the price is reduced by one step, which cannot be less than 5% of the initial price. The minimum price shall not be less than 60% of the initial one, and not less than 20% of the initial price - for rebidding.

Though the Resolution has been recently adopted, the practice has already revealed a number of gaps and application issues.

One of the gaps was the absence of a body authorised to set a minimum price. But the Ministry of Economy has published an official explanation,

which refers it to the competence of the meeting of creditors. The meeting can also decide to transfer the competence to the creditors' committee or the anti-crisis manager.

Some of the provisions of the Resolution are in contradiction with the provisions of the law on insolvency (bankruptcy) proceedings (e.g., electronic auction is held without creating a commission). The judicial authorities are of the opinion that bankruptcy proceedings should be conducted only in accordance with the legislative acts on insolvency (bankruptcy), but not with the ministries' acts, as it is prescribed by the Economic Procedural Code. Moreover, some anti-crisis managers also stand on this position on penalty of administrative and criminal liability for violation of the legislation on insolvency.

The Department for Sanitation and Bankruptcy of the Ministry of Economy (the "Department") clarified the status of these documents (the Resolution, letters and information on the official sites of the Ministry of Economy and the Department): this is the official position of the Ministry of Economy and the Department, and it is a guide to action for anti-crisis managers.

According to the Department data, only about 30-35% of bankrupt companies' property sales are carried out through an electronic auction. The Director of the Department has set a task for the anti-crisis managers to bring the number of electronic auctions to 70% by summer 2020.

Following the results of the World Bank's research "Doing Business" in 190 countries, Belarus ranks 74th in the section "resolving insolvency". Despite the rapid duration (on average 1.5 years) and low financial costs of the procedure, the debt repayment ratio is low. However, compared to 2019, the Ministry of Economy notes an increase in the debt repayment ratio. The introduction of the Dutch auction method will help improve this indicator. ■

DARYA GAIDUCHYK
Associate, International Law Firm COBALT, Belarus

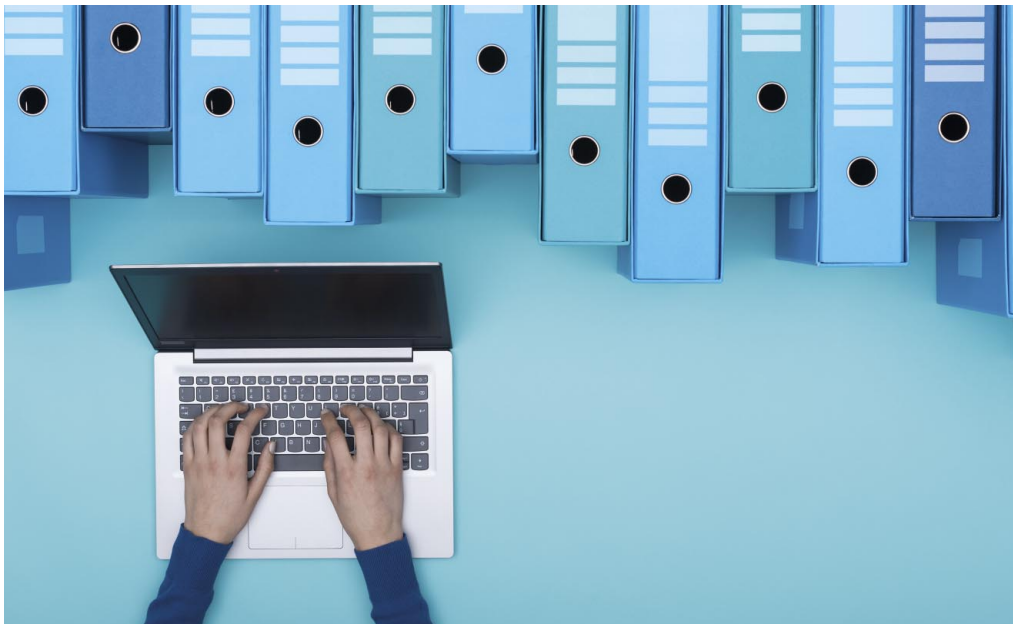
ANNA GRITSKEVICH
Junior Associate, International Law Firm COBALT, Belarus

SOME OF THE PROVISIONS OF THE RESOLUTION ARE IN CONTRADICTION WITH THE PROVISIONS OF THE LAW ON INSOLVENCY (BANKRUPTCY) PROCEEDINGS

European Insolvency Regulation Case Register Update

Myriam Mailly writes about the latest cases published on the Lexis-Nexis website in the past few months and reminds all INSOL Europe members that they have free access to the INSOL Europe European Insolvency Regulation Case Register

MYRIAM MAILLY
INSOL Europe Technical Officer



> **THE CASE REGISTER IS DEFINITELY A USEFUL TOOL FOR IPS' DAY-TO-DAY BUSINESS**

Cases published lately in the Register

The past experience with the European Insolvency Regulation (2000) has shown that even if all the courts in the Member States are only bound by decisions delivered at EU level by the CJEU, all interested parties involved in an insolvency case (namely courts, insolvency practitioners, chartered accountants, lawyers and even debtors themselves in certain cases) may find it of great interest to look at the decisions made by other courts in other Member States for guidance.

When applying the EIRs, several questions arose such as:

- Could the powers to require an individual to produce documents within the UK statute be applied by the English court outside of the UK by application of the EIR?
- Had the Austrian courts jurisdiction to open insolvency proceedings in 'Niki Luftfahrt GmbH' when the main insolvency proceedings were first opened in Germany by application of the EIR Recast?
- How did the Italian Supreme Court rule in the case of Illochroma after the decision of the CJUE in the case C-327/13 [2014] (Burgo group SpA v Illochroma SA (in liquidation))?
- Was it correct to apply the Estonian law to the procedure of releasing the debtors from their obligations, regardless of the fact that the respective debtor was no longer living in Estonia?
- On what basis could the Swedish forum rules be applied on deciding the jurisdiction when one of the contracting parties was established in a non-EU state, namely Norway?
- Had a claimant the right to file a lawsuit by *actio pauliana* provided for the defence of creditor rights under

Lithuanian law while the debtor was released from insolvency in accordance with the provisions of the Insolvency Act of the United Kingdom?
- Was the Portuguese Law applicable to a debt recovery action pending in Portugal when the debtor was declared insolvent in Luxembourg and, if so, which were the effects on the insolvency proceedings?

You'll find all the answers delivered by national courts by consulting the following decisions in the Register:
- Wallace v Wallace [2019] EIRCR(A) 779;
- Niki Luftfahrt GmbH [2018] EIRCR(A) 679;
- Illochroma Italia S.r.l. in liquidazione [2015] EIRCR(A) 712;
- VMKo nr 2-09-22171 [2019] EIRCR(A) 722;
- RH 2017:1 [2015] EIRCR(A) 717;
- Swedbank v. Individual A.K. [2015] EIRCR(A) 631;
- 2153/08.0TVLSB.L1.S1 [2018] EIRCR(A) 698.

As you can see, the Lexis-Nexis INSOL Europe European Insolvency Regulation Case Register enables all insolvency professionals to be aware of the recent developments in relation with the application of the EIR and the EIR (recast) by national jurisdictions and their interpretation by the CJEU.

It is definitely a useful tool for IPs' day-to-day business!

Free access to the Register for all INSOL Europe members

Along the numerous benefits of membership of INSOL Europe, there is the free access to the European Insolvency Regulation Case Register, housed on the Lexis library (UK).

Please note that you can follow the following steps to access the INSOL Europe EIR Case Register from the Lexis Library: (1) by logging-in as usual from the Lexis Library; (2) by selecting 'INSOL Europe: European Insolvency Regulation Case Register' from the source dropdown list of the Cases Search webpage; and (3) to find your case either using the search terms or by clicking the 'browse' button on the left hand side.

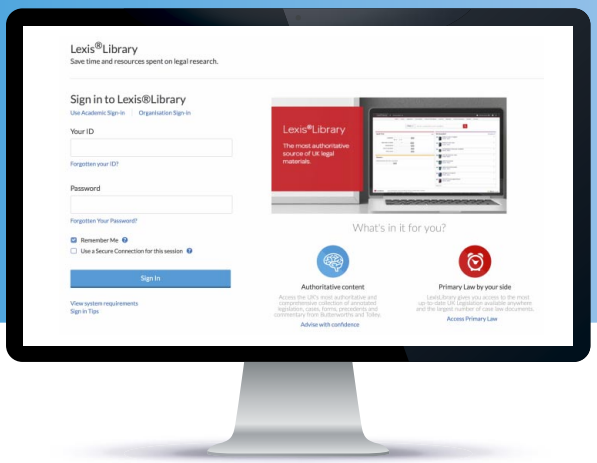
Please be also reminded that if you have forgotten your User ID and Password you will need to contact Lexis-Nexis via their dedicated mailbox for INSOL Europe users at INSOL-Users@lexisnexis.co.uk in order to get a reminder.

And finally, if you need further assistance, please send an email to me at: technical@insol-europe.org

How to access the Case Register

While the Case Register's management and moderation remains the responsibility of INSOL Europe, since 2014, the Case Register has been hosted by LexisNexis and, accordingly, is accessible under: ***http://tinyurl.com/y7tf2zc4***

INSOL Europe members should have received an email with individual login details (user name) and passwords. If these have been forgotten, or the email lost, there is a LexisNexis dedicated mailbox for INSOL users (INSOL-Users@lexisnexis.co.uk) which can be contacted to be sent a reminder.



Useful Links

> Email: technical@insol-europe.org

Updated Insolvency Laws
> www.insol-europe.org/technical-content/updated-insolvency-laws

National Insolvency Statistics
> www.insol-europe.org/technical-content/national-insolvency-statistics

EIR Case Register
> http://tinyurl.com/y7tf2zc4

European Insolvency Regulation
> www.insol-europe.org/technical-content/useful-links-to-be-aware-of-before-applying-the-recast-insolvency-regulation-2015848

> www.insol-europe.org/technical-content/outcomes-of-national-insolvency-proceedings-within-the-scope-of-the-eir-recast

> www.insol-europe.org/technical-content/state-of-play-of-national-insolvency-data-by-outcomes-currently-available

> www.insol-europe.org/national-texts-dealing-with-the-eir-2015

EU Directive on Restructuring and Insolvency (2019)
> www.insol-europe.org/technical-content/eu-draft-directive

> www.insol-europe.org/technical-content/eu-directive-on-restructuring-and-insolvency

Brexit Publications
> www.insol-europe.org/technical-content/brexit-publications

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> www.insol-europe.org/technical-content/introduction

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

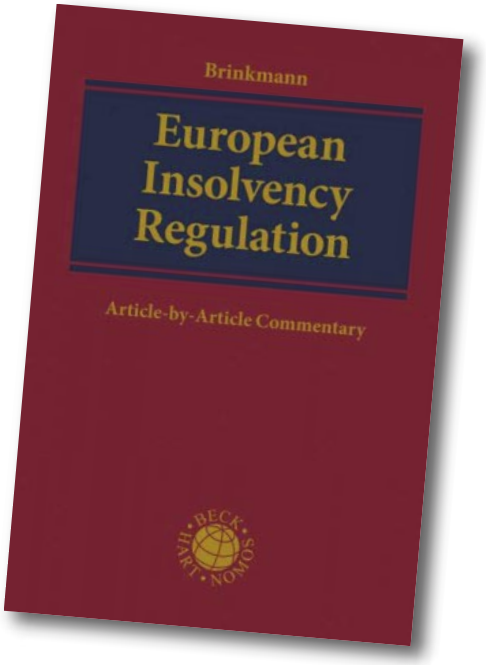
If you would like to suggest a book for a future edition, please contact Paul Newson on: paulnewson@insol-europe.org

European Insolvency Regulation: Article-by-Article Commentary

PAUL OMAR
Technical Research Coordinator, INSOL Europe

Moritz Brinkmann (ed), Beck-Hart-Nomos, 1st edition, 2019, 557 pages, ISBN 978-3-406-69858-3, €220

From the collaboration between 3 major publishing houses in Europe comes this addition to the literature on the Recast European Insolvency Regulation ("Recast EIR"). Handsomely bound in red, the work itself is also a collaboration between a team of scholars, practitioners, judges and policy-makers, most of whom are well-known in European circles for their insolvency expertise. They are led in this endeavour by the eminent Professor Brinkmann from the University of Bonn, a specialist of long standing in insolvency and civil law.



> **THE TEXT BILLS ITSELF AS HELPING TO ENSURE THE PERENNITY AND CONTINUED RELEVANCE OF THE FRAMEWORKS IN THE RECAST EIR GOING FORWARD**

Acknowledging the recent arrival of the Preventive Restructuring Directive ("Directive"), this work situates itself as a helpful addition to the literature on the Recast EIR, even as the Directive looks likely to occupy the minds of legislators and commentators in the period left for its transposition and once it eventually enters into force in the various Member States. With that perspective in mind, and with the ever-increasing toll that insolvencies are taking in a worsening economic climate, the text bills itself as helping to ensure the perennity and continued relevance of the frameworks in the Recast EIR going forward.

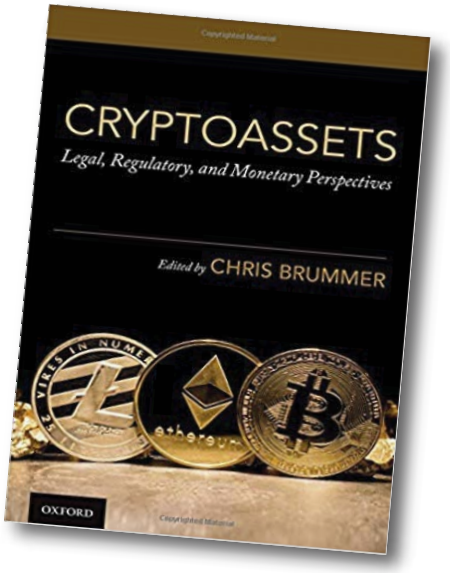
In over 550 pages, the book is organised as an article-by-article commentary with the text of each article and key definitions dissected in turn. Copious references are made to sources, especially to the case-law of the Court of Justice of the EU and of various Member States as well as to relevant domestic legislation.

Reference is also made to the literature, particularly to articles and other similar commentaries, written by authors of note, making this work particularly helpful in assembling the views across the insolvency sector.

All this, accompanied by a general bibliography and all relevant annexes to the Recast EIR, helps make this text a relevant work for all those practising and researching in this field.

Paul Omar
Technical Research Officer, INSOL Europe

Cryptoassets: Legal, Regulatory, and Monetary Perspectives



Chris Brummer (ed), OUP, 1st edition, 2019, 432 pages, ISBN 978-0-19007-732-7, £32.99

Cryptocurrencies and other digital assets remain controversial from legal, social and economic perspectives. Powered by the widely discussed technology of blockchain, cryptoassets capture the minds of politicians, regulators, bankers, investors, academics and society at large. On the one hand, the proliferation of cryptoassets may improve financial inclusiveness and efficiency of capital markets. On the other hand, there are well-founded concerns related to investor protection, privacy and money laundering.

This is why "Cryptoassets" edited by Chris Brummer (Georgetown University) and containing contributions from some of the leading experts, should be warmly welcomed. It attempts to "demystify" cryptoassets by providing the analysis of their major characteristics and applications for "educated generalists". For those not familiar with the concept of distributed ledger technology (DLT) and blockchain, I would advise first reading "Blockchain and Law" (HUP, 2018) by Primavera De Filippi and Aaron Wright and then going on the exciting and elaborate journey offered by Chris Brummer and his team.

There are two major advantages of "Cryptoassets". Firstly, it adopts a multidisciplinary approach, studying cryptoassets from the positions of law, history, economics and social sciences. Secondly, it skilfully combines theoretical discussions with very practical considerations and recommendations. For example, after tracing the historical development of money, payment and payment intermediation preceding the rise of disintermediated cryptocurrencies (Benjamin Geva), and after scrutinising the "decentralisation" claim (Angela Walch), the work dives into the practical nuances of cryptoasset valuation (Nic Carter), disclosure statements for initial coin offerings (ICOs) (Chris Brummer et al.) and tax treatment of cryptoassets (Christophe Waerzeggers and Irving Aw).

In summary, a very enlightening and thorough text, which sheds light on many aspects of cryptoassets. Although not specifically focusing on the issue of insolvency, "Cryptoassets" could definitely benefit insolvency judges, practitioners and scholars faced with the intricate nature of and problems around cryptoassets.

Ilya Kokorin
Lecturer, Leiden Law School

La Ineficacia Concursal: Estudio Doctrinario y Jurisprudencial en el Sistema Concursal Peruano

(Insolvency Clawback Regime: A Doctrinal and Case-Law Study in the Peruvian Insolvency and Bankruptcy System)

Anthony Lizárraga Vera-Portocarrero, Lex & Iuris, 1st edition, 2018, 477 pages, ISBN 978-612-4334-13-9, S/.70

This book examines one of the most significant institutions of current insolvency systems around the world, namely the clawback regime. With that purpose, the author has conducted a deep, analytical, yet instructive and systematic research work based on both doctrine and a case law. The result is a treatise that expounds the theoretical and conceptual aspects of the clawback regime not only within the Peruvian law system but also from a comparative-law perspective using the examples of a number of European jurisdictions.

Thus, the work is characterised by the thorough and in-depth analysis of the implications of current regulations governing insolvency clawback actions as addressed both by the Peruvian law and by legal systems elsewhere. This is accomplished by elaborating on general notions under an insolvency system related to the default of payments of a financially-distressed debtor, on the universal principles of insolvency and bankruptcy law, on the development of both pre-insolvency and insolvency stages of a debtor under an insolvency proceeding, and on the various stakeholders involved. Moreover, the author applies comparative law to describe how insolvency clawback is addressed in both civil-law (continental) and common-law (Anglo-Saxon) countries and how clawback is used in these countries as a device to protect the assets of an insolvent or bankrupt debtor in favour of its creditors.

Additionally, the book describes insolvency clawback as an institution and procedure, its regulation in Peru, and the requirements that any disposal of assets conducted by the debtor should meet to be subject to clawback actions.

Jorge Muñiz Ziches, Founder Partner, Estudio Muñiz, Lima, Peru

INSOL Europe *Contacts*

INSOL Europe
PO Box 7149, Clifton,
Nottingham NG11 6WD

Enquiries: Caroline Taylor
carolinetaylor@insol-europe.org

Tel/Fax: +44 (0) 115 878 0584
Website: www.insol-europe.org

The Executive

President:
Piya Mukherjee
pmu@horten.dk

Deputy President:
Marcel Groenewegen
marcel.groenewegen@cms-dsb.com

Vice President:
Frank Tschentscher
frank.tschentscher@luther-lawfirm.com

Immediate Past President:
Alastair Beveridge
abeveridge@alixpartners.com

Treasurer:
Chris Laughton
Chrislaughton@mercerhole.co.uk

Co-Directors of Administration:
Caroline Taylor
carolinetaylor@insol-europe.org
Catherine Dyke-Price
catherine.dykeprice@insol-europe.org

Secretariat

Communications Manager:
Paul Newson
paulnewson@insol-europe.org

Event Manager:
Harriet Taylor
harriet@insol-europe.org

Conference Technical and Training Course Director:
Emmanuelle Inacio
emmanuelleinacio@insol-europe.org

Technical Officer:
Myriam Mailly
technical@insol-europe.org

Sponsorship & Membership Manager: Hannah Denney
hannahdenney@insol-europe.org

Secretary of Eastern European Countries' Committee:
Niculina Somlea
niculinasomlea@insol-europe.org

Technical Research Co-ordinator
Paul Omar
khaemwaset@yahoo.co.uk

Honorary Chairman

Marc Udink
mcudink@udink.nl

Honorary Life President

Neil Cooper
neilc@trutta.co.uk

Committee Chairs

Academic Forum:
Tomáš Richter,
Tomas.Richter@CliffordChance.com
Secretary: Line Langkjaer
linehl@law.au.dk

Anti-Fraud Forum:
Carmel King
carmel.king@uk.gt.com
Bart Heynickx
Bart.Heynickx@altius.com

Case Register:
Reinhard Bork
bork@uni-hamburg.de

2020 Congress Technical Committee:
Giorgio Corno
Giorgio.Corno@studiocorno.it
Simeon Gilchrist
Simeon.Gilchrist@edwincoe.com
Conference Technical and Training Course Director:
Emmanuelle Inacio
emmanuelleinacio@insol-europe.org

Constitution:
Catherine Ottaway
ottaway@hocheavocats.com

Eastern European Countries' Committee: Evert Verwey
Evert.Verwey@CliffordChance.com
Radu Lotrean, radu.lotrean@citr.ro

EU Research: Barry Cahir
b.cahir@beauchamps.ie

Financiers Group:
Florian Joseph
florian.joseph@helaba.de
Francisco Patricio
francisco.patricio@abreuadvogados.com

INSOL International:
Steffen Koch, steffen.koch@hww.eu

Insolvency Office Holders Forum:
Marc André, Mandrelaw@aol.com
Robert Haenel,
Robert.Haenel@anchor.eu
Jean Baron,
jbaron@cbfassocies.com
David Soden,
dsoden@deloitte.co.uk

Insolvency Tech & Digital Assets Wing:
Dávid Oršula, david.orsula@bnt.eu
José Carles
j.carles@carlescuesta.es
Laurent Le Pajolec, lpa@exco.pl

Judicial Wing:
Michael Quinn
MichaelQuinn@courts.ie
Eberhard Nietzer
nietzer@insolvencycourts.org
Mirela Nicoleta Nastasie
nicoletamirela.nastasie@gmail.com

Membership Approval:
Piya Mukherjee, pmu@horten.dk

Membership Development Committee:
Alice Van Der Schee
alicevanderschee@vbk.nl
Albert Nunez-Lagos
a.nunezlagosb@gmail.com
Radu Lotrean, radu.lotrean@citr.ro

Sponsorship:
David Rubin
davidr@drpartners.com
Frank Tschentscher
frank.tschentscher@luther-lawfirm.com

Strategic Task Force 2025:
Steffen Koch, steffen.koch@hww.eu

Turnaround Wing:
Alberto Nunez-Lagos
a.nunezlagosb@gmail.com
Steffen Koch
steffen.koch@hww.eu

YANIL: Gert-Jan Boon
j.m.g.j.boon@law.leidenuniv.nl

Young Members Group
Georges-Louis Harang
harang@hocheavocats.com
Anne Bach, ABach@GOERG.de

2020

21-22 May	POSTPONED UNTIL AUTUMN INSOL Europe Eastern European Countries' Committee Conference *Kyiv, Ukraine*
30 Sept. & 1 Oct.	INSOL Europe Academic Forum Conference *Sorrento, Italy*
1–4 October	INSOL Europe Annual Congress *Sorrento, Italy*

2021

6 & 7 October	INSOL Europe Academic Forum Conference *Dublin, Ireland*
7-10 October	INSOL Europe Annual Congress *Dublin, Ireland*

2022

5 & 6 October	INSOL Europe Academic Forum Conference *Dubrovnik, Croatia*
6-9 October	INSOL Europe Annual Congress *Dubrovnik, Croatia*

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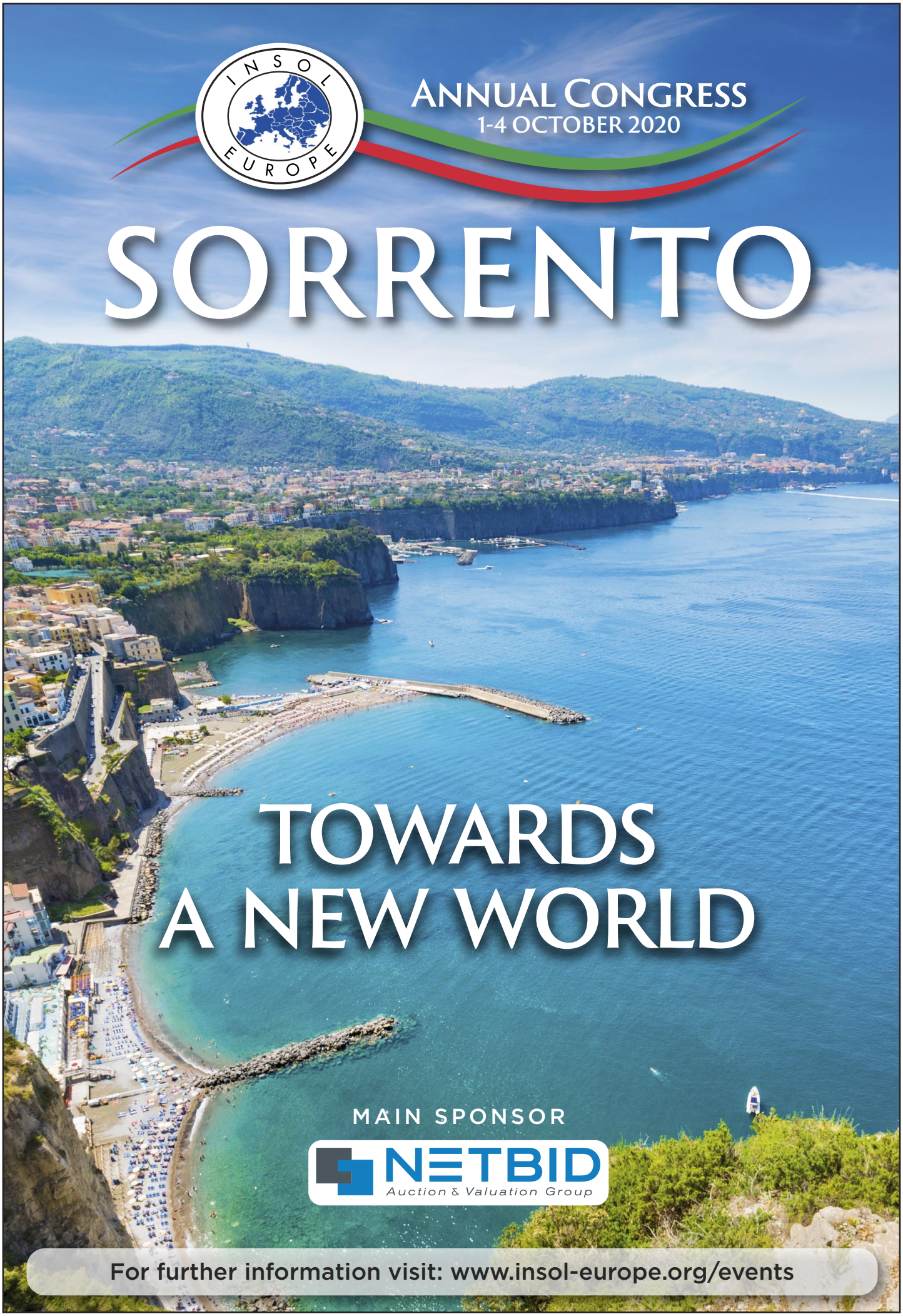
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