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Session Three: Design Issues in Restructuring and Insolvency Law

Chair: Luigi Lai

The Environment in Bankruptcy

Jonatan Schytzer

The Environment Goes Bankrupt

INSOL EUROPE

The Emerging New Landscape of European Restructuring and Insolvency

ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

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Research Questions

1. How *are* environmental claims treated in bankruptcy?
2. Under what legal conditions *should* environmental claims be enforced in bankruptcy?
3. How can bankruptcy law be *changed* to reduce the risk of situations arising when polluters cannot pay?
4. What *changes* at the level of principle can be implemented to reduce the risk that situations arise when polluters can not pay?

1. How are environmental claims treated in a bankruptcy?

- Environmental Liability Directive -> polluter pays principle
- Operators liable for environmental damage
  - preventive & remedial measures
  - costs

- Recognised?
  - YES
- Priority?
  - NO, however, indirect priority

1. How are environmental claims treated in a bankruptcy?

- Insolvency estate liable for environmental costs
  - Continues operations
  - Storing (occupies and has control)
    - MÖD 2002:16 – operator of leaking truck
    - MÖD 2015:19 – cannot disclaim property

2. Under what legal conditions should environmental claims be enforced in bankruptcy?

- Insolvency estate liable for environmental damages
  - Continues operations
  - Storing

- Jackson
  - Insolvency law should not decide questions of priority

2. Under what legal conditions should environmental claims be enforced in bankruptcy?

"Environmental claims based exclusively on the debtor's acts or omissions prior to the commencement of the insolvency proceedings should constitute insolvency claims."

"Environmental claims which have arisen in connection with preventive or remedial measures taken to real property or other affected assets, should have the best right to payment from the proceeds of these assets. This should apply regardless of whether the measures have been taken before or after the commencement of the insolvency proceedings."

3. How can bankruptcy law be changed to reduce the risk of situations arising when polluters cannot pay?

- The insolvency practitioner
  - Assignment limited to working for the creditors.

- NJA 2015 p. 132

4. What changes at the level of principle can be implemented to reduce the risk that situations arise when polluters can not pay?

- Compulsory environmental
  - insurance?
  - security?
  - fund?

Thank's for the attention

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Preventive Restructuring Frameworks and the Separate Domain of Cross-Border Restructuring Law

Ioannis Bazinas

Basic premise of the approach

The traditional view of insolvency and restructuring

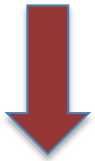
- Insolvency and restructuring law are two sides of the same coin
- The only difference is the outcome: liquidation v reorganization
- Reflected in the EIR definition of insolvency proceedings (Art. 1(1) EIR)

Challenging the traditional view

- Focus on legal rules instead of proceedings
- Considering the function of legal rules can provide significant nuance

Insolvency law and the collective action problem

- In the absence of insolvency law, there would be a destructive creditor race against the debtor's assets (tragedy of the commons)



- Insolvency law replaces individual enforcement with a system of collective enforcement that addresses this economic problem

Restructuring law and the holdout/holdup problem

- Restructuring constitutes contractual renegotiation between the debtor and its multiple creditors
- If the debtor were left to the devices of contract law, there would be free riders and holdouts (tragedy of the anticommons)

- Restructuring law creates a framework for collective renegotiation under a majoritarian decision making rule
- **BUT** it also places limits to majority rule to protect the minority against the risk of holdup (e.g. assigning creditors in separate classes, limiting bargaining to the restructuring surplus etc.)

Insolvency and restructuring: separate domains

- Rules of insolvency law and restructuring law aim at dealing with distinct economic problems (commons v anticommons)
  - However, some rules may have dual functions (e.g. the stay on enforcement)
  - It is possible that these problems arise concurrently (although evidence from restructuring practice indicates that this happens less frequently than before particularly for large firms)
- Important to note that this distinction is not based on a contractual view of restructuring law

Cross-border implications of the dichotomy

Cross-border insolvency

- Recognition of the consequences of the commencement of insolvency proceedings
- Protection of creditor assets, wherever located
- Recognition of the commencing judgment and the Insolvency Representative's authority
- Art. 19 EIR

Cross-border restructurings

- Recognition of the effects of the restructuring plan
- Resolution of holdout problem, wherever creditors are located
- Essentially recognition of judgments
- Art. 31 EIR, provided however that the commencement of the proceeding has been recognized under art. 19

The problem of minority protection in cross-border restructurings

- If restructuring law is also concerned with holdup, should there be any limit to the recognition of restructuring plans?
- A case in point: *Portuguese Railroads* (Nadelmann, 1948)
  - A Portuguese restructuring plan had modified the claims of French bondholders
  - The French court refused to recognize the plan, as inconsistent with French public policy because all creditors had voted in a single class
- Is the public policy defence in the EIR (Art. 33) sufficient to deal with similar issues in cross-border restructurings in the EU?

The EU Directive on Preventive Restructuring Frameworks

Preventive restructuring frameworks → Structured bargaining proceedings

Collective action concerns

- Stay on creditor enforcement actions and its effects (Arts. 6-7)

Holdout/holdup resolution

- Minimum content of restructuring plans (Art. 8)
- Requirements for the adoption of restructuring plans, including classification requirements and majority decision making (Art. 9)
- Requirements on the confirmation of a plan by a court, including the best-interests of creditors, equal treatment and cross-class cramdown (Art. 10)

Cross-border implications

In the context of preventive restructurings, the most pressing issue will most likely be the recognition of restructuring plans

Recognition is automatic under art. 32 EIR (provided that the commencement of the proceeding can be recognized under art. 19)

Uniform rules on the adoption and confirmation of the plan are likely to remove any potential obstacles or objections to recognition

Substantive harmonization is a necessary corollary of automatic recognition

THANK YOU FOR YOUR ATTENTION

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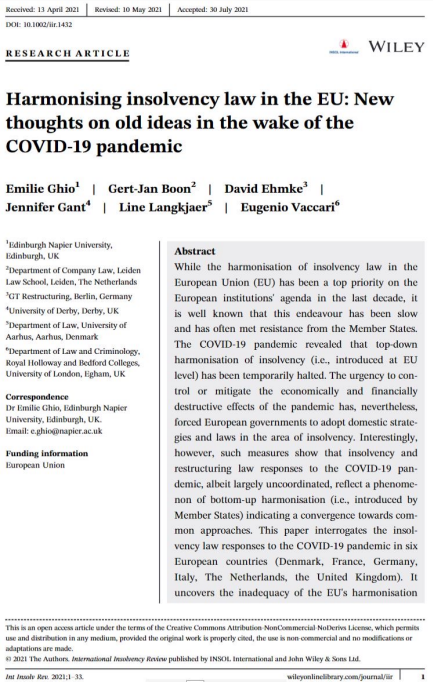
Harmonizing Restructuring Frameworks: Top-Down, Bottom-Up, or Both?

David Ehmke

Eugenio Vaccari

Harmonisation in the EU

- The objective of harmonisation is increased legal similarity across the EU Member States, which is ultimately conducive of European integration.
- Main theoretical approaches:
  - universalism (Westbrook, 2000: "Because bankruptcy is a market-symmetrical law, a global market requires a global bankruptcy law") and modified universalism **[supra-natural view];**
  - territorialism (LoPucki, 1999) and cooperative territoriality – principles of territoriality and plurality **[inter-governmental view]**;
  - contractualism (Rasmussen, 1997) and universal proceduralism (Janger, 1998).



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RESEARCH ARTICLE

WILEY

Harmonising insolvency law in the EU: New thoughts on old ideas in the wake of the COVID-19 pandemic

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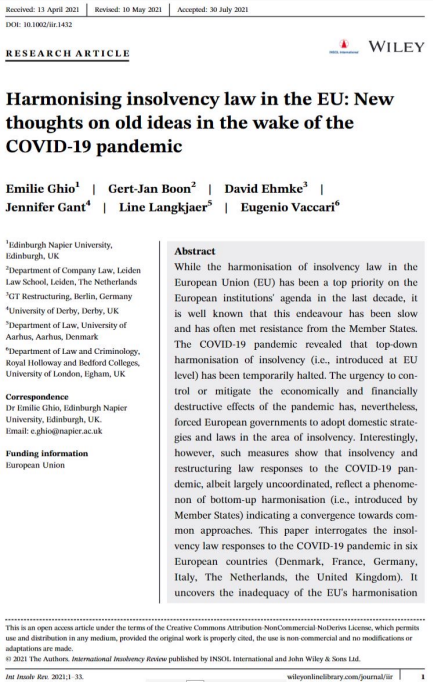
Funding information
European Union

Abstract
While the harmonisation of insolvency law in the European Union (EU) has been a top priority on the European institutions' agenda in the last decade, it is well known that this endeavour has been slow and has often met resistance from the Member States. The COVID-19 pandemic revealed that top-down harmonisation of insolvency (i.e., introduced at EU level) has been temporarily halted. The urgency to control or mitigate the economically and financially destructive effects of the pandemic has, nevertheless, forced European governments to adopt domestic strategies and laws in the area of insolvency. Interestingly, however, such measures show that insolvency and restructuring law responses to the COVID-19 pandemic, albeit largely uncoordinated, reflect a phenomenon of bottom-up harmonisation (i.e., introduced by Member States) indicating a convergence towards common approaches. This paper interrogates the insolvency law responses to the COVID-19 pandemic in six European countries (Denmark, France, Germany, Italy, The Netherlands, the United Kingdom). It uncovers the inadequacy of the EU's harmonisation

Harmonisation in the EU (2)

- Practical implementation:
  - top-down harmonisation through the creation of an area without internal frontiers, for the promotion of the 4 fundamental freedoms (art 114 TFEU):
    - issues: time-consuming, no learning curve because of a lack of try and err, lack of competition, race-to-the-bottom, inability to compromise, interference with aspects of national sovereignty and legal cultures, before PRD limited to procedural rules in insolvency/restructuring.
  - regulatory competition to imitate best (?) practices and attract businesses:
    - issues: forum shopping, regulatory race-to-the-bottom, possibly uncertainty and strategic behaviour.
- Problem: efficient allocation of assets (trade-off, finding the right balance):
  - top-down uniform rules lower transaction costs and increase legal certainty;
  - regulatory competition encourages MSs to develop new strategies for businesses.



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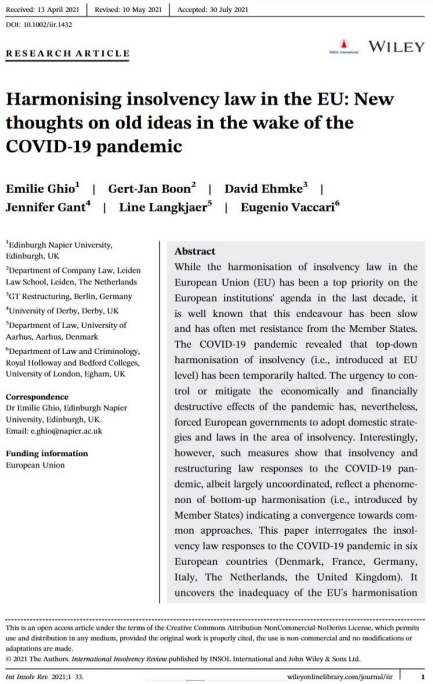
Harmonisation in the EU – A "menu" approach?

- Need to embrace a wider-encompassing definition of legal harmonisation:
  - multi-layered concept, encompassing bottom-up as well as top-down phenomena;
  - ultimate aim to increase legal similarity across legal systems while minimising negative externalities arising from the choice of either bottom-up or top-down approaches, and allow for sufficient flexibility to quickly adjust to new challenges;
  - create a level-playing field of national insolvency laws, which would, in turn, lead to improved access to credit and foreign investment.
- Need to acknowledge what is happening in practice (law-in-action methodology):
  - case-study approach on the implementation of the PRD across different "European" jurisdictions.



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ENTRY CRITERIA

- *recital 26* and *art 5(3)*: MSs should be able to introduce a viability test as a condition for access to the preventive restructuring procedure provided for by this Directive;
- *recital 28:* MSs should be able to extend the scope of preventive restructuring frameworks to situations in which debtors face non-financial difficulties (but likely unable to pay debts);
- *Art. 4*: MSs are entitled to limit the availability of preventive restructuring procedures to companies that are "worthy".

- *Re Cheyne Finance Plc* [2007] EWHC 2402 (Ch): commercial insolvency is not to be ascertained by a slavish focus only on debts due at the relevant date; *Re Casa Estates* [2014] EWCA Civ 383: the cash flow and the balance sheet tests need to be used at the same time;
- *Re A Company* [2020] EWHC 1551 (Ch): injunction restraining the advertisement of a winding-up petition on the basis of COVID-19 and impending legislation;
- Pt 26A plans: **available to all companies that are likely to encounter financial difficulties** that may affect their ability to carry on business as a going concern (s.901A(2) CA 2006).

- **accessible for debtors expected to be unable to pay their debts when they fall due within next 24 months**; no solvent restructuring possible;
- generally not accessible for debtors already over-indebted (liquidity shortage in less than > 12 month) or unable to pay their debts;
- entry tests relies on established insolvency law tests (though recently reformed for prognosis period), no additional viability test.

CREDITORS and SHAREHOLDERS' PARTICIPATION

- *recital 10*: Any restructuring operation, in particular one of major size which generates a significant impact, should be based on a dialogue with the stakeholders (and employees);
- *recitals 60-61*: Throughout the preventive restructuring procedures, workers should enjoy full labour law protection, and should receive adequate information to assess the restructuring plan;
- Restructuring procedures should be conducted by the debtors (*art. 5*), and the stay on enforcement actions shall not extent to workers' claims (*art. 6(5)*).

- CIGA 2020: reforms to CVA and introduction of Pt 26A restructuring plans, BUT:
  - **Debtors have more power than before,** no major reforms/additional powers for workers;
  - "Punitive" approach towards certain categories of creditors, such as landlords:
    - *Discovery (Northampton) Ltd v Debenhams Retail Ltd* [2019] EWHC 2441 (Ch) and *Lazari Properties 2 Ltd v New Look Retailers Ltd* [2021] EWHC 109 – landlord CVAs;
    - *Re Virgin Active Holdings Ltd* [2021] EWHC 1246 (Ch);
    - No winding-up petition for debt under business tenancy (until end March 2022).

- **debtor selects affected parties** (shareholders and creditors) = novelty (no SoA-equivalent in Germany); future claims (e.g. by landlords for future rents) are <u>not</u> subject to plan (cf. CVA);
- affected parties vote on plan and may object restructuring instruments (cram-down, stay, etc.);
- no pro-active role, no substantive control rights for creditors and shareholders; no procedural rights of workers and no infringement of their claims;
- principle = **debtor in possession** (cf. possible in insolvency).

AUTOMATIC STAY on EXECUTORY ACTIONS

- *recital 32* and *art. 6*: A debtor should be able to benefit from a temporary stay of individual enforcement actions, also for the benefit of guarantors and collateral givers;
- *recital 35*: a stay of individual enforcement actions should apply for up to 4 months.

- CIGA 2020: Pt A1 moratorium providing businesses *in financial distress* with a breathing space (20+ business days) during which they can explore rescue and restructuring options, BUT:
  - the debtor must continue to pay for some contracts (new supplies, rents, loans, liabilities arising under a contract involving financial services, etc.);
  - absence of any super-priority status for funding provided during the Pt A1 moratorium;
  - possibility for lenders to accelerate their debt in a Pt A1 moratorium.

- **stay only upon debtor's request**; (automatic in insolvency, on request in opening procedure);
- stay may be **selective** (only selected parties) or comprehensive;
- initially up to 3 months + 1 month;
- additional 4 month (**max. 8 months** in total) after court confirmation of plan has been requested.

TREATMENT of EXECUTORY CONTRACTS

- *recital 40*: *ipso facto* clauses triggered by reason of the company's insolvency or restructuring should not be triggered, esp. if the debtor is otherwise meeting their contractual obligations;
- *art. 7(5) and (6)*: ban on the enforceability of *ipso facto* clauses should come into consideration whenever the clause is triggered by the opening of the restructuring proceeding or a stay on executory actions (or a request for them). It could also apply to netting arrangements in financial, energy and commodity markets.

- CIGA 2020: widened the scope of the restriction on the enforceability of termination clauses from essential suppliers (ss. 233-233A IA 1986) to all suppliers of goods and services for companies which entered an insolvency or restructuring procedure, or applied for a Pt A1 moratorium. BUT:
  - *Laverty v British Gas Ltd* [2014] EWHC 2721 (Ch): suppliers are not priority creditors;
  - *Re Sahaviriya Steel Industries Ltd* [2015] EWHC 2726 (Ch): international reach of UK law;
  - *BNY v Eurosail-UK 2007-3BL Plc* [2013] UKSC 28: you cannot contract out of insolvency.

- ***ipso facto* protection** against termination/modification (established insolvency/ case law);
- stay (if requested) on counter-parties' right to withhold performance / terminate / modify contract based on debtor's <u>past</u> non-performance and delay;
- **no modification/termination right of executory contracts** for debtors (only in insolvency).

CROSS-CLASS CRAM-DOWN PROVISIONS & VOTING THRESHOLDS

- *recital 52*: "best-interest-of-creditors" test, meaning that no dissenting creditor is worse off under a restructuring plan than it would be either in the case of liquidation or next best alternative;
- *recital 54*: It should be possible that, where a majority of voting classes does not support the restructuring plan, the plan can nevertheless be confirmed if it is supported by at least one affected or impaired class of creditors;
- *art. 9(6)*: MSs shall lay down the majorities required for the adoption of a restructuring plan. BUT: not higher than 75 % of the amount of or the number of affected parties in each class.

- CIGA 2020: the Pt 26A plan introduced a cross-class cram-down mechanism & lower voting thresholds. Courts can authorise it subject to the "**no worse off**" and "**economic interest**" **tests**:
  - landlord CVAs;
  - *Re DeepOcean 1 Uk Ltd* [2020] EWHC 3549 (Ch): "no worse off" test is analogous to establishing a suitable comparator for class purposes in the context of a Pt 26 scheme;
  - *Re Virgin Active Holdings Ltd* [2021] EWHC 814 (Ch): how to value the debtor's business;
  - *Re Hurricane Energy Plc* [2021] EWHC 1759 (Ch): rescue is not "a port for every storm".

- class cram-down: **75% majority in value** (no headcount); (cf. insolvency: 50% and headcount test)
- cross-class cram-down requires compliance with **modified absolute priority rule**:
  - **flexibility** to treat creditors of equal rank differently with sound economic reason;
  - exception for managing shareholders adding value, minor infringements of creditor rights.
- **best-interest test** only for dissenting parties who show probable cause of being worse-off;
- developed from established insolvency principles/case law.

UK & Germany: Going Forward on an Established Path

- Initiative to develop a uniform procedure, great flexibility for national implementations;
- COVID-19 as a driver to rescue business;
- Competition for the best possible national implementation (e.g. bold WHOA approach).

- Flexible market-oriented approach with creditor-support (Pt A1 moratorium), supported by the judiciary;
- Pt 26 Schemes: harbour for restructurings (forum shopping);
- Pt 26A Restructuring Plan from established SoA procedure as further developed by case law with the significant reforms (particularly the entry test and cross-class cram-down provisions);
- Pre-pack Regulations 2021 and attempts to avoid abusive use of insolvency provisions.

- Restructuring procedure emerges from established insolvency principle (reforms and case law);
- Significant new innovations (by PRD-reform) compared to insolvency:
  - strict debtor-in-possession principle;
  - flexibility (debtor selects parties, APR-deviations, instruments only upon debtor's request) but less opportunities for operative restructurings (executory contracts/future debts).

Harmonisation in the EU - Conclusion

- EU's harmonisation language is inadequate;
- EU's harmonisation language and strategy should:
  - acknowledge and embrace the reality of harmonisation, with a combined (top-down and bottom-up) approach (EU Member States and EU Institutions);
  - maximise the opportunities arising from varied approaches to harmonisation (support common patterns);
  - uncover the role of EU Member States and relevant players (legislator, market participants (e.g., entrepreneurs, investors, judiciary) as drivers of the harmonisation and convergence process.

Coffee break

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Session Four:
Cross-Border and EU Law Topics

Chair: Francisco Garcimartin

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Preferential Treatment of State Aid Recovery Claims in Insolvency Proceedings and Preventive Restructuring Frameworks

Walter Nijnens

- Member States need to notify the Commission of plans to grant State aid (Article 2(1) Regulation 2015/1589).
- If the aid is not compatible with the internal market -> negative decision (Article 9(5) Regulation 2015/1589).
- Recovery decision (Article 16(1) Regulation 2015/1589): the Commission "shall decide" / Member States "shall take all necessary measures".
- Article 16(3) Regulation 2015/1589: "without delay" and "in accordance with the procedures under the [Member State's] national law".

- Why should incompatible State aid be recovered?
  - Level playing field on the internal market
  - Incompatible State aid gives the recipient an unlawful advantage.
  - Therefore, the *status quo ante* must be restored.
  - Aid + interest (Article 16(2) Regulation 2015/1589)

- Article 16(3) Regulation 2015/1589: “in accordance with the procedures under the national law of the Member State concerned, provided that they allow the **immediate** and **effective** execution of the Commission's decision”.
- CJEU C-232/05, *Scott*, para 53: National provisions which do not ensure immediate and effective execution must be left unapplied.

- Insolvency:
  - Settled case law since 1986 and recently confirmed (CJEU 20 January 2022, C-51/20, *Commission v Greece*):
  - Paras 57-58: If the recipient is in financial difficulty or insolvent -> Member State must bring about liquidation of the company + register its recovery claim in the company's schedule of liabilities (or other measure).
  - Para 59-60: However, if the claim is not met in full -> liquidation + definitive cessation of activities.
- No special ranking is required (CJEU C-499/99, *Magefesa II*, para 37).

- What about restructuring?
  - Commission Notice on the recovery of unlawful and incompatible state aid, para 131: “proceedings aimed at the restructuring or temporary continuation of some or all of the activities of insolvent undertakings […] must be left unapplied insofar as, in absence of timely recovery of the full recovery amount, they prevent the winding up and cessation of activities of the aid beneficiary”.
  - Para 132: A Member State may only vote in favour of a plan which provides for continuation, if the entire aid is recovered.

- Dutch *Wet terugvordering staatssteun* (Act on the recovery of State aid): Article 12
  - Article 362(3) *Faillissementswet* (Insolvency Act): A court must refuse confirmation of a plan, if it does not ensure full recovery. This applies to plans in all procedures in the Insolvency Act, including WHOA preventive restructuring frameworks.
- Is this approach correct?
- Conclusion: preferential treatment?

Recognition of UK Schemes of Arrangement and Restructuring Plans in the Continent: Two Examples Involving Switzerland

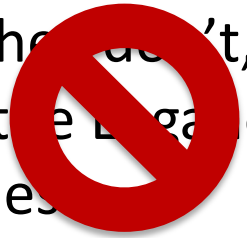
Rodrigo Rodriguez

- The cases
- The scheme and the restructuring plan
- The qualification game
- Consequences for jurisdiction
- Consequences for recognition

- Cross-border «group insolvency»
- Relevant group entities across Europe (Switzerland)
- Relevant creditors across Europe

Situation 1 (simplified):

- The relevant financial agreements have valid forum selection clauses in favour of UK courts (or they can be validly modified)
- Or: the[illegible]'t, but the UK court admits its jurisdiction anyway and the Lugano Convention of 2007/the Brussel I Regulation applies



Situation 2 (simplified)

- The relevant financial agreements have not (or not all) selected UK courts (and cannot be validly modified), but
- The debtor has its COMI in the UK (or has shifted it unsuspiciously to the UK…)

Why recognition matters

- Scheme Company is a UK Company (often a new company or a comi-shifted)
- One or more of the Borrowers under financial agreements subject to the Scheme is a/are Swiss Company/ies
- The Scheme results in a reduction of a claim amount of a dissenting creditor against the Swiss Borrowers.
- Creditor files his claim in a court in Switzerland against the Swiss Borrower. He asks for repayment of the full amount in accordance with the (originally) agreed terms… *quid?*
- *And… the UK judge wants to know in advance..*

What is the right «indirect competence» from a Swiss (or continental) perspective?

- «Proper» jurisdiction in **commercial** matters:
- Forum agreed in the contract

- «Proper» jurisdiction in **insolvency** matters:
- Registered seat (CH) or COMI (UK/CH) of the debtor

«commercial» vs. «insolvency» qualification, jurisdictional and recognution aspects

Situation 1:

No company in the UK, but: choice of forum in favour of UK courts in the relevant financial instruments.

-> Appropriate «commercial» forum – but improper forum for insolvency

Situation 2:

Some relevant creditors have not submitted to UK courts but to – say – New York courts. But the debtor ist located in the UK

-> Appropriate «insolvency» forum – though disregarding the forum selection clause(s)

Qualification of the Part 26 Scheme

«commercial»	«insolvency»
Encompasses only a set of creditors (submitting to UK laws/rules)	*Purpose* and *effect* is to restructure debts – binding on dissenting creditors
«imminent» or «likely» insolvency is not a requirement	[but its main field of application…]
Is regulated in the Companies Law	
[Is not in Annex A]	
No divestment of the debtor	[many newer proceedings have none]
No insolvency practitioner	[many newer proceedings have none]
No stay of enforcement	[not always mandatory…]

Qualification of the Part 26A Plan

«commercial»	«insolvency»
Encompasses only a set of creditors (submitting to UK laws/rules)	*Purpose* and *effect* is to restructure debts – binding on dissenting creditors
«imminent» or «likely» insolvency is not a requirement	likeliness of insolvency is a requirement
Is regulated in the Companies Law	Introduced in a law relating to insolvency
	Provides for a 'cram down'
No divestment of the debtor	[many newer proceedings have none]
No insolvency practitioner	[many newer proceedings have none]
No stay of enforcement	[not always mandatory…]

Qualification and its consequence for the applicable source for recognition

Recognition of Schemes and Plans, CVA in Switzerland

	Scheme (Part 26)	**Plan (Part 26A)**	CVA
qualification	*Commercial (Swissport)*	*insolvency (GateGroup)*	insolvency
sources			
until 2021	**Lugano (=BXL I)**	**SPILA on insolvency**	
since 2021/2019	**SPILA (contracts)**	**(new) SPILA on insolveny**	

Qualification and its consequence for the applicable indirect jurisdiction criterion

Recognition of Schemes and Plans, CVA in Switzerland

	Scheme (Part 26)	**Plan (Part 26A)**	CVA
qualification	*commercial*	*insolvency*	insolvency
Grounds for jurisdiciton			
until 2021	**«who cares?»**	**Registered seat**	
since 2021/2019	**Choice of forum**	**Registered seat or COMI**	

Practical consequences ?

- Part 26 UK Schemes «worse off» since UK out of Lugano
- No (valid) overvoting in a Scheme of (Swiss) creditors that have *not* agreed to UK courts

- But:
  - The Part 26A Restructuring Plan opens new possibilities:
    - Disregarding choice of court by applying the debtors COMI in the UK !
    - And: if there is no UK company, we make it up or move it..(«COMI shifting»)
      - Result: claims subject to a UK Restructuring though never related to UK law or courts..

- Consequence:
  - UK Law(yers) may find a way to restructure your group from the UK and prove an argument for recognition
  - This compensates a bit the legal blow of «Brexit»/«Lugexit»

Practical consequences ?

- Now…does that really work?

  - In theory yes…
  - But «dont overstrecht it..» (COMI shift ? – COMI only of a new company ? Extension to a Borrower with no COMI in UK/no submission of counterparties ..?)
  - Not court-tested yet in Switzerland!

Thank you – questions and debate welcome!

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A New Cross-Border Framework for Restructuring Plan Proceedings

Stephan Madaus

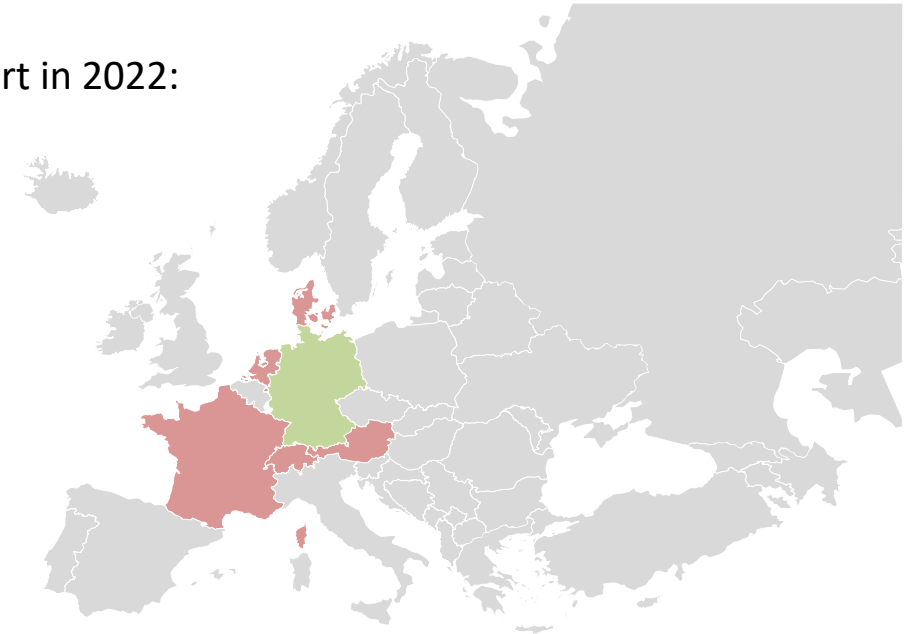
1. Do we need yet another legislative initiative?
   (1) Shortcomings of the EIR 2015
   (2) Shortcomings of the Brussels Ibis Regulation
   (3) The gap in national rules

2. How to approach a new cross-border framework for restructuring plan proceedings?
   (1) Minimum content
   (2) Guiding principles

1. Do we need yet another legislative initiative?

The reality of cross-border restructuring support in 2022:

- Debtor: German start-up company based in Berlin
- Customers all across Europe
- Successful product line



- Product liability claims (defective packing)
- Business is viable if claims are restructured.

1. Do we need yet another legislative initiative?

The reality of cross-border restructuring support in 2022:

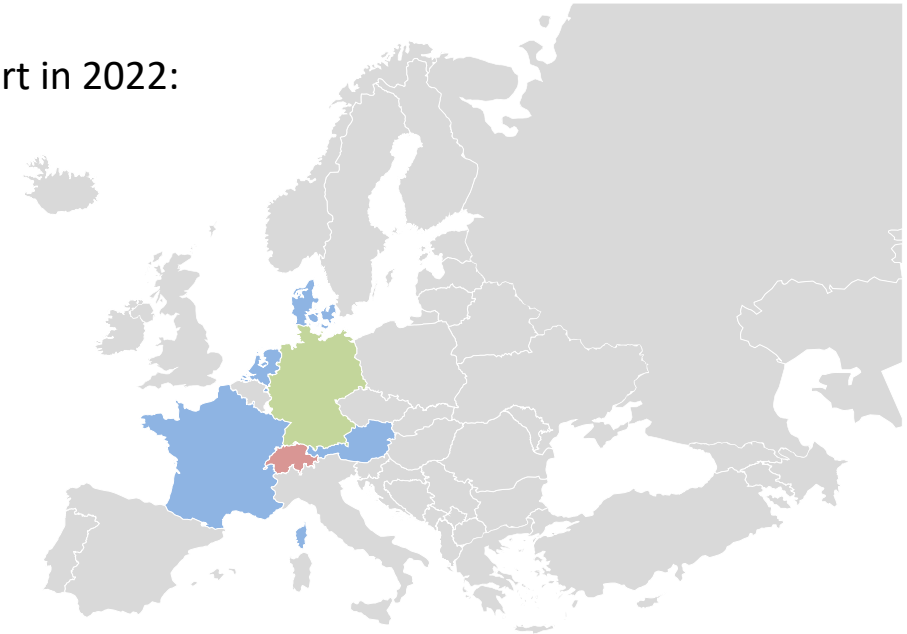
Option 1: German StaRUG restructuring

➢ Effective abroad?

a) Art. 32(1) EIR 2015 – not applicable

b) Art. 36(1) Brussels Ibis Regulation

- Applicable? Art. 1(2) lit. b?
- Jurisdiction? Art. 4(1), 8(1) – 'defendant'?
  Art. 7(1)/(2)? Art. 18(2)? consumer!
  Art. 25? Art. 19(1) – COC only *ad-hoc*
- Applicable law? *lex fori* for modifications of substantive rights?



1. Do we need yet another legislative initiative?

The reality of cross-border restructuring support in 2022:

Option 1: German StaRUG restructuring

- Effective abroad?

c) National laws: (no EIR, no Brussels Reg.)

- Jurisdiction? § 35 StaRUG (COMI)
- Applicable law? open question (*lex fori*)
- Recognition?
  - Pursuant to national laws in target jurisdictions:

1. Do we need yet another legislative initiative?

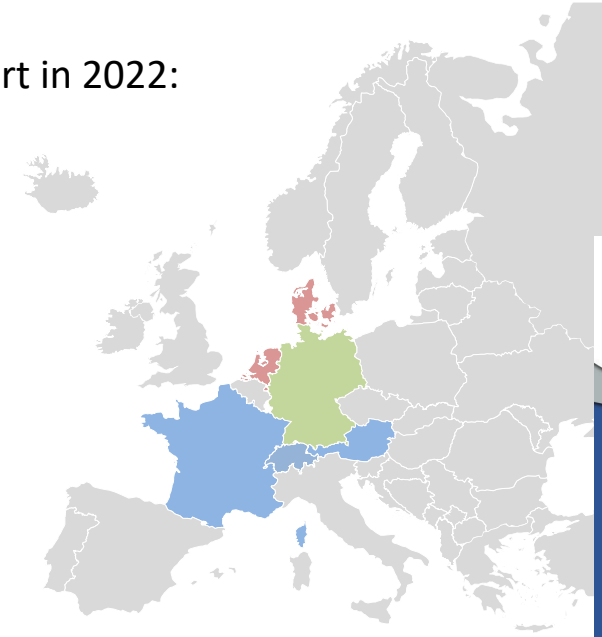
The reality of cross-border restructuring support in 2022:

Option 1: German StaRUG restructuring

- ➢ Effective abroad?

c) National laws:

- – Recognition?
  - ➢ Pursuant to national laws in target jurisdictions:
    - ✓ Austria (§ 240 IO or § 480 VG – no case law yet)
    - ✓ France (case law recognition principles – yet to be tested)
    - ✓ Switzerland Art. 175 PILA or Lugano Conv. – yet to be tested)
    - – Netherlands (restrictive case law)
    - – Denmark (restrictive case law)



1. Do we need yet another legislative initiative?

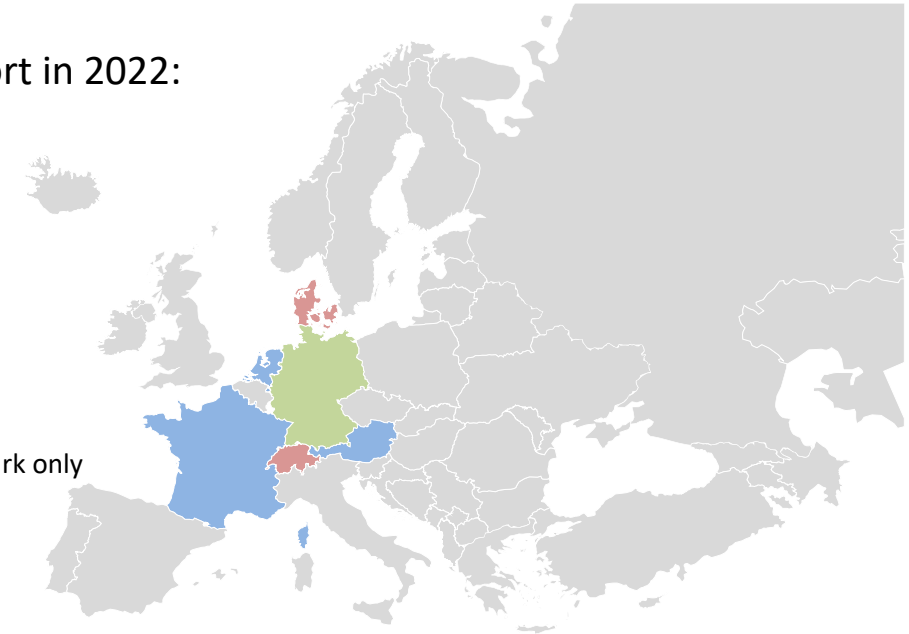
The reality of cross-border restructuring support in 2022:

Option 2: Public German StaRUG restructuring

➢ Effective abroad?

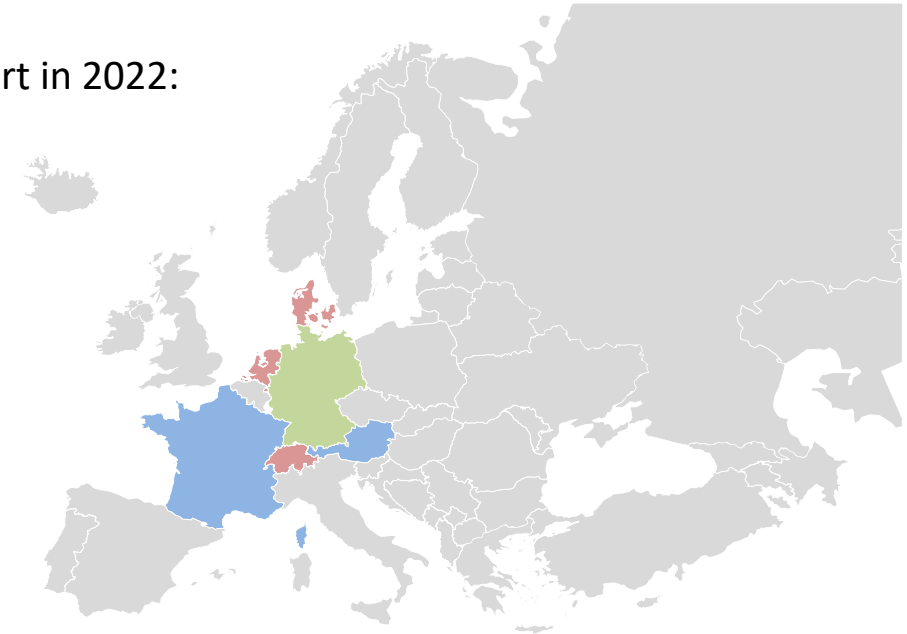
a) Art. 32(1) EIR 2015: Annex A (July 2022)

- Jurisdiction? COMI
- Applicable law? *lex fori concursus (also Art. 8, 10, 11)*
- Recognition? Automatic in Member States except Denmark only
- Pitfalls?
  - Secondary (liquidation!) proceedings (Art. 34)?
  - Payments to non-affected creditors (Art. 23)?
  - Filing and verification of claims mandatory (Art. 53)?



1. Do we need yet another legislative initiative?

The reality of cross-border restructuring support in 2022:



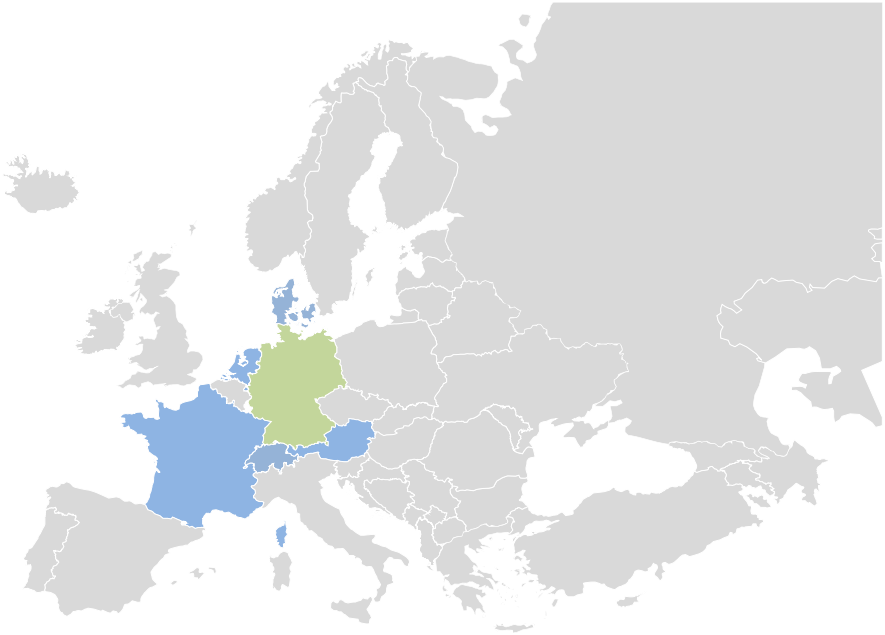
Conclusion:

- *No feasible centralised restructuring option*
- *Parallel proceedings? too expensive*

2. How to approach a new cross-border framework for restructuring plan proceedings?

(1) Minimum content:

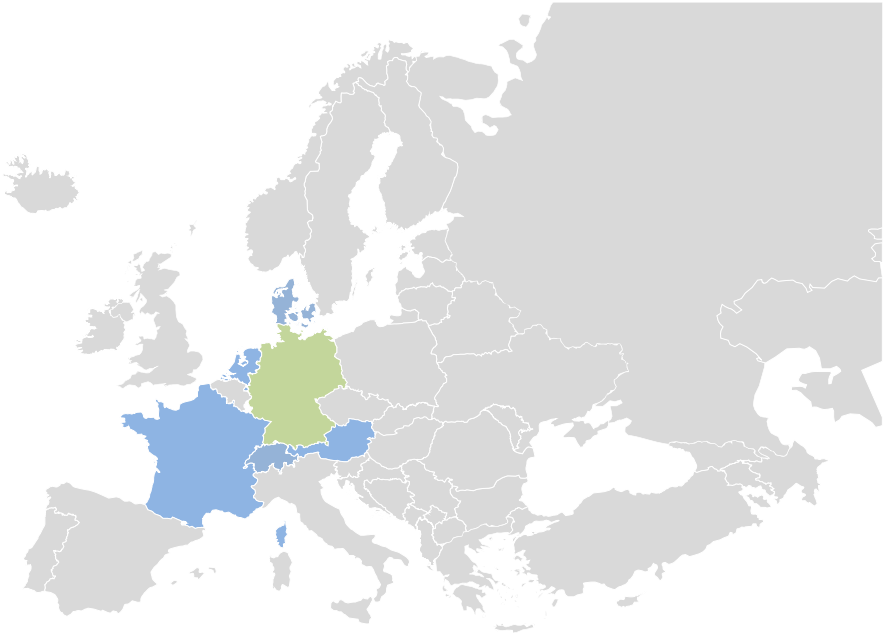
- Jurisdiction
- Applicable law
- Recognition of proceedings and tools



2. How to approach a new cross-border framework for restructuring plan proceedings?

(2) Guiding principles:

- **Universalism** – there is only one debt
- **Debt-oriented**, not asset oriented
- **Automatic** recognition and grounds for refusal



Sources:

- UNCITRAL Model Laws and Legislative Guide
- EIR and Brussels Ibis Regulation
- PIL principles

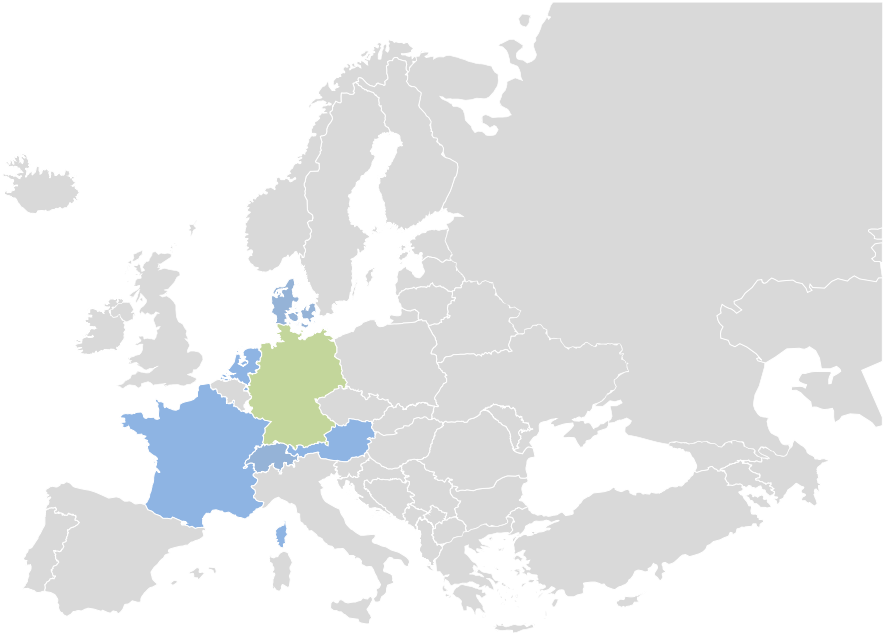
2. How to approach a new cross-border framework for restructuring plan proceedings?

(2) Guiding principles - conclusion:

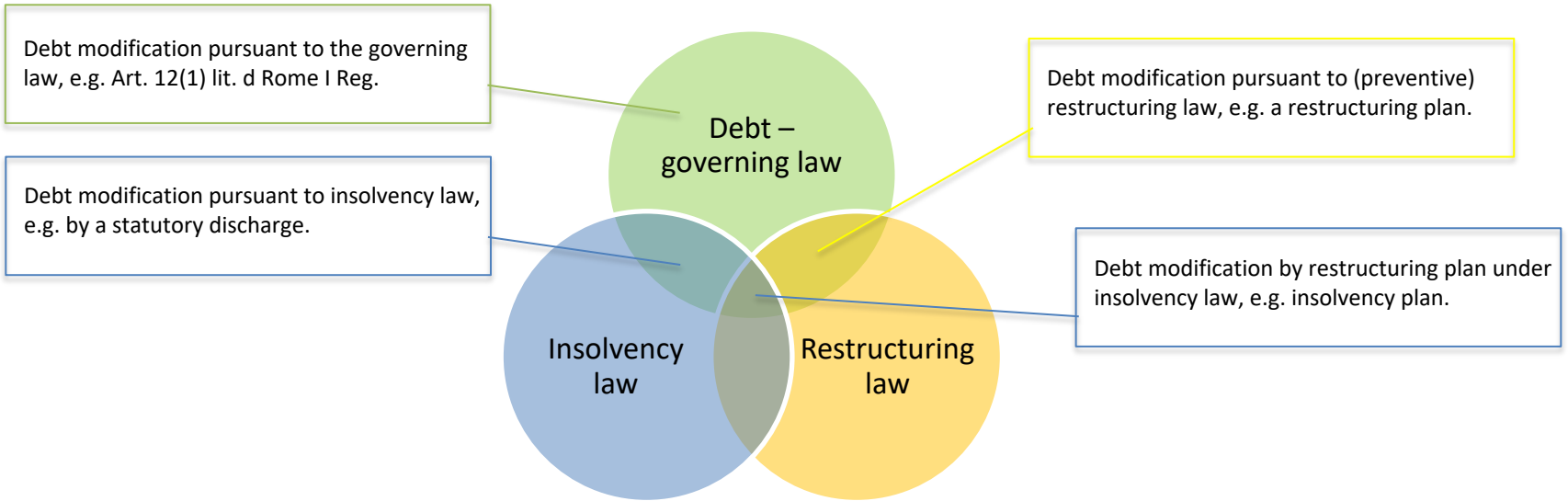
- Jurisdiction:
  - Where? **Closest** or **sufficient** connection to **debt**
    → Agreements (CoC)
    → Debt (CoL, *lex causae*)
    → COMI? Creditors' domicile?
- Applicable law:
  - **Closest** connection → *lex causae* → also **sufficient** connection (*lex fori*)
- Recognition of proceedings and tools:
  - Principle of automatic recognition

(a) Restructuring with **closest** connection to debt: only public policy objection

(b) Restructuring with mere **sufficient** connection to debt: *lex causae*-based objections (akin Art. 6(2) Rome I)



Connection to insolvency law and workouts: multiple layers of principles and rules



Your feedback is welcome!

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Lunch

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Session Five:
More Topics in Corporate Restructurings and Insolvencies

Chair: Gert-Jan Boon

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Insolvency Law: Quo Vadis? About the Regulatory Protection of Non-Controlling Unsecured Creditors prior to and during Insolvency Procedures

Dennis Cardinaels

Table of contents

Introduction

- *Actors*: analogy between corporate governance and insolvency governance:

	Solvent company		Distressed/Insolvent company
1	**Shareholders**	≅	**Unsecured creditors**
2	Management	≅	Management or Office-holder
3	Third party constituents	=	Third party constituents

- *Opportunistic conflicts*: similar analogy?

2. Majority v. minority conflict between unsecured creditors: case-illustrations

- *Case-overview*
  - England and Wales
    - *Gertner & Anor v CFL Finance Ltd* [2020] EWHC 1241 (Ch)
    - *Charnesh Kapoor v National Westminster Bank plc, Kian Seng Tan* [2011] EWCA Civ 1083
  - Belgium
    - Antwerp, 13 February 2014, *RW* 2015-16, 311
    - Brussels, 13 March 2019, *TIBR* 2020, RS-27

2. Majority v. minority conflict between unsecureds: case-illustration cont'd

- Economic perspective: potential 'agency problem' between unsecured creditors
  - Solvent company: controlling (majority) shareholders v. non-controlling (minority) shareholders
  - Distressed/insolvent company: controlling unsecured creditors v. non-controlling unsecured creditors
- Economic risks for non-controlling unsecureds (cf. *infra*):
  - Opportunistic/exploitative behaviour
  - Inefficient behaviour

3. EU Restructuring Directive 2019

- *Class differentiation: solution?*
  - **Recital 44** – "It should also be possible for Member States to lay down specific rules supporting class formation where nondiversified or otherwise *especially* ***vulnerable creditors, such as workers or small suppliers, would benefit from such class formation***."
  - **Article 9.4** – "Member States shall ensure that affected parties are treated in separate classes which reflect sufficient commonality of interest based on verifiable criteria, in accordance with national law. (…) ***Member States shall put in place appropriate measures to ensure that class formation is done with a particular view to protecting vulnerable creditors such as small suppliers.***"
  - **Article 9.6** – "A restructuring plan shall be adopted by affected parties, provided that a *majority in the amount of their claims or interests is obtained in each class*."

3. EU Restructuring Directive 2019

- *Directors' duties: Stakeholder-oriented approach?*
  - **Recital 71**: "(…) It is therefore necessary to ensure that, in such circumstances, directors avoid any deliberate or grossly negligent actions that result in personal gain at the expense of **stakeholders** (…). Member States should be able to implement the corresponding provisions of this Directive by ensuring that judicial or administrative authorities, when assessing whether a director is to be held liable for breaches of duty of care, take the rules on duties of directors laid down in this Directive into account."
  - **Article 19**: "Member States shall ensure that, where there is a likelihood of insolvency, directors, have due regard, as a minimum, to the following: (a) the interests of creditors, equity holders and other **stakeholders**; (b) the need to take steps to avoid insolvency; and (c) the need to avoid deliberate or grossly negligent conduct that threatens the viability of the business."

3. EU Restructuring Directive 2019

- *Criticisms*
  - Class formation: no guarantee of adequate protection
  - How to determine vulnerability of unsecured creditors?
  - Focus on 'nature' of the creditor's claim (e.g. 'consumer' or 'employment' claim)
  - Content of restructuring plan insufficiently focuses on vulnerable creditors
  - No clarity as to *how* vulnerable creditors could (or should) be protected
  - No definition of 'stakeholder'
    - ➔Good intentions but impact on vulnerable creditors is debatable.
    - ➔National legislator: solution?

4. Determination of non-controlling position of unsecured creditors

- *What is control?*
  - Ability to influence decision-making power of the debtor's management prior to and/or during insolvency procedure
  - Examples of influence:
    - Determination of remuneration (UK ⇔ Belgium)
    - Initiating a liability procedure (or pressing the office-holder to start a claim)
    - Asking questions during creditors' meetings
    - Suggesting alternative rescue possibilities (cf. infra)?
  - Determination of controlling position: cf. *infra* (next slide)

4. Determination of non-controlling position of unsecured creditors cont'd

Abstract factors		Concrete/practical factors
- *Size of the unsecured claim (and related percentage of voting rights)* - *Bargaining power of the unsecured creditor* - *Legal/financial knowledge and expertise of the unsecured creditor* - *Information (about the debtor) known to the unsecured creditor* - *Financial funds of the unsecured creditor* - *Nature of a creditor's claim (e.g. consumer claim)*	+	- *Attitude of the unsecured creditor during insolvency procedure (e.g. Coalitions built amongst unsecureds?)* - *Amount of votes of the unsecureds (dependent on the size of their claim and coalitions potentially built)* - *Actual exercising of voting rights*
Non-cumulative abstract factors INDICATIVE of potential non-controlling position of unsecureds		**Practical/concrete factors CONCLUSIVE of actual non-controlling (or controlling) position of unsecureds**

4. Determination of non-controlling position of unsecured creditors cont'd

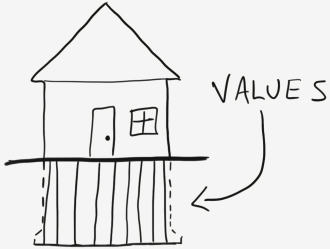
- *Risks*
  - Exploitation situation
    - Example: *Gertner; Kapoor* (cited above)
    - Bad faith / willingly trying to bypass *pari passu*
  - Inefficiency situation
    - Example: distressed debt trading
    - No bad faith / no willingness to bypass *pari passu*
- *Observations*
  - Low level of engagement of (unsecured) creditors
    - Concerns about costs of involvement
    - Insufficient legal/financial knowledge
  - Funding issues regarding insolvency litigation
  - Lack of regulatory incentives of insolvency practitioners
  - Control of courts: marginal control (Belgium) resp. ex post control (CVA/IVA – UK)

5. Insolvency Theories

- *Creditors' bargain theory*
  - Proponents: Thomas Jackson; Douglas Baird
  - Insolvency law = debt-collection regime/private interests of creditors should primarily be considered.
  - Not enough regard for *inter alia* the protection of non-controlling unsecured creditors.
- *Communitarian theory*
  - Proponent: Karen Gross
  - Insolvency law = public law-focus/wide range of constituents' interests should be considered
  - Accountability risks
    - In whose interests should the company be managed?
    - No clear guidance for directors/office-holders
    - Two many masters
  - No (clear) framework as regards the protection of non-controlling unsecured creditors

6. Insolvency Values

- *Cumulative application*
  1. Efficiency
     a) Efficiency of the regulatory framework (aggregate costs of a rule/policy < aggregate benefits of a rule/policy)
     b) Efficiency of the business/corporate decisions
  2. Fairness
     a) Procedural fairness
     b) Substantive fairness
  3. Accountability
     a) Information availability
     b) Explanation and justification of actions/decisions
     c) Opportunity to (dis)approve actions/decisions
     d) Consequences
- *No hierarchy*



7. Regulatory Suggestions

- *General overview:*
  - Approach:
    - Not rooted in communitarian/stakeholder theory nor creditors' bargain theory.
    - Not merely theoretical.
  - Enhanced protection of unsecured creditors and vulnerable (non-controlling) factions of unsecured creditors.
    - Clarity: focus on one (sub)faction of stakeholders
    - Practical approach
    - In line with the 3 insolvency values
    - Measures
      - Private measures
        - » Non-governance related measures
        - » Governance-related measures
      - Public measures

7. Regulatory Suggestions Cont'd

- *Private Measures*
  - Non-governance-related measure: trust mechanism
    - Public trust: enhancing ability to fund insolvency litigation
    - Trust accounts: cf. *Re Kayford* case
  - Governance-related measures:
    - Creditors' activism
    - Derivative actions for (unsecured) creditors
    - Reporting requirements of directors and office-holders (cf. *infra*)

7. Regulatory Suggestions Cont'd

- *Increased reporting requirements*

Prior to insolvency procedure	Corporate Rescue Procedure	Liquidation/bankruptcy procedure

• Determination which creditors might be vulnerable
• Seeking amicable agreement with creditors (if possible)
• Consideration *how* business decisions affect non-controlling creditors
• Creation of ring-fenced fund (*Re Kayford*-case) + justification
	• Actors:
	  • DIP/CVA/..: directors
	  • Judicial restructuring: directors/office-holder
	• Justification of business decisions (e.g. decision to leave classes (un)impaired)
	• Information regarding availability of remedies (if creditors dissatisfied)
	• Opportunity for unsecureds to offer alternative
		• Actors: liquidator/bankruptcy trustee
		• Examination of differential treatment between unsecureds (e.g. claims to swell asset pool such as preferences)
		• Information: claims against e.g. former directors
		• Justification of decisions taken during winding-up + impact on unsecured creditors
		• Information: availability of remedies (if creditors dissatisfied)

7. Regulatory Suggestions Cont'd

- *Increased reporting requirements*
  - Hard law?
    - Not necessary? Assessment as part of *existing* directors' duties
    - Deterrent effect + risk-aversion
    - Economic/transaction costs
  - Soft law
    - More flexibility
    - Tailor-made solutions by directors/office-holders
    - Insolvency Governance Code?

7. Regulatory Suggestions Cont'd

- *Public measures*
  - Which?
    - One single public regulator (⇔ 4 RPBs (recognised prof. bodies) in the UK)
    - An Insolvency Ombudsman (e.g. ASIC – Australia)
      - More responsibilities (⇔ RPBs)
      - Easily accessible
      - Low (or no) costs for unsecured creditors
      - Reduces burden on courts
      - Enhancing accountability + fairness

  - Why?
    - Solving the remaining 'gaps' as regards private measures/enforcement

8. Conclusion

- Analogy: shareholders (solvency) = unsecured creditors (insolvency)
- Risk of economic conflict: controlling v. non-controlling unsecured creditors (~ shareholder conflicts)
- Growing recognition (?) to protect 'vulnerable' factions of creditors
  - How?
    - Criteria to determine 'vulnerability' of creditors;
    - Regulatory suggestions:
      - Private: governance and non-governance related suggestions
      - Public: single regulator + insolvency ombudsman

"All animals are equal, but some animals are more equal than others."

(G. Orwell, *Animal Farm*)

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Relativism and Determination in the Restructuring Frameworks – New and Interim Financing

Flavius Motu

Andreea Deli-Diaconescu

Introduction

- Traditionally, when restructuring, **financing** is of the essence, thus a *measuring unit* of its success.
- But, is **financing** a *sine qua non*, altogether beneficial instrument devised to save the debtor's business?
- Our underlying assumption: *different interests* arise when the debtor in financial distress.
- The financing provider steps in because he/she/it *chooses to*, while the debtor and his/her/its creditors are already there, although *none of the latter really wanted to*.
- Interim financing must be "reasonable" and "necessary". No such conditions for the new financing.
- What if the financing is necessary, but *not reasonable*?

The Institutions Covered by the Analysis – A Theoretical (*Static*) Approach

- (Recital 66): "*The success of a restructuring plan often depends on whether financial assistance is extended to the debtor to support, firstly, the operation of the business during restructuring negotiations and, secondly, the implementation of the restructuring plan after its confirmation.*";
- (Recital 68): "*When interim financing is extended, the parties do not know whether the restructuring plan will be eventually confirmed or not. Therefore, Member States should not be required to limit the protection of interim finance to cases where the plan is adopted by creditors or confirmed by a judicial or administrative authority.*";
- (Recital 68) : "[...] *this Directive should not prevent Member States from introducing an ex ante control mechanism for interim financing.*";

The Institutions Covered by the Analysis – A Theoretical (*Static*) Approach

- (Recital 48): "*Confirmation is particularly necessary where*: […] *the restructuring plan contains provisions on new financing;* […]";
- (Recital 68): "*To avoid potential abuses, only financing that is reasonably and immediately necessary for the continued operation or survival of the debtor's business or the preservation or enhancement of the value of that business pending the confirmation of that plan should be protected*.";
- Art. 17 (1)(a): "*Member States shall ensure that new financing and interim financing are adequately protected. As a minimum, in the case of any subsequent insolvency of the debtor: new financing and interim financing shall not be declared void, voidable or unenforceable*";
- (Recital 68): "*However, encouraging new lenders to take the enhanced risk of investing in a viable debtor in financial difficulties could require further incentives such as, for example, giving such financing priority at least over unsecured claims in subsequent insolvency procedures*.";

The Institutions Covered by the Analysis – A Theoretical (*Static*) Approach

- Art. 17 (4): "*Member States may provide that grantors of new or interim financing are entitled to receive payment with priority in the context of subsequent insolvency procedures in relation to other creditors that would otherwise have superior or equal claims*.";
- Art. 6 (2) of the Directive requires the provision of an alternative scenario to the restructuring plan = Next-Best-Alternative Scenario ("**NBAS**").

- Our analysis focuses on the 'business core collateral' available for new funding, *i.e.*: core assets already encumbered by pre-existing security interests / assets involved in the core operational business to be encumbered by the new security interests created during the restructuring.

Interim & new financing must be "reasonable" as to prevent a *game of reversed chances*

- It is difficult to determine the best financing solution for a distressed business so that it meets the *reasonability standard.*
- Certain criteria to be further identified:
- The "individualistic" interests of the financier may be *of a different nature* than the interests of: (i) the pre-existing secured / unsecured creditors; (ii) the debtor; (iv) the equity holders;
- Insufficient funds ⇒ useless sacrifice of the core-business collateral;
- Excessive financing ⇒ the costs of financing are not fairly backed by equivalent collateral; collateral is downgraded / loses its potential;
- The fairness of such financing may be assessed by: (i) a "forced" realization of the security; (ii) the profit margin of core-business collateral in place.
- *Vexata quaestio:* Is there a *standard model* of financing in restructuring frameworks?

Rescue financing – rescue the debtor, rescue the business, rescue them both ?

- Who may be interested in financing the distressed business undergoing restructuring?
- The portrait of the financier in the restructuring frameworks: a *sophisticated investor* who holds significant experience in the techniques of the formal insolvency frameworks;
- The economic model used to examine a restructuring has two opposite outcomes: (i) *a justified salvation*; (ii) the *realism of failure*.
- => two analysis directions : (i) what is "obsolete" according to the market standards goes naturally into oblivion, if and because it does not evolve; (ii) where a business has the potential to grow but it does not, an investment "booster" may exponentially enhance its growth.
- => the opportunity to create a market for professional investors that act as funds providers in the restructuring proceedings. Corrective: such financiers should abide by rules that are clear, uniform, and verifiable by an unbiased, neutral observer.

Relativity of successful restructuring: is it a chance for the debtor or for the business?

- Marketwise, the purpose of a restructuring should be the successful rescue of the business; (in other words, the market does not care whether the debtor survives or not, as long as the business survives);

- Just like relativity distorts the space and time, the rescue of the business may have different meanings, depending on the observer.

Relativity of successful restructuring: is it a chance for the debtor or for the business?

a) Rescue the business, terminate the debtor (inspired by *Goodman International*)

- On the financial markets, an investor may choose to take the *short position* = the gain in this case results from the total losses of those who speculated on the growth thereof = zero sum game; Unlike the instruments specific to financial markets, the "short" position in a restructuring is unfortunately *invisible* for any other participant, except for the option holder.
- What if the financing is not extended, *ab initio*, with the intent to rescue, but to accelerate the failure, thus to facilitate the way for a hostile takeover? (*e.g.* lending with a debt/equity swap option)
- Similar to the *causa remota* in the insurance contracts, financing may be considered avoidable if, to a neutral, unbiased observer, it could never be recovered under the offered terms; (the insurance does not cover the self-inflicted risks).
- In the case of restructuring, the investor must act upon his/her/its intention to recover the investment and not aim at taking over with hostility a vulnerable, but still viable business.

Relativity of successful restructuring: is it a chance for the debtor or for the business?

b) Rolling up the pre-restructuring debt (inspired by *Colt*)

- A pre-restructuring creditor playing *long*, with a twist: extending new financing subject to the pre-restructuring debt being rolled-up (included in the scope of the super-priority granted to the new financing provider);
- In this case, the *long* position is visible, but inevitable;
- In terms of avoidable transactions: (b) ➔ preference;
- First paradox: the new financier's priority is (and must be) "preferential" as an inducement;
- Second paradox: the "preferential priority" is created *ex lege.*

Conclusions

- Rescue financing is tremendously necessary in the restructuring frameworks;
- However, the mere enunciation of the *reasonableness* is not enough; it must be backed with *adequate criteria* for its determination, in order to ensure the predictability of safe restructurings;
- In the absence of such criteria, the potential clashes between the pre-restructuring secured creditors or the debtor itself, on one hand, and the interim / new financier, on the other hand, would, most probably, end up in the "victory" of the latter, thus denying the restructuring its very legitimacy;
- Uniform / harmonized rules should be adopted by the Member States, in terms of the avoidance actions with regard to such financing, to prevent the existence of "safe-harbor" jurisdictions;
- The financing provider's loan terms should be assessed in the light of the debtor's chances to revert to its pre-difficulty *status-quo*.

THANK YOU !

INSOL EUROPE
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Valuation of Crypto-Assets in Insolvency Proceedings: An EU Perspective,

Theodora Kostoula

Outline

I. Setting the scene

II. Challenges of CAs Valuation in Insolvency

III. Ascertaining Value of CAs in Insolvency: Reflections on *How & When*

I. **Setting the scene**

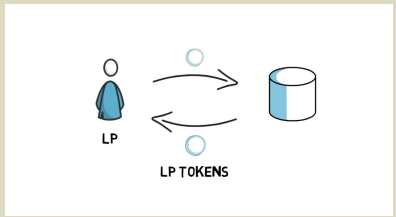
II. Challenges of CAs Valuation in Insolvency

III. Ascertaining Value of CAs in Insolvency: Reflections on *How* & *When*

How & When to determine the value of cryptoassets in insolvency proceedings?

Cryptoassets: *digital assets*

- ✓ Digital representation of value or rights
- ✓ Based on DLT secured with cryptography
- ✓ Not controlled by a central authority

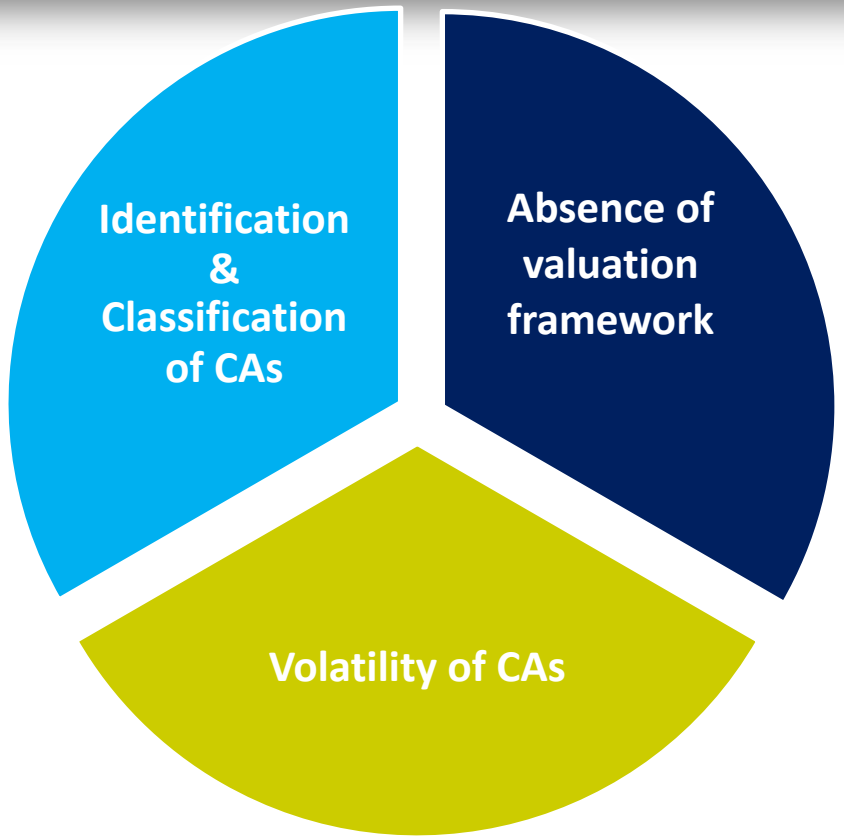


I. Setting the scene

II. Challenges of CAs Valuation in Insolvency

III. Ascertaining Value of CAs in Insolvency: Reflections on *How* & *When*

Challenges


Identification & Classification of CAs
Absence of valuation framework
Volatility of CAs

! Identification & Classification of cryptoassets ⟹ **Different valuation approach = different value**

Practical issues:

- Cryptocurrency or Token?
- Commodity or currency?
- Intrinsic value?
- Many CAs without an "apparent" value
- Tethered CAs: difficulties in valuation of referencing token

Cryptoassets	Value considerations
Cryptocurrencies	• Value linked to supply & demand, node count, production cost • Some without a market price
Stablecoins	Value based on the underlying external asset, e.g. fiat currency, gold
Security tokens	Value derived from the success of the entity or from an external, tradable asset
Utility tokens	• Value derived from the demand for the issuer's service/product • Meaningless resale value outside the platform
Tethered assets (NFTs, Wrapped & LP tokens)	• Valued as financial asset or based on the underlying asset • Fee earnings

! Volatility & Flunctuation of Cryptoassets

- Inherent volatility: Value mostly based on demand
- Prices often differ between different exchanges

Implications for insolvency

- **Appropriate Valuation date*:*** Value changes before & during the insolvency proceedings
- **Valuation in fiat currency or crypto?**
- **Risks for Disposal & Market price**

! Absence of a concrete EU valuation framework in insolvency

EU Insolvency Regulation

X

EU Restructuring Directive

- Going-concern value
- Liquidation value
- Market Value
- MS should provide rules on valuation

MS national laws

- Reference to

International valuation standards (IVS, IFRS/IASB, EVS)

Promoting valuation approaches

I. Setting the scene

II. Challenges of CAs Valuation in Insolvency

III. Ascertaining Value of CAs in Insolvency: Reflections on *How & When*

❖ How?

- Fair value?

- ! Equity & debt securities ?
- Tethered assets ?

Classification of CA → International standards → Adoption of valuation approach → Determination of Value

Classification of CA	Applicable international standards
Financial asset	IVS 500 on Financial Instruments, IFRS 9 'Financial Instruments-, IAS 32 'Financial Instruments: Presentation', IAS 39 'Financial Instruments: Recognition and Measurement'
CA held for sale in the ordinary course of business	IAS 2 Inventory
Other CAs: Intangible assets	IVS 210 Intangible Assets and IAS 38, 'Intangible Assets'

Traditional Valuation Approaches	Valuation Approaches for CAs	Applicability & Limitations
Cost Approach	**Cost of Production** <cost of mining>	✓ PoW, no PoS-based assets ❖ Only Cost, but economic benefits & future risk ?
Income Approach (DCF)	**Equation of Exchange** <network value>	✓ No cash-flows CA (utility tokens) ❖ DCF method for CA generating cash flows
Market Approach	**Network Value to Transaction Ratio** <network value v network use>	✓ CAs with identifiable on-chain transaction volumes ❖ Reliable empirical data? ❖ Off-chain transactions? ❖ Recording of transaction volume depends on tech type

❖ When?

➢ Valuation Date

- Date of the request for opening insolvency proceedings ?
- Post-filing date (flexible) to reflect highest value?

❖ Risks of quick appreciation & depreciation of cryptoassets

Approach:
Striving for the highest value vs legal certainty?

- An opportunity for improvement of the EU insolvency framework?
- Uniform approach of valuation in insolvency proceedings?
- Coordination of valuation standards and insolvency rules?

Novel assets =
New valuation needs?

Thank you for your attention

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Coffee Break

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Reinhard Bork, Michael Veder

Francisco Garcimartin, Christina Fitzgerald

EU Harmonisation of Transactions Avoidance Law

Reinhard Bork

Michael Veder

Overview

- **The project's aim**
- **The need for harmonisation**
- **The research project on harmonisation**
- **The way to harmonisation: a principle-based approach**
- **Fundamental decisions**
- **Challenges**
- **Details of our Model Law**

The project‘s aim

- **Elaborating a proposal for harmonising transactions avoidance laws in the EU Member States**
- **Set of rules which should be implemented in all national insolvency laws**
- **Legal certainty as to which transactions should (or should not) be challengeable in all Member States under the same conditions**

Need for Harmonisation

- **Transactions avoidance laws in Europe are diverse**
  - **as regards intensity**
  - **as regards details**
- **This hampers cross-border business, insolvency proceedings, and restructuring**
- **Art. 16 EIR is no solution**
- **No other elaborated proposals so far**
- **EC strives for harmonisation**

Time frame

establishment of working group	November 2018	✓
questionnaire (28 pages, 122 questions) to members of working group	March 2019	✓
first conference (Amsterdam), discussing the questionnaire	9/10 May 2019	✓
national reports (25 out of 28)	1 December 2019	✓
second conference (Hamburg)	1-3 April 2020	-
draft proposal	March 2020	✓
third conference (Zoom)	April 2021	✓
proposal (final) to EC for internal use	May 2021	✓
impact assessments by national reporters	30 June 2021	✓
publication of the book by Intersentia	February 2022	✓

Methodological Approach

- **All our deliberations are principle-based.**
- **We have therefore**
  - **elaborated the principles supporting and shaping transactions avoidance law**
  - **identified the topics to be addressed from a principle-based perspective**
  - **weighed and balanced relevant principles to find adequate solutions for every single topic.**

PRINCIPLES OF TRANSACTIONS AVOIDANCE LAW

- **supporting principles**
  - **best possible satisfaction of the creditors' claims**
  - **equal treatment of creditors**
  - **collectivity**
  - **fixation**
  - **efficiency**
- **opposing principles**
  - **protection of trust**
  - **predictability (legal certainty)**
  - **proportionality**

Fundamental Decisions

- **This is an academic rather than a political exercise.**
- **That is why we have elaborated a Model Law, not a draft Directive.**
- **We were not dealing with advantages or disadvantages of national laws…**
- **… but rather trying to find recommendable solutions in the field of transactions avoidance law.**

Fundamental Decisions

- **The proposal is restricted to transactions avoidance law.**
- **We have not addressed each and every detail (as regulated in some national laws).**
- **Our proposal aims at a "minimum harmonisation": what should (or should not) be challengeable in all Member States under the same conditions?**

  -> typical cases with relevance for the internal market

  -> no objections against stricter national laws

Challenges

- **getting involved with the methodological approach**
  (take the principles of transactions avoidance law as yardsticks)
- **not discussing national laws**
  (take off your "national glasses")
- **focussing on the proposed Model Law**
  (don't discuss each and every detail)
- **but also reading the explanatory notes**
  (understand the reasons for our proposals)

The Model Rules

- **Preliminary observations**
- **General prerequisites**
- **Avoidance grounds**
- **Legal consequences**

The Model Rules – Preliminary Observations

- **Personal scope**
  - **insolvency proceedings of all types of debtors?**
  - **all types of opponents?**
- **Substantive scope**
  - **Inclusion of restructuring proceedings?**
  - **Inclusion of debtor-in-possession proceedings?**

The Model Rules – General Prerequisites (§ 1)

Legal acts – including forbearance – which have been perfected prior to the opening of the proceedings to the detriment of the general body of creditors are voidable provided the prerequisites of an avoidance ground (§§ 2 – 5) are met.

The Model Rules – Avoidance Grounds

- **Preferences**
- **Transactions at an undervalue**
- **Intentionally fraudulent transactions**

The Model Rules – Preferences (§ 2 (1))

Legal acts benefitting a creditor by satisfaction, collateralisation, or in any other way (preferences) are voidable if

1. **they were perfected within three months prior to the filing for the proceedings and the debtor was unable to pay its mature debts at this point in time or**
2. **after the filing for the proceedings.**

The Model Rules – Congruent Coverages (§ 2(2))

If a due claim of the creditor was satisfied or secured in the owed manner (congruent coverages), the legal act is only voidable if the prerequisites of paragraph 1 are met and the creditor knew, or should have known, the debtor's inability to pay debts or the filing for the proceedings. This knowledge shall be presumed if the creditor was a party closely related to the debtor.

The Model Rules – Exceptions(§ 3)

Not voidable as congruent coverages under § 2 paragraph 2 are:

1. **legal acts performed directly against fair consideration to the benefit of the estate;**

(…)

The Model Rules – Legal Consequences (§ 7)

(1) The legal position resulting from the voidable legal act may not be invoked against the estate.

(2) The opponent is obliged to compensate the estate for the detriment caused by the voidable legal act.

(…)

Many thanks for your attention!

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Closing Address

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