INSOL EUROPE

#89 · Autumn 2022

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The journal of INSOL Europe

Live & Let Fly:

Turbulence lands SAS in Chapter 11

Also in this edition:

- **The EU Directive in Denmark, France, Czech Republic & Slovakia**
- **Energy Crisis in Germany**
- **Business Entities in Lithuania**
- **Country reports**
- **Event news *and more***

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Welcome from the Editors


EDVĪNS DRABA


JOSÉ CARLES

To make up for two years without seeing each other in person, 2022 brings us altogether in two Annual Congresses at INSOL Europe. After meeting in Dublin in March (what a splendid programme in such a welcoming city!), we will turn Dubrovnik into the "European capital of insolvency" for a few days in October, with more than 350 restructuring & insolvency professionals from within Europe and beyond. I cannot imagine a better *rentrée* after this summer than sharing thoughts, ideas and laughs once again with all our INSOL Europe under the witnessing waves of the Adriatic Sea!

17 July was the deadline for European countries to transpose the EU Directive. As referred under the article on New Preventive and Restructuring Schemes adopted in EU Member States (p. 42), by mid-August 2022, only 18 EU Member States (out of 27) had complied with the Directive (19 now given that Spain passed its reform to its Insolvency Act at the end of August). Thus, many of the articles in this issue logically address either the new legislation on restructuring frameworks in some the EU Member States or its implementation in the case of early adopters.

This Autumn edition focuses on the first application of the cross class cramdown under an *accelerated safeguard* in France (p. 16), the introduction of a preventive restructuring procedure under the likelihood of insolvency and class formation in Denmark (p. 18) and the introduction of a negotiated settlement of the crisis in Italy (p.38). It also includes news from Czech Republic and Slovakia (p. 20) and from France on the protection of the debtors' personal assets (as opposed to professional assets) (p. 39).

The protection of new and interim financing under the EU Directive and its implementation in countries such as The Netherlands, Germany or France is also addressed (p. 26). Developing interim rescue financing frameworks in Europe seems of the utmost relevance for European jurisdictions to become a real alternative to other non-European available tools. In this respect, our US column (p.34) explains how different European companies of the SAS airline group have recently filed for Chapter 11 in the US seeking, apart from the worldwide automatic stay, debtor-in-possession financing in the early stages of the proceedings.

This edition also features the advances in Poland regarding directors' liability under insolvency of groups of companies and their subsidiaries (p. 30) and addresses the current energy crisis and, more specifically, the German government's efforts to maintain critical energy supply and help struggling companies (p. 22). In addition, under the current circumstances, the *rebus sic stantibus* clause is becoming more relevant than ever and reference is made to how Spanish Courts are addressing the issue (p. 40).

On the techy side, the IT&DA column addresses on this occasion what makes money actually money and analyses if bitcoin and cryptoassets can be considered as such. It also refers to the UK consultation paper on Digital Assets, which expressly refers to cryptoassets as property (p. 14).

At INSOL Europe we can be proud for the implication of many of our members in many technical contributions. For example, the "Yearbook 2022: Restructuring and Insolvency Tools in Times of Crisis" (p. 8), "Insolvency Law: Back to the Future" (p. 11) or other projects such as the INSOL Europe/LexisPSL Research on implementation of the EU Directive 2019/1023 (more details on p. 42).

Finally, we pray for the terrible situation of our dear neighbours in Ukraine to be resolved soon. Citing poet Percy Bysshe Shelley's message of hope when he describes the Autumn, "*The trumpet of a prophecy! O Wind, If Winter comes, can Spring be far behind?*" we hope the Ukrainian Spring is not far behind.

See you soon in the Pearl of the Adriatic!

José

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Resilience in times of adversity

FRANK TSCHENTSCHER
INSOL Europe President

Frank Tschentscher reflects on his 12 months as President, and what the future might bring

> *As my term as your president nears its end, I am reflecting on what has turned out a truly challenging 12 months*

I am delighted to introduce this Autumn Edition of Eurofenix with a great collection of highly topical articles, case notes and insights into legislative reforms from across Europe and beyond.

My sincere thanks to the editors and authors who have devoted their time and efforts to produce this truly awesome edition of our quarterly publication – you never fail to deliver and continuously produce first class and technically brilliant content. Your contributions are simply inspiring!

As my term as your president nears its end, I am reflecting on what has turned out a truly challenging 12 months. At the start of the year, the Eurozone was gearing up for a strong economic upswing in 2022. Effective state aid measures and funding made available by capital markets had helped businesses across Europe secure the necessary cash to weather the COVID-induced storm. Revenues in the second quarter of 2021 were already 6% above the same period pre-crisis and EBITDA margins improved by more than 300 basis points. Admittedly, some sectors, such as tourism or aviation, were still very much in crisis mode and operating at significantly lower revenues compared to pre-crisis levels. However, other industries bounced back quick and strong and market confidence was high.

All that changed when Russia invaded Ukraine. Russia's war and the sanctions that followed led us back all the way to the Cold War era and its fallout is affecting the economy globally. Indeed, the International Monetary Fund recently called the current situation perhaps the biggest test for Europe since the Second World War.

Surging energy prices and persistently high inflation have put the Eurozone economy under an unprecedented level of stress. The high degree of uncertainty and high inflation have strained the consumer sector, which was originally supposed to drive the recovery in 2022.

Uncertainty depresses economic sentiment

The economic policy uncertainty index, a newspaper-based indicator for measuring uncertainty, recently reached a new peak and continues to remain elevated. *See figure 1.*

Additionally, the European Commission's economic sentiment indicators took a dive in July. Industrial and services sector confidence declined substantially and the flash consumer confidence indicator for the Eurozone reached its lowest level on record in July. Consumer confidence now is considerably lower than during the first wave of the COVID-pandemic because concerns over inflation and continued uncertainty have substantially deterred consumers from spending. *See figure 2.*

Record inflation and monetary policy changes

Inflation continued to accelerate in the 19-member Eurozone in August of this year. Consumer prices were up 9.1% from a year earlier, a record increase, and up 0.5% from the previous month, with energy playing the biggest role, up a staggering 38.3% from a year earlier and unchanged from the previous month. Prices of non-energy industrial goods were up 5% from a year earlier and up 0.8% from the previous month. While annual non-energy and non-food price increases were modest, monthly increases accelerated, suggesting the possibility that underlying inflation is worsening.

In this high-inflation environment, the ECB increased interest rates for the first time in 11 years. The larger than originally expected 50-basis-point rate hike in July brought the deposit rate out of negative territory to zero percent. Finally, earlier this month, the ECB's Governing Council decided to raise the three key ECB interest rates by 75 base points respectively, increasing the rates for the main refinancing operations, the marginal lending facility and the deposit facility to 1.25%, 1.50% and 0.75% respectively, with effect from 14 September 2022.

Recession or not

Surprisingly, despite the above and the rather challenging economic environment, the baseline scenario for the Eurozone economy surprisingly looks quite positive at first glance. In its latest forecast, the European Commission foresees a growth rate of 2.6% for 2022. Inflation is assumed to reach 7.6% on average. There are, however, considerable risks for this baseline outlook. These include a potential recession in the United States and a slowdown in China, larger-than-expected monetary tightening in the face of high inflation or even higher energy and commodity prices. Perhaps the greatest risk for the baseline scenario comes from a possible cut-off of Russian gas supplies. While dependence on gas in general and Russian gas, in particular, varies widely across Europe, a total cut-off of Russian gas would severely affect several countries in Central and Eastern Europe, especially Hungary, the Czech Republic, Slovakia, Germany, and Austria.

In a recent study, the International Monetary Fund calculated the potential effects of a complete and immediate stop of Russian gas supplies on the economies in the Eurozone. Key results of the study show that over the next 12 months, the European Union would lose 1.8 percentage points of GDP growth compared to the baseline scenario. The most affected countries would lose between two and more than four percentage points. *See figure 3.*

Obviously, these calculations represent a worst-case scenario for the Eurozone. Whether they become a reality depends on critical assumptions about demand and other factors, including the steps European economies take to tackle this challenge. These include political decisions regarding the redistribution of energy among European countries, the amount of energy savings, the feasibility of substituting gas with other energy sources such as oil in industrial production, substitutions within value chains, and the speed at which new LNG gas terminals can be built.

How well the Eurozone fares is ultimately a question of how resilient it remains in the face of mounting economic headwinds. Building resilience is the key to long-term sustainability and success - and it why we have chosen 'resilience in times of adversity' as the overall theme for our upcoming Annual Congress in Dubrovnik, to be held from 6 October to 9 October 2022.

At INSOL Europe, we have proven our own resilience during the dark days of the past two years. We have changed the way we deliver our services and generally adapted to the challenges the global COVID-pandemic and now the worsening economic outlook have thrown at us. Today, we are a much stronger organisation, ready to take on new challenges.

It has been my honour and privilege to lead our wonderful organisation Thank you all for your support and your continuous commitment to our wonderful INSOL Europe family. As my presidency concludes, I hope to see many of you in Dubrovnik for handshakes (and maybe even a hug). ■

FIGURE 1

Economic uncertainty in Europe has reached record highs since the start of the Ukraine war

Economic policy uncertainty index Europe

Source: Economic Policy Uncertainty.

Deloitte Insights | deloitte.com/insights

FIGURE 2

Consumer sentiment in the Eurozone has witnessed a significant drop in recent months

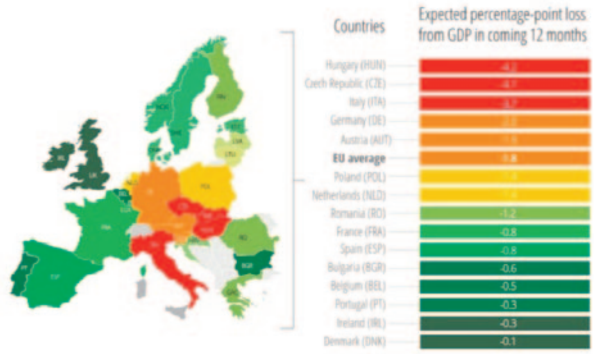
Consumer sentiment indicator Europe

Source: European Commission.

Deloitte Insights | deloitte.com/insights

FIGURE 3

Potential GDP effects of a full and immediate stop of Russian gas supplies



Source: International Monetary Fund.

Deloitte Insights | deloitte.com/insights

> **How well the Eurozone fares is ultimately a question of how resilient it remains in the face of mounting economic headwinds**

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*

INSOL Europe publishes inaugural Yearbook:

Restructuring and Insolvency Tools in Times of Crisis

Due to the pandemic and the government restrictions that came with it throughout Europe, it was not possible to host an Annual Congress in 2020 or 2021. Therefore, 2022 is a very special year, in which INSOL Europe has two Annual Congresses, one in Dublin in March and the second one in Dubrovnik.

To support this special occasion and as one of the new initiatives for 2022, INSOL Europe decided to publish this Yearbook and installed an Editorial Board to manage this new project, consisting of Marcel Groenewegen (*chair*), Evert Verwey, Emilie Ghio, Paul Newson, Ruairi Rynn and Jonathan van Ee (*secretary to the board*).

One of the main objectives of this project was to inspire and encourage young members of INSOL Europe to participate and to provide them with a platform to express their views on restructuring and insolvency tools in times of crisis. The Editorial Board is happy to report that great contributions have been received from young lawyers from all over Europe and even from India.

The title of this Yearbook is "*Restructuring and insolvency tools in times of crisis*", linking it closely to the overall theme of this year's Annual Congress in Dubrovnik: Resilience in the face of adversity.

This Yearbook contains contributions on a wide range of restructuring and insolvency tools, from both national and comparative law perspectives. Some contributions touch upon interesting and present-day topics, such as the implementation of the Directive (EU) 2019/1023 on preventive restructuring frameworks in several Member States of the European Union. Other contributions entail a comparison of restructuring and insolvency regimes of Member States of the European Union, the United States as well as England.

One of the contributors has expressed his view on the recently rendered and long-awaited judgement of the European Court of Judgement in the Dutch Heiploeg-case, regarding the transfer of employees and the protection of their interests in the light of a restructuring. This is, however, only a limited selection of the papers in this Yearbook.

INSOL Europe would like to express its appreciation to all contributors for the time and effort they contributed to get this Yearbook published. A special thank you to and appreciation for Olha Stakheyeva-Bogovyk from the Ukraine, who – despite the very difficult and unhuman situation and circumstances in her country – managed to send in a highly interesting contribution on the new preventive restructuring framework in the Ukraine. INSOL Europe stands with Ukraine and its people!

INSOL Europe and the Editorial Board encourage you to read all contributions. We hope you find this Yearbook enjoyable and informative and wish you many pleasant reading hours.

The Yearbook will be launched at the Annual Congress in Dubrovnik in hard-copy, and thereafter available as a PDF to download from the INSOL Europe website.

The Finnish Insolvency Law Association (FILA) celebrates 10 years in Helsinki

Paul Newson, Chief Executive Officer, INSOL Europe

INSOL Europe's Chief Executive Officer, Paul Newson, was invited to be the opening speaker at FILA's tenth anniversary event in Helsinki, Finland, from 18-19 August.

The Finnish Insolvency Law Association (FILA) was founded in 2011 and brings together lawyers specializing in insolvency law, as well as other professionals working with insolvency issues. The Association has around 250 members, the majority of whom are attorneys at law who act as administrators in bankruptcies and reorganization cases.

Hot topics of the day

The first day of the conference took place at the offices of Castrén & Snellman Attorneys in the centre of Helsinki, attended by over 130 delegates, and was opened by Tuomas Hupli, Chairman of the Board of the Association.

Paul's presentation was entitled "***Responding to Change***" and started by giving the delegates a background to INSOL Europe, including how members can get involved at all levels, whether by simply attending events or contributing to one of our many working groups and forums. During what was to be one of the hottest days ever recorded in the city, Paul moved onto some of the hot topics of our profession such as cross-border schemes and plans - how they work in different jurisdictions, and the harmonization of insolvency laws at EU-level.

Paul then went on to relate the challenges that our profession is facing to the key topics to be discussed at the Annual Congress in Dubrovnik, reminding the audience that "*Resilience is the ability to navigate adversity and to grow and thrive from challenges*" according to the American psychologist Karen Reivich, and that on account of the

current crisis, companies will have to adapt their businesses to cope with rising costs, supply chain challenges, and changing markets to be resilient. The way insolvency and restructuring professionals react to this crisis and aid their clients in dealing with the plethora of issues they are faced with in these uncertain times, will have a profound effect not only on individual businesses and their respective workforces, but on the economy at large.

Finally, Paul invited the delegates to find out more about INSOL Europe and how we are working to get a better understanding of this new landscape and what insolvency and restructuring professionals may be able to offer their clients, what tools they have at their disposal in their respective countries and what is in store in terms of future regulation.

The seminar continued (in Finnish) with a lecture by **Jaakko Mikkilä** (Supervisory Team Supervisor, Legal Unit, Patent and Registration Board) and a long and detailed history of the most peculiar bankruptcy cases in Finland by the legendary **Eero Lyytikäinen**, Bankruptcy Ombudsman Emeritus, who is allegedly responsible for creating the bankruptcy industry in Finland. The audience were certainly enthralled by the tales although as Paul's knowledge of Finnish is very limited, he was unable to join in the jokes!

Rounding off the day's lectures, FILA scholarships were handed out to recently qualified students before the delegates were released into the fresh air to enjoy some well-earned refreshments.

The heat continues in Tallinn

After a short cruise to Tallinn, Estonia, the second day of the conference took place at the Tallink Spa Conference Hotel, in the harbour area of the town, on yet another day with record-breaking temperatures.

Lectures continued in Finnish by **Pekka Puolakka**, EY Law Baltics Managing Partner, Tallinn on "Bankruptcy and related disputes, the good, the bad and the ugly of the late 1990s and early 2000s"; "Insolvency vs. imminent insolvency in restructuring of enterprises" was covered by **Tuomas Hupli** (Faculty of Law, University of Turku and Chairman of FILA) and lastly "Self-incrimination protection" by Professor of Procedural **Law Mikko Vuorenpää** (Faculty of Law, University of Lapland). Tuomas Hupli then closed the day's proceedings and thanked everyone for attending.

Paul Newson would like to thank Olli Rantanen (Head of Legal Services, Domestic Financing at Finnvera plc, Oulu Area, Finland; COO of FILA) and Tuomas Hupli (Chairman of FILA) for the opportunity to attend the conference, and Jan Lilius (Hannes Snellman Attorneys Ltd; Country Co-ordinator for INSOL Europe) for facilitating the arrangements and helping with the Finnish translations on the day!

Richard Turton Award Competition 2022

The Richard Turton Award Panel is pleased to announce that the 2022 winner is Kayode Olude from Nigeria.

Kayode is currently studying for a Master of Laws in International Commercial Law at University of Nottingham, his thesis expounding on the prospects of ratification of UNCITRAL Model Laws on cross-border insolvency in Africa's largest economy – Nigeria, seeking to draw lessons from the experience of other jurisdictions that have adopted the model laws.

Kayode will be writing a paper "*Quest for EU harmonisation of cross-border insolvency rules between EU and Non-EU countries; challenges and prospects*", which will be published in summary in Eurofenix and in full on our website.

As part of the award, Mr Olude has been invited to attend the INSOL Europe Annual Congress in Dubrovnik, Croatia in October.

The panel adjudicating this year's applications was made up of:

- Neil Cooper, INSOL International
- Nicky Fisher, R3
- Maurice Moses, IPA
- Robert van Galen, INSOL Europe

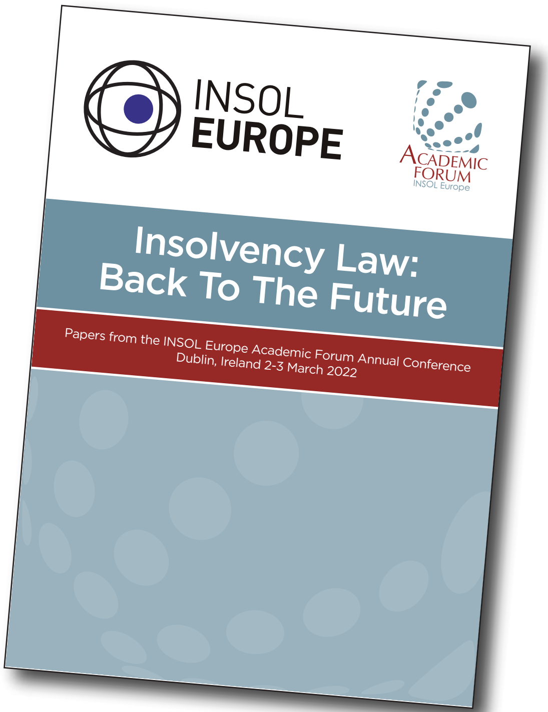
We would like to congratulate Kayode on his excellent application, and also thank all the candidates who applied for the award this year and wish them a successful career in their chosen field.

Richard Turton had a unique role in the formation and management of INSOL Europe, INSOL International, the Insolvency Practitioners Association and R3, the Association of Business Recovery Professionals in the UK. In recognition of his achievements these four organisations jointly created an award in memory of Richard. The Richard Turton Award provides an educational opportunity for a qualifying participant to attend the INSOL Europe Congress with all expenses paid.

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

Insolvency Law: Back to the future

New publication featuring papers from the Academic Forum Annual Conference in Dublin, Ireland, 2-3 March 2022



We are delighted to announce a new publication in our Academic Forum Technical Publication series, featuring presentations from our Annual Conference in Dublin, Ireland, 2-3 March 2022.

When we last met in October 2019 in Copenhagen, we told each other 'Arrivederci a Napoli, in September 2020.' Little did we know that our plans would be cancelled because the COVID-19 pandemic which took over the world at the beginning of 2020. Unfortunately, the pandemic led us to cancel not one, but two, academic conferences.

To give our members the opportunity to meet in person before our "traditional" autumn conference, INSOL Europe organised an extraordinary conference in March 2022 in Dublin, Ireland. Located at the north-western edge of Europe, with its rich past and one of the most modern, developed service and financial sectors in Europe, Dublin was a fitting location for our first in-person conference following COVID-19. Despite the traumatic news of the events occurring on the border between Ukraine and the Russian Federation, INSOL Europe's Annual and Academic Forum conferences were invaluable opportunities to discuss insolvency and restructuring reforms, challenges, and opportunities across Europe.

While the global impact of COVID-19 in the area of insolvency and restructuring was noted, the papers presented at the Academic Forum focused primarily on long-term issues, reflecting the variety of interests and expertise of the INSOL Europe members. The panels covered a range of topics and subjects, including cross-border insolvencies, the need to protect special categories of creditors and debtors, the challenges presented by crypto-assets and the 4th industrial revolution, and issues in consumer bankruptcy. We hope you will find the new publication an interesting and useful read.

The new publication is available or all members of INSOL Europe to download from: www.insol-europe.org/publications/technical-series-publications

New book published on restructuring agreements in Italy

INSOL Europe past-president and regular contributor to Eurofenix, Giorgio Cherubini, has published a book in the series coordinated by the famous Professor Guido Alpa, titled "I nuovi accordi di ristrutturazione" (The new restructuring agreements).

The book analyses the provisions of Article 182bis of the Bankruptcy Law, as recently modified by the new Code of company crisis and by the Law decree 118/2021, introducing a new insolvency proceeding: the negotiated settlement procedure of business crisis, which allows any distressed individual and collective companies to ask for the appointment of an independent expert who could facilitate negotiations between the debtor and the stakeholders, in order to lead the company to its recovery (see page 38 of this edition for an article on this topic by the author). The book is published by Pacini Giuridica and costs €25.

A closer look at:

The INSOL Europe Dubrovnik Congress, 6-9 October 2022: Resilience in the face of adversity

EMMANUELLE INACIO
INSOL Europe Chief Technical Officer

> *Our first plenary session will have the task of designing the new European restructuring plans as the extended deadline for Member States to implement the EU Directive on Restructuring and Insolvency has now expired*

We are most delighted to invite you to the breath-taking city of Dubrovnik (Croatia) for the 41st Annual Congress of INSOL Europe, titled "Resilience in the face of adversity", which will take place from 6 to 9 October 2022 at the Hotel Rixos Premium Dubrovnik.

The city of Dubrovnik lies in the far south of the arc that forms Croatian soil, located on the thin coastal strip between the high hills and the calmness of the Adriatic Sea. Dubrovnik is filled with outstanding natural beauty and many efforts have been made to preserve its varied ecological sites. The city offers an astonishingly clear blue sea, unique flora and fauna, scenic sunsets and a warm Mediterranean climate.

Counting only about 30,000 people, Dubrovnik is the cultural and social centre of the region, the County of Dubrovnik-Neretva and the most famous city of Croatia. Known as "The Pearl of the Adriatic", the city of Dubrovnik is featured by the fairytale appearance of the Old Town (a World Heritage site) and its white stone defensive walls with mighty forts and towers. More than two-thirds of the Old Town's buildings suffered bomb damage and were rebuilt after the Croatian War of Independence. Dubrovnik's white walls reflect survival and resilience, a message of hope.

Resilience

The INSOL Europe 2022 Dubrovnik Congress Technical Committee has been working tirelessly to deliver a programme that is simply astounding under the supervision of the Co-Chairs **Frances Coulson** (Wedlake Bell, UK) and **Jelenko Lehki** (Lehki Law Office, Croatia) on the theme "*Resilience in the face of adversity*".

"*Resilience is the ability to navigate adversity and to grow and thrive from challenges*", according to the American psychologist Karen Reivich. On account of the current crisis, companies will have to adapt their businesses to cope with rising costs, supply chain challenges, and changing markets to be resilient. The way insolvency and restructuring professionals react to this crisis and aid their clients in dealing with the plethora of issues they are faced with in these uncertain times will have a profound effect not only on individual businesses and their respective workforces, but on the economy at large.

Companies that operate with global supply chains, who depend on commodities and consume a lot of energy such as automotive suppliers or manufacturing, engineering and construction companies, have little negotiation power over customers and will be exposed to high levels of uncertainty and challenges. For these industries, the current environment has created a "perfect storm" as the crisis is hitting them at a time that they are experiencing and undergoing disruptive changes such as electrification, digitisation and the need for environmental, social and governance (ESG) compliance. The coming years are likely to remain very difficult for them. Company resilience, i.e. the ability to deal with unexpected negative events, will gain in importance. In relation to today's challenges, a sophisticated inflation management will prove to be a crucial new core competence.

To gather a better understanding of this landscape and what insolvency and restructuring professionals may be able to offer their clients, what tools they have at their disposal in their respective countries and what is in store in terms of future regulation, we encourage you to attend our Congress!

Setting the agenda

The INSOL Europe 2022 Dubrovnik Congress Technical Committee Co-Chair **Frances Coulson** (Wedlake Bell, UK) will also act as our Congress Facilitator. Frances will be the conductor of our event, controlling its tempo and feel, setting the tone of the event and maintaining a strict schedule.

Bojan Fras, Vice-Governor of the Croatian National Bank, coordinating and managing the Legal Area and the Consumer Protection Monitoring Office, will be our first keynote speaker. He was the principal Croatian legal advisor on some of the most significant transactions and investment projects in Croatia, including those in telecom, energy and finance. He represented and advised a large number of leading international corporations and institutions.

José Garrido, Senior

Counsel in the IMF's Legal Department, will give the audience an insight on the role of insolvency law in the global economy. Despite the bad connotations traditionally associated with insolvency proceedings, insolvency law plays an essential role in the economy.

Our first plenary session will have the task of designing the new European restructuring plans as the extended deadline for Member States to implement the EU Directive on Restructuring and Insolvency has now expired. The panellists will present a case study involving a group in Denmark, Germany, Greece and Portugal which are jurisdictions that implemented the EU directive. The delegates will learn whether designing a restructuring plan in each jurisdiction leads to a similar result…

The delegates will then have to select two breakout sessions among four interesting topics covering the Norwegian Air case, the issues of the insolvency management and supervisory bodies submitted to risk, healthcare industry cases in Ireland and the US and the adventures in assets tracing and recovery in Eastern European countries.

Our plenary sessions will then cover topics as diverse and captivating as the game of norms that result from cross-border recognition of insolvency(-related) decisions. Indeed, the question of cross-border recognition of insolvency (-related) decisions makes the Brussels Regulation, the European Insolvency Regulation, the Rome I Regulation, the 2005 Hague Convention, the 2007 Lugano Convention & UNCITRAL Model-Law on Cross-Border Insolvency cross paths.

Given the diversity of transactions avoidance laws, the European Commission strives for the harmonisation of this legal field in the EU. Our next panel will therefore present a Model Law.

The last panel session of the day will explore the dangers of cyberattacks and the legal and practical opportunities to prepare for the inevitable cyber-attack. Indeed, it is vital that businesses take the necessary steps to protect themselves against the complexity and speed of cyberattacks.

Hard facts, soft skills

The second day of our Congress will be opened by the keynote speaker **Fabris Peruško**, CEO and member of the Management Board of the Croatian Fortenova Group, which was formed as a result of the extraordinary management and settlement of Agrokor's creditors.

Lord Justice Snowden from the Court of Appeal of England & Wales will then share with the audience his extensive practice in restructuring cases including Virgin Air, Virgin Active, and Smile Telecom, amongst many. A senior judges' discussion on "to sanction or not to sanction" a plan/scheme in Croatia, Romania and the UK will follow.

Our Congress will also be the opportunity to explore topical and fascinating subjects in our plenary sessions as hard skills and soft skills in our industry. A panel session will explore the forces of change that are transforming the world of work, skills, knowledge and attitudes. Indeed, for the first time in industrial history, five generations are at work together (Traditionalists, Boomers, Gen.Xers, Millennials, Gen Z…).

The next panel will explore the crisis of the energy sector in different jurisdictions. The economic damage from the shutdown of Russian gas flows is piling up fast in Europe and risks eventually eclipsing the impact of the global financial crisis. Europe is very clearly heading into what could be a fairly deep recession Governments are under enormous pressure to intervene and already opened the fiscal floodgates to avert an economic catastrophe during the pandemic and kept up support as the energy crisis took hold.

Our technical programme will end with a panel discussion on what is in store in terms of future regulation for insolvency practitioners in the EU. Now that the extended deadline for Member States to implement the EU Directive on Restructuring and Insolvency has expired, the European Commission will present a proposal for an instrument harmonising the insolvency laws in the EU.

Seize the opportunity to hear and learn from recognised experts and industry leaders in our plenary sessions. Enjoy the educational offering as well as the networking opportunities and catch-up with friends old and new.

We are very much looking forward to welcoming you in Dubrovnik! ■

> "Our technical programme will end with a panel discussion on what is in store in terms of future regulation for insolvency practitioners in the EU"

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Cryptocurrencies and Crypto-Tokens

In this edition, we ask what makes money actually money, and new definitions of crypto-tokens

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"Spanish Courts have affirmed that cryptocurrencies are neither money nor electronic money, but an intangible asset"

The TMA Annual European 2022 conference, held in Madrid, included an interesting panel on "Blockchain, Bitcoin & Cryptocurrency in Restructuring". One of the topics covered by the panel was what makes money actually money and thus, whether cryptocurrencies fall under the category of money or not.

In order to answer this question, the panellists considered that, economically, money is defined as "*any item or verifiable record that is generally accepted as payment for goods and services and repayment of debts*".[1] Money should also be a unit of account and allow to store value for the future.

Panellist Lisa Hough (Unchained Capital, USA) supported the idea that cryptocurrencies seem to be as good as money for any transaction. She mentioned that, in some countries, such as El Salvador or the Central African Republic, cryptocurrencies have been adopted as legal currency and pointed out that, in countries such as the United States of America, you can buy a car (for example, a Tesla) or even fast food using cryptocurrencies. In fact, cryptocurrencies can also be used as payment in 20 USA chains like Petco, Chipotle, Office Depot and Regal Cinemas.[2] Cryptocurrencies are thus generally accepted means of payment and serve as a unit of account. They also are a means to store and deposit value; actually, the easiest way to store value in war times, as one could just cross the border and would only need a computer and their private key (passwords) in order to access their value. For all these reasons, cryptocurrencies should be considered money.

Although all these criteria make perfect sense, from a legal perspective, panellist José Carles highlighted the fact that one of the legal characteristics of money is that it must represent a claim on the issuer (i.e. in the euro area, a claim on the European Central Bank). This has been the reason why Courts in Spain[3] have not considered whether cryptocurrencies are money, as cryptocurrencies do not represent any claim for which the issuer is liable. Spanish Courts also addressed the point that, despite being value stored under electronic means, cryptocurrencies can neither be considered electronic money, as electronic money should also comply with the requisite of representing a claim against the issuer. Therefore, Spanish Courts have affirmed that cryptocurrencies are neither money nor electronic money, but an intangible asset.

Panellist Élodie Trevillot (Banque Delubac, France) supported the same conclusions, since only central banks can issue money and it is clear that cryptocurrencies are not issued by a central bank. This means that cryptocurrencies are not real money, but cryptoassets. Again backing these allegations, panellist Dr. Christian Hilpert (Eversheds Sutherland, Germany) indicated that, since cryptocurrencies are not accepted as payment, in Germany, they are not considered money.

The panellists addressed many other issues regarding bitcoins and cryptocurrencies and, specifically, their treatment under restructuring proceedings. Although courts have already cleared some of these issues, answers will come from the practical field from ongoing proceedings all around the world (i.e., the liquidation of Three Arrows Capital in the BVI, Voyager Digital or Celsius in the US, Zipmex in Singapore or the expected insolvency proceedings of 2gether in Spain).[4]

Crypto-Tokens: Towards a tertium genus of personal property in England and Wales

Courts have already ruled in England and Wales that crypto-tokens can be considered as personal property despite not falling under any of the two existing categories of personal property: "*choses in possession*" (tangible, moveable and visible things) and "*choses in action*" (personal property capable of being enforced by action).

In *AA v Persons Unknown*,[5] the High Court of England and Wales granted a proprietary injunction over cryptocurrencies (specifically, bitcoin), thus recognizing that bitcoin constitutes property. Mr. Justice Bryan stated in this case that it was "*fallacious to proceed on the basis that the English law of property recognises no forms of property other than choses in possession and choses in action*". The EWHC concluded that "*a crypto asset such as bitcoin are property*" and explained that **bitcoin met the criteria of the classic definition of property:** "*being definable, identifiable by third parties, capable in their nature of assumption by third parties, and having some degree of permanence*".[6]

Consistent with this decision, in *Ion Science v Persons Unknown*,[7] the English Commercial Court also considered bitcoin as property and again granted proprietary injunctions.

While this solution might just make sense for most of us, other jurisdictions have ruled otherwise based on their property laws. In Japan, the Tokyo District Court ruled in the *Mt. Gox* case that "*it is not the case that bitcoin has the necessary corporeality and the susceptibility of exclusive control to be the object of ownership*".[8]

Aware of the increasing relevance of digital assets in modern times (i.e. they have a value in themselves and are used as a means of payment), the UK's Digital Assets Consultation Paper,[9] published on 28 July 2022, points out that some aspects of **English and Welsh law should be reformed to acknowledge the specific features of digital assets.** This would create certainty, grant "*consistent legal recognition and protection*" and position England and Wales as a global hub for digital assets (and, specifically, for both "*crypto-tokens and crypto-token systems*").

The Consultation Paper's key recommendation is the explicit recognition of a new, third category of personal property ("**data objects**") that are distinct from those already existing categories. The proposed definition of *tertium genus* of property follows three cumulative criteria:

(1) being composed of data represented in an electronic medium;
(2) existing independently of persons and of the legal system; and
(3) being rivalrous.

Although a fourth criteria (divestibility) is also considered, it is not proposed as a standalone criterion with the purpose of allowing for further flexibility.

Having considered stakeholder feedback that possession and possessory concepts are inappropriate for digital assets, the Law Commission provisionally suggests developing the **concept of control** through the common law instead. A person in "control" of a data object can exclude others from it, use it, transfer it and identify themselves as the person able to do these things.

The Consultation Paper goes on to discuss various issues around cryptoassets, including their transfer, the defence of good faith for a purchaser for value without notice, custody arrangements and trusts, and their treatment as security and collateral. It also considers how existing legal frameworks for things such as breach of contract, vitiating factors, following and tracing, equitable wrongs, proprietary restitutionary claims, and unjust enrichment can be applied to them.

The deadline set for responses to the consultation[10] is set for 4 November 2022. ■

> "The Consultation Paper's key recommendation is the explicit recognition of a new, third category of personal property: "data objects""

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Footnotes:

1 In this regard, https://en.wikipedia.org/wiki/Money.
2 In this regard, https://www.wsj.com/articles/the-secs-cryptocurrency-confusion-coinbase-tokens-securities-register-payment-bitcoin-equity-scam-regulation-11659463294.
3 Ruling of the Supreme Court of 20 June 2019 and ruling of the Court of Appeal of Barcelona (Section 21) of 4 November 2021.
4 As per news such as https://es.cointelegraph.com/news/in-spain-2gether-calls-a-meeting-of-partnersto-request-insolvency-proceedings, the company is expected to file for Spanish "concurso de acreedores" anytime soon.
5 *AA v Persons Unknown* [2019] EWHC 3556 (Comm).
6 Lord Wilberforce's classic definition of property established those four criteria in *National Provincial Bank v Ainsworth* [1965] 1 AC 1175.
7 *Ion Science v Persons Unknown* (21 December 2020, unreported).
8 Literal translation from Japanese to English available at: https://www.law.ox.ac.uk/sites/files/oxlaw/mtgox_judgment_final.pdf. In this case, the Court considered that access to the private key does not really grant exclusive control (a characteristic of ownership in Japan) over bitcoin because bitcoin transactions need third parties to replicate them in the blockchain for the transaction to be confirmed.
9 Available at: https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2022/07/Digital-Assets-Consultation-Paper-Law-Commission-1.pdf.
10 Responses may be sent through an online form available at: https://consult.justice.gov.uk/law-commission/digital-assets-consultation or by e-mail to: digitalassets@lawcommission.gov.uk.

New tools for a higher level of efficiency in France

Isabelle Didier writes on the first case applying the French reform resulting of the implementation from the EU Directive

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The multiplication of crises at a global level, be they health, political, economic, social or environmental, has multiple consequences. It leads the law to evolve and especially the law of insolvency.

The Covid-19 crisis has shaken all our certainties and has shown us that restructurings may concern any size of company and any sector of the economy, even those that seemed historically sheltered. For example, the energy sector has been experiencing unprecedented tensions since 2020, aggravated by the Ukrainian conflict. Many players in this highly regulated market have been and will be affected by this unprecedented and lasting crisis.

For two years, European governments have been supporting companies. The French government adopted an onerous 'Whatever it costs...' policy, in which aid, among others, state-guaranteed loans and favourable public measures in relation to social security contributions and taxes, kept many companies alive. That policy came to an end. The time has now come to manage these situations according to the traditional rules of collective procedures.

> "When faced with new situations, professionals in the field of insolvency proceedings must have new tools at their disposal"

New tools

However, when faced with new situations, professionals in the field of insolvency proceedings must have new tools at their disposal. In France, the Restructuring and Insolvency Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 (the 'Directive'), was transposed by Ordinance no. 2021-1193 of 15 September 2021, amending Book VI of the Commercial Code. It entered into force on 1 October 2021. It provides companies with a perfectly adapted and efficient tool which has notably allowed the treatment of the difficulties of a company in the energy sector, which was one of the first, if not the first, to use the new opportunities of differential treatment between creditors, divided into classes of affected parties.

Moreover, the Directive leads European Union Member States to integrate new concepts into their own legal system for dealing with business difficulties, particularly the need for courts to justify their decision with accounting and financial dimensions that makes this field more than ever an economic law.

New professional structures

At the end of 2020, in the context of this evolution of insolvency law and faced with the imminent transposition of the Directive into French law, French insolvency professionals, all members of GRIP 21, under the impetus of the author, became aware of the importance of pooling complementary skills by bringing them together within the same legal structure, which French law had not allowed until then. This awareness is the result of the keen interest in international best practices and regular participation in the work of UNCITRAL and the World Bank. Indeed, exchanges between professionals, academics and legislators in these forums where the floor is freely shared, necessarily lead to questioning one's own convictions as to the efficiency of one's own system and preparation for the evolution of the law desired by the policy maker.

Thus, at the end of 2020, the first multi-professional company ('SPE') was created for the exercise of the professions of court-appointed administrator, chartered accountant and lawyer, dedicated to the treatment and prevention of business difficulties. Though the Order of Chartered Accountants gave its agreement quickly, it then took nine months to manage to lift the reservations of the Bar Council and the National Commission for the registration on the list of court-appointed administrators, both of which are protective of the specific status of their respective professions.

As a reminder, in France, the profession of IP (insolvency practitioner) is entrusted to a profession divided into two distinct bodies: court-appointed administrators for the restructuring phase, numbering 160, and court-appointed liquidators for the liquidation phase, numbering 300. The latter also represent the rights of the community of creditors within the framework of reorganisation proceedings. These two professions enjoy a form of *de facto* monopoly, if not *de jure*, because of the constraints in terms of insurance, attached to their mandate, but mainly because of the historical and protective links which bind them to the commercial jurisdictions where they intervene. If the competences are national, the designations are very local. The professions of court-appointed administrator and court-appointed liquidator are mutually exclusive and incompatible with any other profession. Only the profession of lawyer can be jointly exercised with the profession of court-appointed administrator, but this dual status is rare. About ten court-appointed administrators are also lawyers, but few practice these two professions in parallel, even though both require compliance with the same professional rules: professional insurance, ethics, professional secrecy, etc.

Facing a rigid legal framework for regulated liberal professions, the French government wanted to change that situation by introducing greater liberalisation through a law called the Macron Law (who was Minister of Economy and Finance in early 2015). Indeed, many professions were required to evolve, merge, or even disappear. An Ordinance of 31 March 2016 and Decrees of 5 May 2017, have therefore instituted a new form of practice for regulated liberal professions: the multi-professional company (SPE). However, in five years, the SPE status has not seen many developments. Nonetheless, the interest of a SPE for the client is very obvious: its purpose is to allow him/her to have access to advice through a single point of contact and a more fluid and efficient collaboration between partners with different skills and expertise. In the case of SPE O3 Partners, these skills are legal, accounting and judicial. The activity pooled by the partners is the prevention and the treatment of the difficulties of the companies in collaboration with the usual advisers, lawyers and chartered accountants of the company facing difficulties. It is also particularly focused on international cooperation.

Due to the difficulties of the registration process by the Bar Councils which have slowed down other initiatives, O3 Partners is, to date, the only SPE bringing together these three professions. Duly authorised at the end of July 2021 to practice the three professions, the SPE was entrusted, in mid-October, by Yves Brulard, lawyer at the Bar of Mons (Belgium) and Paris, specialist in international procedures and Jérôme Lépée, lawyer specialist in the energy market, with the mission to act as counsel for one of their clients, a significant player in the energy market. The partnership immediately set up an operational team to implement the provisions of the Ordinance transposing the Directive that had just come into force on 1 October 2021, and in particular the aspects of business valuation, carrying out of the IBR and all the legal and accounting documentation likely to convince the court and the procedural bodies that would be appointed of the feasibility of the restructuring project and the sustainability of the business.

In this case, the usefulness of the 15 September Ordinance was obviously to be able to obtain a vote on the plan with the support of the majority of affected parties (under the meaning of the Directive) thanks to the *cross-class cram down* mechanism which allows a court to impose a draft plan on one or several classes of recalcitrant creditors who voted against it.

In France, the debtor company used the new designed French *accelerated safeguard* proceedings which should always be opened after a preliminary amicable phase (*conciliation* proceedings). Once convinced of the applicability of the Ordinance (implementing the Directive) to the case, the President of the Commercial Court of Lyon (who was the competent judge) opened first conciliation proceedings and then *accelerated safeguard* proceedings (on 19 January 2022) for the purpose of confirming a safeguard plan with classes of affected parties, including dissenting affected creditors (banking institutions). Indeed, the safeguard plan was confirmed on 13 April 2022 by the court with a favourable opinion from the Public Prosecutor. It demonstrates in the meantime the effectiveness of the hard work done by the varying type of professionals involved in this case, including O3 Partners.

Conclusion

This first success in the application of the 15 September Ordinance demonstrates that the French courts and professionals in the treatment of companies in difficulty have perfectly integrated the new paradigms from international insolvency law. French insolvency law is therefore accompanying the international trend towards the unification of insolvency rules. This rapid evolution of French courts and insolvency professionals will be even more useful as a new European initiative was launched by the European Commission in November 2020 ('Insolvency III') which should be completed by the end of 2022. Numerous key items, such as the common definition of insolvency, the nullity of the suspect period, the obligations and liabilities of directors in case of insolvency or the conditions governing the practice of the profession of insolvency practitioner are also currently being debated within working groups such as those of UNCITRAL Working Group V on Insolvency Law or those of the World Bank.

These will lead tomorrow to new professional rules that professionals will integrate with even more facility for which they will have been prepared by trainings and their exchanges proposed by INSOL Europe or INSOL International which take part in these working groups. This is how GRIP 21's role as an expert with UNCITRAL Working Group V and the World Bank has played an essential role in the creation of the SPE O3 Partners and in the ease of understanding the concepts resulting from the Directive. ■

“This first success in the application of the 15 September Ordinance demonstrates that the French courts and professionals have perfectly integrated the new paradigms from international insolvency law”

The Danish implementation of the EU Restructuring Directive

Michala Roepstorff discusses the amendments to the restructuring legislation in Denmark which were implemented to improve the framework for restructuring

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> *Prior to the implementation, in-court restructuring proceedings required that the debtor be insolvent*

Legislation to implement the EU Directive on Restructuring and Insolvency came into force in Denmark on 17 July 2022. Prior to the implementation, in-court restructuring procedures, discharge of debt and disqualification were already part of proceedings under the Bankruptcy Act (the "Act") and an early warning system had also applied on a temporary basis for a number of years.

In 2021, certain amendments to the restructuring legislation were implemented to improve the framework for restructuring, which seems to have led to a (slight) increase in the number of filings. The implementation took place mainly by incorporating a new chapter on a preventive restructuring procedure, adjusting certain provisions and inserting a provision on the early warning system.

Preventive Restructuring Procedure ("PRP")

Prior to the implementation, in-court restructuring proceedings required that the debtor – whether a natural person or a legal entity – be insolvent. In case of insolvency, an application to open a restructuring procedure could (and still can) be filed either by the debtor or by a creditor. The implementation introduces a PRP for a debtor that, while not yet insolvent, is likely to become insolvent. The filing for such procedures is only available for the debtor, not for creditors, provided the debtor – in the case of natural persons – carries out business activities and the debtor – in the case of legal entities – is not subject to be wound up as a result of a decision by the Danish Business Authority.

Neither an automatic stay (meaning mainly that creditors are not allowed to seek satisfaction) nor a mandatory appointment of a restructuring administrator applies to the PRP – both are optional but connected. Thus, a filing for PRP may be made with or without a request for a stay. The PRP procedure PRP will to some extent differ depending on whether a stay applies.

In cases where a **stay applies**, the following is mandatory:

- A restructuring administrator is appointed (either based on the application or a subsequent request by the debtor).
- Current information on the procedure must be provided to the creditors and by public notice.
- Meetings in court must be held (see the dual-stage process described briefly below) to which the creditors must be invited to participate and receive certain information.
- The date on which the bankruptcy court decides to grant a stay is considered as the reference date (*fristdag*), which is of importance, for example, for the classification of certain claims and the time period for clawback actions.
- *Ipso facto* clauses cannot be upheld, meaning that the filing for the PRP itself cannot cause termination of a contract, nor can the counterparty demand security for claims under the contract. In fact, contracts may be continued with the consent of the restructuring administrator, regardless of default or delay in performance by the debtor prior to the PRP. Accordingly, claims under such continuing contracts will become preferential claims (for contracts with ongoing services, preferential status only applies to claims relating to the period while the stay is in effect. Discontinuation of such contracts may be effected at a month's notice and the preferential state for future claims will then cease accordingly).

In cases where a stay does not apply:

- A restructuring administrator is not appointed.
- Informing creditors on the opening of the PRP is optional (if the court is to decide on a restructuring plan, it must be presented to the creditor(s) along with certain information.
- *Ipso facto* clauses cannot be upheld (see above). However, no protection against termination or demand for security etc. applies, contrary to when a stay is granted.

The dual-phase process

Prior to the implementation, the restructuring procedure needed to have a purpose: (i) compulsory composition - write-down of the debtor's debt (a full write-off was and still is possible) and/or a moratorium and/or (ii) a business transfer in full or in part. The implementation retains both purposes and introduces a third

purpose in the form of other measures that may result in the debtor ceasing to be/become insolvent - such measures may be aimed at the capital structure of the debtor, such as a write-down of the share capital and subscription of fresh capital by cash as part of the final restructuring plan.

The restructuring procedure – prior to/post implementation - is a dual-phase process; meaning that (1) a restructuring plan addressing the overall purpose of the procedure must be presented to the creditors for a vote at a meeting to be held no later than four weeks after the opening of the restructuring procedure; and (2) a final restructuring plan must be presented to the creditors for a vote at a meeting to be held no later than six months after the opening of the restructuring procedure. An extension mechanism applies to both these phases.

When restructuring proceedings were introduced in Denmark in 2010, the terms "restructuring plan" and "restructuring proposal" were applied to phases (1) and (2) respectively. As the dual-phase process is maintained, so are the terms. Hence, the Danish term for the initial overall purpose description means a restructuring plan and the term for the final plan/scheme for the restructuring means a restructuring proposal.

Class formation

The class formation system is a significant amendment to the in-court restructuring procedures applicable prior to implementation. From the pre-legislative work, it appears that had class formation not been mandatory for non-SMEs, it might not have been introduced. The reason being that although the classes must be formed on the basis of the common interests of the creditors in each class, class formation may impair the influence of major creditors. However, the implementation states, among other things, an obligation for the bankruptcy court to deny ratification of the final restructuring plan if it entails that the creditors will receive less dividend than they would otherwise have in case of bankruptcy - the best-interests-of-creditors test. If the debtor is a SME, the class formation system is optional (applicable both in PRP and restructuring procedures) at the sole discretion of the debtor. Moreover, class formation is only applicable to a vote on the final restructuring plan, but not to votes on, e.g., the initial restructuring plan (see above for definitions).

Related parties are excluded from voting. Prior to and post implementation, votes are cast based on each voting creditor's proportionate share of the total unsecured claim. However, if class formation applies, the result will be based on the joint votes of the creditors in each class. A restructuring plan as well as a restructuring proposal is deemed to be adopted by the creditors if a majority of the voting creditors represented vote in favour.

Prior to implementation, votes were cast to reject (a non-cast vote was considered a vote in favour) and, unless a majority voted to reject the plan/proposal, it was considered adopted. In respect of the plan, rejection by a simple majority of the votes represented required that the rejecting creditors represent at least 25% of the total claim of all creditors with voting rights. The 25% threshold for rejecting voting creditors to the initial plan still applies.

It remains to be seen to what extent the new tools will be used and especially whether they will result in an increase in the number of filings for the in-court restructuring procedure as well as in the number of ratified final restructuring plans. Moreover, of interest will be whether the preventive restructuring regime may lead distressed debtors to seek in-court measures in an attempt to avoid a worsening of their financial position. ■

> *"The class formation system is a significant amendment to the in-court restructuring procedures applicable prior to implementation"*

Implementation of the EU Restructuring Directive in Slovakia and the Czech Republic: A brief comparison

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> **In line with the Directive, both the Slovak Act and the Czech Bill deal with imminent insolvency in preventive proceedings**

In order to ensure the transposition of Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks (the "Directive"), Slovakia and the Czech Republic have initiated the process of adopting their respective implementing legal acts.

While Slovakia has recently adopted Act No. 111/2022 Coll., on resolving imminent insolvency (**Slovak Act**), the bill on preventive restructuring (**Czech Bill**) is yet to be adopted in the Czech Republic and there is unfortunately no clear indication about any timing. The aim here is to provide an overview of the main principles of both texts.

In line with the Directive, both the Slovak Act and the Czech Bill deal with imminent insolvency in preventive proceedings, which serves as an effective tool for resolving the debtor's financial situation in a timely manner so that it can keep existing as a going concern and carry on its business. This helps, in particular, to avoid bankruptcy and subsequent liquidation proceedings. Under both Slovak and Czech law, only legal entities are eligible for preventive restructuring. The Slovak Act sets out also a condition for the debtor to be registered in the Public Sector Partners Registry (evidencing ultimate beneficial owners).

Implementation of the Directive in both countries effectively distinguishes between public and non-public preventive restructuring. In Slovakia, proceedings are generally public (open to any affected creditor) and non-public proceedings are available only to debtors with creditors under supervision of the national bank. The Czech Bill defaults to non-public proceedings, where the debtor is allowed to choose which groups of creditors are involved – though the debtor might opt for a public preventive restructuring.

In accordance with the Directive, all of the above proceedings also involve adoption of a restructuring plan, which includes, in particular, description of restructuring measures, the creditors and their classes and other information, though these differ under the Slovak Act and the Czech Bill. A restructuring advisor also plays a key role in the preparation of the restructuring plan. Classes of creditors vote on the adoption of the plan, which also has to be confirmed by the court.

A crucial tool in preventive restructuring proceedings is the moratorium, which provides the debtor temporary protection from effects of insolvency proceeding and enforcement proceeding. The Czech Bill, unlike the Slovak Act, stipulates that the debtor does not have to obtain creditor approval when requesting a moratorium. Apart from the general moratorium, the Czech Bill also offers the possibility of an individual moratorium, applicable only to a specific creditor.

One of the differences between the Czech and the Slovak processes is the degree of formality of the proceedings. While in Slovakia, judicial intervention is necessary from the very beginning, preventive restructuring may be approved in the Czech Republic without court intervention if the debtor and all the relevant creditors agree. However, in practice, formal court approval is expected in order to give effect to the restructuring plan. As regards granting a moratorium, the court's decision is still necessary under the Czech Bill.

Courts are involved under the Slovak Act also in relation to the committee of creditors. After approval of the preventive restructuring, Slovak law requires the court to establish the committee of creditors. The committee may, *inter alia,* determine certain material acts of the debtor which will be subject to the approval of the creditors committee or the debtor's advisor.

The main principles and procedures of preventive restructuring under the Slovak and Czech implementations are also summarised in the following table, which highlights in more detail the main differences between the Slovak Act and the Czech Bill. ■

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Table 1: Selected differences between Slovak and Czech implementations of the Directive

	The Slovak Act	The Czech Bill
Eligibility	Legal entities, excepting those not subject to the Slovak Act on Bankruptcy and Restructuring (the State, banks, financial institutions, insurance companies etc.)	Legal entities, except banks, financial institutions, insurance companies etc.
Disqualification from the process (examples)	• A debtor whose business is not viable, • A debtor in liquidation or dissolved, • A debtor with declared bankruptcy or restructuring proceedings commenced, • A debtor subject to pending execution proceedings, • A debtor subject to pending enforcement of security, or • A debtor not listed in the UBO register.	• A debtor whose business is not viable, • A debtor pursuing dishonest intentions, • A debtor in liquidation, • A debtor declared bankrupt within the last 5 years, or • A debtor initiating preventive restructuring in the last 5 years ending with a declaration of inadmissibility due to dishonesty.
Types of proceedings	Public and non-public (private) preventive restructuring. The use of private preventive restructuring depends on whether creditors are subject to supervision by the Slovak National Bank (or similar body elsewhere).	Apart from general preventive restructuring envisaged both for creditors and debtors, a debtor can opt for a public preventive restructuring. Under certain circumstances, publicity of proceedings is needed (e.g., if a general moratorium is declared).
Commencement of proceedings	When the debtor files a motion with the court attaching a draft restructuring plan.	When the debtor deliver to affected parties of written notice of intent to negotiate a restructuring plan, attaching a restructuring project detailing, inter alia, the cause of financial difficulties, and outlining measures to be taken in order to preserve or renew business operations.
Restructuring advisor	Although the Slovak Act provides for significant involvement by a restructuring advisor in preparing the restructuring plan, the debtor cannot delegate preparation completely.	The debtor can wholly or partially delegate preparation of the restructuring plan to a restructuring advisor.
Voting on plan adoption	Affected creditors adopt the restructuring plan if: (i) each class of secured creditors has voted for the adoption, (ii) in each class of unsecured creditors, at least 75% of the voting creditors have voted for the adoption, (iii) in each class of unsecured creditors, a majority of the creditors with receivables exceeding 1% of the sum of receivables of voting creditors in that group have voted for the adoption (where a rule of one creditor-one vote applies), (iv) in each class of creditors with related receivables and subordinated creditors, more than 50% of voting creditors have voted for the adoption and (v) in each class of shareholders, more than 50% of the voting shareholders have voted for the adoption. Cramdown is available to overcome dissenting creditors.	Majority voting is by the amount of claims, not number of persons. A group of affected parties adopts the restructuring plan if at least three-quarters of them have voted for the adoption. Cross-class cramdown is available if a group of creditors disagrees.
Effectiveness of the restructuring plan	The restructuring plan is given effect by the court decision confirming it.	In most cases, it is expected that the restructuring plan will be given effect by a court decision confirming it. This is because a court order is required when the restructuring plan (i) affects any dissenting party directly, (ii) includes provision of new financing measures or (iii) envisages reduction of employees by at least 25%. Otherwise, the restructuring plan is effective as at the day of its acceptance.

Table 2: Selected differences with regard to the (general) moratorium

	The Slovak Act	The Czech Bill
Application for a moratorium	The court may grant a moratorium as part of a resolution approving the preventive restructuring, if the debtor has applied for it. The court will grant a general moratorium if the debtor evidences creditor approval (certain thresholds apply). An individual moratorium is not envisaged in the Slovak Act.	A debtor may file an application for a general moratorium from the commencement of the preventive restructuring until the restructuring plan is effective. It may be combined with an individual moratorium, which can be applied for before proceedings are initiated.
Basic rules on duration	A moratorium is effective for 3 months. With creditors' committee approval, it can be extended for up to 3 months.	A general moratorium is effective for 3 months. It may be extended for up to 3 months. The combined effects of any moratorium (general and/or individual) against any creditor may last only up to 12 months (e.g., when a general moratorium follows an individual moratorium or when an additional general moratorium is declared).
Effects on court proceedings	A moratorium avoids a declaration of bankruptcy or formal restructuring over a debtor. Any such proceedings opened have already been initiated, they will be stayed. Execution or security enforcement proceedings cannot be initiated.	A creditor cannot open insolvency proceedings against the debtor, nor can enforcement proceedings be initiated against the debtor's assets.
Offsetting of mutual claims	Certain limitations on offsetting of mutual claims (related receivables) between the debtor and the creditor apply.	Offsetting of mutual claims between the debtor and the creditor can occur, unless the restructuring court determines otherwise through an interim measure.
Effects on security	The debtor's secured assets cannot be used to satisfy a creditor's claim during the term of the moratorium. The Slovak Act does not generally prevent the creation of new security rights.	The debtor's collateral cannot be used to satisfy a creditor's claim. A security right can be acquired only in relation to specific claims (under agreements providing for business viability).

"You'll never walk alone"? Germany's Lifeline

Michael Thierhoff and Niklas Franke write about the German government's efforts to maintain critical energy supply and keep struggling companies in the industry trading

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> *By 2020, Germany was procuring 55% of its natural gas needs from the Russian Federation*

Once upon a time natural gas, being the "cleanest" fossil fuel available, was considered in Germany as the sample solution bridging supply required for the transition from nuclear energy, coal and lignite to renewable, green energy. At the same time, the history of gas supply by Russian state-controlled entities was marked by growth and steady relations for decades, undisturbed by foreign policy crises.

Already at the end of the 1980s, Western Germany purchased about half of its natural gas from the Soviet Union. By 2020, Germany was procuring 55% of its natural gas needs from the Russian Federation. State-owned companies there, such as Gazprom, supplied reliably and with reasonable conditions, leading to a general lack of concern about the availability of this critical resource. The entire infrastructure, from production facilities and transit to the largest natural gas storage facility in Germany, was owned by Russian-controlled entities. This dependence was barely questioned critically. By the end of 2021, winds changed and the European energy markets experienced disruption, with prices rising by 4.2%: a foreshadowing of events to come.

The turning point

Russia's continuing aggression against Ukraine was the turning point. To counter well deserved sanctions imposed by the international community resulted in a reduction of gas deliveries through pipelines to Germany. If the conflict intensifies, Russian gas deliveries are expected to come to a complete stop. The use of control valves on pipelines to enforce geopolitical goals has led to a historic disruption in already tense energy markets.

The Federal Government seems determined to maintain gas supplies for industry and consumers for as long as possible and to stabilise companies along the supply chain economically by all means. To this end, the German Ministry for Economic Affairs and Climate Action implemented a whole series of measures at record speed, all with one clear goal: to avoid insolvencies along the supply chain at all costs to prevent potential damage to the manufacturing industry and bitter consequences for consumers in winter. Of the numerous legal changes enacted by the Federal Government, the amendment to the Energy Security of Supply Act of 12 July 2022 can be highlighted.

Energy pricing issues

The legislator thus reacted to a dilemma which some gas supply companies find themselves in in view of the troubled energy markets. In order to be able to meet their obligations, even with reduced supply volumes from Russia, they have to buy their gas on the soaring spot markets. While the price per megawatt hour used to be less than €20, current prices are up to ten times that amount. However, they cannot pass these prices on to end customers because they are bound to long-term contracts on fixed terms. This situation results in considerable insolvency risks, especially for those who have procured all or large parts of their gas supplies from Russia.

Current prices have the potential to kill, where guaranteed prices or the typically long-term customer commitments leave no room to pass on increased prices. Here profits are slashed, turning into losses, while liquidity is under stress. Both can instantly result in imminent insolvency and a negative going concern. Other importers have long since diversified their sources of supply and buy most of their natural gas from Norway, the Netherlands or the few domestic gas producers. In this respect, they are also affected by increased purchase prices, if no long-term agreements are in place, but at the same time they are less dependent on replacement purchases. This makes them more robust in the current crisis.

In response, the government has passed a regulation, according to which the collectively increased gas prices can be passed on uniformly to all end customers from 1 October 2022 until April 2024. However, the amount of the gas levy is set centrally and adjusted every three months by Trading Hub Europe, initially at 2.419 cents per kilowatt hour, plus VAT, which will be reduced from the regular 19% to a reduced 7% rate, as Germany was not allowed to waive VAT under EU law. In addition, gas suppliers can also exercise a right to refuse performance if they cannot procure the required gas quantities on the markets. However, they need permission from the regulator (*Bundesnetzagentur*) to do so.

Equity investments and state trusteeship

Ways for the Federal Government to invest in equity or otherwise financially support ailing enterprises upon request have been facilitated and have already been applied in practice. *Uniper SE*, a large energy supply company with an annual turnover of almost €164 billion, was also in crisis. To stabilise it, the Federal Republic took a 30% equity stake by increasing capital. In addition, the company's credit facility was increased by €7bn by KFW, the state development bank, and *Uniper SE* was provided with a further €7.7bn via convertible bonds, bringing the total for the financial aid package to €15bn.

In the decision process, there was also an initiative to adapt the insolvency law. An early draft bill also catered for the insolvency option, guiding insolvency administrators to assure a seamless supply. However, the draft did not make it into the final version of the Energy Security of Supply Act. This clearly shows that the legislator is looking for crisis management and stabilisation for the market avoiding insolvency law and/or preventive restructuring.

As part of the critical supply infrastructure, the Energy Security of Supply Act also provides for the possibility of placing a company in the gas supply industry under state trusteeship, a process that has also already been used. *Gazprom Germania*, a German wholly-owned subsidiary of the Russian state-owned *Gazprom*, has been under the trusteeship of the Federal Network Agency since early April 2022. The background to this was that, by shareholder resolution, the company was to be liquidated. As a result of the trust administration, voting rights for the shares were transferred to the *Bundesnetzagentur*, which is closely supervising trading and has also appointed a managing director of choice. Due to Russia's economic sanctions against *Gazprom Germania*, its liquidity situation also had to be secured by KFW. However, the use of these funds is restricted for use only for the business and to maintain gas supplies, in order to prevent a drain to Russia. Since June, the company has been trading as *SEFE Securing Energy for Europe GmbH*.

Resilience for Winter

The Federal Government has also enacted the Gas Storage Act, according to which all gas storage facilities in Germany must have attained specified charging levels by 1 October 2022, in order to assure appropriate supply for the coming winter. Finally, the public sector has also pushed ahead with the expansion of LNG terminals on the coast by issuing the necessary permits to be able to obtain liquefied gas from ships in the future. Floating LNG terminals have been chartered to bridge the construction period.

With *Uniper SE* and *SEFE Securing Energy for Europe GmbH*, the German government has stabilised the main pillars of the national natural gas supply. However, there are countless other businesses along the supply chain that are also essential for the supply situation in Germany. They can also make use of the new price adjustment rights and rights to refuse performance. In addition, there are state funded credit and guarantee programmes. Additionally, there are plans for subsidies to mitigate losses.

If the last stage of the gas emergency plan, the alert stage, is declared, the gas still available in gas storage facilities and obtained through replacement procurement will be allocated by the *Bundesnetzagentur*. Combined with orders for conservation measures, this is intended to give priority to defined consumer groups, e.g., households with gas heating, social institutions such as hospitals, but also gas-fired power plants, which also serve to generate heat for households. Gas-intensive industries are currently not included. At the moment, however, there are discussions about softening this clear prioritisation in favour of businesses.

At the same time, the European Union's Gas Emergency Plan also came into force on 9 August 2022. Within the EU, 15% of gas consumption is to be saved by March 2023. This corresponds to 45 billion cubic metres. This savings target is non-binding and there are numerous exceptions, for example for extremely gas-dependent states such as Spain or Italy. Only if it is missed could binding savings targets be adopted with the consent of 15 EU states.

> *The use of control valves on pipelines to enforce geopolitical goals has led to a historic disruption in already tense energy markets*

Energy allowances and further steps

For the people, a taxable "energy allowance" of €300 is to be paid out in September to account for income differences. But the government has assured the public that this is just the start. Further aid is currently subject to intense cabinet discussions. Whether these measures will be sufficient to avoid major collateral damage and a state of emergency in energy supply in the event of a complete cessation of Russian gas supply remains open. Measures taken so far show that Germany does not shy away from substantial financial aid to ensure security of supply. Or, to conclude with Chancellor Scholz's promise: "*You'll never walk alone.*" ■


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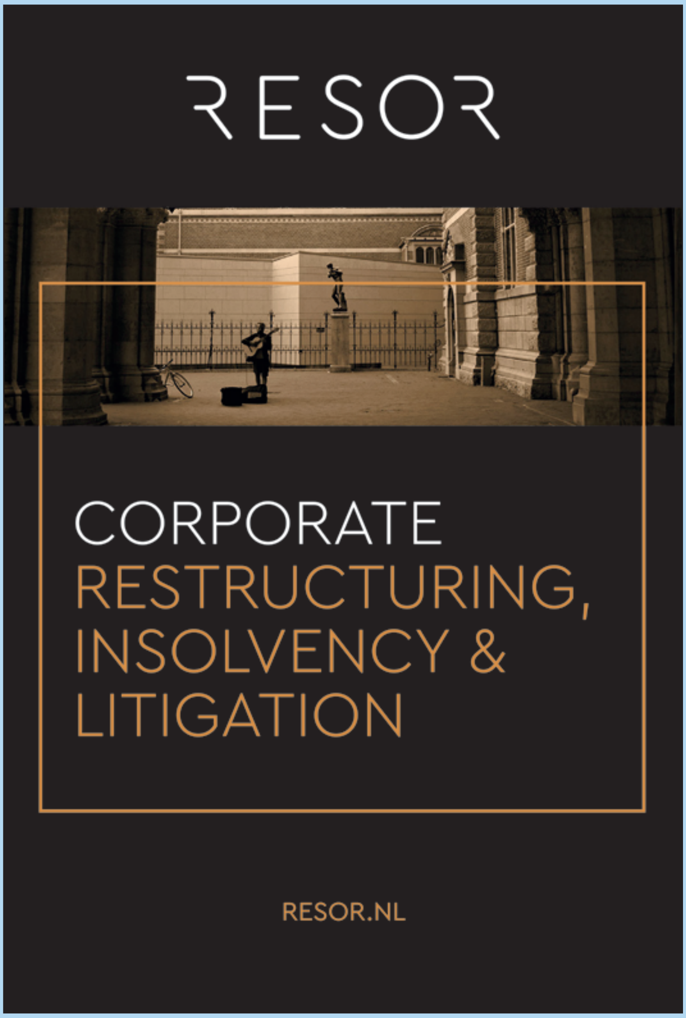
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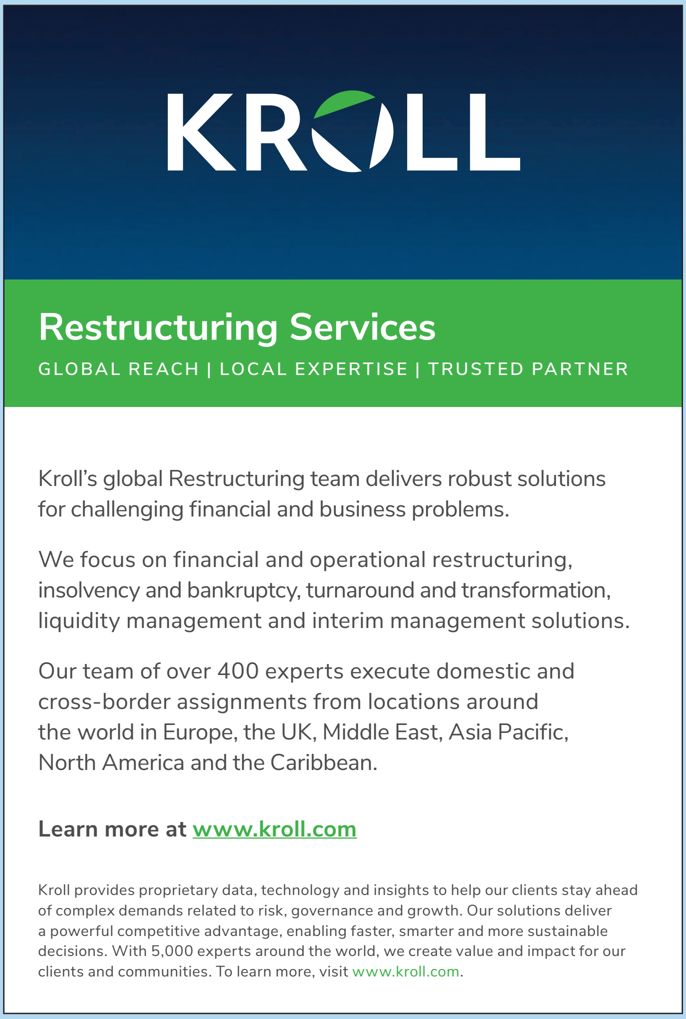
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Protecting new and interim financing: The stakes are high!

Paul Omar discusses how funding for business in a restructuring is addressed by the EU Directive

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The first axiom of insolvency is there is never enough money. For any restructuring to happen, however, funds are required in the firm's coffers to pay for the costs of restructuring, including the specialist advice necessary, and to provide the business with a bridge until revenue streams return online, income picks up and the restructuring savings emerge.

Other major costs will attend the implementation of any restructuring plan agreed with the creditors, including payments for necessary supplies governed by executory contracts.

The Directive on Preventive Restructuring and its view of financing

The Preventive Restructuring Directive (Directive (EU) 2019/1023) addresses the issue of interim and new financing. Always assuming that debtors can access restructuring and can persuade the creditors to approve any plan, the identity of who pays for the consequences of the plan will be an issue. Existing financial creditors may be unwilling to shoulder a further burden, adding to their exposure; a new creditor may well be more amenable, but may ask for protection from the application of the priority rule. For the directors, the risk is that their endeavours are in vain, perhaps because the negotiations fail or recovery hits the buffers further down the line. As a result, their dealings with the assets may raise the spectre of personal or vicarious liability as well as the application of clawback rules. The Directive has considered all these questions and attempts to create an inter-related framework to deal with the issues holistically. It defines two categories of financing: interim, pending the adoption of a plan, and new financing, as envisaged in and the subject of that plan.

> *The Directive defines two categories of financing: interim, pending the adoption of a plan, and new financing, as envisaged in and the subject of that plan*

As such, Recital 66 sets us down the route of accepting financing as a precondition for success seen in the light of two particular needs: to operate the business during negotiations and to help in implementing a plan, once confirmed. Anticipating failure, the text also makes the point that exemption from future avoidance actions is necessary, all of which serves to promote a "culture of early restructuring". Though postulating that national rules on avoidance actions and liability for the extension of credit to debtors in financial difficulties (e.g., the French *soutien abusif*, since abolished) could constitute impediments to obtaining financing, Recital 67 does not wish to supersede them entirely. A permissible scope for their operation would include scenarios involving fraud, bad faith, related-party transactions and where parties receive undue entitlements from transactions.

The Directive also anticipates how interim financing should be treated pending the adoption of a plan. Given an uncertain outcome, parties may be very reluctant to engage in financing pending that adoption, albeit such funding might be critical for the business to bridge its difficulties. To that end, Recital 68 suggests that Member States also protect interim financing, but not to limit its availability by reference to plan adoption and/or confirmation, otherwise appropriate for new financing. However, protection should only extend to financing that is "reasonably and immediately necessary". This is provided that financing has been engaged for two permissible purposes: (i) continued operation or survival of the business; and (ii) preservation/enhancement of business value. While protection for new financing could be made subject to plan adoption/confirmation, nevertheless, for interim financing, protection could be extended on the basis of some form of *ex ante control* existing, e.g., approval by a practitioner, creditors' committee or a court. Any financing so protected should also attract a priority at the very least above the position of unsecured creditors in any subsequent insolvency.

This does not mean, however, that *carte blanche* will be given to all financing that does not otherwise infringe the conditions listed above. While the vagueness of the phrase "reasonably and immediately necessary" invites judicial interpretation, Recital 69 provides a gloss that might help this process. It recommends recourse to "estimates and projections", updated as necessary by the debtor, and that are made available to stakeholders. This will promote more certainty and lead to greater confidence that transactions do not risk being declared void. Member States may, in fact, provide that protection by defining a moment from which protection will begin to run for negotiation-related costs, even though no procedure has yet been opened or a stay granted. Optionally, for employee wages and other non-negotiation-related costs, protection may be tied to the opening of proceedings and a stay.

While the Directive provisions proper seem fairly light-touch, it is in the Recitals that the very elaborate architecture of new and interim financing is really apparent. It goes without saying that the aim is to ensure the availability of protection occasioned by a genuine need for (re-)financing the business. However, all three elements must be present: (i) appropriate priority for the financing; (ii) an exemption from liability for providers and directors alike; and (iii) exemption from avoidance provisions, should the restructuring fail and proceedings are opened subsequently. The absence of any one of these elements, whether wholly or partially, will imperil what is a carefully constructed framework designed to promote financing arrangements in the most efficient manner, by minimising liability, albeit subject to tightly-drawn exceptions. The complexity of this, and many other elements, in the Directive text explains why most Member States availed of the facility to delay transposition. Nonetheless, by the time this is published, that deadline will have passed. The concern is that transposition may occur without the architecture being fully-formed, perhaps because the rationale for the need to maintain the unity of framework is not fully appreciated.

In this light, it is instructive to see how the Member States that have already proceeded to transposition have approached the subject. In the Netherlands, the *Wet Homologatie Onderhands Akkoord* (WHOA) inserts an Article 42a in the *Faillissementswet* to avoid the annulment of transactions that are "*necessary to continue the debtor's business during the preparation of a plan*" and "*in the interests of the general body of creditors and would not materially prejudice the interests of any individual creditors*". This facility is subject to a request to and granting of authorisation by the court. While the courts have begun producing guidelines through the jurisprudence defining what new money attracts protection and how to define material prejudice to any creditor,[1] the brevity of the provision suggests that recourse to the general rules for director's liability in the Dutch Civil Code is necessary. It will take time to elucidate the precise articulation between the liability rules and the specific context of preventive restructuring, which is not entirely encouraging.

In Germany, a similar provision in section 90(1) of the *Gesetz zur Fortentwicklung des Sanierungs- und Insolvenzrechts* (StaRUG) confers immunity on any legal transactions made in furtherance of a restructuring plan, including finance commitments entered into for the purposes of a plan subject to section 12. For interim financing, some protection is conferred by section 89(1) stating that any delays occasioned by transactions undertaken with view to the conclusion of a plan, including presumably any financing arrangements, do not render directors liable under any rule stipulating culpability for any delay in filing for insolvency. The focus on director's liability is also addressed in section 1 of StaRUG, which requires directors to react appropriately to threats to the business, but leaves untouched any duties in other legislation.

Also noteworthy, the French transposition in the Ordinance no. 2021/1193 of 15 September 2021, whose Article 31 (applying to *sauvegarde*) requires new financing to be the subject of express noting in any plan and confers a payment priority. Its Article 18 (applying to *sauvegarde accélérée*) also grants priority to new money proposals necessary for implementing a rescue plan (including any funds occasioned by a modification to such a plan). Nonetheless, in common with the Dutch text, no mention is made of director's liability and the application of avoidance rules in a subsequent insolvency may depend on a court taking the view of when insolvency supervened, which suggests that no specific protection is conferred on interim financing.

Summary

Given the variations in how some Member States have approached the Directive, the risk is that other Member States with varying experience of preventive restructuring may not appreciate the holistic approach in the Directive to the protection of new and interim financing. In fact, with the exception of Germany, the examples above do not really address the position of interim financing, preferring to concentrate on new financing for the purposes of a plan. Moreover, there is partial commonalty in the desire to protect against the risk of avoidance in subsequent insolvencies. Moreover, with respect to director's liability, the structuring of these rules (together with any exceptions) displays great divergence, mostly with reference to the general law.

This is not ideal, but it shows how such a text, necessarily complicated because many of its elements reflect the latest developments in insolvency and restructuring, will also engender difficulties in its transposition, given the varying stages of development of European jurisdictions. This is by no means the final such text, the Insolvency III initiative following hot on its heels, also with many topic areas potentially within its scope, each likely to prove problematic to interpret, transpose and apply. Nonetheless, the steep learning curve formed by this experience is a necessary one, if Member States are to better improve their domestic laws and embrace the modern age of insolvency represented by new approaches to restructuring that are intended to produce great benefit for a continent emerging from the pandemic and still subject to the resilience risks posed by global economic and political instability. ■

Footnote:

1 See Clifford Chance, "One Year Dutch WHOA Scheme" (2022), available at: www.cliffordchance.com/content/dam/cliffordchance/briefings/2022/02/one-year-dutch-whoa-(scheme)-some-lessons-learned.pdf.

"With respect to director's liability, the structuring of these rules (together with any exceptions) displays great divergence, mostly with reference to the general law"

Does the business entity model still matter in Lithuania?

Ieva Strunkienė gives her thoughts on whether or not the legal form of an individual enterprise is still relevant for a modern business in Lithuania

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In Lithuania, there is a dual regime for the conduct of individual business activity,[1] i.e., two models of individual business activity conducted either in an incorporated or an unincorporated manner.

The unincorporated form of individual business activity can be commenced in three ways:

- by declaring the status of self-employment under an individual activity certificate from the date of their activity with the tax administration;
- from the date of acquisition of a business license; or
- from the date of registration of a farm.

The incorporated form of individual business activity, acting as a legal entity, starts from the moment the legal entity is registered in the Register of Legal Entities (**RLE**).

Currently, Lithuania is searching for a legal regime for simplified individual business insolvency proceedings. This raises issues over how legal rules govern the interaction between insolvency proceedings in respect of an individual enterprise (**IE**) operating in an incorporated form and those of its owner.

The individual enterprise is a specific form of individual business organization in Lithuania,[2] so it is very important to critically assess its relevance in the context of the modern business. First, the registration of an IE with the RLE is necessary, which requires the preparation of the founding documents. Registering an IE involves the increased cost of incorporation and time to launch business activities. Second, as a legal person, an IE must have a single-person management body – the head of the enterprise; information on his/her employment must be submitted to the National Insurance Fund Board, and the head of the enterprise must be paid a salary and the corresponding taxes. Third, not only is the owner of the IE a taxpayer, but also the IE itself, as it is subject to corporate taxes. Fourth, the accounting records of an IE must be kept in accordance with procedures laid down in accounting legislation. Fifth, the specific features of the IE may influence cases of lesser trust of company's contractors.

Sixth, the small scale of the IE's activities makes it difficult to recruit highly-qualified staff, which results in a lack of professional management. Seventh, the procedure for liquidating an IE (because of insolvency proceedings) is more complex, as the liquidation procedure is subject to provisions of the insolvency articles regulating legal persons and also partly subject to Law on Bankruptcy of Natural Person (**LBNP**). Eighth, an IE is a legal person with unlimited civil liability, which determines the peculiarities of its civil liability, i.e., despite the fact that an IE and its participant are separate entities capable of independently assuming obligations and consequent liability, and the principle of the separation of the assets of the IE and the IE participant is in place, in the event the IE does not have enough assets to settle its property obligations, the IE's participant has a secondary liability for the IE's debts.[3] Ninth, the insolvency of an IE is considered to be highly disadvantageous for the participant, while the insolvency process is highly advantageous for the creditors, as the relevant legislation provides for the discharge of the IE's obligations to its creditors not only out of the assets of the IE itself, but also out of the assets of the participant.

According to the model chosen by Lithuania, the IE insolvency process is prioritized in terms of time, i.e., is not possible to commence the bankruptcy proceeding of a natural person (Article 5(8)(6) of the LBNP) if the IE managed by him or her is subject to bankruptcy proceedings. The national regulator has stipulated that the insolvency proceedings of the IE must be completed, first, which also includes the claims of the creditors to the natural person as the participant in the IE. Where the proceedings against an IE are wound up, the IE ceases to be a participant in civil law relations and the claims of its creditors are extinguished, but the obligations of the owner (participant) of the IE as a natural person towards his personal creditors are not terminated.

Before the adoption of LBNP, it was not possible to write off debts of this kind and creditors had the right to enforce their debts indefinitely. The adoption of the LBNP changed this and enabled a natural person who is an entrepreneur to apply for the opening of bankruptcy proceedings against him/her in case there are still outstanding claims of the creditors to the IE

> *Currently, Lithuania is searching for a legal regime for simplified individual business insolvency proceedings*

business owner after the closure of the proceedings against the IE business itself. The chosen method for solving the insolvency problems of a natural person who is a sole trader is complicated, not only because two bankruptcy proceedings have to be conducted in sequence, but also because the creditors of the natural person are included in the bankruptcy proceedings of the individual enterprise (a common list is drawn up), but the relations between the creditors, the different statuses of the creditors, and the ranking of their claims is not governed by the legislation.

The liquidation of an IE due to its insolvency and the deregistration of an IE from the Companies Register terminates only the obligations of the IE to its creditors, but this does not affect the termination of the personal obligations of the participant of IE as a natural person. Creditors of a participant, who have participated in the insolvency proceedings of an IE, have the right to continue the recovery of debts from the assets of the participant if they were not paid, under the general procedure, specified in the Civil Procedural Code of the Republic of Lithuania.

Granting legal personality rights to the individual enterprise model, where a natural person who is an entrepreneur chooses the legal form of a sole proprietorship to carry out economic activity, does not meet the needs of modern individual business practice, therefore it is necessary to grant (to return) by law the rights of a natural person to individual enterprises (as was the case prior to 1 July 2001), and to apply the provisions of the LBNP to the resolution of the issues related to the insolvency of an IE in such cases. Meanwhile, if the national legislator does not support the idea of granting IE the status of a natural person, it is necessary to adjust the insolvency legislation to provide that natural persons exercising the right to engage in economic activity in the legal form of an IE would be recognized as entrepreneurs (including in their self-employed professional capacity), and that the insolvency proceedings of the latter would be governed by the insolvency law of legal persons (in the appropriate scope). ■

> *The adoption of the Law on Bankruptcy of Natural Person enabled a natural person who is an entrepreneur to apply for the opening of bankruptcy proceedings against him/her*

Footnotes:

1 The unique features of individual business in Lithuania demonstrate that it meets all of the criteria for the universally understood definition of an SME, and it is therefore appropriate to add a new concept of individual business to the legislation governing SMEs, describing an individual business run by a single natural person as the conduct of economic activity of an SME. In the interests of legal clarity, and economic effectiveness in a manner likely to stimulate entrepreneurship by sole traders, there is a need to create procedures for more efficient bankruptcy proceedings of SMEs. It is therefore also proposed to adopt amendments to the SME legislation to achieve this.

2 An individual enterprise is considered to be a private legal person with unlimited civil liability, which means that when such an enterprise does not have sufficient assets (or has no assets at all) to pay for the obligations assumed by the IE, the participant of the IE has a subsidiary obligation to be liable for the debts incurred by the IE.

3 Resolution of the Supreme Court of Lithuania of 7 December 2012 in civil case No 3K-7-400/2012.

New rules for directors' and officers' liability for insolvency in Poland

Karol Tatara, Paweł Kuglarz and Mateusz Kaliński report on the new so called 'holding law' in Poland

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In Autumn 2022, new legislation will significantly amend the Commercial Companies Code in Poland with respect to directors' and officers' liability, including in the insolvency context. The amendments will introduce the so-called 'holding law' to the Polish legal framework.

It is estimated that around 46,000 Polish companies may be treated as holding companies, both based upon agreement or factual holding. The main aim of this legislation is to regulate the situation of groups of companies, though the provisions will not be mandatory for all holdings or groups. Moreover, the new rules will not apply to WSE (Warsaw Stock Exchange)-listed companies. Last but not least, the new law will not be applicable to companies already in bankruptcy (i.e. with the trustee appointed and operating), but may be applicable with regard to companies in restructuring.

The Rosenblum doctrine

The changes to be implemented introduced the so-called 'Rosenblum doctrine', which says that a director of an individual subsidiary may be deemed to have acted in the best interests of the group of companies to which the subsidiary belonged. The doctrine was created by a French criminal court in a case where managers were accused of acting wrongfully to the detriment of the company and they contended that they acted in the interests of the group itself. The court accepted this defence and released the managers from criminal liability.

Registration of holdings

If a group of companies decides to enter into the new arrangements, they should notify this fact to the National Court Registry. However, if the parent company is registered outside Poland, the notification is required only with regard to a Polish subsidiary company. This raises questions on international aspects of new regulations, though this is beyond the scope of this article. Such companies included in the group will be subject to a specific regime of liability.

Holding liability and the binding instruction

According to the new legislation, the parent-company and its subsidiary involved in the group of companies, may act outside the company's interest, but with the interest of the group in mind, provided that this is not detrimental to the creditors or minority shareholders. This provision underlines the creditors' interest, which overrides even the interest of a group of companies. In order to realize the interest of the group of companies, a parent company can issue a binding instruction to the management board of the subsidiary.

A binding instruction is defined by law as a binding instruction related to carrying out the company's affairs issued by the parent company to the subsidiary involved in the group of companies and that is justified by the interests of the group, unless other rules provide otherwise. Such an instruction should include:

1. Planned and expected activity of the subsidiary in relation to the binding instruction;
2. Indication of the group interests justifying the need for the subsidiary to carry out the binding instruction;
3. Expected benefits or damage (detriment) to the subsidiary, if any, related to the act of carrying out the binding instruction; and
4. Planned manner and deadline for compensation for the damage (detriment) to the subsidiary connected with carrying out the binding instruction.

Liability of directors in the insolvency context

Under certain circumstances, however, the management board of the subsidiary may refuse to perform the binding instruction. These circumstances are particularly important and interesting within the insolvency context. According to new Article 21[4] sec. (1) of the Polish Commercial Companies Code, the subsidiary included in the group of companies may pass a resolution refusing the performance of the binding instruction if this could lead to the insolvency or the threat of insolvency of the subsidiary.

The definition of insolvency or the threat of insolvency have not been defined separately in the said amendments or in the Commercial Companies Code. Reference is thus required to the terms of Article 11 sec. 1 and 2 of the Insolvency Law (*insolvency through loss of the ability to perform due pecuniary obligations or where pecuniary obligations exceed the value of the debtor's property persisting for a period exceeding twenty-four months*) and/or Article 6 sec. 3 of the Restructuring Law may be required (*a threat of insolvency exists where the debtor's economic situation indicates that it may become insolvent soon*).

The interest of creditors

The resolution refusing performance of the binding instruction should be appended with the rationale behind the instruction. In our view, such rules support the opinion that the creditors' interests is above the interests of the group, especially when there is a shift of interest towards the company in an insolvency situation. The management of the subsidiary is in the first place obliged to assess whether the performance of the binding instruction will not lead to a threat of insolvency. Therefore, the grounds for refusal of performance of the binding instruction are to some extent extensive. The solvency tests that are already available in Poland with regard to a simple joint-stock company, which will be extended with the implementation of the EU Directive 2019/1023 in Poland, may further help any assessment.

Grounds for refusal of a binding instruction

Separate grounds for refusal of performance of the binding instruction are situations where the damage may be caused to a subsidiary (not, however, single-shareholder companies) and this damage will not be compensated within two years from the event causing damage. However, the profits gained by the subsidiary resulting from its involvement in the group should be taken into account.

Taking into consideration the situation of single-shareholder companies (subsidiaries), there is one change, namely compensation for the damage concerns only the case where performance of the binding instruction led to insolvency. It may be observed that this standard will be higher in such situations.

Liability with regard to a binding instruction

Other important rules are also set expressly with regard to directors' and officers' liability, i.e. pursuant to the new legislation, a member of the board or a liquidator may not be held liable for the damage caused by the performance of the binding instruction. However, it should be borne in mind that the grounds for refusal to perform the binding instruction are set in a way protecting creditors, as discussed above.

Summary

To conclude, the new rules that are about to be introduced will have an impact on the restructuring and insolvency context, especially with regard to the grounds of refusal towards the newly introduced legal instrument – the binding instruction, which may be issued by the parent company to its subsidiaries involved in the group. ■

> *Such rules support the opinion that the creditors' interests is above the interests of the group, especially when there is a shift of interest towards the company in an insolvency situation*

Protection of dissenting creditors' interests

Abbas Abbasov, winner of the Richard Turton Award 2021, writes on the direct application of the "Substantive Fairness" test in considering the recognition of foreign restructuring plans

ABBAS ABBASOV
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This article is a summary of the full paper written by the 2021 Richard Turton Award winner, Abbas Abbasov from Azerbaijan

As part of the award, Abbas was invited to attend the INSOL Europe Annual Congress in Dublin (Ireland) in March 2022.

You can read the full version of the award-winning paper on our website: www.insol-europe.org/richard-turton-award

The protection of the dissenting creditors'[1] interests is one of the core issues to be considered in recognition of debt discharges under foreign restructuring plans. The recent restructuring case of the OJSC International Bank of Azerbaijan (IBA)[2] is a clear indication of how differently the courts in various jurisdictions deal with the issue: the English and the US courts[3] reaching contradictory outcomes in respect to analogous relief (an indefinite stay) sought by the IBA.

In refusing the relief sought,[4] the Court of Appeal (England and Wales) referred to the Gibbs rule articulated by Lord Esher MR in *Antony Gibbs* which aims to protect English-law creditors from the adverse effects of foreign insolvency proceedings and stipulates that a contract can only be discharged under a proper law governing this contract.[5,6] The court concluded that the indefinite stay would, in substance, indefinitely prevent English creditors from enforcing their English law rights, effectively meaning the discharge of the said rights. It also highlighted the possibility of the initiation of analogous proceedings under English law by the IBA.[7] By way of contrast, Judge Garrity in the US Bankruptcy Court (SDNY) granted the relief and overruled any objections thereto.[8]

Criticism of the Gibbs Rule: is the idea behind it worth preserving?

Academics and practitioners from various jurisdictions consider that the Gibbs rule is not in line with the principle of *universalism* or (its current form) *modified universalism*, which envisages a single set of insolvency proceedings with worldwide effect.[9] The late Professor Fletcher highlighted the paradox that English law does not recognize the foreign bankruptcy discharge, while expecting the English bankruptcy discharge to have universal effect.[10] Look Chan Ho argues that the rule and the CBIR (Cross-Border Insolvency Regulations 2006) are mutually exclusive.[11] In Singapore, Judge Ramesh disapproves the characterisation of debt discharge under compositions as a matter of contract law,[12] while the US bankruptcy judge, Judge Glenn, criticizes the rule by describing its essence as territorialism.[13]

It is possible to agree with these arguments (in part) that the manner of the implementation of the rule is inconsistent with modern developments in cross-border insolvency law. In cases where the plan confirmed by the COMI (centre of main interests of the debtor) court does not treat the creditors less favourably than a plan under the law of the contract would do, the necessity to initiate costly and time-consuming parallel proceedings is not comprehensible.

Having said that, one can question whether the idea behind the Gibbs rule is also completely wrong. Arguably, the answer to this question is not affirmative, as the creditors' reasonable reliance on the minimum guarantees provided for by the law governing the contract cannot be completely ignored. The US approach based on the satisfaction of procedural fairness[14] cannot be accepted as an ideal solution to that end. The US courts generally extend comity under Chapter 15, if the fundamental standards of procedural fairness have been met and US public policy has not been violated in the respective foreign proceedings.[15]

Professor Stefan Madaus makes a clear distinction between insolvency and restructuring proceedings and highlights the contract law underpinning of the latter,[16] which is also relevant to the issue of recognition of a foreign bankruptcy discharge. Accordingly, the law of the contract is to be taken into account in the recognition of debt discharges under foreign law. The problem deserves much more attention, particularly in cases where well-established substantive tests[17] dealing with the rights of the individual dissenting creditors do not exist under the foreign law governing the confirmation of the plan.

An alternative approach?

Article 22 (1) of the MLCBI (UNCITRAL Model Law on Cross Border Insolvency) and Article 14(f) of the MLREIRJ[18] are of particular importance in this regard. Both provisions highlight the need to consider whether the interests of the affected creditors have been adequately protected. The language of the latter is particularly significant, as it highlights the confirmation of a plan of reorganization and discharge of debts. This safeguard offers an additional (and broad) layer of substantive protection for the affected creditors besides the "procedural fairness", "public policy" and "fraud" safeguards in the text.[19]

Despite the refusal to extend comity, while considering recognition and enforcement of foreign restructuring plans and foreign discharge of debts, in a limited number of cases,[20] bankruptcy courts in the US acknowledge the broad discretion given to them under section 1522[21] of the U.S Bankruptcy Code.[22] US courts define "sufficient protection"[23] as embodying three basic principles: "the just treatment of all holders of claims…, the protection … against prejudice…., and the distribution of proceeds of the [foreign] estate substantially in accordance with the order prescribed by US law."[24] The third principle mentioned needs to be further explored: it empowers the US courts to take into account the relevant substantive provisions of US law. It should also be mentioned that such direct application is only operative where the dissenting creditor opposes the recognition of the foreign restructuring plan.

As to the essence of the said test, the MLCBI does not contemplate any substantive test.[25] A viable solution could be to apply the respective tests applicable under the law governing the contract (e.g., the "best interest test" under Chapter 11 plan confirmation[26] or "unfair prejudice" challenge under an English CVA),[27] due to the contract law underpinning of the restructuring law[28].

In summary, this author proposes a two-tier test ("substantive fairness test').[29] At the first tier, the assessment should show how differently would the opposing creditor have been treated in analogous proceedings under the law of the contract by applying the respective test thereunder. Unfair treatment can be affirmed in cases where the result of such assessment indicates that the foreign plan has had a materially adverse effect on the entitlements that the opposing creditor would have received had the plan been confirmed under the law of the contract. It is also worth mentioning that the foreign restructuring law need not to be identical to the law of the contract and only the material adverse effect should be taken into consideration.

The second tier comes into operation only if the fact of unfair treatment is established. This tier comprises (i) the examination of the foreign law governing the plan to establish whether effective safeguards exist to remedy such unfair treatment and (ii) if yes, an assessment of whether the opposing creditor has exhausted all remedies available under foreign law.[30]

Concluding remarks

The purpose of this article is to reopen the discussion on the need for the development of new mechanisms to protect the substantive rights of dissenting creditors, while considering the recognition of foreign restructuring plans and bankruptcy discharges thereunder. Of note is that courts in states that have implemented the MLCBI or the MLREIRJ have broad powers under the respective provisions of those texts. ■

Abbas Abbasov (centre) receiving his award in Dublin, from (left-right) Scott Atkins (INSOL International), Christina Fitzgerald (R3), Louise Brittain (IPA) and Frank Tschentscher (INSOL Europe)

> The late Professor Fletcher highlighted the paradox that English law does not recognize the foreign bankruptcy discharge, while expecting the English bankruptcy discharge to have universal effect

Footnotes:

1 For the purposes of this article, "dissenting creditor" means a creditor who voted against or did not vote for the plan in question.

2 For more about the IBA case, see *Bakhshiyeva (Foreign Representative of the Ojsc International Bank of Azerbaijan) v Sberbank of Russia & Ors* [2018] EWCA Civ 2802 (18 December 2018).

3 Both jurisdictions adopted the UNCITRAL Model Law on Cross Border Insolvency (1997) (MLCBI), the UK via the Cross Border Insolvency Regulations 2006 (CBIR) and the US via Chapter 15, US Bankruptcy Code (Title 11) (Chapter 15) respectively.

4 *See Bakhshiyeva* (n 2).

5 *Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux* (1890) LR 25 QBD 399.

6 The rule does not apply in cases where the respective creditor has submitted to the foreign insolvency proceeding. This exception was not engaged in the IBA case, as the objecting foreign creditors (Sberbank of Russia and others) of the IBA had not submitted to Azeri proceedings. See Bakshiyeva (n 2), 28.

7 *Bakshiyeva* (n 2), 9 and 88.

8 *In re International Bank of Azerbaijan*, 17-11311 jlg, 23.01.2018.

9 Reinhard Bork, *Principles of Cross-Border Insolvency Law* (Intersentia, 2017), 28 (para. 2.11).

10 Ian Fletcher, *The Law of Insolvency* (5th edn) (Sweet and Maxwell, 2017), 922 (para. 29-063).

11 Look Chan Ho, *Cross-Border Insolvency: Principles and Practice* (Sweet & Maxwell, 2016), 169 (para. 4-028).

12 Kannan Ramesh, 'The Gibbs principle. A tether on the feet of good forum shopping' (2017) 29 *SAcLJ* 42.

13 *In re Agrokor d.d.*, 591 B.R. 163 (Bankr. SDNY 2018).

14 "Procedural fairness", "public policy" and "fraud" safeguards are outside the scope of this article.

15 *In re PT Bakrie Telecom Tbk*, 628 B.R. 859, 878 (Bankr. SDNY 2021), citing *Hilton v. Guyot*, 159 U.S. 113, 205-206 (1895); *JP Morgan Chase Bank v. Altos Hornos De Mexico, S.A de C.V.,* 412 F.3d 418, 428 (2d Cir. 2005); *Marcus v. Dufour,* 796 F. Supp. 2d 386, 392 (EDNY 2011).

16 Stephan Madaus, 'Leaving the Shadows of US Bankruptcy Law: A Proposal to Divide the Realms of Insolvency and Restructuring Law' (2018) 19 *Eur Bus Org Law Rev 615–647.*

17 See below (nn 26 and 27) for examples.

18 UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgements (2018).

19 These three issues are expressly or impliedly dealt by other provisions of both Model Laws. (e.g. Articles 7 and 14 (b), MLREIRJ).

20 *In re PT Bakrie Telecom Tbk* (n 15); *Ad Hoc Group of Vitro Noteholders v. Vitro S.A.B. de C.V.,* 701 F.3d 1031 (5th Cir. 2012).

21 Chapter 15 equivalent to Article 22, MLCBI.

22 *In re Intl. Banking Corp. B.S.C.,* 439 BR 614, 626–27 (Bankr. SDNY 2010), citing *Tri-Cont'l Exch.,* 349 BR at 636-37; In re Atlas Shipping A/S, 404 BR 726, 740 (Bankr. SDNY 2009), citing *Tri-Cont'l Exch.,* 349 BR at 638); *Jaffé v. Samsung Elecs. Co.,* 737 F.3d 14, 27-28 (4th Cir. 2013).

23 Section 1522 uses the term "sufficiently protected", instead of the term "adequately protected" used in Article 22, MLCBI.

24 *In re PT Bakrie Telecom Tbk* (n 15), 876, citing *In re Atlas Shipping A/S*, 404 BRn726, 740 (Bankr. SDNY 2009), *In re Artimm, S.r.L.,* 335 BR 149, 160 (Bankr. CD Cal. 2005).

25 As the MLCBI does not attempt a substantive unification of insolvency law. See Guide to Enactment and Interpretation of the MLCBI, I.A.3.

26 Rodrigo Olivares-Caminal et al., *Debt Restructuring* (2nd edn) (OUP,2016), 169-170 (paras 3.110-3.111).

27 Ibid., 220-224 (paras 3.257-3.276), citing section 6, Insolvency Act 1986; P*rudential Assurance Company Ltd & Ors v PRG Powerhouse Ltd. & Ors* [2007] EWHC 1002 (Ch) (01 May 2007) and other cases.

28 See Madaus (n 16).

29 To avoid any doubts, this article proposes applying the test as an additional (second) layer of the fairness test, the first layer being 'procedural fairness', which falls outside the scope of this article.

30 In contrast to the English law approach deterring local creditors from submitting to a foreign jurisdiction in order not to lose protection of the Gibbs rule, see above n 6.

Live and let fly: Turbulence lands SAS in Chapter 11

David H. Conaway reports on two recent cases where European companies have chosen Chapter 11 over insolvency proceedings in other countries

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SAS's revenues fell 56% in 2020 and 70% in 2021, primarily due to the COVID-19 pandemic

On 5 July 2022, SAS AB and 13 affiliates filed for Chapter 11 protection in the Southern District of New York. Owned 44% by the Kingdoms of Denmark and Sweden, SAS encountered financial turbulence resulting from increased debt, reduced revenue, labour shortages and strikes, common in the aviation industry that has been heavily impacted by the pandemic and struggles to scale back up in 2022.

According to the First Day Declaration of Erno Hilden, SAS's Executive Vice President and Chief Financial Officer, the following points are notable:

1. SAS's revenues fell 56% in 2020 and 70% in 2021, primarily due to the COVID-19 pandemic.
2. To address a "severe liquidity challenge", in 2020, SAS recapitalized its capital structure. The recapitalization included issues of shares and rights for approximately $1.2 billion, and conversion of approximately $220 million of debt to equity.
3. The recapitalization required cost-cutting measures including reconfiguration of its fleets, and anticipated a rebound in passenger demand. However, SAS's EBIT for 2020 and 2021 was negative $1.5 billion.
4. In late 2021, SAS engaged restructuring professionals and developed the SAS FORWARD plan. The main elements included:
   - $750 million annual cost savings;
   - $2 billion debt to equity conversion;
   - $950 million new capital; and
   - A redesigned fleet and network.
5. Notable problems:
   - SAS has been unable to renegotiate above market aircraft leases with its lessors. SAS has surplus aircraft in its fleet. SAS's aircraft lease and finance liabilities were about $2.5 billion. In addition, SAS has contracts for new Airbus aircraft of $1.8 billion.
   - Approximately 80% of SAS employees are members of unions, and almost all pilots are. SAS has been unsuccessful negotiating with labour, resulting in a 900 pilot strike by SAS Scandinavian pilots' union. SAS estimated disruption of 50% of its flights, costing $10-13 million a day.
   - As a result of these issues, SAS concluded it could not complete its debt-for-equity conversion or attract new equity.

The Chapter 11 solution

Jurisdiction

Chapter 11 allows foreign corporations to file Chapter 11 if they have a domicile, principal place of business, or principal assets in the district of filing. Virtually all global airlines have assets and property in the US. The bar is very low in establishing jurisdiction in the US for Chapter 11 filings.

Capital markets access

Unfortunately, the SAS FORWARD plan of early 2022 did not generate the interdependent creditor concessions or the capital infusion needed. Prior to Chapter 11, Seabury Securities, LLC ("SEB") and Skandinaviska Enskilda AB ("SEB"), on behalf of SAS, solicited over 90 private and state funding sources for $950 million in new capital, which did not materialize due to apparent investors' "cold feet" regarding SAS's labour issues and lack of progress on the aircraft leases. The access to bank funding and private equity funding is well-established in the US, with a complement of legal and financial advisors with airline industry experience.

Labour Issues

For SAS to succeed, it must resolve its labour disputes and avoid disruptions caused by pilots or other employees. To that end, SAS needs to terminate, or more likely modify existing collective bargaining agreements between SAS and its unions.

A debtor may obtain the bankruptcy court's approval to unilaterally reject or modify the collective bargaining agreement pursuant to section 1113 of the Bankruptcy Code. Section 1113 requires that the debtor make a proposal to the union "which provides for those necessary modifications in the employees benefits and protections that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all affected parties are treated fairly and equitably".

Section 1113 also provides that the bankruptcy court shall approve an application for rejection of a collective bargaining agreement if the union refuses to accept the proposal without good cause and the balancing of the equities favours a rejection. The power of section 1113 usually promotes modifications to the collective bargaining agreement necessary for the debtor to restructure. SAS clearly needs the provisions of section 1113 to successfully deal with its labour issues, which will in turn facilitate a capital infusion and DIP financing, and thus a successful restructuring.

Aircraft leases

The Bankruptcy Code provides debtors the right to elect to assume or reject executory contracts and unexpired leases. If a debtor rejects an executory contract, the non-debtor party receives a general unsecured claim for damages arising from the debtor's "breach" of contract. Thus, a debtor escapes the contract with little cost. On the other hand, the debtor also has the right to assume or assign a contract. In this instance, the Bankruptcy Code requires that the debtor "cure" the contract by paying existing defaults. Presumably, debtors would assume contracts that they deem to be valuable, either because they ensure an uninterrupted supply of goods or contain favourable pricing or terms.

The Bankruptcy Code requires that the non-debtor party to an executory contract must continue to perform its obligations under the contract pending the debtor's decision to assume or reject such contract, and provided that the debtor is in fact performing its obligations of the contract post-petition.

In a "First Day" motion, SAS sought and obtained a bankruptcy court order that provided:

> *"… notwithstanding any contract or lease provision or applicable law, an executory contract or unexpired lease of the Debtors may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the Debtors' chapter 11 cases solely because of a provision in such contract or lease that is conditioned on (i) the insolvency or financial condition of any or all Debtors or (ii) the commencement of the Debtors' [C]hapter 11 cases".*

> In its pleadings filed in the Chapter 11 case, SAS noted that they have assets located in at least 34 countries in the world

World-wide automatic stay

In its pleadings filed in the Chapter 11 case, SAS noted that they have assets located in at least 34 countries in the world. In addition, SAS noted that they are largely incorporated under the laws of non-US countries, including Denmark, Ireland, Norway, and Sweden. Also, key contracts are governed by the laws of non-US jurisdictions. Accordingly, one of SAS's many "First Day" motions was a motion to enforce the automatic stay of section 362 of the Bankruptcy Code, resulting in a bankruptcy court order to enjoin any action

> On 26 May 2020, Latin American airline LATAM Airlines Group S.A. filed Chapter 11 in the Southern District of New York. LATAM chose Chapter 11 as its insolvency proceeding for reasons similar to SAS's

by any person against any of SAS's assets or operations, throughout the world. Such world-wide injunction provides SAS the "breathing spell" that is essential to a successful reorganization.

However, in *Kumtor Gold Company CJSC, et al*. ("Kumtor"), a Chapter 11 proceeding in the Southern District of New York, the section 362 automatic stay was challenged by a foreign creditor. In fact, the foreign creditor filed an objection to Kumtor's motion for a section 362 stay, and filed lawsuits to seize Kumtor's assets outside the US, ignoring the section 362 stay. Kumtor has sought sanctions against the creditor for the foreign lawsuits against Kumtor. However, there are no bilateral or multilateral treaties that would enforce the SDNY judgment in the foreign country. In fact, Kumtor illustrates the potential practical problem of enforcing the section 362 "world-wide" automatic stay.[1]

Management control

Chapter 11 management almost always stays in control during the Chapter 11 proceeding. In rare circumstances, debtor's management can be supplanted by a Chapter 11 trustee for fraud, gross mismanagement or if in the best interest of creditors. Most significant financing contracts provide for a default of the agreement, in the event of a management change, appointment of a Chapter 11 trustee or change of control. Having such agreements at risk is rarely in the best interest of creditors. Lenders or private equity interests often steer filings to Chapter 11, so their relationships with management are not interrupted by the insolvency proceeding.

Joint administration

SAS benefits from the Chapter 11 provisions allowing for the joint administration of SAS and all of its 13 affiliates. This means one insolvency proceeding, one judge, one set of debtors' counsel, one set of financial advisors and investment bankers, one consolidated creditors' committee, and one restructuring plan. Even though jointly administered, SAS and its affiliates are NOT substantively consolidated, which is rare in Chapter 11. While Chapter 11 is expensive, the ability to jointly administer an entire company group, wherever located, in a single unified insolvency proceeding provides unparalleled efficiency.

Apollo Management loan to Own

US-based Apollo Group Management agreed to provide SAS $700 million in DIP financing, approved by the court on 31 August 2022, at per annum interest of SOFR + 9%, and a break-up fee of 1% ($7 million). Also, the DIP provides Apollo a Call Option to subscribe for equity in the reorganized debtors based on an enterprise value of $3.2 billion. It is projected that Apollo will ultimately own 22%-30% of SAS. Apollo and Denmark will collectively own approximately 50% of SAS.

Though not novel, the Apollo DIP transaction demonstrates the incredible versatility of Chapter 11 as a forum to not only restructure, but to also facilitate an acquisition, essentially in one transaction. The equity lenders receive all of the super-priority, fees, controls, protections, and other perks of DIP lending, for an option to be a significant equity owner of the reorganized debtors, if successful in the restructuring. Chapter 11 thus encourages the capital markets to engage with creative solutions.

Coda: LATAM Airlines and Lumileds Holding B.V.

SAS is not the only airline to choose Chapter 11 over insolvency proceedings in other countries. On 26 May 2020, Latin American airline LATAM Airlines Group S.A. filed Chapter 11 in the Southern District of New York. LATAM chose Chapter 11 as its insolvency proceeding for reasons similar to SAS's. As part of its "First Day" motions, LATAM filed a motion for joint administration of the numerous Chapter 11 proceedings of LATAM's affiliates. LATAM also filed a motion to enforce the section 362 automatic stay as a "world-wide" injunction. In his "First Day" declaration, LATAM's CFO also telegraphed LATAM's intent to utilize Chapter 11's favourable provisions regarding "Executory Contracts" to reject aircraft leases to right-size its fleet in the aftermath of the COVID-19 pandemic.

Lumileds Holding B.V., a Dutch manufacturer of lighting for 1 out of 3 automobiles globally, filed Chapter 11 in the SDNY on August 29, 2022. According to the First Day Declaration of Lumileds' CFO, Johannes Paulus Teuwen, Lumileds filed Chapter 11 to effect a balance sheet restructuring via a pre-packaged plan of reorganization. Specifically, Lumileds seeks to reduce first lien debt from $1.7 billion to $400 million, in a debt for equity conversion. In addition, Lumileds needed liquidity to continue operating, pursuant to a $275 million DIP facility.

Unlike SAS, Lumileds' Chapter 11 seeks only a balance sheet restructuring. Notably, Apollo Management is involved in both SAS and Lumileds. In SAS, Apollo provided DIP financing as part of a strategy to significantly increase its equity stake. In Lumileds, Apollo will lose equity control, in favour of the first lien lenders. Presumably, Apollo influenced SAS and Lumileds to pursue restructurings in Chapter 11 for access to capital markets, fast-track restructurings, and virtually unlimited flexibility of solutions. ■

Footnote:

1 For more on the Kumtor case, see, by this author, 'Over the Hills and Far Away' Eurofenix (Winter 2021/2022) 36-37.

HMRC's welcome new approach to Voting on CVAs

Colin Haig looks at how HMRC's new approach to voting on CVAs will help to support viable businesses restructure and trade out of financial difficulties

COLIN HAIG
Immediate Past President of insolvency and restructuring trade body R3, London

R3 has long campaigned for HMRC to take a more constructive and engaged approach to supporting Company Voluntary Arrangements (CVAs) and restructuring proposals. We saw an important development in this area in July when HMRC issued guidance acknowledging that it has not always voted on such proposals in the past and announcing that it would be doing so from now on.

R3 has said for some time that such a change in approach from the Government department may mean that CVAs can become an option for a larger number of viable businesses and help to 'unlock' successful restructuring efforts. Previously, HMRC had tended to abstain in such cases. After lobbying the Secretary of State for Business, Energy and Industrial Strategy, Kwasi Kwarteng MP, on the importance of HMRC taking a supportive stance on company rescue, the Business Secretary supported our calls for the Government department to change its approach.

We are therefore really pleased to see HMRC adopt its new approach, which will help to provide more options to financially struggling businesses in the current economic climate. HMRC's guidance acknowledged that this change was needed "*where it is beneficial to try and support business restructuring to help them recover from the effects of the past two years*", as well as in light of "*HMRC's increased creditor status*" in insolvencies from December 2020.

The guidance also referenced our lobbying of the Business Secretary, noting that "*this approach also aligns with the BEIS Minister's commitment to the R3 chairman that HMRC will take a more commercial approach to restructuring proposals*".

Campaigning for change

In 2020, amidst the financial challenges faced by businesses due to the pandemic, R3 launched our 'Back to Business' campaign. Alongside improving director knowledge of the insolvency framework and the role it can play in facilitating business rescue, the campaign aimed to ensure that the insolvency and restructuring profession could effectively carry out its work in an environment that promotes business rescue.

As part of this campaign, we wrote a joint letter with the Institute of Directors to the Secretary of State for Business, Energy and Industrial Strategy, Kwasi Kwarteng MP, to highlight the importance of HMRC taking a more constructive approach to viable restructuring proposals so that businesses that would have been viable were it not for the pandemic could be rescued. In the past, R3 members had reported that HMRC could often be a 'passive' creditor, not always supporting efforts to make an insolvency procedure as effective as possible.

Responding to our letter, the Business Secretary said that he was "*very much in agreement … that all stakeholders should support company rescue*" and added that HMRC would "*[build] its resources to be able to respond to an increased number of rescue proposals in the near future*".

A new direction

A year later, at R3's Annual Conference in May 2022, representatives from HMRC announced that it would be taking a more active role when asked to vote on proposals put to HMRC in future. This was confirmed in guidance issued at the beginning of July. Accepting that a change in approach was needed, HMRC said that it "*will be more proactive in the use of our voting rights and will vote on proposals*" going forward.

The Government department acknowledged that its previous approach "*has frustrated IPs who are trying to restructure businesses, sometimes causing businesses to fail when there was an opportunity to rescue them*". The guidance also pointed out that members of the insolvency and restructuring profession should not automatically assume that HMRC will always vote positively and urged those submitting proposals to "*ensure the best offer is proposed at the first approach*".

We really welcome this new approach and will continue to work with HMRC, and other Government departments, to ensure that the insolvency and restructuring profession can carry out its important work in an environment that is as conducive as possible to business rescue. ■

> *"CVAs can become an option for a larger number of viable businesses and help to 'unlock' successful restructuring efforts"*

In this section of *eurofenix* we bring you short updates from our members including insolvency measures in response to the COVID-19 crisis in their jurisdictions. To contribute to a future edition, please contact: *paulnewson@insol-europe.org*

Stopping company crisis: The Italian procedure for negotiated settlement

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As has occurred, all over the world, the spread of the COVID-19 virus is having a strong negative impact on economic and commercial activities, causing serious corporate defaults and the consequent bankruptcy of many companies. In Italy, as anticipated in an article published in an earlier issue of Eurofenix,[1] the legislator has acted by researching and promoting the implementation of instruments to prevent and deal with companies in crisis.

More specifically, on 24 August 2021, Law Decree no. 118/2021 was published in the Official Gazette (Gazzetta Ufficiale) and then converted into Law no. 147 of 21 October 2021; it introduces urgent measures in the matter of business crisis and corporate restructuring. The new provisions, together with other rules, set out the creation of a procedure called "negotiated settlement of the crisis". This is a new procedure that undoubtedly represents the most significant action in providing a new tool to support companies in difficulties. It is firmly aimed at their recovery and presents the following characteristics.

Recipients

According to Article 2 of Law Decree no. 118/2021, all commercial entrepreneurs, as well as agricultural entrepreneurs - normally entities who cannot be adjudicated bankrupt, can use this procedure. In order to promote its use, Law Decree no. 118/2021 provides a series of protective incentive measures for an entrepreneur who decides to make use of this procedure and who may request, at the time he submits the application or later during the procedure, the appointment of a so-called expert.

Appointment of the expert

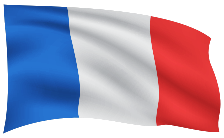
One of the main peculiarities is the appointment of the "expert", a new professional to facilitate negotiations between the entrepreneur, the creditors and any other interested parties in order to overcome the condition of equity- or economic-financial imbalance. By virtue of his role, the expert must have in-depth skills in the area of business crisis and corporate restructuring. In fact, for this purpose, in addition to the already required registration in the professional registers, the expert must also have previous experience of at least five years in the field of corporate restructuring and business crisis.

Reasonable pursuit of recovery

An essential requirement for access to the procedure is the actual perspective of recovery, which is verified by carrying out a test involving a preliminary assessment of the complexity of recovery through the relationship between the entity to the debt to be restructured and the cashflows that could be committed annually to servicing the debt. This test is also aimed at making clear the degree of difficulty that the entrepreneur will have to meet and how much the recovery will depend on the ability to adopt discontinuity initiatives and their intensity. ■

Footnote:
1 'Country Report: Italy' *Eurofenix* (Autumn 2021 Issue), 36.

A new status for French sole traders



JEAN-LUC VALLENS
Former Judge, CA Colmar

Since the Civil Code of Napoleon, French law has considered that a debtor's entire assets constituted a pledge to creditors. Though later subject to change influenced by business law, it is not until the Law of 14 February 2022 that the unity principle came to an end.

The new sole trader regime

The French legislator has created two separate sets of assets for individual debtors, namely professional and private. Only the debtor's professional assets are now liable for debts related to activity; the aim clearly being to protect the debtor's personal assets. The law is directly influenced by Directive 2019/1023 of 20 June 2019, which is designed to give a second chance to individual debtors (see Recital 72).

This new regime is not compulsory or of public order: the entrepreneur needs only opt for sole trader status by registering with the Trade and Companies Register and by indicating on business documents his/her name together with 'sole trader' (*entrepreneur individuel/EI*). The debtor also may waive division of the assets in favour of a creditor by means of an official act. The debtor also may transfer professional assets to a company.

The law protects the debtor's private assets by prohibiting guarantees for professional debt over his personal assets. However, the division of assets cannot be invoked against the tax authorities or social security bodies in the event of fraud or deceit by the debtor.

Apart from these cases, the law limits pledges to professional creditors only over assets considered as 'useful' for the debtor's professional activity. The assessment of this utility may give rise to difficulties of interpretation and litigation. Similarly, the division of assets by the debtor may be challenged by creditors.

Financial difficulties or insolvency

Debtors must provide the Commercial Court with a detailed list of their professional assets, debts related to professional activity and a list of other claims, so that the court has a complete picture. Insolvency will be assessed only in relation to professional assets. If proceedings are opened, other assets however may be recovered through avoidance actions, if any act by the debtor has impoverished the business assets.

In the event of judicial liquidation, the liquidator may in principle only sell assets that are useful for the debtor's professional activity, other assets remaining subject to the management of the debtor who remains in possession. The debtor's personal liability may be invoked in the event of abuse, in particular if the debtor takes any personal advantage of the distinction between both classes of assets before applying for the opening of insolvency proceedings.

Coordination of the treatment of the individual entrepreneur insolvency and private debts

Special provisions have been introduced to coordinate the insolvency situation of individual entrepreneurs and their financial situation as a natural person for private debts. Some difficulties may arise from the existence of two competent bodies: the Commercial Court, for professional debts, and an administrative body ('Over-indebtedness Commission'), for private debts, dealing with over-indebted consumers.

The French legislator has instituted a single referral mechanism to the Commercial Court to clarify the debtor's situation by distinguishing professional and personal assets. If necessary, the court can refer the assessment of private debts to the Over-indebtedness Commission, which will then implement an amicable procedure with a settlement of debts or provide for liquidation of the private assets. However, the Commercial Court will rule on any difficulties relating to the division of assets, disputes and the coordination of both proceedings.

The complex mechanism for coordination and cooperation between the two procedures can raise difficulties: (i) the Commercial Code does not require good faith for initiating insolvency proceedings, though this is necessary for over-indebtedness proceedings; (ii) the termination of both proceedings grants a full discharge using different provisions with different exemptions.

The legislator is undoubtedly counting on the courts to adapt the text to specific situations encountered: good luck to the judges!

Let us hope that a forthcoming reform will give the French legislator the opportunity to simplify its law by entrusting the treatment of the professional and private assets of insolvent entrepreneurs to the commercial courts. ■

"The French legislator has created two separate sets of assets for individual debtors, namely professional and private"

Spain: The "rebus sic stantibus" or "material adverse effect" clause in contracts

JOSÉ MARÍA DUTILH
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> *The inclusion or use of such clauses normally allows one of the parties to discharge or "adjust" its obligations assumed by virtue of the contract*

Problems arising from the performance of contracts due to the occurrence of extraordinary or unforeseen adverse circumstances

M&A activity, Distress M&A, restructuring, venture capital, private equity and corporate investments in general are capital-intensive and require returns in line with the volume and risk taken. To avoid or mitigate these risks, the so-called *rebus sic stantibus* clause or *material adverse change*, in the English-speaking world, is included in contracts or brought up before the courts.

The inclusion or use of such clauses normally allows one of the parties to discharge or "adjust" its obligations assumed by virtue of the contract, provided that adverse, relevant, unforeseeable circumstances occur after signing the contract that make performance of the obligation an exorbitant sacrifice or extraordinarily onerous. The invocation of such clauses is spreading before the Spanish courts and is affected by timid but progressive legislative modification at the supranational European level and also in some neighbouring countries (mainly Germany and Italy).

Common situations and recent cases

Hotel leases

In respect of the lease of a hotel building by an operator in the sector, the Supreme Court (STS 15/10/2014) once again upheld a more standardised application of this legal concept in our law and recognised that the global economic crisis (2007-2014), due to its depth and duration, could be considered as a phenomenon giving rise to an unforeseeable change in circumstances and, together with other requirements, justify the application of this doctrine.

Leases of shopping centre business premises

More recently, the Court of Álava upheld a modification of the contract between CBRE, owner of the "El Boulevard" shopping centre, and one of its tenants to share the hardship in the fall in sales during Covid, recognizing the right to modify the obligations of a contract in the event of a substantial and totally unforeseeable alteration, providing for a 50% reduction in the minimum guaranteed income during periods when the premises or shopping centre where it is located is closed to the public and 25% during periods when, without being obliged to close to the public, it is necessarily affected by direct limitations.

Understanding related concepts: material impossibility of performance, unforeseeable circumstances and force majeure

Material impossibility of performance

Material impossibility of performance is regulated in the Civil Code under Articles 1.182 to 1.184. which stipulate that: "*An obligation to deliver a specific item shall be extinguished if it is lost or destroyed through no fault of the obligor and before the obligor has defaulted*" and "*The obligor shall also be discharged in the case of obligations to perform when the performance is legally or physically impossible*".

Unforeseeable circumstances and force majeure

The Civil Code provides in Article 1.105: "*Apart from the cases expressly mentioned by law, and those in which the obligation so declares, no one shall be liable for such events that could not have been foreseen, or which, foreseen, were unavoidable*".

Case law construction in the absence of a general regulation in our legal system regarding the concept of the "rebus sic stantibus" clause

As noted above, "unforeseeable circumstances" and "*force majeure*" imply exoneration and/or release from liability arising from a breach of contract. By contrast, the supervening alteration of circumstances, better known as the *rebus sic stantibus* clause, has the purpose of modifying the contract. In other words, the purpose of this clause is a mandate to renegotiate the contract and compensate for the inequality of performance caused by the supervening alteration of the initial contracting circumstances. It may be argued that the current trend of Spanish courts and tribunals is towards typifying or objectifying the clause, thus avoiding its "automatic application" and in any case taking into account the uniqueness of specific circumstances.

Projected regulations: towards a new contract renegotiation law

Proposals for codification in Spain

As revealed by the caselaw above, even before the outbreak of the "Covid" pandemic, the rebus sic stantibus doctrine is not a new issue. In fact, at the beginning of 2009, the first section, Civil Law, of the General Codification Commission proposed a preliminary draft bill. Among the proposed amendments was the inclusion of Chapter VIII, which in turn consisted of a single

Article 1.213, which would provide that: "*Article 1.213: If the circumstances which formed the basis of the contract have* **changed** *in an* **extraordinary and unforeseeable manner** *during its performance in such a measure that it has become* **excessively onerous** *for one of the parties or the purpose of the contract has been thwarted, the contracting party who, having regard to the circumstances of the case and especially to the contractual or legal distribution of risks, cannot reasonably be required to remain bound by the contract, may request its review, and if this is not possible or cannot be imposed on one of the parties, the contracting party may request its termination. The request for termination may only be upheld if it is not possible to obtain from the proposal or proposals for review offered by each of the parties* **a solution that restores the contract's reciprocity of interests**".

A similar rule was suggested by the Association of Civil Law Professors in 2018 and the Council of Ministers in 2014 (draft Commercial Code).

Unidroit Principles and the Principles of European Contracting

The Unidroit Principles and the Principles of European Contract Law consist of the materialisation and admission of the *rebus sic stantibus* clause in comparative law and in international law, as witness Article 6.2.2 of the Unidroit Principles and Article 6.111 Principles of European Contract Law.

Specific regulation regarding the leasing of industrial and business premises through COVID-19

The main measures adopted consisted of a temporary reduction in rent and a moratorium. Regulations provided for their application both to leases of real estate for use other than as a dwelling and to industrial leases.

Conclusions and recommendations

In the Spanish legal system, companies may raise the occurrence of legally established grounds to terminate a contract or an acquisition transaction under the circumstances of (i) material impossibility of performance, (ii) unforeseeable circumstances, or (iii) *force majeure*. However, in most cases in the Private Equity sector (including the distress M&A) the most desirable solution is to renegotiate the terms and conditions of the transaction.

In that light, the advice must be that resorting to the *rebus sic stantibus* clause before the Courts and Tribunals or Arbitrators is not to be undertaken, but that parties should promote recourse to appropriate contractual clauses and formulas to re-establish the contractual equilibrium between them. ■

"The advice must be that resorting to the rebus sic stantibus clause before the Courts and Tribunals or Arbitrators is not to be undertaken"

New Preventive and Restructuring Schemes adopted in EU Member States

Myriam Mailly writes about significant progress on the implementation of the EU Preventive Restructuring Directive during the Summer period and in particular through two on-going projects, namely the INSOL Europe tracker and the INSOL Europe/LexisPSL Research on implementation of the EU Directive 2019/1023

MYRIAM MAILLY
INSOL Europe Technical Officer

Significant progress on the status of implementation of the Directive on Restructuring and Insolvency in all EU Member States

By mid-August 2022, 18 EU Member States have notified the European Commission of their compliance with the Directive on Restructuring and Insolvency, namely Greece, Austria, France, Germany, Portugal, Croatia, Lithuania, Slovakia, Estonia, Romania, Denmark, Italy, Slovenia, Finland, Sweden, Hungary, Ireland and lastly, Spain.

A few EU Member States will implement the EU Directive in their national laws only after the summer break including Poland, Latvia, Malta, Luxembourg, Bulgaria, Belgium, Czech Republic, Cyprus and the Netherlands, mainly due to the delay of the national legislative processes. The final implementation of the EU Directive by all EU Member States is thus not expected before early 2023.

The progress of the implementation of the EU Directive in EU Member States is still available on the INSOL Europe website at: www.insol-europe.org/tracker-eu-directive-on-restructuring-and-insolvency

When the time comes, relevant information in relation to the EU transposition and conformity checks (for more details, please see the INSOL Europe August 2022 Newsletter) will be published here as well.

> *By mid-August 2022, 18 EU Member States have notified the European Commission of their compliance with the Directive on Restructuring and Insolvency*

Significant progress in new INSOL Europe/LexisPSL joint research on implementation of EU Directive 2019/1023

As a reminder, this research looks at how the EU Member States as well as the UK (before Brexit) have implemented Directive (EU) 2019/1023 as part of the Joint Project between INSOL Europe and LexisPSL to track implementation.

At time of writing, answers from the following 19 EU Member States are available: Austria, Croatia, Cyprus (on the Draft Bill), Czech Republic (on the Draft Bill), Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Lithuania, Portugal, Romania, Slovakia, Slovenia (on the draft Bill), The Netherlands (on the Draft Bill) and the UK.

Consequently, the consolidated table is not yet complete and will be updated with more EU Member States, as more articles are received in forthcoming weeks. Individual articles as well as the consolidated table are available at: www.insol-europe.org/technical-content/insol-europelexispsl-research-on-implementation-of-the-eu-directive-20191023

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National insolvency statistics

Quarterly insolvency statistics have been published for France (Q2 2022) as well as for England & Wales and Northern Ireland & Scotland (Q2 2022).

If we have a closer look to these insolvency statistics **country per country or those published quarterly by Eurostat** (last on 17 August 2022), one can see that the latest available figures for the beginning of the year show a **return to reality** on the insolvency scene. Indeed, the upward trend has clearly accelerated and now approaching the levels seen in the pre-Covid-19 crisis period (2019).

The increase in the number of insolvency proceedings is expecting to continue in the following months to reflect the consequences of the withdrawal of most measures taken by national public authorities to support their own businesses during the Covid-19 crisis.

Though a number of companies may benefit from the new preventive and restructuring schemes now adopted in a majority of EU Member States, it is worth mentioning that companies failing to meet the test of viability (the requirement test as provided for by the EU Preventive Restructuring Directive) are or will be simply excluded from those varying restructuring tools put in place by the European Member States.

Consequently, this will lead companies that are not long-term viable to see their restructuring proceedings converted into liquidations or to have to apply for compulsory proceedings leading in most cases, if not all, to liquidations: 'a return to reality'.

To note, EU and National Insolvency Statistics are available from the dedicated technical section of our website at: www.insol-europe.org/technical-content/national-insolvency-statistics ■

For updates on new technical content recently published on the INSOL Europe website, visit: **www.insol-europe.org/technical-content/introduction** or contact Myriam Mailly by email: **technical@insol-europe.org**

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European Insolvency Regulation
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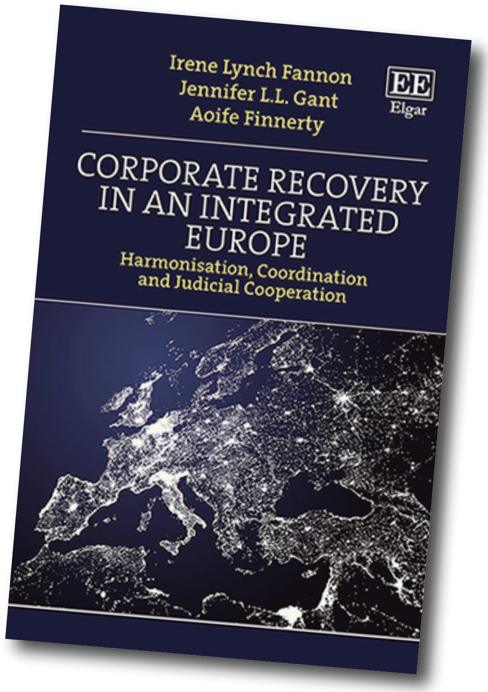
Corporate Recovery in an Integrated Europe:

Harmonisation, Coordination, and Judicial Cooperation

Irene Lynch Fannon, Jennifer L.L. Gant and Aoife Finnerty (1st edition) (2022, Edward Elgar Publishing, Cheltenham), xiii + 365 pp., £110, ISBN 978-1-80088-785-5



The turn of the millennium marked the beginning of a process of progressive harmonisation of European insolvency laws. This process, initially focused on establishing harmonised conflict of law rules, has gradually expanded to include group proceedings, judicial cooperation and even harmonisation of substantive laws on preventive restructuring procedures. These make for significant achievements, especially considering the large number of countries involved in this harmonisation exercise (and despite the loss of the United Kingdom as one of the participants in this process).

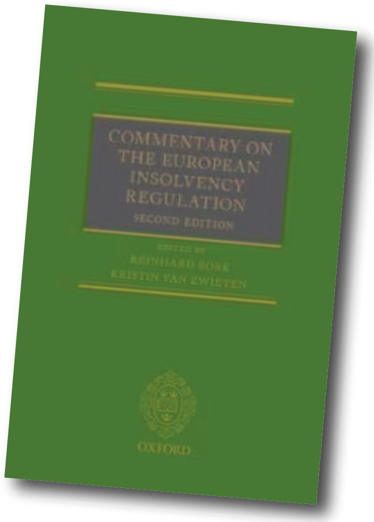
This context was the background to the JCOERE (Judicial Cooperation Supporting Economic Recovery in Europe) research project. Funded by the European Commission, this project aimed at investigating how cooperation obligations contained in the European Insolvency Regulation (recast) (Regulation (EU) 2015/848) would operate in a preventive restructuring cross-border case conducted according to the tenets of the Directive on Restructuring and Insolvency (Directive (EU) 2019/1023).

This research project has, in turn, been essential in building the foundations of this book. The monograph starts with an analysis of the approach of the European institutions to business failure and insolvency. Part II explores the concept of procedural coordination and cooperation through the lens of the European Insolvency Regulation (recast) while Part III focuses on the evolution of a preventive restructuring framework in Europe. Building on the findings of the JCOERE project, this latter part identifies the most controversial provisions of the Preventive Restructuring Directive. The fourth and final part of the monograph identifies issues to closer harmonisation and integration in cross-border insolvency and restructuring cases.

The book is doctrinal in nature, focusing on the harmonisation of laws on corporate rescue and cross-border co-operation between courts and practitioners in the field of insolvency. This monograph comes as highly recommended for a large audience of insolvency and restructuring stakeholders, including judges and lawmakers, who should include this monograph among their essential insolvency readings. This is thanks to the evidenced, detailed and persuasive analysis of cooperation and coordination issues conducted by the authors, who are leading international experts in this field. Equally, researchers, students and insolvency lawyers and practitioners should take a careful look at this comprehensive analysis of European approaches to business failure and recovery.

Eugenio Vaccari, Lecturer in Law, Royal Holloway, University of London

Commentary on the European Insolvency Regulation



Reinhard Bork and Kristin van Zwieten (eds) (2nd edition) (2022, OUP, Oxford), lxxxiv and 1052pp, £275, ISBN 978-0-19-885211-7

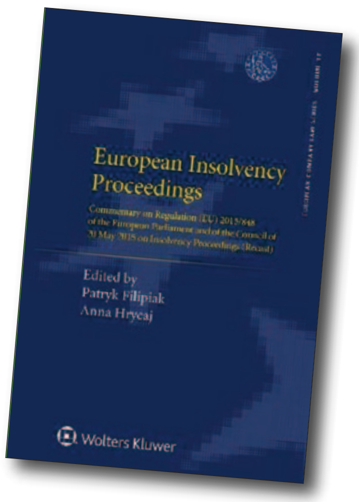
With the advent of the Recast EIR in 2015, a number of texts soon appeared offering commentary and exegesis on its contents, including Bork and Mangano's European Cross-Border Insolvency Law (2016, OUP, Oxford), Moss, Fletcher and Isaacs' The EU Regulation on Insolvency Proceedings (3rd ed) (2016, OUP, Oxford) and this work, the second edition of which has just been published. The editors and others combined have contributed to what remains a serious and weighty tome on the terms of the Recast EIR and its place in the European legal order in insolvency.

By and large, the work has not changed in structure since its first edition. Thus, as it explores the Recast EIR, it covers, in close order, the general provisions, the recognition framework, secondary insolvency proceedings, creditors and claims, the group dynamic, data protection as well as the final and transitional provisions, divided, as necessary, into the sub-sections that exist in the legislative text. In each of these parts are set out the wording of the text, followed by a methodical analysis of the issues raised, including the rationale for the provision and its scope of application. In places, the text also anticipates future developments, many of which have come true.

Rounding off the work, as in the previous edition, are appendices containing both the EIR 2000 and the Recast EIR, the Virgos-Schmit Report (accompanying the predecessor convention), the CoCo Guidelines and the JudgeCo Principles and Guidelines. To these have been added the recent proposal envisaging the replacement of Annexes A and B to the Regulation text, given the many changes in domestic insolvency law that have intervened, particularly in light of the adoption of the Preventive Restructuring Directive, to which the text also refers in analysing the relationship between both key texts. Overall, it is clear that this commentary continues to rest on very solid foundations. For that and many other reasons, it should prove an enduring work of reference in the field of international insolvency for academics, judges, practitioners and policy-makers alike.

Paul Omar, Technical Research Coordinator, INSOL Europe

European Insolvency Law



Patryk Filipiak and Anna Hrycaj (eds) (1st edition) (2022, Wolters Kluwer, Alphen a/d Rijn), xxix and 774pp, £221, ISBN 978-94-035-3410-7

With the advent of the Recast European Insolvency Regulation 2015, commentaries and analytical works have proliferated in almost every jurisdiction subject to the text. This work is no different in terms of its coverage, seeking as it does to offer an article by article commentary on the workings of the Regulation by reference to the rich case-law under this and its predecessor text, as well as by reference to the solid body of literature that has accompanied the way the text has been developed, interpreted and understood. However, where this work offers a unique perspective is in the orientation of the literature to which it makes reference, which includes a vast number of sources from Central and Eastern European legal journals and texts, many authored by the contributors to this volume, that are not often seen or used in prevailing works consulted in other European jurisdictions.

What this approach does is to firmly domesticate the Regulation text within the national hierarchy of norms in member states not often represented in the standard compendia and to treat it as a fundamental part of the insolvency law framework in those jurisdictions, which often exhibit features that are distinct from others with a "well-established market economy system" where concepts of insolvency and restructuring law have had much more time to bed in. As such, the careful attention to detail and the explanations in terms that reflect the standpoints of Central and Eastern European lawyers help make this a work that is very accessible to those wishing to integrate a framework of European origins within their daily practice and to assist in capacity building amongst courts and key mainstays of the insolvency law system, thus ensuring buy-in from their clients and other stakeholders. With the rich bibliography of sources used and reflected in the extensive footnotes, this work fulfils this ambition squarely and will serve as a useful and special addition to the literature.

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Looking forward to hearing from you
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