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The journal of INSOL Europe

Spring 2017

Cyber-risk & Insolvency

The consequences for our profession

Early Warning Signs

When the red lights should come on

Also inside this edition:

- New Age of Debt in Europe
- Foreign proceedings in Russia
- Streamlining proceedings in Greece
- The attractiveness of Statistics

... and more

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Welcome from the Editors


ANNEROSE TASHIRO


GUY LOFALK

While writing this editorial, I am currently sitting in New York where the topic of the day is about changing political views like flipping a coin. Stability and predictability are what the economy, hence businesses, need to operate on in order to invest or to design a sustainable rescue concept.

Whether the rescue environment the lawmakers create actually works can be measured by statistics. Myriam Mailly, Technical Officer of INSOL Europe, explains why statistics are important for our profession to measure how "sexy" the law is. For the bigger global scale, Emmanuelle Inacio reports on the 2017 Dun & Bradstreet Global Bankruptcy Report, which shows that insolvency rates have declined in 16 out of 23 European countries while Economic growth is slowing. The UK is the only major European economy to record increasing bankruptcy rates in 2016 (10.1%). Brexit? Trump? And Le Pen to come? Emmanuelle Inacio shares her take on this.

Speaking of actual, real measurement, bankrupt individuals who can or cannot achieve a discharge and on what terms, very well know the impact on themselves and their families from personal experience. Therefore, one of the initiatives of the EU Commission when submitting the Proposal for a Directive on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures was to ensure that consumers and entrepreneurs have access to a discharge mechanism within a relatively short time frame. So much so that even a wealthy Russian citizen took "refuge" in England to open bankruptcy proceedings! Ilya Kokorin tells the story.

On that subject, Yiannis G. Sakkas and Yiannis G. Bazinas of Greece outline a new law allowing honest entrepreneurs to file for discharge two years after the declaration of insolvency and to be released from all residual obligations. These amendments are fully in line with the European Commission's recommendation for a fresh start. Likewise, Vladimír Kordoš and Filip Takáč explain the necessity of an amendment regarding personal insolvencies in Slovakia.

While debt waiving might appear the big new "thing" – read Professor Madaus' contribution and find out what the Biblical Jubilee Year is and why we owe some salutation to Hammurapi of ancient Mesopotamia, reigning from 1792 BC to 1750 BC (in case you don't remember).

By all means, the Proposal will be discussed over the course of the next months and years. In their contribution, Professors David Burdette and Paul Omar concentrate on how the new proposals for a Europe-wide preventive restructuring framework affects small businesses.

Reading the Proposal many stumbled over the ideas of an early warning system and ask how that would work out. Giovanni Matteucci explains how and why such an early warning indicator does exist and could indeed work already in Italy and why it is not used.

There is another important topic I want to draw your attention to: the EU Directive of 2016 on the security of networks and information systems aimed at protecting digital and digital economy activities in the single market. That sounds dry, I know. But consider that the emergence of cyber-crime is one of the main risks for companies in the world and read Ludovic Van Egroo's view on what the challenges for insolvency professionals are.

Finally, I urge you to take note of INSOL Europe's first training course that took place in Romania. Over the course of two days, Professor Ignacio Tirado and other speakers covered the theoretical perspective of the main elements of business restructuring and insolvency and discussed two case studies with 61 delegates. These training courses will continue in Romania along the year and will be also organized in other countries in the years to come.

I hope you find this edition of *eurofenix* as interesting as I do.

Annerose Tashiro

14
NEW AGE OF DEBT

18
CYBER-RISK & CONSEQUENCES

eurofenix
Edition 67 Spring 2017

CONTENTS

3 **Welcome from the Editors**
Annerose Tashiro introduces the new edition

6 **President's Column**
INSOL Europe's President, Steffen Koch, calls the whole INSOL Europe family to action

8 **News and Events**
Conference news, book previews and updates from our organisation across Europe

12 **Technical Column**
Emmanuelle Inacio takes a closer look at French insolvency statistics

14 **The New Age of Debt**
Prof. Dr. Stephan Madaus presents his radical ideas on debt cancellation

18 **Cyber-risk and Corporate Insolvency**
Ludovic Van Egroo examines the rise of cyber-crime and the consequences for our profession

22 **Foreign insolvency proceedings in Russia**
Ilya Kokorin recounts the story of the curious case of Russian businessman Vladimir Kekhman

25 **Enhancing practice qualifications and conditions**
David Burdette & Paul Omar look at how small businesses are particularly affected by new proposals for Europe-wide preventive restructuring frameworks

CONTENTS

28 **Early disclosure of business crisis in Italy**
Giovanni Matteucci laments the under-use of the early warning indicator

32 **Streamlining proceedings in the Greek Insolvency Code**
Our Greek correspondents outline new laws aimed at simplifying and streamlining the insolvency process

34 **Resurrection of personal insolvencies in Slovakia?**
Vladimír Kordoš and Filip Takáč explain the necessity of an amendment regarding personal insolvencies

36 **Book Review: Commentary on the European Insolvency Regulation**
Chris Laughton reviews a new publication from the Oxford University Press on the recast EIR

38 **Country Reports**
Updates from UK, Czech Republic, Latvia, Turkey and USA

44 **Technical Update**
The attractiveness of national insolvency laws from a statistical viewpoint

46 **Dates for your diary**
INSOL Europe contacts and dates for your diary

28
EARLY WARNING IN ITALY

38
COUNTRY REPORTS

Photo by INDat

STEFFEN KOCH
INSOL Europe President

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See page 46 for contact details of each group.

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

61 delegates attend INSOL Europe's first training course in Romania

The first Module of the "INSOL Europe High Level Course on Insolvency Law in Eastern European Jurisdictions" took place from 2 to 4 February 2017 in Bucharest, *reports Emmanuelle Inacio*.

61 Romanian lawyers, lenders, insolvency practitioners, judges, representatives of the National Institute of Magistracy, the National Institute for the Training of Insolvency Practitioners and the National Union of Insolvency Practitioners attended the first module of the course dedicated to "International best practice and comparative examples".

The Director of the Programme of the High Level Course, Prof. Ignacio Tirado (Universidad Autonoma de Madrid, Spain) together with three International Experts, namely Prof. Irit Mevorach (University of Nottingham, UK), Prof. Riz Mokal (Barrister, South Square and (Hon.) University College London, UK) and Prof. Michael Veder (Radboud University Nijmegen, Resor, The Netherlands) provided the attendees with a general overview of international standards and best comparative examples concerning

the main elements of business restructuring and insolvency.

The first two days covered the analysis from a theoretical perspective, although always including the provision of comparative examples of the systems existing in different jurisdictions, as well as practical examples of cases and judicial decisions. The final day of this module included two case study sessions.

Mihaela Carpus-Carcea, Legislative Officer of the European Commission, closed the first Module with the presentation of the Proposal of the European Commission for a Directive on preventive restructuring frameworks.

The feedback so far is very positive. One of them particularly synthetises them.

According to Judge Nicoleta Mirela Nastasie, the course was "*[…] an important occasion to improve my learning activity, to find out about recent developments in international insolvency law from the most important specialists in the field […]. The International insolvency domain is becoming for me an increasingly stronger passion and I hope to have the chance to enlarge my knowledge and become able to transmit this passion to other people from my field of activity*".

The second module devoted to the analysis of relevant topics related to the Romanian insolvency system will be chaired by the local director of the programme of the High Level Course, Radu Lotrean (CITR, Romania), and by local experts and will take place from 29 June to 1 July 2017.

We are looking forward to another successful course in Romania and further on, in other Eastern European Jurisdictions. For details visit our website: www.insol-europe.org/education/courses2017

We are grateful to CITR for sponsoring our Educational Course in Romania.

All 'EYES on Insolvency'

INSOL Europe President Steffen Koch addressing the delegates in Amsterdam

Myriam Mailly reports on the one day international conference which took place on 27 January 2017 in Amsterdam, attended by over 250 delegates.

The one-day international conference titled 'Designing pre-insolvency proceedings of the future' took place in Amsterdam on 27 January 2017. The conference was organised by RESOR and the Business & Law Research Centre of Radboud University in cooperation with INSOL Europe and the European Commission.

The conference started with an overview of the European Commission's draft proposal on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures published on 22 November 2016 (hereafter 'draft proposal').

During the course of the conference various themes included in that draft proposal were raised from a legal, economical and financial angle. Before entering into the debate on the benefits and the weaknesses of the draft proposal, the question of 'what are the pre-insolvency proceedings?' was first evoked. In particular, the normative foundations (insolvency instrument) and the objectives (any kind of restructuring including liquidation by a sale of the business as a going concern) of this kind of proceedings were highlighted. Recommendations then followed on various aspects of the preventive restructuring process as described in the draft proposal including the need to clarify the scope of early determination decisions (meaning where the court is involved before the confirmation stage). By contrast, the panelists were of the view that the draft proposal should not include either a prior mandatory approval of disclosure or a compulsory hearing for the confirmation of the restructuring plan (the latter should be only a possibility available to the parties, according to their needs).

The emphasis was then put on the need to clarify some issues relating to the cram-down process, and in particular the valuation of the company's business (or assets). The difficulties relating to the cross-class cram-down mechanism were evoked and this led to the need to explain why it is still an on-going debate in the US. Other aspects relating to the valuation issue were highlighted from a judicial perspective (the role of the experts in the valuation process and the role of the courts with regard to the treatment of confidential information and the procedural means to reduce the duration of the valuation process.

There was also a discussion of the fact that there may be room for the European legislator to clarify some provisions in the draft proposal relating to the stay, the continuation of executory contracts and the protection of the (interim/new) financing within a preventive restructuring process.

An interactive session based on a fictitious scenario at the end of the conference gave the delegates a chance to be aware of the uncertainties which remain when a restructuring plan for a parent company and its subsidiaries established in different Member States is foreseen under the (forthcoming) application of the Regulation 2015/848.

The co-chairs of the conference (Nico Tollenaar and Michael Veder) wanted it to facilitate lively discussions not only between the distinguished panellists but also with the audience. It was then the occasion to open the debate on which extent of the harmonisation of insolvency law at EU level is desirable and achievable.

More information and photos from the conference can be found at: www.eyesoninsolvency.com

LinkedIn

INSOL Europe now has several LinkedIn groups which you can join and then engage with its members:

- INSOL Europe (main group)
- Eurofenix: The Journal of INSOL Europe
- INSOL Europe Turnaround Wing
- INSOL Europe Financial Institutions Group
- Eastern European Countries' Committee
- INSOL Europe Anti-Fraud Forum

To join one of the groups, visit: **www.linkedin.com** and search for the group by name.

Share your views!

You will have noticed that we have added QR Codes to every main article to encourage readers to give us their views. The QR codes take you the LinkedIn group for *eurofenix* (see above).

Of course, you are welcome to pass on your comments to any member of the Executive Committee, whether by email or in person!

Make a comment!

R3 & INSOL Europe International Restructuring Conference

London, 19 May 2017 – Full details and programme to be announced soon

The 14th Joint R3 & INSOL Europe International Restructuring Conference between the UK trade body, R3, and INSOL Europe will take place in London on 19 May.

This conference will debate topical issues from current international and cross-border cases delivered by speakers that are thoroughly involved in cross border litigation. With a varied international background to give a balanced perspective on all issues being debated, it is an event not to be missed.

Technical sessions will be delivered through a combination of presentations, panel discussions and case studies. Delegates will be fully updated on the main developments in this area, equipped for the next phase of cross-border insolvencies and restructurings.

This is a technical conference aimed at all insolvency and restructuring professionals who have an interest in cross-border matters, including insolvency practitioners, lawyers, financial advisers, lenders, distressed asset investors, judges and academics.

Prices from just £370+VAT. Visit www.r3.org.uk for details or email courses@r3.org.uk.

Eastern European Countries' Committee Conference
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Book Launch:

Insolvency Law, revised and extended, 2nd edition

Publisher: Wolters Kluwer, Prague
Author: Tomáš Richter,
Of Counsel, Clifford Chance LLP
Published: 2017, 2nd Edition
Length: 624 pages
Price: 880 Kč
ISBN: 978-80-7552-444-7

In February 2017, the second edition of Tomáš Richter's treatise "**Insolvenční právo**" has been published by the Czech subsidiary of Wolters Kluwer.

The second edition keeps the structure and methodology of the first, published with the same publisher in 2008, however, it has been substantially revised and extended.

In 624 pages, the second edition provides a critical analysis of the functioning of the Czech insolvency law reform of 2006, looking both at general questions of formal resolution of insolvency and on applications to the insolvency of large, non-financial corporate debtors.

Whereas the first edition's primary focus was on the reform's market-oriented regulatory method and its contrast with the previous Bankruptcy and Composition Act repealed at the end of 2007, the second edition has added an in-depth analysis of the corporate insolvency practice, established over the past nine years in market practice and in judicial opinions. The second edition has also been influenced by the new codes of Czech private law adopted with effect as of 1 January, 2014. Finally, the second edition has paid increased attention to strictly procedural rules and principles in their role as bulwarks of due process in the formal resolution of insolvency.

The second edition reflects several successive amendments to the Insolvency Act adopted since 2006, including the last set of major amendments pending, at the time of writing, as House Bill 785.

The author is Of Counsel in Clifford Chance LLP's Prague office and lectures at the Institute of Economic Studies, Faculty of Social Sciences, Charles University in Prague. Between 2011 and 2014 he was Professor (Chair in Cross-border Corporate Insolvency Law) at the Radboud University's Faculty of Law. He has been a member of INSOL Europe's Academic Forum since 2006, having served on its Supervisory Board since 2008. He has been a member of The International Insolvency Institute since 2015 and of The Conference of European Restructuring and Insolvency Law since 2016. In 2012, he served on the board of private experts with whom the European Commission consulted on the recast of the European Insolvency Regulation promulgated as Regulation 2015/848. In 2016, he served on the board of private experts with whom the European Commission consulted a proposal of a directive on certain aspects

Supplement to the Commentary on the Swiss Debt Enforcement and Bankruptcy Code

INSOL Europe Council member Thomas Bauer and former President Daniel Staehelin, the editors of the leading commentary to the Swiss Debt Enforcement and Bankruptcy Code ("*Bundesgesetz über Schuldbetreibung und Konkurs*"; "*Loi sur la poursuite pour dettes et sur la faillite*") recently published a supplement to the second edition dated from 2010.

Daniel Staehelin commented the articles 1-219 and Thomas Bauer the articles 220-349.

The supplement contains a summary of all relevant court decisions published in Switzerland since 2010 as well extensive commentaries to the new articles which entered into force on 1 January 2014, following a revision of the articles concerning the restructuring of companies and the insolvency of groups of companies after the collapse of the Swissair airline.

www.schulthess.com

French insolvency statistics: *Fluctuat nec mergitur?*

Emmanuelle Inacio takes a closer look at French insolvency statistics

EMMANUELLE INACIO
INSOL Europe Technical Officer

The 2017 Dun & Bradstreet Global Bankruptcy Report[1] shows that bankruptcy rates have declined in 16[2] out of 23[3] European countries while Economic growth is slowing.

The UK is the only major European economy to record increasing bankruptcy rates in 2016 (10.1%) – due to a spike in the fourth quarter after the referendum voted in favour of a Brexit – and paradoxically also one of the fastest-growing economy.

In compliance with most of the EU countries, the number of insolvency proceedings opened in France in 2016 has seen a decrease of 8.3% according to the 12th edition of the Deloitte Altares Report on the distressed businesses in France[4].

57,844 insolvency proceedings were opened in 2016 – compared to 63,081 in 2015 – of which 39 263 were liquidation proceedings, 17,288 reorganisation proceedings and 1,293 safeguard proceedings[5].

If the number of insolvency proceedings opened in the second quarter of 2016 has seen a low increase of 2.7% when compared to 2015 (due to judicial workers' strikes in May and June 2015), the first and third quarter of 2016 have seen a decrease of 10.1% and 12% when compared to 2015, respectively.

The last quarter of 2016 has even seen a decrease of 12.2% with the opening of 13,971 insolvency proceedings, which is close to the rates registered before the previous financial crisis (13,662).

> IF THE TERRORIST ATTACKS IN PARIS ON 13 NOVEMBER 2015 HAD IMMEDIATE SHORT TERM ECONOMIC IMPACTS, THE IMPACT DID NOT LAST

If the terrorist attacks in Paris on 13 November 2015 had immediate short-term economic impacts, the impact did not last[6].

Since 2009, the hope of returning under the threshold of 15,000 insolvency proceedings for the last quarter, and 60,000 for the year, seemed a more elusive goal than ever. 2016 attained this goal.

A closer look...

If we look closely at the statistics, the number of insolvent companies with more than 10 employees is the lowest since 2008, with a decrease of 34.8% in 2016 when compared to 2015. Similarly, the number of insolvent companies with more than 50 employees has seen a decrease of 31.2% in 2016 when compared to 2015.

It is important to highlight that an important number of insolvency proceedings opened in 2016 concerns small businesses with 1 or 2 employees, which have seen a decrease of 5.3% in 2016. Consequently, the number of threatened jobs has seen a decrease of 17.4% in 2016, which is its lowest rate since 2008 (193,649 threatened jobs in 2016 versus 234,453 in 2015).

On the other hand, if we look at the statistics concerning company creations, 554,000 companies (of which 188,800 companies, 142,400 individual companies and 222,800 self-employed persons) were created in France in 2016 with an increase of 6% when compared to 2015. This means therefore that only 10.44% of the companies created in 2016 in France have failed.

Significant factors

The insolvency statistics only include the public and collective judicial reorganisation, judicial liquidation and safeguard proceedings. Nonetheless, the 12th edition of the Deloitte Altares Report on the distressed businesses in France raises that 2,467 preventive and confidential proceedings were opened in 2016, with an increase on 3% when compared to 2015 of which 65% are *ad hoc* mandate proceedings.

612,001 jobs are concerned by these preventive and confidential proceedings with a growth of 5% when compared to 2015 due to increase of the size of the preventive and confidential cases. Preventive and confidential proceedings, which represent 4% of the 2016 proceedings as a whole, concern 76% of threatened jobs. 1 out of 2 preventive proceedings opened do succeed helping to preserve jobs under the best possible conditions.

The increased use of preventive proceedings shows that a rescue culture exists in France, as requested by the European Commission proposal for a Directive on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU[7]. Indeed, as the *ad hoc* mandate and conciliation proceedings are opened only at the request of the debtor, the directors now address their financial difficulties at an early stage, which should be seen as a major step forward in the prevention of insolvency.

Upward trend

Meanwhile, the latest available macro-economic data was surprising, highlighting an underlying improving trend in the French economy. The harmonized unemployment rate has fallen to its lowest value since late 2011, and the Purchasing Managers' Indices in the manufacturing, retail and service sectors are all moving higher, according to the 2017 Dun & Bradstreet Global Bankruptcy Report.

However, the upcoming presidential election of 23 April and 7 May followed by the parliamentary elections of 11 and 18 June 2017, could jeopardise these figures.

Party politics

The incumbent socialist president François Hollande made history by becoming the first president since 1958 to decide not to seek a second term, due to his unpopularity, despite the encouraging figures.

Conservative anti-welfare, François Fillon (who is under formal investigation on suspicion of embezzling state funds); left and green wing of the socialist party, Benoît Hamon; far-right nationalist, anti-immigrant, anti-EU Marine Le Pen (and whose chief of staff is under formal investigation over the alleged misuse of EU funds to pay parliamentary assistants); pro-EU former investment banker, independent centrist, Emmanuel Macron and eurosceptic, anti-capitalist, radical left wing Jean-Luc Mélenchon are the major candidates.

If opinion polls indicate that Marine Le Pen will easily reach the final round run-off of 7 May, all polls show Marine Le Pen losing against either Emmanuel Macron or François Fillon. But what if the Republican Front of anti-Le Pen voters from across the political spectrum, that has formed in past presidential and legislative elections to block a victory by the far-right National Front, simply might not materialise this time? The chances that France may be about to add a new chapter to the disruptions of Brexit and the Trump presidency are very real indeed.

To be continued… ■

> "THE CHANCES THAT FRANCE MAY BE ABOUT TO ADD A NEW CHAPTER TO THE DISRUPTIONS OF BREXIT AND THE TRUMP PRESIDENCY ARE VERY REAL INDEED"

Footnotes:

1 http://www.dnb.com/perspectives/finance-credit-risk/2017-global-bankruptcy-trends-report.html
2 Serbia (-50.8%); Bosnia (-32.5%); Portugal (-22.9%); Bulgaria (-21.8%); Spain (-17.9%); Netherlands (-16.2%); Russia (-13.8%); Turkey (-10%); France (-8.8%); Poland (-8.7%); Italy (-7.7%); Slovakia (-7.5%); Belgium (-6.2%); Germany (-6.1%); Finland (-5.1%); Sweden (-5%).
3 Norway (3.9%); Slovenia (4.4%); Austria (6.6%); Switzerland (9.3%); United Kingdom (10.1%); Czech Republic (21%); Denmark (69%).
4 http://www.altares.com/fr/actualites/nos-publications/barometres-181/article/12eme-edition-de-l-etude-deloitte-altares-l-entreprise-en-difficulte-en-france?id_rubrique=181&id_article=354
5 http://www.altares.com/fr/actualites/nos-publications/defaillances-et-sauvegardes-186/article/defaillances-d-entreprises-en-france-4eme-trimestre-2016-et-bilan-annuel-2016#up
6 "French Insolvency Statistics" in *Eurofenix*, Winter 2015/16, Issue 63, p. 45.
7 http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=50043.

Share your views!

The New Age of Debt

...and the common function of insolvency and restructuring law

Prof. Dr. Stephan Madaus presents his thoughts on debt cancellation in an essay based on his after-dinner presentation at the recent Academic Forum Annual Conference in Cascais (Lisbon, Portugal)

PROF. DR. STEPHAN MADAUS
Martin Luther University
Halle-Wittenberg, Germany

> FOR A LARGER PART OF SOCIETIES, A NETWORK OF DEBT WAS THE VERY FABRIC OF SOCIAL COHESION, NEVER REALLY MEANT TO BE PAID

We are witnessing a new, unprecedented "Age of Debt"[1]. Almost ten years after a financial crisis that was triggered by the accumulation of unsustainable debt in the household and financial sectors, debt levels have not declined.

Years of economic stagnation and the costs of the financial sector bailouts in Europe, but also excessive growth in China and other developing countries, account for a continued increase in global debt. According to a 2015 study by the McKinsey Global Institute, global debt rose by \$57 trillion since 2007 to a total amount of \$199 trillion in 2015, clearly outpacing the world GDP growth.[2] High levels of debt across different sectors (government, household, corporate and financial) are a problem, as they reduce the capacity to finance investments or consumption using new lines of credit, which is bad for any economic recovery.

High debt levels are all but new. Debt and over-indebtedness have been constant companions to economies at all times. Debt crises were common in the ancient Near East already.[3] Structural over-indebtedness was demonstrated in Europe from the 13th to the 19th century.[4] To give credit and to live and work on short-/long-term credit lines has always been a common denominator of human interaction. In a past world in which credit relationships were personal, credit was given based on social norms and responsibilities of the creditor (sic!) rather than on the expectation of a prompt repayment. Historical research[5] shows that a common way to handle an insolvent debtor in a personal credit relationship in rural communities in 13th century England, but also in 19th century Germany, was to suspend payments on the principal amount for decades while expecting payment on interest and waiting for a setoff with unpaid credit. It was the repayment of credit from (tax or church) officials or "outsiders" (foreign traders or Jews) which was usually legally enforced. Today, most of our creditors are such "outsiders" as they are not bound or restricted by social norm when enforcing their legal rights.

Over time, different strategies have been developed to address a high level of debt in an economy. For a larger part of societies, a network of debt was the very fabric of social cohesion, never really meant to be paid.[6] If it was, a high debt level was always a menace to social peace. Debtors would try to get rid of their creditors by violent means. Peasants, in particular, would rebel against their landlords (and creditors).[7] An early response to a debt crisis that had the potential to spark uprisings was a "clean slate" policy. Already under the Law of Hammurapi of ancient Mesopotamia, it was customary for rulers taking the throne for their first full year to "restore order" and "righteousness" by cancelling the debt of their peasants (barley debt and mortgage liens)[8] – a tradition that found its way into the Bible with the Jubilee Year (the cancellation of debt every seven years)[9] – but has not been practiced in a relevant economic way for centuries. Another way to quickly lower the overall level of debt is hyperinflation. However, this option involves socio-political consequences that are less than welcome, as one could witness in the 20s in Germany, with all the traumatic repercussions. Hyperinflation means a hard and uncontrolled debt restructuring for everyone in the market at the same time. It is a "brutal mechanism for reducing the real value of debts".[10]

For centuries, the most practical way to handle high debt levels and over-indebtedness has been to wait for the dissolution of the debtor (and their debt). This solution is obvious for a corporate debtor where a liquidation can be done under company law, but (if over-indebted) also under insolvency law. The process has always resulted in paying creditors (partially) from remaining assets and cancelling all unpaid debt with the dissolution of the corporate entity. In case of an individual being the debtor, the debt cancellation has actually not been affected much differently if

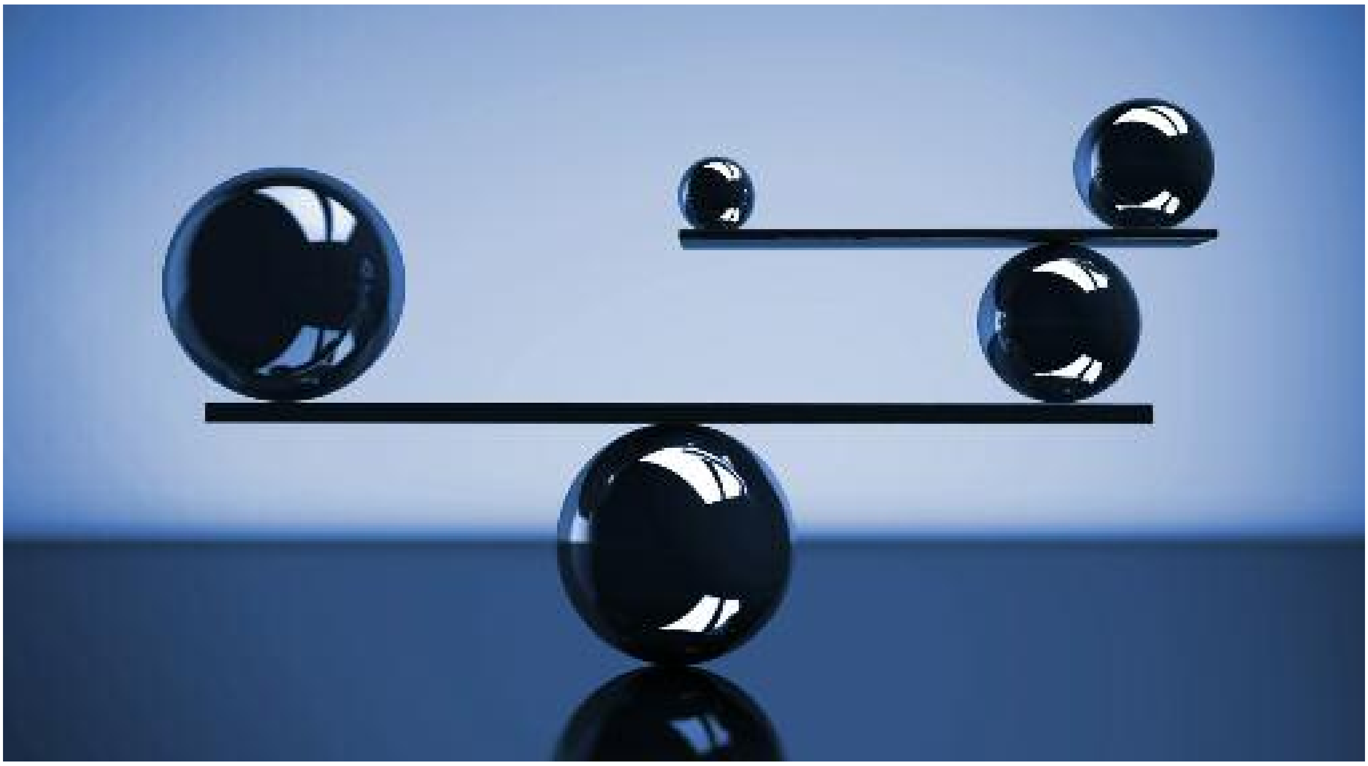
we consider common insolvency proceedings relating to a deceased (insolvent) estate. The only major difference is the sequence of events: in a corporate winding-up, the liquidation of the insolvent estate precedes the dissolution (death) of the entity, while for individual debtors, their death precedes the liquidation of their insolvent estate. From this perspective, insolvency law and insolvency proceedings have always played a key role in handling over-indebtedness and non-performing loans in market economies.

The role of insolvency law seems even more relevant when we add restructuring procedures to the analysis. Over-indebted, but honest merchants have always enjoyed contractual debt restructurings within their networks of merchants.[11] Corresponding statutory rules, which have facilitated a renegotiation of contractual agreements by allowing for a majority vote in case of formal insolvency proceedings relating to a merchant (composition or accord), were common to insolvency laws of all major medieval trading capitals like Ferrara, Florence or Milan.[12] The privilege of a composition was extended to non-merchants only rather recently. Today, modern civil law expects any consumer to act like a merchant – handling credit and liquidity, comparing competing offers, taking insurance and risk in the market for consumer goods and services. A facilitated debt restructuring option would, thus, be consistent with our consumer image.

A functional analysis of insolvency and restructuring proceedings reveals that all such proceedings share one common effect: debt cancellation. This seems to be common knowledge to macroeconomists when they praise the decentralised debt reduction "handled routinely by private renegotiations or formal bankruptcy procedures […] without causing more than low-intensity 'background noises' for the system as a whole."[13]

At the same time, such procedures have another common function: they provide a procedural mechanism able to identify what fraction of a debt a debtor is still able to serve. It is only non-performing loans in a

> **A FUNCTIONAL ANALYSIS OF INSOLVENCY AND RESTRUCTURING PROCEEDINGS REVEALS THAT THEY ALL SHARE ONE COMMON EFFECT: DEBT CANCELLATION**



> "THE COMMON DEBT CANCELLATION EFFECT OF INSOLVENCY AND RESTRUCTURING PROCEEDINGS SHOULD MAKE THE FURTHER DEVELOPMENT OF SUCH PROCEDURES A PRIORITY"

debtor's debt pile that is cancelled. This mechanism is obvious in liquidation proceedings. Here, the collection of all debts, plus the sequestration and liquidation of all assets, results in a precise determination of the capacity of the debtor to pay the debt at the end of the proceedings. For a corporate debtor or deceased individuals, this is also the moment when they (more exactly their estates) exit the market. Unpaid debt ceases to exist. In restructuring proceedings, it is a contract between all or some creditors and the (individual or corporate) debtor by which the ratio of non-performing credit is fixed and cancelled. Here, a delay of payment may also increase the nominal ratio of performing loans. Nevertheless, the basic function of such procedures remain the same. They determine what a financially troubled debtor is able to pay and cancel out the exceeding fraction of debt.

Finally, insolvency proceedings for consumers show the very same effect if they are connected with a discharge. Here, the liquidation of the debtors' estates (and/or a possible additional payment period) also determines their ability to pay and the fraction of non-performing credit which is then dissolved by a discharge.

Conclusions

Several conclusions could be drawn from this insight.

The common debt cancellation effect of insolvency and restructuring proceedings should make the further development of such procedures a priority for all economies with an unhealthy level of debt. Compared with the alternative instruments of immediate debt cancellation (clean slates, hyperinflation), such proceedings deserve a favourable treatment and image. Where paying all non-performing loans is impossible (over-indebted debtor), continuing the *status quo* (e.g. by granting payment periods for decades, with little or no interest) leads to a stagnation not only of the over-burdened debtor (who is hardly able to finance new investments with a new line of credit), but also of the economy as a whole. It is as much in the macroeconomic interest of policy-makers, as it is in the interest of the debtor, to find a better solution. At the same time, each creditor affected by an orderly debt cancellation only absorbs the risk of default which is imminent to any credit relationship and which is often reflected and counterbalanced by the interest rates.

The academic discussion about the function and principles of insolvency and restructuring proceedings should not only focus on assessing the creditor/asset side of such proceedings. The common factor may instead be better found on the debt side of the very same medal. The collective nature of such proceedings might, thus, be as much a secondary effect as the desire to maximise the creditors' payoff (which is a fraction of the performing loan). They are certainly not common features of all insolvency and restructuring proceedings which exist in Europe. Theories with a purely creditor-oriented view (e.g. the famous creditors' bargain theory) could, therefore, miss an essential aspect from the outset. A debt-(not debtor-!)oriented perspective on insolvency and restructuring procedures would potentially allow for a more open discussion about the stakeholders' or the public interest within such frameworks.

If we look at insolvency and restructuring proceedings as instruments of debt assessment and debt cancellation, their procedural aspect becomes less dominant in the definition of their characteristics. Overall, such proceedings may rather be considered an essential part of the law of obligations, than only a section of the law of civil procedures, or even of the law of enforcement.

Old fashioned and strict consumer insolvency proceedings which assess the NPL (*Non-Performing Loan*) fraction by liquidating all assets without allowing for a discharge are a remnant of a time when defaulting debtors were held to be criminals, and when the bankruptcy law was designed to punish the debtor for a breach of trust and promise. In the market economy of today, insolvency law assumes a different function: it cancels debt and – in the process – terminates failed businesses; it reallocates not only the debtors' assets to a more efficient use, but also the entrepreneurship or workforce of the individual debtors. ■

> **OLD FASHIONED AND STRICT CONSUMER INSOLVENCY PROCEEDINGS ARE A REMNANT OF A TIME WHEN DEFAULTING DEBTORS WERE HELD TO BE CRIMINALS**

Footnotes:

1 The classic term commonly refers to periods in 14th to 16th century Europe; see Delloyd J. Guth, *The Age of Debt, the Reformation and English Law*, in: Delloyd J. Guth and John W. McKenna (eds.), *Tudor Rule and Revolution*, 1982, at 69; see also Peter Schuster, *The Age of Debt? Private Schulden in der spätmittelalterlichen Gesellschaft*, in: Gabriele B. Clemens (ed.), *Schuldenlast und Schuldenwert, Kreditnetzwerke in der europäischen Geschichte 1300-1900*, 2008, at 37.

2 McKinsey Global Institute, *Debt and (Not Much) Deleveraging*, February 2015, at 15.

3 See Michael Hudson, in: Michael Hudson/Marc van den Mieroop (eds.), *Debt and Economic Renewal in the Ancient Near East*, 2002, 5 (28).

4 See e.g. the articles edited by Gabriele B. Clemens (ed.), *Schuldenlast und Schuldenwert, Kreditnetzwerke in der europäischen Geschichte 1300-1900*, 2008.

5 In the book edited by Gabriele B. Clemens (ed.), *Schuldenlast und Schuldenwert, Kreditnetzwerke in der europäischen Geschichte 1300-1900*, 2008, such practice is mentioned repeatedly; see e.g. Philipp R. Schofield, *Die Kreditvergabe im englischen manor court 1250-1350*, 21 (27-36); Peter Schuster, *The Age of Debt? Private Schulden in der spätmittelalterlichen Gesellschaft*, 37 (43-51); Gerald Grommes, *Netzwerke und Geschäftstrukturen kastilischer Messebankiers im 16. Jahrhundert*, 84 (99-102).

6 See also Laurence Fontaine, *Die Bauern und die Mechanismen der Kreditvergabe*, in: Gabriele B. Clemens (ed.), *Schuldenlast und Schuldenwert, Kreditnetzwerke in der europäischen Geschichte 1300-1900*, 2008, 109 (118-130).

7 For historical examples see e.g. David Graeber, *Debt. The First 5,000 Years*, 2012, at 231.

8 Michael Hudson, in: Hudson/Van den Mieroop (eds.), *Debt and Economic Renewal in the Ancient Near East*, 2002, 5 (30).

9 See Deuteronomium, 15:1-3. In Levitikus, 25:8-31, only every 50th year was a Jubilee Year.

10 Josef E. Stiglitz and Daniel Heymann, *Life after Debt, The Origins and Resolutions of Debt Crises*, 2014, at 19.

11 See Gerald Grommes, *Netzwerke und Geschäftstrukturen kastilischer Messebankiers im 16. Jahrhundert*, in: Gabriele B. Clemens (ed.), *Schuldenlast und Schuldenwert, Kreditnetzwerke in der europäischen Geschichte 1300-1900*, 2008, 84 (99).

12 See Josef Kohler, *Lehrbuch des Konkursrechts*, 1891, at 447.

13 Josef E. Stiglitz and Daniel Heymann, *Life after Debt, The Origins and Resolutions of Debt Crises*, 2014, at 18.

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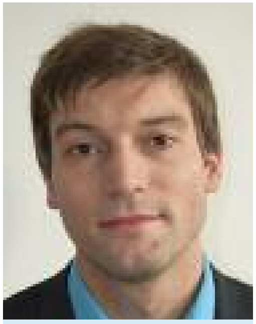
Cyber-risk:
A new factor for corporate insolvency?

Ludovic Van Egroo examines the rise of cyber-crime, the regulatory impact and the consequences for insolvency professionals



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Digital is now prevalent in all sectors of economic activity. The European Commission[1] has identified it as a strong vector of growth with the potential to create hundreds of thousands of jobs and about 415 billion euros in revenues.

According to the French E-Commerce Professional Federation (FEVAL), quoted by the "Journal du net", e-commerce websites in France generated a turnover of 72 billion euros in 2016. A figure that is constantly increasing[2].

While it is a great source of wealth and value, this economy is also creating new risks for companies.

The French Government[3] defines Cyber-risks as "*An attack on information systems carried out for malicious purposes. [A cyber-attack] targets different computing devices: computers or servers, isolated or in a network, linked or not to the web, peripheral equipment such as printers, or communicating devices such as mobile phones, smartphones or tablets. There are four types of cyber-risks with various consequences, directly or indirectly affecting individuals, administrations and companies: cyber-crime, damage to the image (reputation?), industrial spying, sabotage*".

These four types of cyber-risks can have an impact on businesses that can be immediate or of medium to long term. These consequences can be classified as in diagram 1 below[4].

According to the Global *Economic Crime Survey* by PWC[5]: "*The emergence of cyber-crime is one of the main risks for companies in the world*". Indeed, according to PWC, cyber-crime increased by 25 points between 2014 and 2016, from 28% to 53%.

THE EMERGENCE OF CYBER-CRIME IS ONE OF THE MAIN RISKS FOR COMPANIES IN THE WORLD

1. Cyber-risks and their impact

Type of Impact	Management	Economic and Financial	Reputation	Juridicial
Immediate consequences	Governance challenged	Loss of clients Failure / Bankruptcy Destruction of intangible assets / depreciation of assets	Theft of customer / corporate data	Increase in insurance premiums Prosecution for Non-compliance
Medium / long term consequences		Decommissioning of production tools, investment for the restoration of assets	Degradation of E-reputation and corporate image	Prosecution for theft and / or data destruction

What are the regulatory developments in the sector? To what extent are insolvency professionals concerned by this risk? What are the consequences for insolvency professionals?

Regulatory developments in the sector: Towards a division of responsibilities between Internet operators

Faced with these new challenges, the Council of Europe and the European Parliament adopted in 2016 a Directive on the security of networks and information systems[6] aimed at protecting digital and digital economy activities in the single market. This Directive is based on the principle of protection and assistance of the European Union for consumers[7].

Once the Directive has been transposed into each Member State's legal system, companies will be required to disclose "*the major IT security incidents of which they are victims*"[8]. The measures adopted aim to:

- strengthen cybersecurity capacities in each country and the national strategy for digital security;
- establish a framework for voluntary cooperation to facilitate the sharing of technical information on risks; and
- define at national level cybersecurity rules for the companies responsible for networks.

The Council and the European Parliament have defined two levels of corporate responsibility between:

- on the one hand, network and infrastructure operators qualified as "*Operators of essential services*". These include search engines, social networks, cloud operators but also the administrations responsible for networks that are used for data transfer;
- on the other hand, companies that collect and use consumer data through Internet. Companies in charge of this data will have to guarantee the security of data and justify it.

The European directive will have to be transposed to Member States by 2018 and applied to companies as part of the digital economy.

What are the new obligations of the regulatory framework?

The European Directive opens up the possibility of:

- Class actions in order to protect consumers' rights and personal data; and
- the right to ask for compensation for material or moral damage by the "contractor" or "subcontractor" who has not met the conformity requirements and who has not protected users' data.

The second part of the Directive concerns businesses using personal data and company data. Any company that processes and stores personal data is required to comply with the General Data Protection Regulation (GDPR). Member States have two years, until 2018, to implement and define the bodies in charge of the implementation.

In concrete terms, this translates into:

- obligation for companies collecting and using data to ensure that users explicitly

> THE EUROPEAN DIRECTIVE WILL HAVE TO BE TRANSPOSED TO MEMBER STATES BY 2018 AND APPLIED TO COMPANIES AS PART OF THE DIGITAL ECONOMY

> **FROM THE MOMENT FIRMS ARE ABLE TO IDENTIFY CYBER-ATTACKS AND THEIR CONSEQUENCES, THIS COULD BECOME A CAUSE OF THEIR FAILURE**

2. Issues and consequences of cyber-risks

Consequences of cyber-risks	Issues
Damage to intangible assets	Restore intangible assets to avoid depreciation Assess the possibility of maintaining the activity
Data protection for companies in difficulty	Assess the impact of difficulties on the protection of company data Ensure that the company was and remains in compliance with the regulations in the context of insolvency procedure

consent to the way their data is used, and also provide for the transferability of the data to the users as well as their permanent deletion;

- the right to be informed in case of data piracy (Articles 33 and 34 of the GDPR). Thus, "*Companies and organizations shall be obliged to inform the national supervisory authority immediately in the event of a serious breach of the data so that users can take appropriate measures*"[9]; and
- the need to improve security features, that is to increase the level of protection but also the ability of devices to detect data thefts.

Faced with this new economy and regulatory developments, what are the new responsibilities of insolvency professionals?

What are the challenges for insolvency professionals?

As part of their mandate, in accordance with the Order of 14 January 2009[10], insolvency professionals will be required to take into account the cyber-risks.

Including the cyber-risk factor in the analysis of the origin of a company's difficulties

From the moment firms are able to identify cyber-attacks and their consequences, (e.g.: Decommissioning of an e-commerce company's website) in terms of loss of turnover, this could become a cause of their failure. Thus they could seek the assistance of the Commercial Court.

The failures could have originated from two different levels of responsibility:

Direct causes, if the difficulties originate from an attack on the infrastructure and the systems of the company such as its servers and information networks:

In this case, the company's data might have been compromised and the company can be held accountable. It will be necessary to ensure that the company has taken the necessary measures to protect the data of its customers, but also to evaluate the company's ability to carry on its activities. The immediate consequences are the depreciation of the value of the assets and of the company's reputation. In October 2016, DYN, an American company hosting websites, was the victim of an attack rendering several platforms and websites inaccessible. The company was bought the following month by Oracle.

Indirect causes, in the event that a company suffers from the failure of an operator of essential services, such as a web host:

This scenario applies, for example, to vendors selling via e-commerce sites and mobile applications. In case the website crashes or becomes inaccessible because of a cyber-attack, their sales are negatively affected, generating a net loss of turnover which, in turn, does not allow companies to meet their due dates.

In these cases, the insolvency practitioner may have to call on cybersecurity professionals in

order to make a diagnosis:

- Compliance with data standards.
- Analysing the origin of the attack and involving the insurance company.
- Identifying solutions to secure the networks, in order to maintain the business and safeguard employment.
- Researching the responsibilities of the different stakeholders.

Depending on the findings, the insolvency practitioner may initiate procedures to repatriate data, to request the deletion of personal data, hosted or in transit, as per the defaulting company's framework of compliance requirements.

The challenge of identifying data and stakeholders

In the same way that the administrator and the legal representative ensure that the administered company carries out its activity in compliance (as may be the case for a restoration activity with an IV license or compliance with a company's environmental norms), the insolvency practitioner must ensure that the company complies with national standards for cyber-fraud and risk.

However, the digital economy being international in nature, identifying the stakeholders, especially in terms of responsibility, is difficult.

Conclusion

Frauds and company failures linked to cyber-risk and cyber fraud have emerged as a result of the digital economy, leading the European Union and Member States to acquire new means of protection and to create a legislative framework necessary for the protection of data collected by companies.

The European Directive was necessary to standardize the legal framework of national institutions because of a continuously evolving risk, thus guaranteeing the security of the common market and the interests of European consumers.

The European framework created for business activities related to the digital economy provides an initial orientation for the treatment of failures. Insolvency professionals will be required to take into account the potentially international aspects of this type of activity, in particular:

- **The nationality of the structure hosting contracts:** the user data can be hosted in different countries;
- **Contracting or subcontracting the companies' nationality,** especially in the case of the involvement of a holding company structure for tax purposes;
- **The ownership of data** by the insolvent company, and getting in touch with each country's relevant insolvencies within the European Union; and
- **The possibility of initiating or joining collective actions** by several European insolvency professionals.

Finally, the treatment of the insolvency of digital companies has a supranational dimension: it can be just European, but also international. ■

> THE INSOLVENCY PRACTITIONER MUST ENSURE THAT THE COMPANY COMPLIES WITH NATIONAL STANDARDS FOR CYBER-FRAUD AND RISK

Footnotes:

1 European Commission, A DIGITAL SINGLE MARKET FOR EUROPE, https://ec.europa.eu/commission/priorities/digital-single-market_en (20-03-2017)

2 Journaldunet, "*In 2016, French E-commerce raised 72 billion euros*", http://www.journaldunet.com/ebusiness/commerce/1172030-chiffre-d-affaires-e-commerce-france/ (20-03-2017)

3 Official French government website dedicated to cyber-risk http://www.gouvernement.fr/risques/risques-cyber, (20-03-2017)

4 Michael Bittan & Fouzi Akermi "*Cyber 2016, The Hidden Face of Cyber*"; DELOITTE Office, publicised in 2016

5 Jean-Louis Di Giovanni , Fabienne Borde , Thomas Estève, "*Fraud explodes in France Cyber-crime at the heart of all concerns*", Global Economic Crime Survey 2016, published March 2016

6 European Commission, "*The Directive on security of network and information systems (NIS Directive)*" https://ec.europa.eu/digital-single-market/en/network-and-information-security-nis-directive, (20-03-2017)

7 European Union, "*Areas of action of the European Union*" https://europa.eu/european-union/topics/consumers_fr (20-03-2017)

8 European Union Council, "*Improving cybersecurity in the EU*" http://www.consilium.europa.eu/fr/policies/cyber-security/ (20-03-2017)

9 European Parliament, "*New EU rules on data protection put citizens in charge*" http://www.europarl.europa.eu/news/fr/news-room/20160413BKG22980/nouvelle-l%C3%A9gislation-europ%C3%A9enne-sur-la-protection-des-donn%C3%A9es, (20-03-2017)

10 Légifrance : Arrêté du 14 janvier 2009 - art. (V) https://www.legifrance.gouv.fr/affichCodeArticle.do?cidTexte=LEGITEXT000005634379&idArticle=LEGIARTI000020163273&dateTexte=&categorieLien=cid, (20-03-2017)

Share your views!

Foreign insolvency proceedings in Russia:

The curious case of Vladimir Kekhman

Ilya Kokorin recounts the story of a wealthy Russian citizen who was held bankrupt in England, despite rather weak connections to the English jurisdiction

ILYA KOKORIN
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A well-known Russian businessman, Vladimir Kekhman, successfully sought a bankruptcy order in the UK back in 2012, but despite that, his case fell under the Russian insolvency procedure in 2015.

Russian courts, including the Supreme Court of the Russian Federation, reasoned that a foreign insolvency order did not prevent Russian courts from hearing the case under Russian insolvency law.

Russian citizens do not initiate insolvency proceedings outside Russia regularly, and the case of Mr. Kekhman in this respect is exemplary, allowing us to see the larger picture related to the treatment of foreign insolvency proceedings in Russia.

> “RUSSIAN CITIZENS DO NOT INITIATE INSOLVENCY PROCEEDINGS OUTSIDE RUSSIA REGULARLY”

Background

Mr. Kekhman has a somewhat extraordinary personality. He is a Russian citizen, domiciled and resident in the Russian Federation. In 1994, he went into the fruit business, which rapidly expanded in the 1990s and the beginning of 2000s, turning into a multibillion-dollar empire. It is said that every third banana was imported to Russia by the JFC Group founded by this businessman, sometimes referred to as the “Banana King”. In addition to his business endeavors, Mr. Kekhman led an active social life and acted as a director at the Mikhailovsky Theatre in Saint Petersburg and the Novosibirsk State Academic Opera and Ballet Theatre.

In 2011, Mr. Kekhman’s business got into financial troubles. Negotiations and restructuring attempts failed, and several lending banks took steps to enforce their securities and called in their guarantees. On 20 February 2012, insolvency proceedings against JFC were initiated in Russia.

Escape to the UK to file for insolvency

At that time (2012), Russian law did not provide a procedure for personal insolvency, so Mr. Kekhman went to England for two days to file a petition seeking a bankruptcy order. In order to obtain the support of the English jurisdiction, he argued that he was personally present in the UK on the day he filed the petition and that three of his personal guarantees and indemnities were subject to English law.

Despite a rather weak connection, on 5 October 2012, the court issued a bankruptcy order on Mr. Kekhman’s petition. Under English law, personal presence in the country has been sufficient to obtain the order in bankruptcy for at least a century: (Section 1(2) of the Bankruptcy Act 1914, Section 265 Insolvency Act 1986). Once jurisdiction is established, the court has an unfettered power to make a bankruptcy order or reject the petition. In the present case, the court exercised its discretion in favour of Mr. Kekhman. It took into account the fact that there was no regime of personal insolvency in Russia, so Mr. Kekhman had come to the English jurisdiction to fill a lacuna in the laws of Russia.

All attempts by Russian creditors to challenge the English bankruptcy order failed. On 5 October 2013, Mr. Kekhman was discharged from his bankruptcy under Section 279(1) of the Insolvency Act 1986.

Unhappy creditors start a fight in Russian courts

In 2015, the Russian insolvency law was amended to include special provisions on personal insolvency (insolvency of individuals). Following such developments, Sberbank, the largest bank in Russia, filed a motion to hold Mr. Kekhman insolvent under Russian law. This would give creditors significant control over the businessman’s assets in Russia (and possibly abroad). As a result, Russian courts were faced with the intricate question – what are the consequences of a foreign insolvency order issued against a Russian individual within the framework of Russian insolvency law?

Interestingly, English courts analyzed this same question when issuing the order. Relying on the expert opinion of two prominent Russian scholars, they arrived at the conclusion that the bankruptcy order was unlikely to be recognized or enforced by the

> FROM THE TREATMENT OF MR. KEKHMAN'S CASE, ONE MAY CONCLUDE THAT RUSSIAN COURTS ARE OVERLY HOSTILE TO FOREIGN INSOLVENCY PROCEEDINGS

courts of the Russian Federation. And right they were – Mr. Kekhman's attempts to discontinue or be discharged from Russian insolvency proceedings fell flat. The refusal to give effect to the English judgment was based on the following arguments (in no particular order):

- The bankruptcy order dated 5 October 2012 was not preliminarily enforced in Russia, in other words no exequatur was received;
- Close connection to Russia (transactions with major creditors were made in Russia and entailed execution in Russia, the debtor resided in Russia) and no connection with the UK;
- The insolvency procedure affects the status of an individual and thus shall be carried out pursuant to the personal law of the individual, i.e. Russian law;
- Russia is not a party to any international agreements on insolvency matters and Mr. Kekhman failed to prove application of the principle of reciprocity between England and Russia, when it comes to recognition of personal insolvency judgments;
- By the time Sberbank filed the insolvency claim with a Russian court, Mr. Kekhman had already been discharged from his bankruptcy in England;
- The aim of insolvency is not confined to the release of a debtor from his obligations, but comes down to fair satisfaction of creditors' claims.

While objecting to the Russian insolvency proceedings, Mr. Kekhman in a separate motion, asked the courts to recognize and enforce the English bankruptcy order. Not surprisingly, the motion was denied.

Firstly, it was held that the applicant failed to prove the existence of reciprocity in recognizing personal insolvency judgments between Russia and the UK, which is a prerequisite for the enforcement of foreign insolvency judgments in Russia. Secondly, due to the public element present in bankruptcy disputes, the court asserted exclusive jurisdiction of Russian courts to handle personal insolvency cases of Russian citizens. Such "arbitrary extension of the jurisdiction of foreign courts to matters of public importance in Russia" as displayed by English courts was held contrary to the Russia's public policy. The court also found a violation in the "confiscatory" character of the bankruptcy order in favour of the creditors, breaching such principles as the equality of parties and inviolability of property.

General remarks on treatment of foreign insolvencies in Russia

From the treatment of Mr. Kekhman's case, one may conclude that Russian courts are overly hostile to foreign insolvency proceedings when there is some sort of connection to the Russian territory. However, this impression could be deceptive, as Mr. Kekhman's flight to England for the sole purpose of filing for his bankruptcy was seen by many as an example of bankruptcy tourism, the negative image of which must have affected the courts. But taking away that negative connotation, the situation with the status of foreign insolvency proceedings in Russia looks less harsh, but still quite ambiguous.

Under Article 1(6) of the Russian insolvency law, judgments

Share your views!

> **UNLIKE THE EU MEMBER STATES... RUSSIA IS NOT PARTY TO ANY SPECIFIC INSOLVENCY-RELATED REGIME**

of foreign courts in insolvency cases are recognized in Russia in accordance with international treaties signed by the Russian Federation. In case of absence of the latter, such judgments are recognized on the basis of reciprocity. Since there are no relevant international treaties, recognition is only possible through the reciprocity mechanism. This means that either there should be proven cases of recognition by foreign courts of Russian insolvency judgments, or the hypothetical probability of such recognition following from laws of the foreign country.

Whereas in the Kekhman's case the court did not find such reciprocity, in another dispute concerning insolvency of a company registered in Denmark (case No. A56-14945/2004), the court relied on the Danish legislation to discover the possibility of such recognition. This was enough for Russian courts to discontinue proceedings against the Danish debtor. Notably, there are two important details of this case worth mentioning. First, the foreign insolvency judgment was preliminarily recognized in Russia. Second, the Russian creditor (claimant) was included in the register of creditors in Denmark, so there was no reason to believe that his rights would be violated, should the proceedings in Russia cease.

In yet another case (No. A09-14352/2014) involving a Kazakh debtor undergoing an insolvency procedure in Kazakhstan, the Russian court discontinued parallel proceedings in Russia with reference to international practice and applied *lex fori concursus* to the matter at hand. According to the Kazakh insolvency law, in case of a debtor's insolvency, all pecuniary disputes involving the debtor shall be terminated. This was enough for the Russian court to dismiss the claim of a creditor brought in Russia. Remarkably, as opposed to the above case, the court did not bother going into the issues of reciprocity or recognition. It also overlooked the problem related to the rights of the Russian creditor, if the latter is left out from the Kazakh register of creditors.

Unlike the EU Member States, which cooperate under the common framework for insolvency proceedings, Russia is not party to any specific insolvency-related regime. This situation is exacerbated by the fact that Russian insolvency law is quite immature when it comes to insolvencies complicated by the foreign element. The categories of main and secondary proceedings, key to resolving cross-border insolvencies in the EU, are not known in Russia. Amid the surge in bankruptcies of multinational companies, matters raising important cross-jurisdictional legal issues are likely to appear in Russian courts more often, bringing more certainty and predictability. ■

RICHARD TURTON AWARD

Sponsored by:

Richard Turton had a unique role in the formation and management of INSOL Europe, INSOL International, the English 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 annual INSOL Europe Conference.

In recognition of those aspects in which Richard had a special interest, the award is open to applicants who fulfil all of the following:

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

Applicants for the award are invited to write to the address below enclosing their C.V. and stating why they should be chosen in less than 200 words by the 1st July 2017. In addition the panel requests that the applicants include the title of their suggested paper as specified below. The applications will be adjudicated by a panel representing the four associations. The decision will be made by the 3rd August 2017 to allow the successful applicant to co-ordinate their attendance with INSOL Europe.

The successful applicant will

- Be invited to attend the INSOL Europe Conference, which is being held in Warsaw, Poland from 5-8 October 2017, all expenses paid.
- Write a paper of 3,000 words on a subject of insolvency and turnaround to be agreed with the panel. This paper will be published in summary in one or more of the Member Associations' journals and in full on their websites.
- Be recognised at the conference and receive a framed certificate of the Richard Turton Award.

Interested? Let us know why you should be given the opportunity to attend the IE Conference as the recipient of the Richard Turton Award plus an overview of your paper in no more than 200 words by the 1st July 2017 to:

Richard Turton Award
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6-7 Queen Street
London
EC4N 1SP
E-mail: claireb@insol.ision.co.uk

Too old? Do a young colleague a favour and pass details of this opportunity on.

Applicants will receive notice by the 3rd August 2017 of the panel's decision.

Enhancing practice qualifications and conditions: The European dimension

David Burdette & Paul Omar look at how small businesses are particularly affected by the new proposals for Europe-wide preventive restructuring frameworks

The publication on 22 November 2016 of proposals aimed at introducing Europe-wide preventive restructuring frameworks has brought focus on the problems facing enterprises at a stage prior to formal insolvency when non-performing loans constitute a major threat to their success.

Though affecting enterprises of all sizes, a particular concern is paid in the text to the situation of small- and medium-enterprises, which constitute the lifeblood of European commerce. In the wake of the 2014 Recommendation, which this text is designed to boost, attention will undoubtedly now be paid to how the various Member States respond to the call for the institution of new frameworks or the overhaul of existing legislation so as to improve the chances of businesses in financial difficulties. However, interest in the text should go beyond the preventive restructuring and second chance measures it promotes. Included in Title IV of the Draft Directive are proposals aimed at addressing perceived lacunae in support structures for restructuring (as well as other insolvency procedures!) across the European Union, chiefly associated with the qualification and training of insolvency professionals and the support for restructuring measures through the courts.

That this should be addressed within the framework of this text may not come as a surprise given the express inclusion of practice connected rules in the call for expertise in September 2015 mentioning the subjects of interest for the Experts' Group,[1] which first met in January 2016 and which has been working on the text on the basis of submissions by members of the group and other interested parties. Nor should it be seen as an unusual step, given that a number of the international institutions have been interested in professional development, capacity building and the inculcation of good practice in the insolvency arena.[2] How the proposals justify the extension of scope to include insolvency practice is by making reference to the need to address issues with a "direct impact" on the duration of procedures, the specialisation of the judiciary and the professionalism of practitioners being the two points specifically mentioned in the Explanatory Memorandum.[3] In this respect, specialisation of both courts and practitioners, as well as reinforcement of the judiciary, are seen as helping to speed up procedures and reduce their overall length and costs, thus leading to procedures of better quality with more effective supervision, a consequent improvement of the residual value for creditors[4] and, importantly for the creditors, a reduction in the legal uncertainty, which are said to lead to low recovery rates at present.[5]

Title IV, which is meant to address this overall concern, is relatively short, with only 5 draft articles, the last one of which addresses the incidental use of electronic communication at various stages of the proceedings.[6] At first sight, the proposals do not contain much that should alarm the world of insolvency practice. Thus, the proposals state that judicial and administrative authorities should receive training (both "initial and further", addressing foundational skills, as well as continuing professional development needs) to a level appropriate for the responsibilities they are to undertake.[7] With the caveat that preventive procedures need not involve judicial or administrative authorities, excepting insofar as there is a need to safeguard the interests of stakeholders through supervision or to intervene punctually for the purposes of expediting matters,[8] the proposals suggest that the focus of the training should be, for the courts at least, to ensure that appropriate expertise and specialisation is available, in order to allow for efficient and expeditious treatment of cases.[9] This is acknowledged as being especially important given the "potentially significant economic and social impacts" cases may have.[10] So far, the approach seems uncontentious, particularly as the proposals recognise the differences in court structures across the European Union and seek to avoid prejudicing the Member

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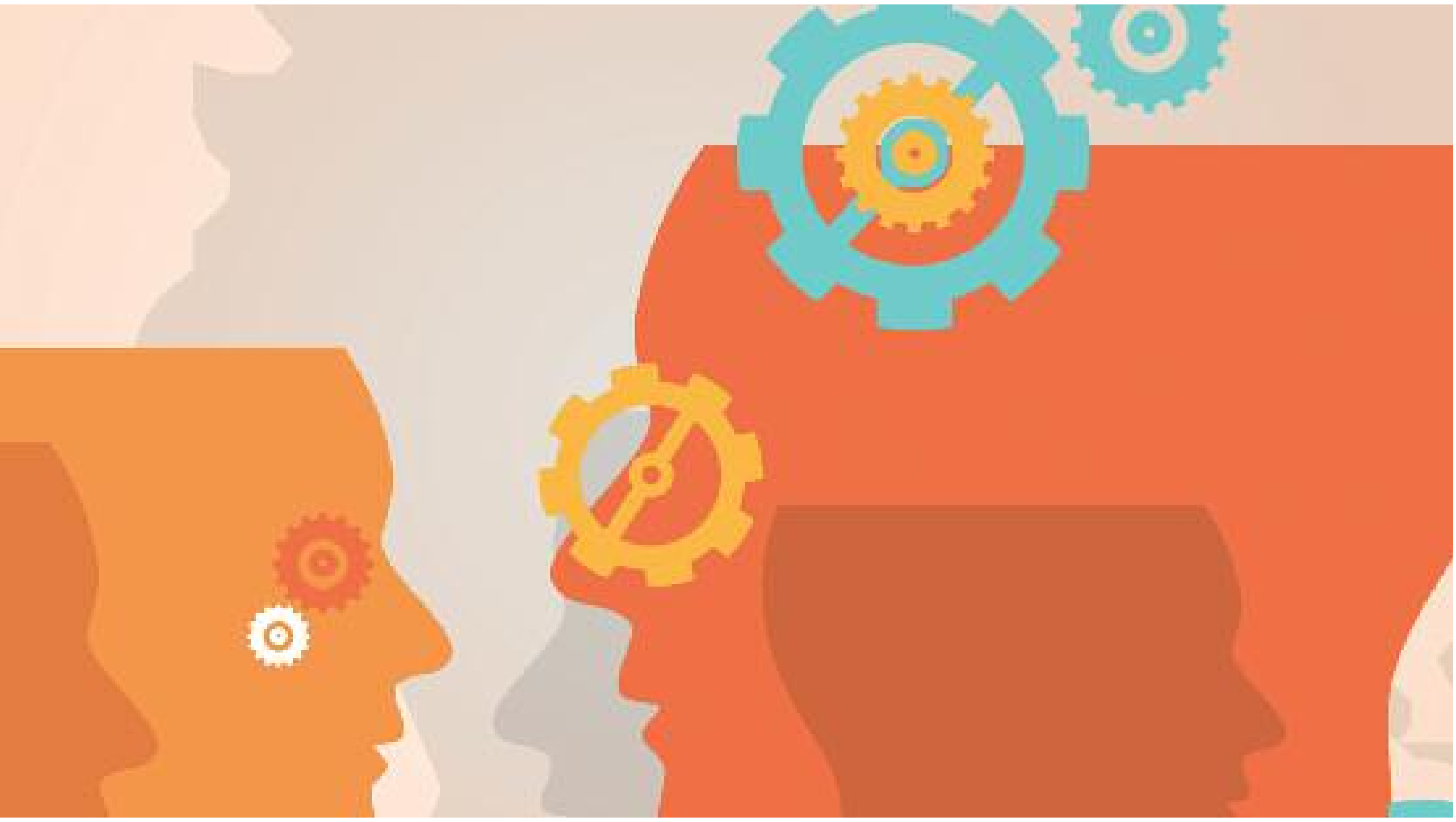
> ACROSS THE EUROPEAN UNION, THERE IS CONSIDERABLE DIVERSITY AT PRESENT IN THE WAY THE PROFESSION IS ORGANISED AND REGULATED

States' competence in matters of judicial organisation and the independence of judges themselves. Thus, Member States are not required to ensure that judges have an exclusive competency in restructuring and insolvency matters, but may create specialised courts or divisions (chambers) provided their national systems so allow.[11]

Turning to the status of practitioners, the same concern for retaining as much informality in the preventive process is evident, as the proposals do not envisage appointments as mandatory, but subject to a case by case appreciation of the debtor's needs and specific circumstances of the case, including, for example, where effective supervision is needed to safeguard stakeholder interests.[12] The proposals stipulate the same "initial and further" training requirements as for judges, suggesting that this will lead to an "effective, impartial, independent and competent" provision of services.[13] The provisions further go on to suggest that the Member States should encourage the development of voluntary codes of conduct for practice, as well as effective oversight mechanisms, which, with appropriate regulatory structures including a sanctions element, should lead to effective supervision of the practitioner.[14] What the voluntary codes should contain might include, the proposals suggest, guidance as to appropriate levels of qualification and training, rules on the transparency of the duties to which practitioners are subject, how their remuneration is determined and requirements for professional indemnity cover, although, overall, these requirements are not intended to impose any particular obligation to create a new qualification or profession to accommodate the changes that may be required.[15]

What this reflects is the fact that, across the European Union, there is considerable diversity at present in the way the profession is organised and regulated.[16] As with the concerns about the Member State's competence and judicial independence, the unwillingness to be more prescriptive can be seen to underline these proposals, which are firmly intended to avoid harmonisation.[17] Where the text has delved a little deeper on issues of practice organisation, however, is in connection with appointments and remuneration. Here, the proposals require that the process by which practitioners are appointed or removed or resign is "clear, predictable and fair".[18] What this means in practice is that the conditions for eligibility and grounds for ineligibility for appointment are "clear and transparent".[19] Furthermore, where responsibility for appointments falls to the courts or administrative authorities, the criteria should similarly be "clear and transparent", although the selection may be influenced by the experience or expertise of the practitioner under consideration and room may be given for appropriate consultation of the debtor and/or creditors in the making of that choice.[20] Dealing with the specific situation of cross-



border instances, other criteria for selection could include the human and administrative resources available to the practitioner and, perhaps more importantly, their ability to communicate and cooperate with foreign practitioners and courts.[21] Insofar as remuneration receives a mention in the proposals, the text suggests that the rules in the Member States, by which fees and expenses are determined, should serve as an incentive for the "timely and efficient resolution" of procedures, subject to consideration of the overall complexity of proceedings and the availability of mechanisms for the timely resolution of any disputes over remuneration.[22]

While much in the proposals is uncontentious, questions might be asked as to whether the time is right to lay down even these modest rules. Politically, the downplaying of the proposals connected to practice, which may be conceived of as ancillary to the main objective of the Draft Directive to promote preventive restructuring, suggests the answer to this is in the affirmative. In the way the proposals are drafted with very flexible and open language, the intention is clearly to make this first step towards establishing minimum requirements for oversight and regulation more palatable for the Member States. In the long run, however, it should be noted that the EBRD considered the way in which practice is organised to have an impact on the success of insolvency procedures, with jurisdictions where professional organisations were independent and active and where less tutelage by state bodies existed being perceived as more successful at inspiring public confidence in the good administration of procedures.[23] This would very much advocate for a more profound reflection on this issue when the dust has settled on this particular text. There may be then, in light of the way in which the text will have been implemented, a better idea of any consensus towards further development of practice rules and frameworks. ■

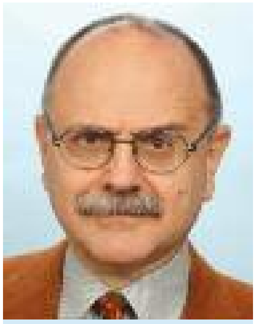
Footnotes:

1 Call for Expressions of Interest in the Experts' Group (September 2015), at paragraph 3.
2 Cf D. Burdette and P. Omar, "Benchmarking Insolvency Practice Frameworks: The Challenges" *Eurofenix* (2016 Autumn) 24-25.
3 Explanatory Memorandum, COM(2016) 723 final (22 November 2016), at 6.
4 Ibid., at 5.
5 Preamble recital (39), Draft Directive.
6 Ibid., Article 28.
7 Ibid., Article 24(1).
8 Ibid., Preamble recital (18).
9 Ibid., Article 24(2).
10 Ibid., Preamble recital (39).
11 Idem.
12 Ibid., Preamble recital (18).
13 Ibid., Article 25(1).
14 Ibid., Articles 25(2) and 27(1).
15 Ibid., Preamble recital (40).
16 A 2014 EBRD Report, which surveyed its client states, including 10 of the 13 states acceding to the European Union between 2004-2013, demonstrated the wide range of regulatory models in existence: <http://assessment.ebrd.com/insolvency-office-holders/2014/report.html>.
17 Explanatory Memorandum, above note 3, at 6.
18 Article 26(1), Draft Directive.
19 Ibid., Article 26(2).
20 Ibid., Article 26(3).
21 Ibid., Article 26(4). Interestingly, despite Article 42 of the European Insolvency Regulation, a similar competence is not required of judicial or administrative authorities in these proposals.
22 Ibid., Article 27(2).
23 Above notes 2 and 16.

" WHILE MUCH IN THE PROPOSALS IS UNCONTENTIOUS, QUESTIONS MIGHT BE ASKED AS TO WHETHER THE TIME IS RIGHT TO LAY DOWN EVEN THESE MODEST RULES "

Early disclosure of business crisis in Italy

Giovanni Matteucci explains how and why such an early warning indicator does exist and does indeed work, but is not used



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When a company begins to show signs of crisis, all parties involved are trying to sweep the dust under the carpet.

Yet in Italy a warning system for financial crisis, especially conceived for small- and medium-sized companies, exists, it works, but it is not used. It is the RATING that banks give to all positions at risk with them that is particularly efficient, because it is influenced by:

- the structure of the company's financial statements, as in the bank's electronic archive;
- the negative elements drawn from databases (the Centrale dei Rischi at the Bank of Italy, the Register of Companies at the Chamber of Commerce, etc.).
- the day-to-day modus operandi of corporate customers at the bank itself, spot-tested.

"*Sero venientibus ossa*" or "*bones for those who come late*". When it comes to critical situations, whether they concern one's health or a raging fire, timeliness is key to increase the chances of achieving a positive result: this also applies to corporate crisis management.

Sweep the dust under the carpet

When a company begins to show signs of difficulty, all the parties involved try to sweep the dust under the carpet. An issue that is not a prerogative of Italy[1] only.

An entrepreneur who finds himself in financial trouble might think his difficulties are temporary. He recalls the times when he went through seemingly similar problems in the past. He resorts to do-it-yourself credit (issues post-dated checks, submits questionable receipts to the bank under reserve and calls them back just before the deadline, submits the same bill for the advances to several lender institutions and replaces it right before its expiry date, requests a mortgage loan for very different purposes than those stated; etc., etc.), when not to more fraudulent remedies. He waits for a "godsend" that never comes.

The banker who is in charge of the business relation will think

at first of temporary difficulties and will merely give the customer a call (which does not always come with a complete review of the credit risk), requesting a payment. Later he will feel uneasy in highlighting his own error of assessment in granting credit. The business relationship will enter then a blind spot because there are budget targets that must be achieved. The bank itself will seek to delay allocations to non-performing loans, which limit the possibility of granting credit (and thus generate income), or even make it difficult to comply with the regulations on the company's capital until the credit position is reclassified as impaired and its management is entrusted to the bank's Legal Department. For these "*blind falls*", in most cases, there are only two alternatives: a rigid repayment plan or a letter of formal notice with judicial recovery of credit.

The accountant who assists the company typically focuses on accounting and the relationship with the tax authorities, a task about which he often complains, as it is poorly remunerated and giving it any extra time would turn out to be considered "voluntary work". So, he adopts temporary-effect solutions. Later, when he turns to a colleague, who is a specialist in insolvency proceedings, the situation will be almost irreversible. The same is true when you ask a lawyer for intervention.

An early intervention, however, would be more than appropriate, because it gives more chances to save the ailing company.

For many years the financial doctrine (mainly Anglo-Saxon)[2] has developed some alert indexes based on the budgets (and therefore on historical data) which only proved to be effective in the 60-70% of cases and, especially, after two or three years since problems started. Then there are the impairment tests (based on the future), the calculation of the present values of the expected cash flows relating to the various balance-sheet items, to assess whether they will be able to meet the already existing liabilities – an analysis, that however, requires a proper corporate accounting structure and not low-level technical expertise.

International bodies as well are fully aware of the appropriateness of an early appreciation of the danger of the emergence of a business crisis.

- In 2005 "The Legislative Guide on Insolvency Law" (UNCITRAL)[3].
- In 2004 the European Commission issued a recommendation "*... to ensure that viable enterprises in financial difficulties, wherever they are located in the Union, have access to national insolvency frameworks which enable them to restructure at an early stage …* [4].
- In 2016 attention is given to the EWIs (*Early Warning Indicator*) by the European Central Bank[5].

With regard to the Italian legislation, a debate has been going on for several years: the topic of discussion is not the opportunity of such indexes, upon which everyone agrees, but rather on their configuration. Yet, in Italy, since the early 2000, an early warning index of corporate financial crisis does exist, it does work, but ... it is not used!

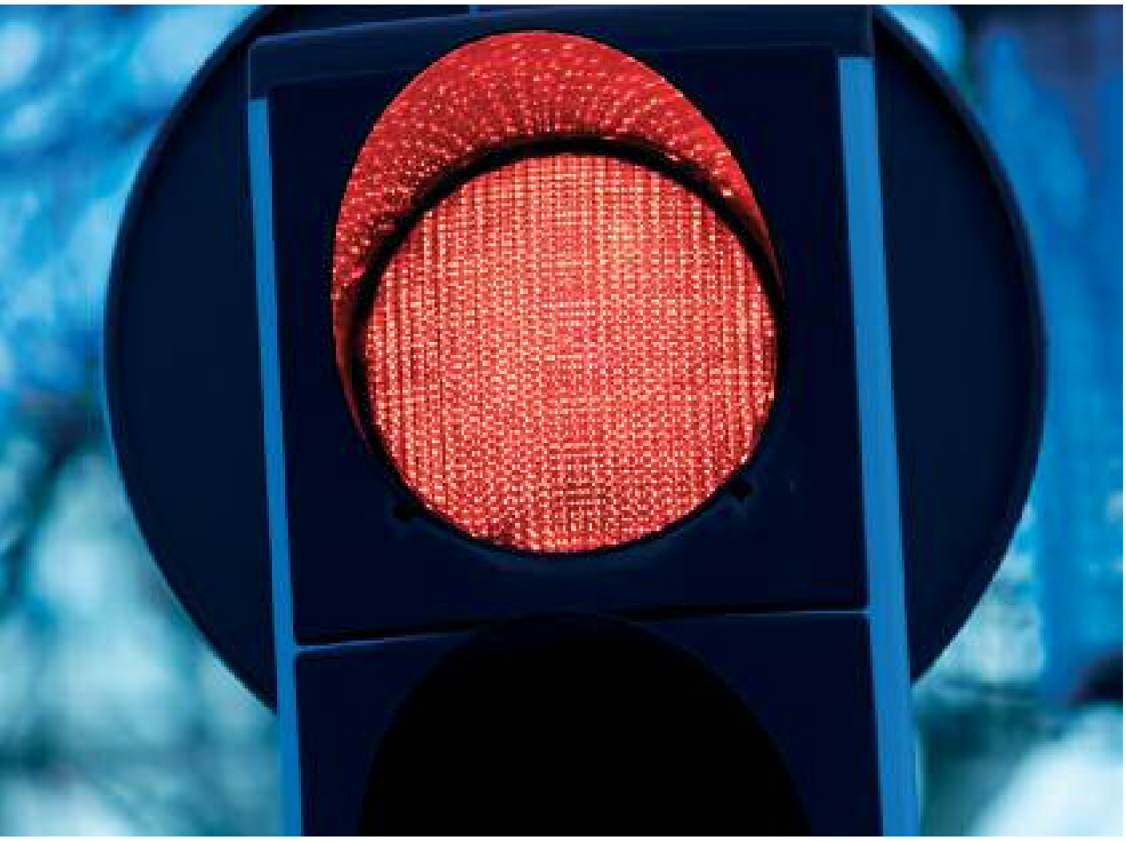
Forthcoming rules: will they prove effective?

In November 2015 the Rodorf Commission[6] presented a legislative proposal for a comprehensive reform of bankruptcy regulations: art.4 on "*alert procedures and mediation*", managed by The Body for the Resolution of the Crisis (*Organismi di Composizione della Crisi – OCC*[7]). Further, on March 11, 2016 the Government submitted to the Parliament a draft law[8].

In case there are clear indications of a crisis:

- a specialized section of the

" WHEN A COMPANY BEGINS TO SHOW SIGNS OF DIFFICULTY, ALL THE PARTIES INVOLVED TRY TO SWEEP THE DUST UNDER THE CARPET "



> **WHEN IT REACHES 7 AN ALARM SHOULD SOUND, A RED LIGHT SHOULD GO ON, A RED FLAG SHOULD BE WAVING**

body for the resolution of the crisis (OCC) will manage the proceeding;

- the proceedings can be started by the debtor, the corporate auditors, auditors and auditing firms (which should inform the company's board of directors or the OCC) or the Revenue Agency, IRS agents and social security institutions (which must report the persistence of a prominent breach to the supervisory bodies of the company or, in their absence, to the OCC);
- the professional entrusted by the OCC must convene the debtor and (if any) the company's supervisory boards (it is not made clear if creditors must / may also be convened) and within six months he must certify that the entrepreneur has put in place measures to overcome the crisis or that he has not, or that he did not even show up when he was summoned. In such a case the OCC must notify the President of the Commercial Court of the district where the company is established and the magistrate must immediately convene the entrepreneur, appoint a qualified professional to write a report, assign a deadline for the appropriate measures to remedy the crisis. If this deadline expires fruitlessly, the report is published in the register of companies; and
- the debtor can request the court to adopt, omitting any formalities not essential to the cross-examination, the protective measures needed in order to conduct the negotiations in progress, regulating their duration, effects, disclosure regime, competence to issue them and revocability.

The trouble is that companies which don't have any supervisory board are the overwhelming majority in Italy and the company's supervisory bodies have already company-related powers/duties towards their managers.

Delays in tax and social security payments are an appropriate index of financial difficulty, but it is possible to postpone them (other than applying for an instalment, which is a more and more often used trick) and, at the same time, it is also possible to delay payments to suppliers, create accounting tricks, resort excessively to bank credit, resort to "do-it-yourself credit" or fraudulent remedies. So, by the time the IRS agents and the social security institutions highlight any serious delay in paying the instalment plan, insolvency has already kicked in.

From the moment the OCC is informed, six months will pass, after which the judicial authority may be involved and, months later (after prior report), the crisis situation may be disclosed. It is therefore likely that from the beginning of the procedure, which is activated when the crisis is already evident, at least a year can go by!

What about the debtor? Once the procedure is activated, perhaps by himself/herself, he may request the court to suspend the proceedings against his/her assets, and perhaps the contractual obligations at his/her own expense as well. But the confidentiality of the procedure would be nonetheless weakened and, above all, all the contradictory effects experienced in the pre-filing insolvency proceeding "*concordato in bianco*"[9] could be revealed.

Last, but not least, there is no answer to the question: *What are the contents of the early warning indicator?* The definition of "*persistence of a prominent breach*" in relation to tax and social security obligations is too general.

The aspect that is more perplexing (at least for those who have an operative experience of the customer's bank relationship) is that in Italy, since 2000, there exists an early warning indicator, extensively tested, and effective in 70- 80% of the cases, which has a "lag time" of only about 12 months (if not less). It is the *rating* that banks give to all positions at risk with them. A number, an alphanumeric scale, which can range from 1 (excellent economic situation, financial position and revenues of the client) to 10 (bankruptcy in progress). When it reaches 7 an alarm should sound, a red light should go on, a red flag should be waving.

What is the rating?

Faced with a capital of 100%, the banks expand their loans at significantly higher multiples. But how can they go without questioning their own solvency? What is an appropriate balance between capital and loans in a credit company?

In the Basel 1 agreement, 1988, a rate of 8% was agreed, giving the different activities in the bank's balance sheet a different "weight" according to the kind of customer (corporate, retail, government, etc.).

In the Basel 2 agreement, 2006[10], however, the activities were "weighted" according to credit-worthiness, with two different calculation methods: the easier standard method and the internal-ratings-based method (IRB, basic or advanced), both under the control of the credit authorities. Three categories of risk were considered: market, credit and operational.

The credit risk consists in the counterparty's ability to return the credit they obtained, in case of an unexpected event. The expected loss (*EL*) is calculated by the combination of the probability of default (*PD*) within 12 months (the customer's credit rating), the loss given default rate (*LGD*), influenced by the guarantees, the exposure at default (*EAD*), influenced by the type of operation, and the maturity, residual maturity of the exposure (*M*).

The rating of the customer (the PD) is an evaluation of the subject's ability to meet its obligations, referred to 12 subsequent months, on the basis of all available information of quantitative and qualitative nature, and expressed with an alphanumeric classification on an ordinal scale. It is determined on the basis of historical and prospective financial statement score, qualitative score and performance score.

Possible operating methods: mediation in bankruptcy

In a crisis situation, everybody sweeps the dust under the carpet. But the warning system exists, it works, it does not require further processing (and time), and is free (its cost has already been met!).

How could it be used? With communication and mediation in bankruptcy techniques[11].

In 1999, the ABI (Italian Bank Association) published the "*Code of behaviour for banks - enterprises in crisis*"[12] (modelled on the London approach), which provided for a concertation procedure, art. 4:

"In the event of activation of the conciliation procedure, (banks) members commit themselves:

- *to attend the meeting;*
- *to participate at the appropriate level;*
- *to provide immediately a proper written information with regards to every detail of the exposure, of collaterals and repayment sources;*
- *to manifest conflict situations (…);*
- *to maintain the confidentiality about the convening of the meeting;*
- *not to use the news of the meeting in order to change their situation in fact; and*
- *to send their decisions in terms foretold by each participant to the other participants at the meeting and in any case before the completion of any urgent acts against the company and the guarantors common ………".*

This procedure was practiced in Italy up to 20/25 years ago when the CEOs of the local banks met at the local branch of the Bank of Italy. A practice increasingly less suited to medium- and small-sized customers since the leading Italian (and international) banking groups have increasingly characterized their networks as points of sale and centralized decision-making and control all activities from a few locations, usually hundreds of kilometres away from the customers. The same procedure that may well be replicated by the OCC. ■

Summary

In summary, in Italy, the early warning index of financial crises for businesses, based on the rating (especially for small- and medium-sized) does exist, does work, is free, but... it is not used![13]

Footnotes:

1 http://www.accountancyage.com/aa/opinion/2196955/fds-must-smash-emergency-glass-and-call-for-help-sooner#ixzz23QBKTvlV
http://www.latribune.fr/opinions/tribunes/20121120trib000732105/-faillites-en-france-tout-ca-pour-ca-.html

2 Altman E., "*Financial ratios, discriminant analysis and the prediction of corporate bankruptcy*", in *Journal of Finance* sett. 1968, page. 589.

3 https://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf

4 http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014H0135&from=IT

5 https://www.bankingsupervision.europa.eu/legalframework/publiccons/html/index.en.html
https://www.bankingsupervision.europa.eu/legal framework/publiccons/pdf/npl/npl_guidance.en.pdf

6 http://www.dirittobancario.it/news/fallimento-e-procedure-concorsuali/riforma-procedure-concorsuali-testo-disegno-legge-delega-presentato-commissione-rordorf 4.12.2015.

7 Organismi di composizione della crisi, L. 3/2012, art. 15 e D.M. 202/2014 http://www.adrmaremma.it/norm65.pdf , Ministero della Giustizia
http://www.adrmaremma.it/norm67.pdf

8 http://www.osservatorio-oci.org/index.php?option=com_k2&view=item&id=413:riforma-delle-leggi-sull-insolvenza

9 To change a law is one thing, but how to change a culture? INSOL Europe, Inside Story, Italy https://www.insol-europe.org/download/inside_story/8075

10 http://www.bis.org/publ/bcbs128.pdf

11 Jacob A. Esher , "*Alternative dispute resolution in U.S. bankruptcy practice*", Boston 2009
http://www.mwi.org/images/publications/esher_adrbankruptcy.pdf
Matteucci G., "Come prevenire le sofferenza bancarie in Italia", in "Piazzetta Monte" III trim. 2012
http://piazzettamonte.dobank.com/III-Trimestre-2012/COME-PREVENIRE-LE-SOFFERENZE-BANCARIE-IN-ITALIA

12 http://www.promem.it/ris/documenti/risanamento/00RIS_ABI_CodiceComportamentoCrisi.pdf

13 For a more extended version of the article https://www.academia.edu/29734700/Early_diclosure_of_business_crisis_in_Italy_the_early_warning_indicator_exists_it_works_it_is_not_used_2016.10.30

“

THE EARLY WARNING INDEX OF FINANCIAL CRISES FOR BUSINESSES DOES EXIST, DOES WORK, IS FREE, BUT... IT IS NOT USED!

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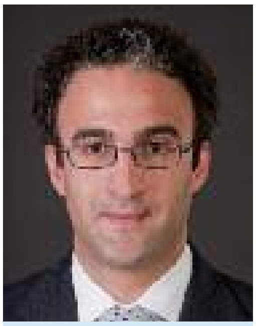
Share your views!

Streamlining proceedings in the Greek Insolvency Code

Yiannis G. Sakkas and Yiannis G. Bazinas outline new amendments in Law 4446/2016 aimed at simplifying and streamlining the insolvency process



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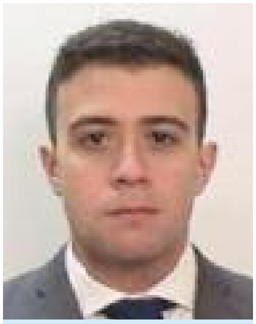

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The Greek insolvency code (IC) has been going through an endless reform cycle ever since its total revamping in 2007[1].

The most recent amendment, sixth so far[2], was adopted in December 2016 as Law 4446/2016[3]. The legislator, once again, is trying to attune available insolvency procedures in search of measures that will:

a) make feasible a second chance for honest entrepreneurs;
b) streamline rescue proceedings; and
c) expedite and de-formalize the insolvency process overall.

A second opportunity

So far, an attempt for a fresh start, to the extent that the prospect is linked to discharge, stumbled upon an overly complex framework that required the lapse of 10 years before debtors could apply for the cancellation of residual debt[4]. However, the said proviso was revisited, drawing inspiration from similar national rules in other EU jurisdictions.

The resulting framework is fully in line with the European Commission's recommendation on a new approach to business failure (the Recommendation)[5]. Specifically, the new provisions allow honest entrepreneurs to file for discharge two years after the declaration of insolvency and be released from all residual obligations on the condition that the court finds the debtor "excusable", that is, in good faith and cooperative throughout insolvency proceedings[6]. However, the IC provides that only one discharge may be awarded per debtor. Any additional discharges will have to be decided on the basis of a reorganization plan[7].

Streamlining rescue proceedings

An important direction of the new law is to promote less formal and earlier reorganization of viable enterprises. To achieve this, the legislator has taken another crack at the two pre-insolvency rescue proceedings of Chapter 6, i.e. special liquidation and rehabilitation.

For starters, special liquidation, introduced in 2011[8], was abolished altogether. The procedure was never a success and was in mismatch with the rest of the IC[9].

Rehabilitation, on the other hand, was vastly reformed. Prior to the recent amendment, rehabilitation was exclusively a voluntary rescue procedure, allowing debtors the option to follow either a pre-pack or a judicial route. In the first case, the debtor would conclude a rehabilitation agreement with the required majority of creditors before the inception of any formal proceedings and then file the agreement to court for ratification. In the judicial route, the debtor filed an application requesting the opening of proceedings. If the court accepted the petition, the debtor and the creditors would set out to conclude a rehabilitation agreement, which was then entered to the court for ratification. Nevertheless, the judicial route was often blamed for encouraging debtor malfeasance as in many cases the real intention for the opening of proceedings was to take advantage of any provisional measures granted, without a true intention to conclude a rehabilitation agreement[10].

With this in mind, the new rehabilitation procedure only provides for a pre-pack route. The agreement must gather the approval of creditors holding 60% of all claims (40% of which must be secured claims) and is submitted to court for ratification. An automatic stay goes into effect until the court decides on the ratification. The *moratorium* has a maximum duration of four months, upon the lapse of which any stay will have to be decided by the insolvency court[11].

The court can also order preventive measures to cover the negotiation period, for a period of up to four months before the submission of the agreement, provided that creditors holding 20% of total of claims consent. In addition, rehabilitation is no longer exclusively a voluntary procedure. Creditors holding the above percentages of claims (60%-40%) can also submit a rehabilitation agreement to the court for ratification, provided that the debtor is in cessation of payments[12].

In order to further promote the early and prompt restructuring of viable enterprises, Law 4446/2016 also includes changes regarding the reorganization procedure. More specifically, the commencement standard has been expanded to include the "*likelihood of insolvency*" in order to allow the (voluntary) filing for debtors that are not yet in cessation of payments but only begin to experience economic difficulties. This provision, which also applies to rehabilitation proceedings, aligns the IC with the Recommendation and seeks to support early restructuring.

Furthermore, the new amendments restrict the right of the syndic[13] to submit a reorganization plan and reserve such right only for the debtor and the creditors holding the aforementioned percentages, but on the condition that creditors file the plan together with the involuntary insolvency petition[14].

The deadline for the submission of a plan by the debtor is also shortened to 3 months from the declaration of insolvency. The main reasoning behind these amendments is to simplify the procedure and shift the burden and the responsibility for submission to the debtor, who is considered to have more intimate knowledge of the business and be in a better position to make a timely and informed decision about the opening of proceedings.

Expediting the insolvency process

Finally, another set of amendments aim at simplifying and expediting the insolvency process by streamlining procedures and by removing bottlenecks. More specifically, the creditors' committee is abolished, since its usefulness, as envisaged by the law, was not confirmed in practice and it was considered that maintaining it would render the procedure even more burdensome and slow[15]. In addition to the above, the authority of the insolvency court has been reduced and many of its competencies have been transferred to the judge-rapporteur, who is now in a position to govern significant parts of the procedure (particularly the submission of claims and the liquidation) by virtue of final decisions.

Furthermore, the preliminary review of the reorganization plan by the court has now been abolished to further streamlining the procedure. In addition, the right of appeal for offended parties has been drastically reduced and the relevant deadlines have been shortened.

Last but not least, amendments have also been included in order to expedite small insolvency proceedings, allowing the court to derogate from the provisions of the IC in the context of such cases[16].

Summary

It is clear that the amendments to the law have a specific direction. The simplification and the streamlining of the insolvency process is indeed a crucial step forward, particularly if one considers that the chronic problem of the Greek insolvency system was the long duration of proceedings, which rendered any chance of rescue meaningless. Additionally, a debtor-friendly and workable discharge regime was urgently needed in order to remove the stigma of insolvency and support entrepreneurs and SMEs, which means 99% of all businesses in the country.

Yet, it would be unrealistic to expect too much of the new provisions. As noted before, the IC has been amended numerous times in the past decade and has in time incorporated the majority of international best practices, currently ranking highly among international peers[17]. However, the practical application of all these efforts has been significantly undermined by the prevailing economic conditions, which leave little room for successful business-turnaround.

The absence of an investor-friendly regime and difficulties in accessing new financing effectively sabotage restructuring efforts of the magnitude required to support the recovery of the Greek economy. In this respect, the new amendments to the IC, while well-intentioned, should not be expected to exhibit significantly different results in the insolvency practice, unless combined with an ambitious initiative to reshape the economic profile of the country. ■

Footnotes:

1 For a full English translation of the Greek insolvency code, see www.bazinas.com
2 This does not include insolvency related laws like the emergency para-insolvency legislation that was rarely deployed and is now being replaced or the consumer bankruptcy law (L.3869/2010), which was adopted (and amended) during the same period.
3 Law 4446/2016, State Gazette A 240/22.12.2016.
4 Discharge only applies to natural entities. After a brief amendment in 2015, Article 170a officially reduced the time limit for discharge to 3 years, yet this provision proved inapplicable without a full reform of the discharge framework.
5 C 2014/1500, 12.03.2014.
6 See articles 167-169 IC.
7 See article 169(4) IC.
8 See law 4013/2011.
9 Apparently, special liquidation was not in the initial drafts of the bill for the amendment of the pre-insolvency proceedings and was added at a much later stage.
10 See Explanatory Report to Law 4446/201, p., 2.
11 See articles 106(1),(3) and 106a IC.
12 See articles 100(1) and 104(1) IC.
13 The syndic is the office holder empowered to administrate the insolvency estate, see articles 63 et seq IC. His office is now being replaced with the Insolvency Practitioner, a fully regulated profession according to international best practices.
14 Reorganization is an *intra*-insolvency procedure under Greek law, considered the *ultimum refugium* for the cases where the declaration of insolvency does not result in an irreversible "trading death", see Explanatory Report.
15 The committee was composed of three members, one from each group of secured, unsecured and preferred creditors and its functions and responsibilities included the monitoring of insolvency proceedings, assisting the syndic etc, see G. B. Bazinas, Y. G. Sakkas, Greece, Chapter 23A, Collier International Business Insolvency Guide, Matthew Bender/Lexis-Nexis, 2014, p., 23A 32.
16 See articles 162 and 163 IC.
17 The 2017 World Bank Doing Business Report assigns a score of 12.0/16.0 to Greece on the Strength of Legal Framework Index, which is fully in line with regional peers.

" AN IMPORTANT DIRECTION OF THE NEW LAW IS TO PROMOTE LESS FORMAL AND EARLIER REORGANIZATION OF VIABLE ENTERPRISES "

Share your views!

Resurrection of personal insolvencies in Slovakia?

Vladimír Kordoš and Filip Takáč explain the necessity of an amendment regarding personal insolvencies

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In November 2016, the Slovak Parliament passed an amendment to the Act on Insolvency and Restructuring ("IARA").

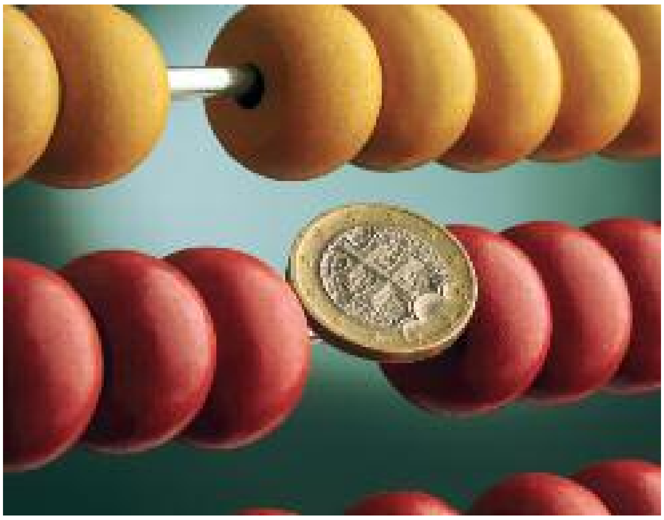
One of its major aims is to address defects in the law of personal insolvencies, which are a huge social and economic problem in Slovakia. Since the IARA first took effect in 2005, the number of persons who have filed for personal insolvency is lower than in other EU countries even though, at first glance, the conditions seem favourable. The amendment came into force on 1 March 2017.

Before the amendment, debt relief for natural persons was carried out in two phases:

(i) total liquidation of the debtor's assets; and
(ii) a 3-year period during which the debtor transferred a part of their income to creditors, following which debt relief was finally approved.

Personal bankruptcy under the IARA was problematic for several reasons:

- Debt relief was only possible once the first phase – liquidation of assets - was concluded, which generally took a year or more.
- Debt relief was then granted only after an additional 3-year period.
- The law disadvantaged those in dire financial circumstances by requiring advance payment of €663.88 for costs and trustee and the demonstration of assets worth at least €1659.70.
- The court determined the amount the debtor had to pay to creditors during the 3-year period before approval of debt relief, which could be up to 70% of the debtor's net income. However, the law did not require the debtor to notify the liquidator of any increase in income during the 3-year period. That meant that the system could be abused if, at the beginning of the proceeding, the debtor could demonstrate a lower income than he really had.



The advance payment could not be waived and, together with the need to demonstrate sufficient assets, it proved an insurmountable obstacle for many ordinary people.

Particulars of the new amendment

The amendment does away with the IARA's two-phase process, and introduces two new options for those seeking personal bankruptcy, modelled on foreign legal systems' approaches:

a) Liquidation of the debtor's assets and quick debt relief, referred to as *insolvency* proceedings (Fresh Start); or
b) Restructuring of the debtor's obligations with a *payment schedule* (No Fresh Start).

In both cases, the debtor is automatically relieved of debt – as of the day the bankruptcy petition is filed in insolvency, or as of the day the payment schedule is approved and claims become unenforceable towards the debtor in the case of a repayment schedule. Debt relief through either method can only be requested once every 10 years.

The amendment includes provisions for the mandatory legal representation of the debtor during either type of bankruptcy proceedings. The debtor may be represented by the Centre for Legal Aid ("Centre") or by an attorney designated by the Centre, or, in the case of a payment schedule, the Centre can assign an attorney chosen by the debtor. The bankruptcy petition or application for a payment schedule can only be filed if an enforcement proceeding or similar proceeding is pending against the debtor.

With certain exceptions, practically all claims which creditors submit are subject to debt relief. The amendment defines three types of claims:

- claims satisfied in insolvency or under a payment schedule, such as ordinary claims established before the insolvency, future claims of warrantors and co-debtors, etc.
- claims excluded from satisfaction, such as claims from bills of exchange, contractual fines, accessories to claims exceeding a certain amount, monetary claims of affiliated parties, etc.; and
- claims not subject to debt relief, such as legal aid granted to the debtor by the Centre, alimony, etc.

Under the IARA, secured creditors were required to lodge their secured claims. But the amendment puts secured claims in principle aside, as claims unaffected by the debt relief.

Insolvency

In insolvency, all of the debtor's assets are liquidated and sold, and the proceeds distributed among the recognized creditors.

When filing a petition in bankruptcy, a debtor now only has to pay €500 in advance for costs and trustee. A debtor who meets certain requirements can ask the Centre for Legal Aid to pay the fee for them. Thus, personal insolvency is now more accessible to people of lesser means. It's an alternative for persons with few assets and low income whose debts will in most cases greatly exceed the value of their assets.

As of the day a petition for bankruptcy is filed, the right to dispose of debtor's assets is transferred to the trustee. However, the debtor may continue to use the assets in the usual way.

The amendment introduces the so-called unenforceable value of the home. The unenforceable value of the home is part of the value of the residence which the debtor specifies as their living quarters (€10,000). If the market value of the home exceeds the unenforceable value, the home will be sold and the unenforceable value paid to the debtor, with the money deposited in a special bank account which can be used to pay creditors only with the debtor's consent.

Under the amendment, creditors can lodge claims until the trustee publishes the payment plan in the Commercial Bulletin. In addition, the debtor's affiliated parties have a preferential right to buy the debtor's assets. This means that the debtor's property does not necessarily have to change hands.

Payment schedule

A payment schedule is a good alternative for persons of relative means and reasonable income, with assets burdened by security rights, who are unable to fulfill their financial obligations on time. It is best for those who become aware of the impending insolvency in time.

In addition to meeting general requirements, a debtor's application for a payment schedule must be supported by tax declarations for the last five years, an overview of the debtor's income and expenses for the last five years, and a projection of the debtor's anticipated income and expenses for the next five years.

If the application meets all requirements, the court will offer the debtor protection from creditors. It will appoint a trustee to draft a payment schedule within 45 days from receipt of the advance payment specified by the court. The schedule will take into consideration several circumstances, such as the ratio of debts to assets, reasons for the debtor's inability to pay, performance of unaffected claims, and the debtor's income, health, family, social, and other circumstances.

The period of satisfaction for unsecured creditors is five years, with satisfaction not lower than 30%, and at least 10% higher than the satisfaction that would be achieved in insolvency.

The trustee publishes the proposed payment schedule in the Commercial Bulletin, including the dates and amounts of proposed payments. Creditors and the debtor may file objections to the proposal within 90 days of publication. The proposal, together with the objections and the comments of the trustee and debtor on the objections, are examined by the court, which determines the final payment schedule.

If the court finds that the debtor's circumstances do not support the proposed payment schedule, the proceeding is suspended and the court instructs the debtor about the possibility of filing for insolvency.

Finally, the amendment addresses the procedural rules of personal bankruptcy in detail, which should clarify the legal relationships of particular subjects during bankruptcy proceedings.

Time will tell whether the number of personal bankruptcies will rise, but it is believed that the very first year will see up to 15 to 20 thousand new cases, i.e., 40-50 cases for each trustee. The wording and provisions of the amendment indicate that its stated aim – to make personal bankruptcies more accessible – has been fulfilled. Personal bankruptcy will now be accessible even to members of the poorest social groups. ■

> “THE WORDING AND PROVISIONS OF THE AMENDMENT INDICATE THAT ITS STATED AIM HAS BEEN FULFILLED”

Share your views!

Commentary on the European Insolvency Regulation

Chris Laughton reviews a new publication from the Oxford University Press on the recast EIR, accompanied by an academic view on the text

Editors:
Reinhard Bork and Kristin van Zwieten

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2016

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Main review by Chris Laughton, Partner, Corporate Advisory Services, Mercer & Hole, London

Academic view by Paul Omar, Former Secretary of the INSOL Europe Academic Forum (2007-2015)

Share your views!

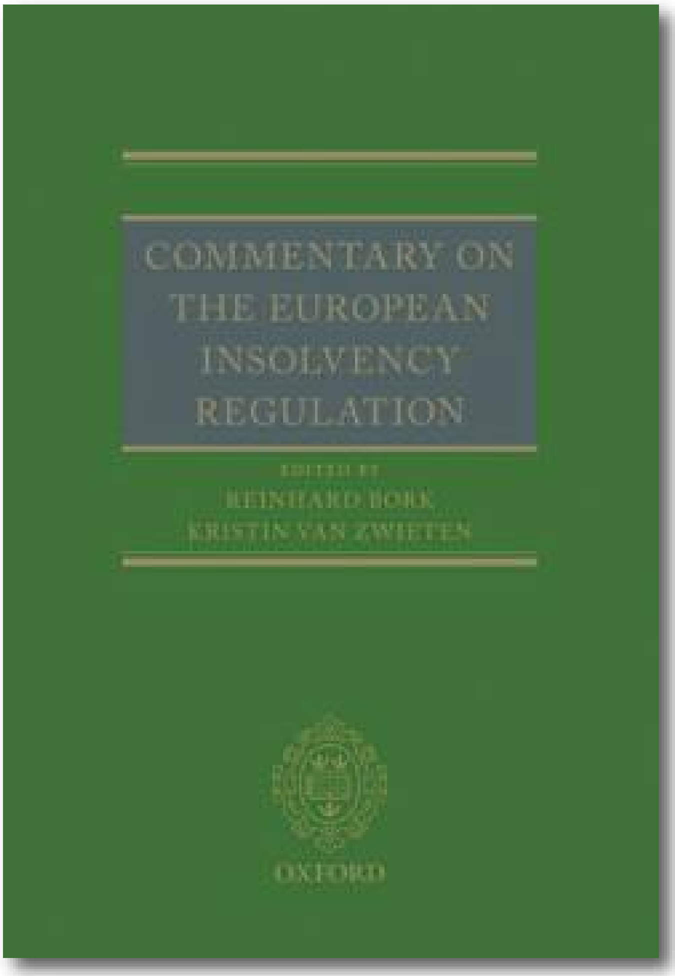
Billed as a detailed article-by-article commentary on the recast European Insolvency Regulation (2015/848) (the "EIR"), this 990-page work does much to prepare readers for implementation of the EIR throughout the EU (except Denmark) with effect from 26 June 2017.

Professor Bork (University of Hamburg) and Dr van Zwieten (University of Oxford) have maintained academic rigour in the contributions from a dozen leading scholars and practitioners, producing an authoritative, useful and readable analysis of the legislation.

Dr van Zwieten sets the scene in an introduction discussing the rationale for, the background to, the key features of and the future for the Regulation. The work continues, appropriately, with the Recitals to the EIR, which are of course rather more extensive than those of the current Regulation (1346/2000) (the "EIR 2000").

As one might expect, the EIR is included as an Appendix, but so too are the EIR 2000, the Virgós-Schmit Report, the "CoCo Guidelines" and the EU Cross-Border Insolvency Court-to-Court Cooperation Principles.

Where relevant, the work's contributors have mined the existing jurisprudence developed over the life of the EIR 2000; and where the law is new they have turned to academia, considering the underlying research and debate. The credentials of the



contributors are as impressive as the quality of their contributions.

With no offence intended to those whom this review lacks space to mention, Sir Richard Snowden (Justice of the High Court, England & Wales) contributed a general provisions section on Articles 7 – 11 covering applicable law, third parties' rights *in rem*, set-off, reservation of title and contracts relating to immoveable property. A not too random dip to explore the analysis of Article 7(2)(l) in relation to costs and expenses reveals a discussion about the application of the law of the main proceedings to claims for costs of secondary proceedings to be paid from assets subject to the main proceedings, citing *Landgericht Aachen – 6T44/14*, [2014] EIRCR(A) 470. INSOL Europe members will be delighted to see the reference to its Case Register as the relevant law report.

Reinhard Damman (Clifford Chance, Paris) contributed a secondary proceedings section on Articles 45 – 52. Exploring the question of whether the form of the lodgement of claims was exclusively determined by the law of the (in this case secondary) proceedings caused Mr Damman to draw on his own experience in *Alkor* (a case in which your reviewer has an interest as the claiming secondary liquidator). He cites an unpublished decision where it was held that the content of the lodgement of the claims by the IP was done in accordance with Article 41 EIR 2000 and could be supplemented in accordance with French law.

As Professor Heinz Vallender (University of Cologne) observed of the work in the Foreword:

"Its authors have demonstrated in their commentaries that Europe is a vibrant, lively place that provides fertile ground for legal innovation."

Academic viewpoint

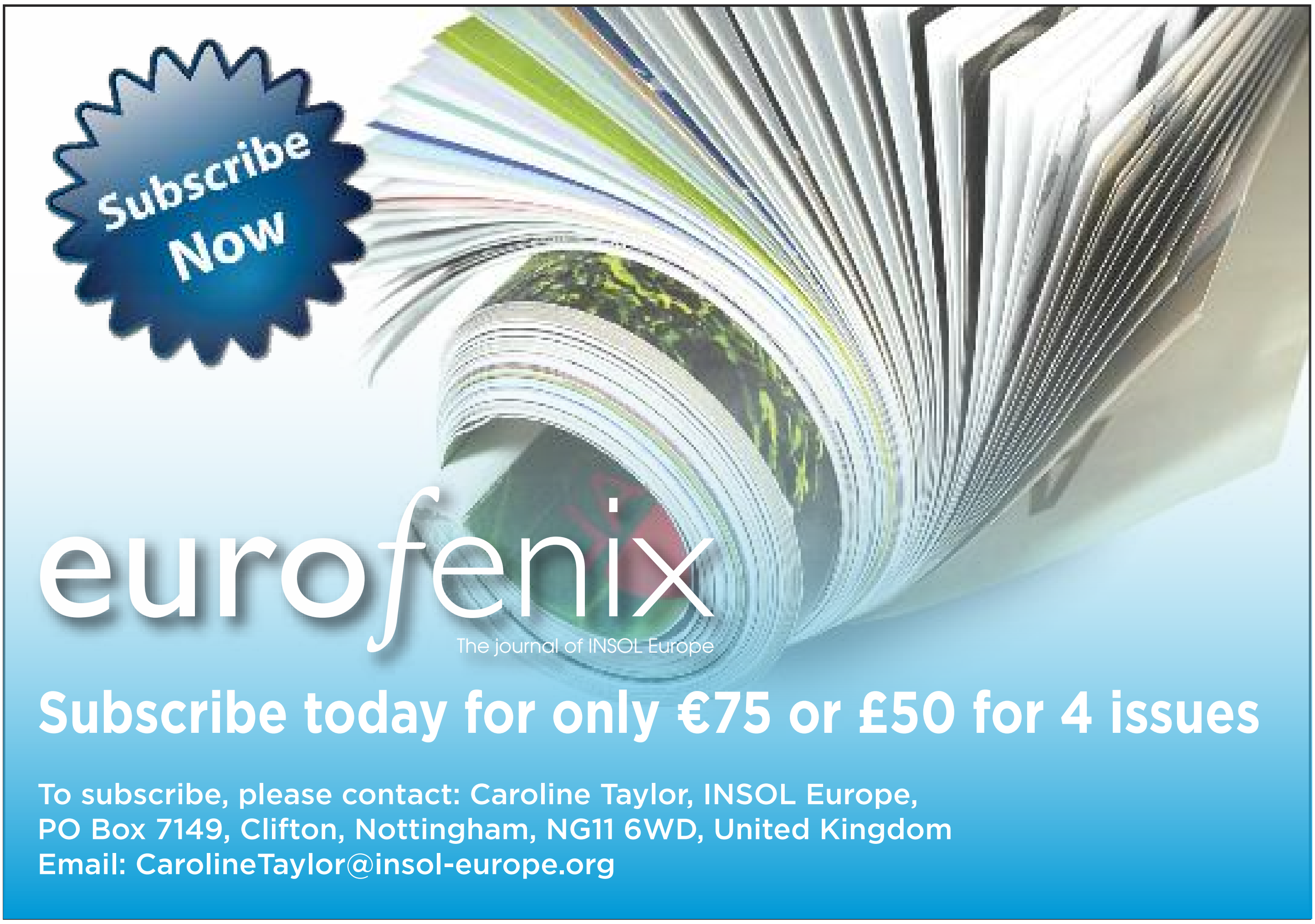
Structurally, the book takes the legislation in the order of its provisions following a preliminary (though highly informative) outline of the history of the initiative that saw the EIR first appear in 2000. Thus, in seven parts, the pages cover, in close order, the general provisions, the recognition framework, secondary insolvency proceedings, creditors and claims, the group dynamic, data protection as well as the final and transitional provisions.

In each of these parts are set out the wording of the legislative text, followed by a methodical analysis of the issues raised, including the rationale for the provision and its scope of application, as well as, in some instances, a conclusion anticipating future developments. Within each section of the parts are also references to useful and relevant bibliography, much of which is also referenced in the footnotes, together with pertinent jurisprudence and cross-references within both versions of the EIR as well as to other legislative texts.

The inclusion of so much useful material reflects the serious academic nature of the work, which seeks not just to outline the law, but to mirror the experience since the EIR first came into force in 2002 and to provide a pragmatic explanation for the way in which the development of the text has been influenced by the practice context. There is also a strong sense of the way the individual authors, drawn from academia and practice, seek to anticipate the challenges that will come when the Recast EIR enters into force in mid-2017.

Overall, it is clear that this commentary rests on very solid foundations and should prove a work of reference for academics, the judiciary, practitioners and policy-makers alike. ■

"THE CREDENTIALS OF THE CONTRIBUTORS ARE AS IMPRESSIVE AS THE QUALITY OF THEIR CONTRIBUTIONS"



Country Reports

Spring 2017

Updates from UK, Czech Republic, Latvia, Turkey, USA

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UK:
PPI in IVA cases – Green v Wright

The decision in this case has been long awaited by IPs who deal with IVAs.

The decision from the Court of Appeal was handed down on 1 March 2017 and has confirmed that if a trust is created by an IVA that trust will continue in the absence of specific terms to bring it to an end. This is despite a debtor having received his certificate of discharge and confirmation that he has no liability to IVA creditors.

Facts of the Case

- The debtor entered into an IVA with his creditors which was concluded in January 2013.
- The IVA created a trust which comprised all assets save for any which were specifically excluded.
- The debtor complied with all obligations under the arrangement and received his certificate of completion.
- The IVA was silent as to what would happen to the trust on completion.
- Some months following completion two PPI claims were paid.
- Those funds were paid to the former supervisor of the IVA who then issued an application to the court for guidance as to who was the correct recipient of those monies – were they to be repaid to the debtor or retained by the supervisor for distribution to creditors?

> IT SEEMS CLEAR THAT THERE WILL BE THOUSANDS OF CASES WHICH HAVE BEEN CLOSED, YET A TRUST STILL EXISTS

Court of Appeal

The two lower courts had ruled that the funds were due and payable to the debtor but this has been overturned by the Court of Appeal. The judgment confirms that a trust created by an IVA does not terminate on completion unless there is specific provision within the IVA terms for that to happen. In the absence of those specific terms the trust continues.

The Court of Appeal has also confirmed that the effect of the completion certificate is to release the individual debtor from his/her liability to the IVA creditors but those creditors can still have a claim on assets within the trust. The judgment has considered the core issues of what it meant by "creditor" and "debt".

The Court of Appeal was keen to draw a parallel between the certificate of completion in an IVA and the discharge from bankruptcy and the attempt to align the effects of these two regimes.

It remains to be seen what the real impact of this will be on the profession, but it seems clear that there will be thousands of cases which have been closed, yet a trust still exists. This has implications for debtors, insolvency practitioners and banks alike. This issue is undoubtedly to be compounded by the fact that the FCA has set a deadline of August 2019 for PPI claims. It is predicted such claims will increase significantly and those making the claims, and paying out on them, need to be aware of the issues surrounding any ongoing IVA trusts, not just for those currently in IVAs, but for those who have been even years before.

Debtors would reasonably have taken "completion" certificate to mean exactly that, but it seems matters are not so straightforward.

Czech Republic:
Insolvency Act undergoes substantial overhaul

DAVID FECHTNER
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On 1 July 2017, a far-reaching amendment to the Czech Insolvency Act will come into force.

This will bring the following changes, among others:

(i) Negative assumption of bankruptcy.
(ii) Barriers intended to curb what is known as 'forum shopping'.
(iii) A preliminary review of insolvency petitions.
(iv) The obligation to provide evidence for one's receivables as to their existence and amount.

The Insolvency Act in its current manifestation determines in what situation a given debtor is bankrupt (i.e., when they are assumed to be unable to honor their payment obligations), whereas the actual existence of bankruptcy is to be substantiated by the petitioner (be it the debtor or one of the creditors).

In the new Act, one may also take as one's point of departure the statutory assumption that the debtor is able to meet its obligations (i.e., that it is *not* bankrupt). This statutory assumption will come into play in cases in which a debtor (who must be an entrepreneur who keeps regular accounts) shows that "the hole in the budget" (i.e., the difference between disposable funds and due liabilities) is no bigger than 1/10 of the overall debt.

The territorial jurisdiction of the insolvency court will also be determined, based upon the address at which the debtor had his or her registered office, on the day which precedes the moment of commencement of the insolvency proceedings by six months. This should greatly limit the number of cases in which a debtor relocates his or her seat, with the nefarious objective to "move" a future insolvency procedure into the district of another court, in order to obtain more favourable conditions or, as it were, worse conditions for the creditors.

Under the current rules, insolvency proceedings are commenced as of the moment in which the insolvency petition is delivered to the court. The insolvency court must publish such petitions within two hours from the moment of delivery. In this manner, the very existence of an insolvency procedure becomes a public matter, even though the petition has in no way been examined in terms of its substance. This has often adverse consequences for debtors (in the form of a "run on the debtor", or their exclusion from public tenders). In the future, if the insolvency court has reason to doubt the legitimacy of an insolvency petition, it may hold back publication until it has reached a decision on whether to dismiss the petition for manifest lack of reasons.

Last but not least, we ought to mention a new obligation imposed on creditors to be found in the role of insolvency petitioners (though only if they are a legal entity that keeps accounts or tax records) – namely, to prove the existence of their purported receivable, either by way of a written acknowledgement by the debtor (with certified signature), by way of an enforceable title (court decision or notarial deed with direct enforceability), or by way of a confirmation by the auditor according to which the receivable is properly accounted for in the creditor's books. The lawmaker here seeks to prevent situations in which the case for insolvency as presented in the petition was built on a doubtful receivable.

However, it remains to be seen whether this new obligation will really lead to the desired decline in the number of frivolous insolvency petitions or whether it will merely mean burdening honest creditors with additional red tape.

> **THE TERRITORIAL JURISDICTION OF THE INSOLVENCY COURT WILL ALSO BE DETERMINED, BASED UPON THE ADDRESS AT WHICH THE DEBTOR HAD HIS OR HER REGISTERED OFFICE**

EDVĪNS DRABA
Associate, SORAINEN (Latvia)

Latvia:
Amendments to insolvency law

Another package of amendments to Latvian Insolvency Law was adopted in the end of last year. It has partially come into force in January this year; however, the largest part of them will come into force on 1 July 2017, and thereafter. Amendments to the Civil Procedure Law affecting insolvency and restructuring proceedings came into force in January, as well.

Legal protection proceedings

An "open market" principle has been introduced with regard to persons who are entitled to supervise restructuring proceedings. Hence, creditors will now be able to decide to appoint any individual to supervise the restructuring proceedings, who should not necessarily be a certified administrator.

The person supervising the restructuring will be paid by the creditors who voted in favour of the restructuring plan, and not by the debtor (as previously).

In case the creditors have submitted objections to the restructuring plan and the debtor does not take them into account (and does not amend the plan, accordingly), then a certified auditor provides an opinion about these objections.

Administrators' profession

Likewise, the amendments provide changes to the regulation of the administrator's profession, with the intention to ensure that qualified and honest professionals of their areas enter and stay in the administrators' profession.

Thus, the Latvian Association of Certified Insolvency Proceedings Administrators has been deprived of rights to certify administrators. Instead, a new procedure has been established for appointing and releasing insolvency administrators, as well as a procedure to decide on terminating the position. This procedure provides that administrators will be appointed by the director of the Insolvency Administration (a state institution). Therefore, the state will take over the issues, which are related to entering the administrator profession, from the Latvian Association of Certified Insolvency Proceedings Administrators as the professional organisation of administrators.

A precondition for appointment to the administrator's position (as previously - certification) will be passing of the administrator's exam. However, now the administrators will have to repeat this exam every two years. The administrator exams will be held by the examination commission appointed by the Minister of Justice. The examination commission will consist of representatives from the Ministry of Justice, Insolvency Administration, academic personnel from universities, association of administrators, judges and an NGO representative. An additional requirement has been imposed on the administrator's position - impeccable reputation.

The amendments provide for disciplinary responsibility of administrators and persons who supervise restructuring proceedings. Namely, a commission for disciplinary matters has been established, which will be entitled to impose disciplinary penalties, including removal from the administrator's position.

> A COMMISSION FOR DISCIPLINARY MATTERS HAS BEEN ESTABLISHED, WHICH WILL BE ENTITLED TO IMPOSE DISCIPLINARY PENALTIES

Insolvency Administration's powers and transparency of proceedings

The Insolvency Administration will be entitled to visit the administrator' place of practice or debtor's (in corporate insolvency) legal address and to inspect documents related to insolvency proceedings.

The Insolvency Administration will also publish data on its website regarding violations committed by administrators and persons supervising restructuring proceedings, results of their activities, length of proceedings and other data that should facilitate transparency.

In addition, creditors will be entitled to claim inspection of administrator's activities in particular insolvency proceedings by inviting a certified auditor.

Jurisdiction

The amendments to the Civil Procedure Law provide that the insolvency and restructuring cases will be heard by court pursuant to the debtor's address registered/declared three months before filing for insolvency/ restructuring. These amendments have been introduced for the purpose of combatting the practice where a debtor changed its registered or declared address shortly before filing an application to court.

Turkey:
Further details of the new pledge and assignment regime announced

Turkey recently introduced a range of secondary legislation, collectively outlining details of major legislative changes to the pledge and assignment regime for commercial transactions.

The updated regime facilitates access to finance for SMEs and boosts competitiveness. The most notable aspect of the changes are that possession of the pledged asset no longer needs to physically change hands. The latest announcements include detailed procedures and principles for applying movable pledges, establishing a central registry of moveable pledges, valuing movables subject to pledges, as well as structuring and executing pledge agreements.

The new regime was introduced by the Law on Pledge on Movables in Commercial Transactions, numbered 6750, published, in Official Gazette number 29871 on 28 October 2016. However, the most recent developments were announced via a range of secondary legislation, published in Official Gazette number 29935 (bis) on 31 December 2016 and entering into effect on 1 January 2017.

Moveable Pledge Registry established

A central movables pledge registry is established, intended to ensure records are complete and correct, as well as provide legal security to parties and provide public access to the records. The registry system will process requests to amend or erase pledge agreements, as well as transfer rights arising from pledges and changes to the degree of pledges. Records will be publicly accessible. Any third party who can prove their relevance will be able to make queries in the registry. Queries will be made either through physical registry offices or electronically.

Secondary legislation introduces principles and procedures for:

- establishing and operating a movables pledge registry;
- duties and authorities of registry service units and access to these registry services;
- sharing data recorded in the registry; and
- fees for registry services.

Establishing pledge rights in commercial transactions and execution upon default

Secondary legislation addresses issues pertaining to the pledge agreement itself, establishing pledge agreements, pledge systems, registering pledge agreements, as well as the rights and obligations of the pledgee and pledger on default.

Accordingly, a statement in the pledge agreement of the parties' explicit intention to establish a pledge over the moveable will now be sufficient to establish the pledge. This represents an important change in practice for movable pledges. Previously, establishing the pledge required possession of the pledged movable to pass to the pledgee.

Persons who can be pledgees under the Law are limited to credit institutions, tradesmen and craftsmen. Whereas, pledgers can only be tradesmen, craftsmen, farmers, producer organisations and self-employed persons.

Recent secondary legislation outlines detailed lists of:

- items which must be included in the pledge agreement; and
- assets which can be pledged, including receivables, intellectual property rights, rent incomes, commercial projects, and commercial enterprises.

Notable provisions in the secondary legislation include:

- Pledge agreements can be executed either electronically (signing via secure electronic signature) or in writing (signing before the registry officer or a notary public).
- Once signed, the pledge agreement will then be registered in the movables pledge registry.
- It is possible to establish a pledge over receivables that arise out of a specific agreement. However, agreements requiring pledge of all future receivables without any limitations will be deemed invalid.
- Detailed rules for applying the pledge degree system, which allows movable pledges to be ranked. Accordingly, it is possible to establish pledges with either progressive ranking (allowing advancement to a higher degree, if there is an empty degree) or fixed ranking.
- To fulfil the debts secured by the pledge on default, pledgees can now request transfer of ownership of the pledge movable. The pledgee can now apply to execution offices to initiate an enforcement procedure, demanding ownership transfer. This right constitutes an exception to the *lex commissoria* principle for pledges under Turkish law.

Valuing Movables in commercial transactions

Procedures and principles are now outlined for valuing movables which are subject to pledge, assigning valuation experts, as well as fees for expert services.

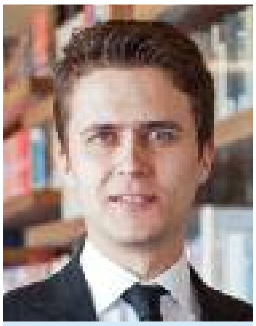
Movables subject to pledge can be valued either independently by the parties, upon mutual agreement before establishing the pledge or by applying to the courts to determine the value.

If the parties request a court valuation, experts will be appointed in accordance with the Regulation on Authorization and Activities of the Entities Providing Valuation Services to Banks.

Fees for valuation services will be determined and announced by the Ministry of Customs and Trade. If parties apply to the courts for valuation, court expenses and valuation service fees will be paid equally by both parties.

> "THE UPDATED REGIME FACILITATES ACCESS TO FINANCE FOR SMES AND BOOSTS COMPETITIVENESS"

ORÇUN ÇETINKAYA
Partner, Moroğlu Arseven, Istanbul, Turkey



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USA: Everything Must Go: Retail Chapter 11 filings

The global retail sector is struggling. Throughout the world, previously successful and storied retailers and brands are facing increasing pressure from the "online" retailers.

Some are succumbing to these pressures and becoming insolvent, including filing for Chapter 11 protection in the U.S. The U.S. retailers source products globally. AlixPartners 2017 North American restructuring experts survey reports that 67% of respondents said the retail industry would be the most likely to see distress in 2017, taking the top spot from the oil and gas industry in 2015 and 2016. Indeed, recent Chapter 11 retail filings include Sports Authority, Linens & Things, The Limited, Wet Seal, and most recently Radio Shack's "Chapter 22" and electronics retailer hhgregg with 220 U.S. store locations, filed in Indiana.

One reason that Chapter 11 is an attractive alternative for struggling retailers are Sections 365 (Sale of Assets) and 365 (Executory Contracts) of the Bankruptcy Code. Under Section 363, a debtor may sell its assets ("property of the estate") free and clear of liens, with liens attaching to proceeds. In this fashion, and consistent with the "practice" in many Chapter 11 cases, a debtor may sell assets quickly, usually within 60-120 days after a Chapter 11 filing. In the most truncated sales process ever, the Lehman Brothers brokerage business was sold to Barclays in five days.

In theory, a quick sale allows for the preservation of going concern value and avoids on-going operating losses. Parties can allocate the sale proceeds later, based on the parties' respective priorities and rights. In most Chapter 11 cases recently the secured debt to asset values ratio is quite high, and thus Section 363 sales primarily benefit the secured lenders.

There is inherent tension between secured lenders and the unsecured trade creditors, normally represented by the unsecured creditors' committee, who may be "out of the money" at the outset. The creditors' committee normally seeks to realize value for its constituents by "enhancing" the value of the debtors' assets, or by pursuing claims against third parties. Often the administrative expenses associated with pursuing this strategy do not justify the actual benefit to creditors. Lenders, by contrast, seek to sell assets quickly to cover the secured debt, with as little administrative cost as possible. Since "time is money", lenders push for a quick Section 363 sale.

Section 365 of the Bankruptcy Code regarding executory contracts is another powerful tool that makes Chapter 11 attractive to struggling retailers. Under Section 365, a debtor enjoys the right to decide, to assume or reject executory contracts, which include store leases. In the context of store closings, if the debtor rejects a store lease, the landlord's breach of contract claim is generally limited to one year's rent, and is deemed a prepetition general unsecured claim. Such claims are usually of little value in Chapter 11 cases, thus making store closings relatively cheap and easy for retailers.

With these powerful tools available to financially distressed retailers, it is predictable that more retailers will choose the Chapter 11, as AlixPartners predicts. The impact will reverberate in the U.S. and also in the global supply chain. It is no wonder that Radio Shack recently filed "Chapter 22", or its second Chapter 11 case, less than two years after its first filing.

> "A RESTRUCTURING EXPERTS SURVEY REPORTS THAT 67% OF RESPONDENTS SAID THE RETAIL INDUSTRY WOULD BE THE MOST LIKELY TO SEE DISTRESS IN 2017"

INSOL International / INSOL Europe One Day Tel Aviv Joint Seminar
26th - 27th June 2017

Venue: Hilton Tel Aviv
Tel Aviv, Israel

We are delighted to announce we will be holding a one day seminar in Tel Aviv, Israel on Tuesday 27th June 2017. This is a joint initiative between INSOL International and INSOL Europe and we anticipate that this will be a very popular event. We are working with local practitioners and international experts to develop a highly relevant and stimulating programme.

Tel Aviv is a dynamic city, titled the "Mediterranean Capital of Cool" by the New York Times. This is a 24 hour city, combining sandy Mediterranean beaches, a buzzing cultural scene, incredible food, UNESCO recognised Bauhaus architecture and an international outlook.

Prior to the seminar, on Monday 26th June, we will be holding a welcome dinner on the shores of the Mediterranean overlooking old Jaffa (a city 4,000 years old).

Optional tours will be available on the Saturday and Sunday prior to the seminar, so make sure you arrive in time to explore all that the area has to offer. Tours will include Jerusalem, Nazareth, Caesarea, Sea of Galilee, Bethlehem, Masada and the Dead Sea.

Tel Aviv is the economic and cultural heart of Israel, the "startup nation", with 9 million people, out of which 3 million live in the metropolitan area of Tel Aviv. Tel Aviv is the financial center as well as the hub for high-tech companies and many advanced technologies.

The chairs of the seminar, and the main organising committee have prepared a stimulating technical programme to include sessions on the key issues of relevance to the region including: a judicial panel covering Israel, UK, USA and Europe; cross-border insolvency and inter alia the way to buy Israeli technologies from Israeli high-tech companies who are in distress, amongst other hot topics.

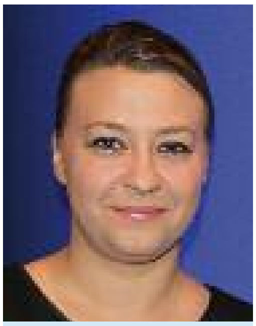
The registration brochure including full details of the programme is available on the INSOL International and INSOL Europe web sites.

The Organising Committee looks forward to welcoming you to Tel Aviv where we are certain you will enjoy the local hospitality, as well as amazing sights, and a rewarding professional experience at this exciting Seminar.

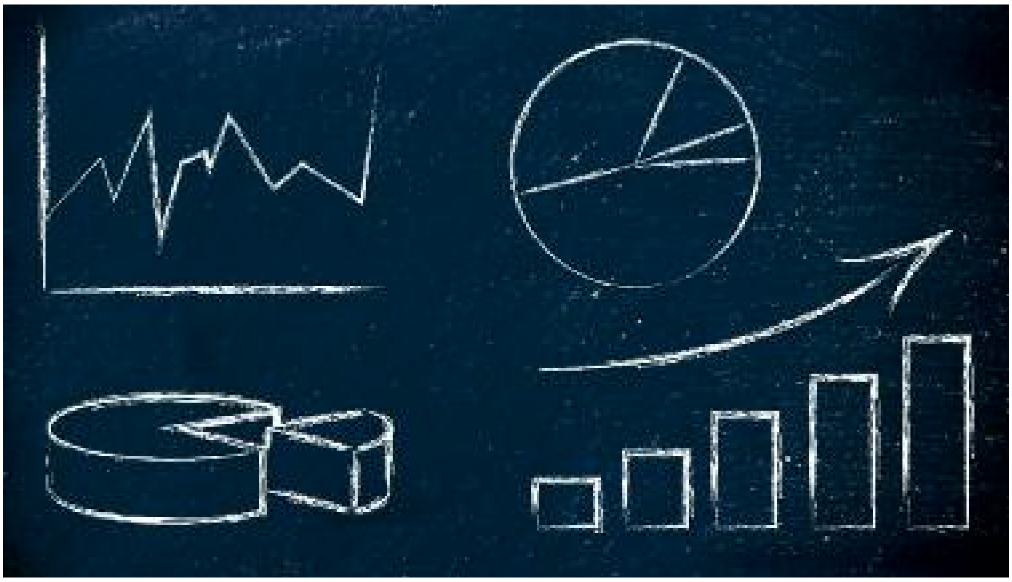
For further information and details of sponsorship opportunities available, please contact Penny Robertson, INSOL International at pennyr@insol.ision.co.uk

The attractiveness of national insolvency laws from a statistical viewpoint

Myriam Mailly, Technical Officer of INSOL Europe, explains why statistics are important for our industry



MYRIAM MAILLY
INSOL Europe Co-Technical Officer



"THE EUROPEAN COMMISSION HAS LISTED A NUMBER OF CRITERIA WHICH WOULD FURTHER IMPROVE THE QUALITY OF INSOLVENCY STATISTICS AT EUROPEAN LEVEL"

Since our last issue, updated and additional national insolvency statistics have been published on the INSOL Europe website. The compilation of this kind of data is indeed crucial on a number of specific aspects.

Statistics as a means of measuring the efficiency of national insolvency frameworks

From a national point of view, insolvency statistics are generally used as a tool to show the country's good social and economic health. Depending on the degree of details which are published at national level, insolvency statistics can shed some light on the type of proceedings available in a national insolvency framework ('on paper') and whether they are used in the day-to-day practice ('real world'). They can consequently be used as an indicator to enable creditors to secure their choice in lending in one Member State rather than another.

From the debtors' point of view, figures can also highlight the success of a specific type of proceedings rather than another.

From a European perspective, national statistics are a means of measuring the efficiency of national insolvency laws from a cross-border investment angle.

The collection of national statistics required in the Draft Directive on Preventive Restructuring, Insolvency and Second Chance

As a reminder, the European Commission has published on 22 November 2016 a Directive proposal on Preventive restructuring, Insolvency and Second Chance (COM(2016) 723 final).

The main goal of this legislative Proposal is to provide legal certainty to cross-border investors and companies operating across the EU. To achieve this goal, the European Commission has developed minimum standards on key aspects of preventive restructuring and insolvency proceedings including those enabling over-indebted entrepreneurs to get a "fresh start" by a discharge of their debts provided that certain conditions are met.

The underlying idea is to ensure that minimum standards are available throughout the European Union to avoid too many liquidations of viable companies in financial difficulties and to give honest entrepreneurs who learned from business failure a "second chance".

Back to statistics, the Directive proposal (2016) contains a title V which is entitled "Monitoring of restructuring, insolvency and discharge procedures". In that title, the European Commission has listed a number of criteria which would further improve the quality of insolvency statistics at European level (art. 29 "Data collection").

To that end, Member States would be required to communicate on a yearly basis the number of proceedings (preventive restructurings, liquidation proceedings and those leading to a full discharge of debt for natural persons), their outcome, length and average costs.

In addition, the European Commission would ask Member States to compile other information including, where relevant, the number of applications rejected for lack of available funds in the debtor's estate, the recovery rates for secured and unsecured creditors separately, as well as the number of proceedings with zero or no more than two percent total recovery rate in respect of each type of proceedings falling under the scope of the Directive proposal.

Among the figures to be provided by the Member State, the Directive proposal also includes the information which would enable to point out the number of preventive restructurings which failed within the specific time period of three years and those relating to the opening of new proceedings against an entrepreneur who was previously discharged of his/her debts.

Last but not least, these figures should be produced by national authorities taking into account several criteria, and more precisely: (1) the size of the debtors involved depending on the weight of the working force, (2) whether debtors are natural or legal persons, and (3) where relevant, whether the procedures concern only entrepreneurs or all natural persons in respect of the discharge provisions.

The role of INSOL Europe in the collection of national insolvency statistics in Europe

In a near future, reliable national insolvency statistics should then be required from Member States in order to improve the quality of insolvency statistics at European level but even more for assessing the efficiency of national insolvency frameworks.

This is the reason why national contributions as a first step are essential. Indeed, the collection of insolvency data by INSOL Europe is necessary before going into a deeper analysis on a long-term project within or with the involvement of the EU Study Group which would help the European institutions in designing the future of the European Insolvency Law. ■

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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11-12 May	**Eastern European Countries' Committee Conference 2017** *Budapest, Hungary*
27 June	**INSOL International & INSOL Europe One Day Joint Seminar** *Tel Aviv, Israel*
29-30 June	**German Bar Association 6th European Insolvency & Restructuring Congress** *Brussels, Belgium*
4 & 5 October	**INSOL Europe Academic Forum Conference** *Warsaw, Poland*
5–8 October	**INSOL Europe Annual Congress** *Warsaw, Poland*

2018

3 & 4 October	**INSOL Europe Academic Forum Conference** *Athens, Greece*
4–7 October	**INSOL Europe Annual Congress** *Athens, Greece*

2019

25 & 26 September	**INSOL Europe Academic Forum Conference** *Copenhagen, Denmark*
26–29 September	**INSOL Europe Annual Congress** *Copenhagen, Denmark*

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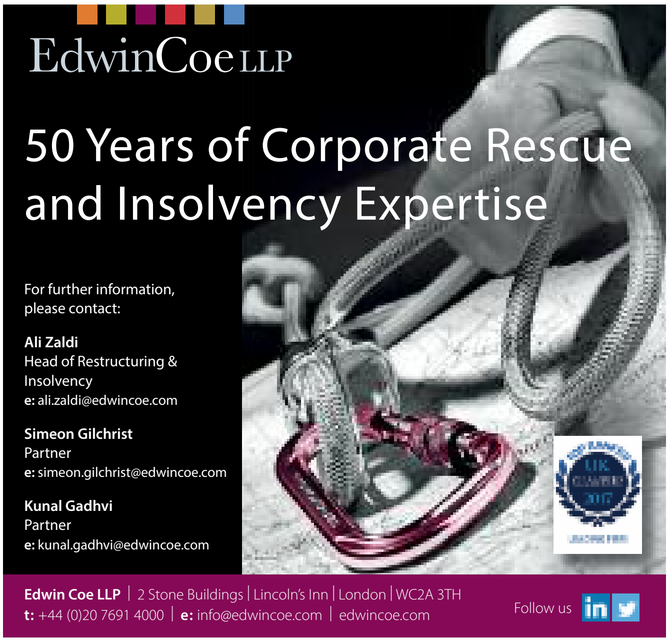

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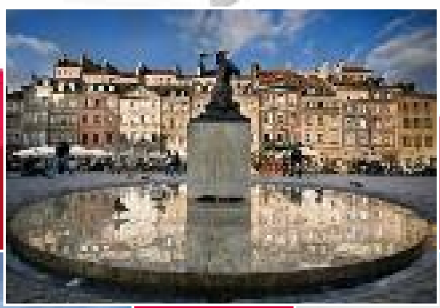

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