eurofenix

The journal of INSOL Europe
Autumn 2017

Pre-Packs in Poland

The future for insolvency proceedings?

Training & Events

Reports from Tel Aviv, Brussels and Bucharest

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- Virtual secondary insolvency proceedings
- Ongoing IVA Trusts: Where are we now?
- Asset security: Time to harmonise?
- Book reviews, Country Reports

... and more

€30 ISSUE 69
ISSN 1752-5187

eurofenix®
Autumn 2017

Eurofenix Français:
Sponsored by CNAJMJ – France
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Printed by: MRP Print
www.mrp.uk.com

NEXT ISSUE PUBLISHED: Jan. 2018
Copy deadlines available on request.

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Welcome from the Editors


ANNEROSE TASHIRO


GUY LOFALK

This is a very special occasion for us, as co-editors in chief, as it is the last column we will write for this magazine. After eight years for Annerose and ten for myself at the helm, it is high time to pass the baton to someone new, with new ideas.

We are very grateful to the Executive Board of INSOL Europe for its support during this time and to you, dear readers, who have been a never-ending source of inspiration to write for this magazine.

Special thanks go to our colleagues on the editorial board, all the national correspondents and authors taking care to supply us with substantive content. Special thanks must go to Paul Newson, whose talent has been crucial in the layout of this magazine. Besides, his determined, but very friendly, pursuit of the delivery of the articles has had an importance that cannot be overestimated. And last, but not least, we have to thank our sharp-eyed, experienced, Florica Sincu, who never let an article pass without her kind views and sharp pen.

Florica and Paul, you have been a tremendous support during our years as editors. We will also miss our meetings, our correspondence and the engagement over this magazine.

When thinking back of the years we spent together making this magazine I feel great joy and gratitude for this period in my life and towards the people we met and cooperated with: all the experience, kindness and generosity we encountered over all these years! It was incredible inspirational to have our group's brainstorming sessions on every new topic, to exchange comments and ideas during our meetings. We'll miss them!

Our successors, Catarina Serra and Frank Heemann, are really to congratulate for their new position, thanks to their numerous and good contributions. They have our best wishes for their future work. You will enjoy it a lot! We look forward to seeing how the magazine will evolve from where it is today and are certain that it will explore new territories. Watch out!

Now we look forward to our meeting in Warsaw when we will finally pass the baton to Catarina and Frank. Please feel free to invite us to the editorial meetings any time you like.

So, in this our last issue as editors, we suggest you to pay special attention to some of the articles, the book review on the UK and US restructuring law and practice, for instance, written by very experienced writers. I will certainly get a copy.

The seminar in Tel Aviv seems to have been a great opportunity to get acquainted with the insolvency and recovery of distressed businesses in Israel. The Brussels conference in cooperation with the German Bar Association added knowledge and experience to a very busy summer. See also how top practitioners and judges launched in Romania a much appreciated high-level course introduced by INSOL Europe in the Eastern European jurisdictions. It is also with pleasure that we notice Russia coming closer to INSOL Europe, with articles describing the insolvency situation there. The use by foreign debtors of US law (Chapter 15) is also always followed with interest and in some cases, with mixed feelings.

Country reports are interesting contributions to read, allowing us to see the similarities, as well as the differences, between the various jurisdictions. It is stimulating to get ideas or to reflect on the different ways to handle legal issues in other jurisdictions.

This issue proposes a lot of other interesting articles, but we will not duplicate the contents table. Among other things, please notice the links provided: you will be surprised how useful they can be.

Last but not least, on behalf of the *eurofenix* team, let us mention how grateful we all are to our sponsors, hoping to keep them, and you, our readers, interested and eager to continue your contributions in the future.

Guy & Annerose

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Family and Friends

Photo by INDat

STEFFEN KOCH
INSOL Europe President

Steffen Koch reviews his busy year as President of INSOL Europe

> THIS IS THE PERFECT ARENA TO MAKE FRIENDS AND TO HAVE A GOOD TIME TOGETHER IN FASCINATING PLACES AROUND EUROPE!

My term as your President has nearly elapsed and this is the moment to review what we have achieved together for INSOL Europe in the last twelve months, and what should be achieved in the future.

Family and Friends

I hopefully have implemented the headline of my presidency in everyone's minds: "Family and Friends" reflects perfectly what INSOL Europe is standing for, a group of like-minded professionals covering the whole range of services delivered in the insolvency and restructuring area, who share their knowledge, exchange and discuss different approaches, in order to find the best solutions for businesses in trouble throughout Europe. This, of course, also includes our friends from other associations dealing with the same topic, especially INSOL International, to which I will refer later in this column.

And this headline also reflects the social aspect of our INSOL Europe family. This is the perfect arena to make friends and to have a good time together in fascinating places around Europe!

Working Groups

Our working groups: Academic Forum, Anti-Fraud Forum, Eastern European Countries' Committee, EU Study Group, Insolvency Office Holders Forum, Judicial Wing, Financial Institutions Group, Turnaround Wing and Young Members Group are the tools that keep our membership busy throughout the year between our Annual Congresses.

It is essential for each and every working group to have committed co-chairs who ensure that there are projects to be working on. Without a project it is extremely difficult to keep people involved or to attract new members.

To ensure that activity and commitment stay at the highest level, the working groups are monitored by our Executive Board and the Council. Furthermore, a rotation system has been implemented to ensure that every few years the co-chairs are invited to find successors in order to inject fresh energy into the working group. Having this in mind I am most grateful for all the work that has been done in our working groups this year and I look forward to seeing this activity continued in the year to come.

Executive Board and Council

As stated earlier, I implemented a bi-monthly Council call where the Council is updated of the work of the Executive Board.

This has become a well-established routine. The Council and The Executive Board both appreciate these occasions of exchange and updating in between the bi-annual Council meetings. Regularly, the vast majority of Council members are dialing in to discuss, in one hour, current issues of our INSOL Europe family, update each other and help each other in finding solutions for making it ever quicker to react and more flexible.

INSOL International, DAV and other friends

In the past year we have deepened our long lasting relationship with our friends from INSOL International.

As reported earlier (and you will find a conference report in this issue) we organised together a one-day seminar in Tel-Aviv, which turned out to be a tremendous success. Furthermore, I was invited to join INSOL International's Working Group 3, which deals with the implementation of the INSOL Taskforce 2021 findings with regard to member associations and their relationship to INSOL International.

Together with the German Bar Association (DAV), section of Insolvency and Restructuring, INSOL Europe co-hosted the 6th European Insolvency and Restructuring Congress (EIRC) in Brussels (you will also find a report in this issue). In parallel, I negotiated an agreement with DAV, to always co-host this important event in the future. These negotiations have already been approved by the Executive Board and the Council and the agreement will be adopted in our Council meeting in Warsaw.

In addition, we welcome every cooperation occasion with other associations dealing with restructuring and/or insolvency.

Our friends are also part of our Strategic Taskforce 2025 where we will have interviews with their Executive Board in order to find out possible

Share your views!

cooperation issues or joint approaches.

The Strategic Taskforce 2025

The members of the Strategic Taskforce 2025 (STF 2025) have worked hard and the membership questionnaire has been sent out in July. So far the response from the members has been significant and the taskforce will present its first results in Warsaw. Additionally, the Taskforce will approach our friends from other associations to explore their expectations towards INSOL Europe. Based on the responses collected, we will then set up a strategy supposed to be presented at our annual congress in Athens in 2018.

The STF 2025 will determine our future strategy to serve all our members and our friends even better!

Brexit and the UK Members

The Brexit negotiations between the EU and the UK have started, but significant progress is not visible yet. Despite these negotiations our UK members are and will remain an integral part of our family!

Having chosen Alastair Beveridge as Vice President, the Executive Board and the Council will have a UK professional to lead INSOL Europe during 2018-2019, when Brexit is expected to be executed. This also symbolises our trust in a common future of the UK and the EU that hopefully will smoothly be negotiated in the meantime. Additionally, our BREXIT specialists will work on relevant legal issues and their practical solutions.

EU and UNCITRAL

INSOL Europe is regularly attending UNCITRAL Working Group V (insolvency) sessions in Vienna and New York, headed by the current President. Florian Bruder from our Academic Forum, together with Frank Tschentscher, form currently the technical backbone of our delegation and have delivered input to these sessions as already reported earlier.

With the EU commission our relation will grow steadily as we will now be present in Brussels every year as co-host of the EIRC (see above) and our EU Working Group is dealing with all aspects of EU related legislation.

Steffen Koch addressing the delegates at the Annual Congress 2016, Cascais (Lisbon)

INSOL Europe's High-Level Course on Insolvency in Eastern European Jurisdictions

Our first course held in Bucharest will be finished in November, but it has already turned out to be highly successful. With more than 60 participants actively working with high profile professionals from our INSOL Europe family, we feel rewarded and encouraged to continue this course in 2018 in Budapest, and in 2019 in Riga.

Again our INSOL Europe family has proved its leadership in Europe in this field too and we can be proud of it!

Dear family members, dear friends,

This has been my last column as your president and I would like to thank you for your support and encouragement.

It has been a busy year, but together we achieved a lot for INSOL Europe.

It has been a true pleasure to work intensively with so many dedicated family members for the sake of INSOL Europe and I know our organisation will be in good hands with my successor, Radu Lotrean, to whom I wish all the best!

Carpe diem!

> **"IT HAS BEEN A TRUE PLEASURE TO WORK INTENSIVELY WITH SO MANY DEDICATED FAMILY MEMBERS FOR THE SAKE OF INSOL EUROPE"**

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

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.

Make a comment!

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!

New Draft Bill seeking to introduce Pre-Insolvency Proceedings in The Netherlands

On 5 September 2017, the Dutch government published a new draft bill seeking to introduce pre-insolvency proceedings in the Netherlands, report Michael Veder and Nicolaes Tollenaar of RESOR.

"By way of short summary, the intended procedure will be very similar to the English scheme, with a few notable differences.

Under the proposed bill, both the debtor and, under certain circumstances, a creditor can propose or initiate a restructuring plan. Like the English scheme, the restructuring plan can be implemented outside formal insolvency proceedings. The restructuring plan can bind all types of creditors and shareholders. It need not include all, but can be directed to only a subset of them. The plan can include third party releases.

Unlike the English scheme, neither a convening hearing nor any creditors meetings are required. The vote can take place electronically. A class has accepted the plan if a 2/3 majority in amount has voted in favour (no head count). Following the vote, the court has to confirm the plan for it to become binding for dissenting parties. The procedure features a Chapter 11-style cram down mechanism, giving the court the power to confirm the plan over the objections of dissenting classes.

The procedure will contain certain flanking measures, such as a stay, the ability to set aside *ipso facto* clauses, the power to terminate onerous contracts and the right for the debtor to request the court to give binding early determinations on matters of dispute such as jurisdiction, class formation or valuation. The entire procedure is confidential until the confirmation decision has been delivered. It is designed to avoid unnecessary court involvement and to be as swift, efficient and flexible as possible.

All in all, we believe that the proposed bill will be a significant step forward and provide an effective and efficient instrument for dealing with both domestic and international restructuring cases.

The draft will be open for consultation on 1 December 2017. Hopefully the bill will be submitted to the parliament shortly after that. If things go smoothly, it could become law within a year."

The Dutch draft bill can be found at: https://www.internetconsultatie.nl/

INSOL Europe

Council Elections 2017

Vacancies

Every year, countries with 30 or more members are entitled to a reserved seat on Council and we have received the following nominations for the vacant seats.

Non-Reserved Seat

This year there was one vacancy and we received nominations for Béatrice Dunogué-Gaffié (France), Rita Gismondi (Italy), Vasile Godinca-Herlea (Romania) and Nicolas Theys (France).

Reserved Seat Vacancies

The following nominations have been received for the individual country vacancies:

Italy: Goffredo Caverni and Giorgio Corno

United Kingdom: Frances Coulson and Glen Flannery

All fully paid-up members are eligible to vote for the non-reserved seat, whilst members from Italy and the UK are entitled to vote for the respective reserved seat vacancy.

Results

The results will be announced to the successful candidates after the closing date of 10 September and will be formally announced to the membership at the Ordinary General Meeting on 5 October at the Annual Congress in Warsaw, and in the following newsletter.

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Paul Omar joins the INSOL Europe team

We are pleased to announce that Paul Omar has joined INSOL Europe in the new role of 'Technical Research Co-ordinator', supporting the development of a research and publication strategy within the organisation.

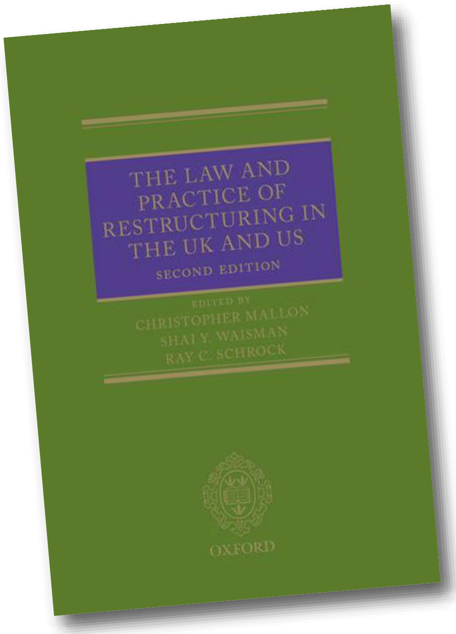
Paul is an academic lawyer by profession, having worked in mainstream British academia for 20 years, principally at Sussex University, but also in Wales and the East Midlands. He has also had visiting appointments at the University of Pretoria, University College London and the Jersey Institute of Law, St. Helier. He has published over 230 books, edited collections, chapters and articles.

Paul has served as Secretary of the INSOL Europe Academic Forum and as a member of the Steering Committee of the INSOL International Academics' Group, the INSOL Europe Joint Academic-Practitioner Project on Cooperation and Communications, and the Academic Advisory Group on the INSOL International Diploma Project. Paul is also currently a Consultant to the International Financial Corporation, a division of the World Bank, working on a number of projects in Asia and Africa. He is also a member of the European Commission's Experts Group on Restructuring and Insolvency.

Book Review:

The Law and Practice of Restructuring in the UK and US

Christopher Mallon, Shai Y. Waisman and Ray C. Schrock (editors) (2nd edition) (2017, OUP, Oxford), 503pp, £195, ISBN 978-0-19-875539-5.



This text takes as its essential foundation the need to bring together issues affecting restructuring practice in the two jurisdictions where most cross-border businesses of a certain magnitude will have acquired debt, more often than not in both jurisdictions at the same time. For a financial restructuring to be successful, due attention must be paid to the laws in London and New York, where most such transactions occur, laws which are stipulated to govern most debt instruments. Though both jurisdictions are ostensibly common-law ones, the differences in underlying theory and practice have led inspired the authors to put together a compendium of the issues most likely to feature in a debt restructuring as well as a consideration of the position of key stakeholders in the process. Acknowledgement of the international dimension of debt restructurings is also very much a natural feature of this work, consisting of 14 chapters written by a selection of key practitioners in both the UK and US.

The chapter sequence takes in turn a consideration of the practice trends in both legal systems, a focus on the process of the emergency sale, an exploration of out-of-court restructuring techniques involving repurchase, amendment and exchange of securities, the duties of directors in the process and important developments in practice techniques (such as compromises, waivers, amendments and standstills). The chapters also cover giving effect to contractual and statutory compromises, an analysis via case studies of the role of private equity and distressed debt funds in facilitating or disrupting restructuring attempts, the forum question and UK and US venue/jurisdiction rules, discrete practices in the energy, shipping and insurance sectors and ever-present tax concerns in the process.

Finally, discussing stakeholders, the book ends by looking at shareholder claims, the role of employees and trade unions in restructurings, the pensions dimension. The text is then rounded off by a discussion of the very important aspect of cross-border insolvency.

In summary, while the text is a necessary overview, given the complexities of each of the issues it covers that would merit treatment in a separate work, the intention of the authors to bring the major themes under a single roof is achieved. The discussion is well-informed and supported by frequent references to not just primary materials (statutes and cases also reflected in the well-ordered tables), but also the rich and ever-growing literature in the field. As such, this is a masterful work that conveys what it promises to do and, for that reason, should be of use to practitioners and stakeholders in the restructuring environment.

Paul J. Omar, Technical Research Co-ordinator, INSOL Europe

Book Review: European Insolvency Law: Reform and Harmonisation

Gerard McCormack, Andrew Keay and Sarah Brown (2016, Elgar, Cheltenham), xvi and 487pp, £95, ISBN 978-1-78643-330-5

The European Union's interest in substantive insolvency led to the adoption of the 2014 Recommendation on preventive proceedings, alleviation of consumer debt and the fresh start through early discharge.[1] This work is the report of the Leeds Law School study, funded by DG Justice, studying key topics in 30 jurisdictions (all Member States, Norway and the US) within the insolvency process (esp. directors' duties, priorities, avoidance actions, SME-focused procedures and the status of insolvency office-holders). The text also analyses reforms implementing the Recommendation's approach to preventive insolvency, the treatment of consumer over-indebtedness and fresh starts in domestic insolvency systems, all accompanied by an analysis of the impact of any disparities in domestic systems on cross-border cases.

The first five substantive chapters of this work deal with directors' liability and disqualification; insolvency practitioners; ranking of claims and order of priorities; avoidance and adjustment actions; and procedural issues relating to formal insolvency proceedings. Each chapter provides an introduction to any pre-existing work by international bodies in this regard and a note of how the rules are dealt with, if at all, within the insolvency initiative overall. The impeccable analysis here includes examples drawn from almost all of the systems examined, together with summaries of trends as well as commonalties and divergences between systems, many helpfully illustrated in tabular format. The final three chapters take on the subject of the Recommendation and the issues it highlighted, exploring how the Recommendation was received in the Member States as well as the issues of fresh starts for entrepreneurs and consumer over-indebtedness.

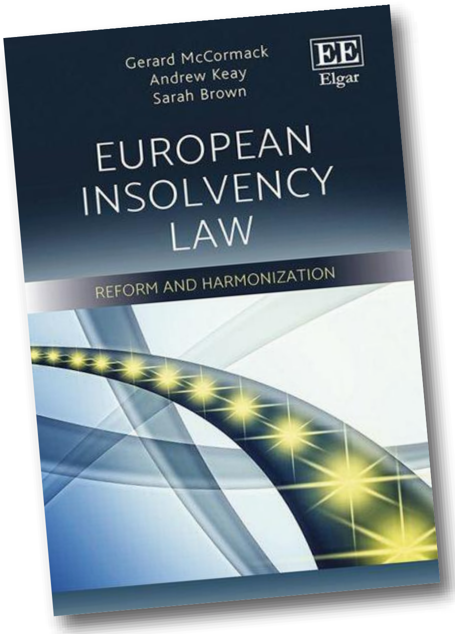
Overall, the work can justly be described as magisterial. The report on which it was based was influential on the work of the European Commission's Expert Group on Restructuring and Insolvency,[2] which directly led to the Draft Directive of 22 November 2016, which is at present going through the legislative process. While the work presents a snapshot in time of the various domestic laws, it is also useful in understanding convergence trends within Europe and serves as a warning not to under-estimate the complexity of these issues, particularly how problematic any further harmonisation initiatives might be. The text is a useful compendium of references to primary sources of domestic and international law as well as the essential literature in this area and, for many reasons, can be heartily recommended.

Footnotes:

1 Recommendation 2014/135/EU.

2 Of which the reviewer was a member.

Paul J. Omar, Technical Research Co-ordinator, INSOL Europe



Bingdao Wang of China wins 2017 Richard Turton Award

This year's competition attracted much enthusiasm and a great response from the younger members of the profession.

A panel representing the four associations sponsoring the award adjudicated the applications: Robert van Galen (INSOL Europe), Neil Cooper (INSOL International), Patricia Godfrey (R3) and Maurice Moses (IPA).

The committee is delighted to announce that the winner is **Bingdao Wang from China**. Bingdao is currently a third year PhD candidate at University of Leeds, UK. His research focuses on the development of cross-border insolvency law in developing countries and explores how experiences from Europe and other developed jurisdictions would help the imperative insolvency system reforms in emerging markets.

As part of the award, Bingdao is invited to attend the INSOL Europe Annual Congress in Warsaw, Poland. His paper will explore the possibility of developing a cross-border insolvency treaty among participants of China's 'Belt and Road Initiative'. This will be published in summary in Eurofenix and in full on our website.

We would like to thank all the candidates who applied for the award this year.

Insolvency Registers

in the Recast European Insolvency Regulation

Emmanuelle Inacio takes a closer look at insolvency registers and their interconnection, creditors' rights and confidentiality.

EMMANUELLE INACIO
INSOL Europe Technical Officer

The establishment of insolvency registers in all Member States and their interconnection is an innovation of the Recast European Insolvency Regulation (EIR), created to "*improve the provision of information to relevant creditors and courts and to prevent the opening of parallel insolvency proceedings*"[1].

Indeed, the previous EIR does not provide for a mandatory publication of the opening of insolvency proceedings in any other Member State. This is only a possibility given to the liquidator appointed in a main or secondary proceedings.

The publication becomes mandatory for the liquidator of the Member State where the main insolvency proceedings are opened only if any Member State within the territory of which the debtor has an establishment requires it[2].

Regarding the registration in any public register in the other Member States, only the liquidator of the main insolvency proceedings has the possibility to request it. The registration of the judgment opening the main insolvency proceedings is however mandatory if required by any Member State[3].

Nevertheless, the publication does not seem to have formal legal effects, other than those they have under the national law, as Recital 29 of the previous EIR states that publication is not a condition for recognition of the foreign proceedings. Indeed, the decision opening the proceedings becomes effective in the other Member States, even without publication in those Member States.

Of course, the previous EIR provides two provisions that mitigate the effects of the absence of mandatory publication.

On the one hand, Article 24 provides that the person who was unaware of the opening of proceedings honouring an obligation for the benefit of the debtor instead of the liquidator shall be deemed to have discharged. The ignorance shall be presumed, in the absence of proof to the contrary, where the obligation has been honoured before the publication. However, where the obligation is honoured after such publication has been effected, the person honouring the obligation shall be presumed to have been aware of the opening of proceedings.

On the other hand, Article 40 establishes a duty to inform known creditors who have their habitual residences, domiciles or registered offices in the other Member States, by means of an individual notice.

However, the good functioning of cross-border insolvency proceedings relies to a significant extent on the publicity of the relevant decisions relating to an insolvency procedure[4].

The Recast EIR thus obligates the Member States to establish and maintain in their territory one or several publicly accessible insolvency electronic registers in which information concerning cross-border insolvency cases shall be published as soon as possible after the opening of such proceedings[5].

> "THE RECAST EIR OBLIGATES THE MEMBER STATES TO ESTABLISH AND MAINTAIN IN THEIR TERRITORY ONE OR SEVERAL PUBLICLY ACCESSIBLE INSOLVENCY ELECTRONIC REGISTERS"

The mandatory information that should be made publicly available is related to the identification of the court, debtor, insolvency practitioner, if any, date of the opening and closing, if any, of insolvency proceedings, type of insolvency proceedings and the jurisdiction for opening proceedings.

Also mandatory to be published are: the time limit for lodging claims, if any, or a reference to the criteria for calculating that time limit; the court before which and, where applicable, the time limit within which a challenge of the decision opening insolvency proceedings is to be lodged in accordance with Article 5, or a reference to the criteria for calculating that time limit.

Moreover, Member States have the possibility of including documents or additional information in their national insolvency registers, such as directors' disqualifications related to insolvency.

Member States are not obliged to include in the insolvency registers the mandatory information in relation to individuals not exercising an independent business or professional activity, or to make such information publicly available through the system of interconnection of those registers, provided that the relevant information is given to the creditors by individual notice, and that claims of creditors who have not received the information are not affected by the proceedings.

In order to facilitate access to information in insolvency registers, the Recast EIR provides for the interconnection of such insolvency registers via the European e-Justice Portal[6].

There are other references to publication in the Recast EIR.

Indeed, Article 28 states that the insolvency practitioner or the debtor in possession shall request that notice of the judgment opening insolvency proceedings be published in any other Member State where an establishment of the debtor is located in accordance with the publication procedures provided for in that Member State. They may request this publication where they deem it necessary.

Moreover, Article 29 requires that the insolvency practitioner or the debtor in possession shall request that publication in any public register, where the law of a Member State in which an establishment of the debtor is located, or the law of a Member State in which immovable property belonging to the debtor is located, requires such registration. They may request such registration in any other Member State, provided that the law of the Member State where the register is kept allows such registration.

Finally, the provision of Articles 24[7] and 40 of the previous EIR[8] are maintained.

The publication of information in the insolvency registers under the Recast EIR only provides specifically one legal effect: the opening of the minimum legal period that Member States shall observe in order to allow a foreign creditor to lodge his/her claims which shall not be less than 30 days following the publication of the opening of insolvency proceedings in the insolvency register of the State of the opening of proceedings[9]. The publication of information in the insolvency registers under Recast EIR shall not have any other legal effects other than those set out in national law[10]. Indeed, publication is not a prior condition for recognition of the foreign proceedings[11].

But the establishment of insolvency registers in all Member States and their interconnection could have another aim: allowing the inclusion of confidential procedures in the scope of the Recast EIR.

If the scope of the regulation has been broadened to include preventive proceedings, only the public proceedings fall within the scope of the new regulation "*in order to allow creditors to become aware of the proceedings and to lodge their claims, thereby ensuring the collective nature of the proceedings, and in order to give creditors the opportunity to challenge the jurisdiction of the court which has opened the proceedings*"[12].

Thus, confidential proceedings are excluded from the scope of this Regulation for reasons of legal certainty. Indeed, "*while such proceedings may play an important role in some Member States, their confidential nature makes it impossible for a creditor or a court located in another Member State to know that such proceedings have been opened, thereby making it difficult to provide for the recognition of their effects throughout the Union*"[13].

However, the European Commission's Proposal for a Directive on preventive restructuring frameworks aims to put in place a restructuring framework to enable the debtors to address their financial difficulties at an early stage, when it appears likely that their insolvency may be prevented and the continuation of their business assured[14]. The Proposal then also implies that confidential proceedings will be generalised in the European Union.

Therefore, the opportuneness to include confidential proceedings in the scope of the Recast EIR arises to the greatest extent so far. Indeed, if a confidential procedure is opened in one Member State against a debtor who possesses establishments within the territory of other Member States, the non-recognition of this procedure by the Recast EIR will not prohibit at a later stage the opening of a main insolvency procedure by a court of another Member State which has jurisdiction to open the main insolvency procedure.

This situation is all the more unfortunate as this seriously threatens the chances of success of the preventive procedure and does not incentivise the debtors to pursue early restructuring.

The main reason invoked against the application of the Recast EIR to confidential proceedings is the respect of the creditors' rights. Indeed, it is impossible for a creditor or a court located in another Member State to know that confidential proceedings have been opened.

But it would be possible to square the respect of the principle of confidentiality with creditors' rights.

Indeed, as the Recast EIR provides for the establishment of insolvency registers in all Member States from 26 June 2018 and their interconnection from 26 June 2019[15], the opening of confidential procedures could be published in the insolvency register of a Member State but the access to this confidential information would be granted only to the insolvency judges and administrative authorities dealing with restructuring, insolvency and second chance matters.

Therefore, in the event of the opening of a confidential procedure in one Member State against a debtor and, at a later stage, the request by a creditor for the opening of a main procedure within the territory of another Member States, the solution would be to take one decision refusing the application *in camera*. This decision would not be publicly available and would be notified only to the parties in order to respect the principle of confidentiality. Then, after the information of the parties, it could be proposed to the creditor to become party of the agreement. Obviously, the creditor could refuse this proposal and exercise his/her right to challenge before a court the decision opening main insolvency proceedings on grounds of international jurisdiction. ■

> **IT IS IMPOSSIBLE FOR A CREDITOR OR A COURT LOCATED IN ANOTHER MEMBER STATE TO KNOW THAT CONFIDENTIAL PROCEEDINGS HAVE BEEN OPENED**

Footnotes:

1 Recast EIR, Recital 76.
2 EIR, Article 21.
3 EIR, Article 22.
4 Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) no 1346/2000 on insolvency proceedings, COM(2012) 744 final.
5 Recast EIR, Article 24.
6 Recast EIR, Article 25.
7 Recast EIR, Article 31.
8 Recast EIR, Article 54.
9 Recast EIR, Article 55(6).
10 Recast EIR, Article 24(5).
11 Recast EIR, Recital 75.
12 Recast EIR, Recital 12.
13 Recast EIR, Recital 13.
14 COM(2016) 723 final, Recital 17.
15 Recast EIR, Article 92.

Tel Aviv joint-seminar provides enriching debate

Eitan Erez provides his full report on the successful one-day joint seminar organised by INSOL Europe and INSOL International on June 27

EITAN EREZ Adv,
Eitan S. Erez & Co., Israel

The seminar began on Monday 26 June with a fascinating reception on the beautiful terrace of the Hilton in Tel Aviv, overviewing the blue Mediterranean Sea and the 4,000 years old city of Jaffa

The delegates were greeted by the presidents of INSOL Europe, Dr. Steffen Koch and INSOL International, Adam Harris, who were presented by the chair of the Israeli organising committee, Eitan Erez.

The delegates then had dinner, overlooking the sunset in the Mediterranean Sea, enjoying opportunities for networking and making new friends.

The programme

On the following day, 120 participants from Israel, Europe, US and South Africa learned about innovations in Europe regarding cross border insolvency, and UNCITRAL.

The panels at the Hilton Hotel in Tel Aviv were indeed entertaining and enriching!

The delegates first enjoyed a panel on insolvency and recovery of distressed businesses in Israel. The panel included adv. Amit Pines from FBC law firm and the honorable judge Adi Zarenkin (retired). The panel also included Mr. Yuval Cohen from Fortissimo capital fund, which is the leading venture capital funds which invest in the Israeli high-tech industry. This interesting panel was moderated by advocate Ofer Shapira.

The delegates discussed the proposed new Israeli insolvency law and the setting of the appropriate forum for discussing an international insolvency case (COMI).

The start-up nation

The delegates then heard a lecture from former high-tech mogul Eli Reifman, who described the '*the start-up nation*', Israel, which is a magnet for investors from around the world in the high-tech field. Eli Reifman was one of four founding partners and a key member of the senior management team that built Emblaze Systems from start-up to a multi-billion dollar company, one of the largest Israeli high-tech companies, traded on the London Stock Exchange.

One of the great things that Emblaze developed was a system of file compression and streaming video. At its peak Emblaze employed over 5,000 employees and generated over $500 million per annum.

Reifman is currently under bankruptcy proceedings. Debt claims have been filed against Reifman to the tune of NIS 200 million.

Reifman was sentenced to four years imprisonment by the Tel-Aviv district court but is now a free man, coming up again.

Just over the horizon

Afterwards the delegates listened to a panel called '*just over the horizon*'. This panel discussed the application of the EU Insolvency Regulation and the latest proposed Israeli insolvency law, by means of a theoretical case study involving cross-border Israeli-European aspects.

The Panelists were Dr. Reinhard Dammann, Dr. Ernst Giese, Adam Plainer, Guy Gissin, Dr. Israel (Reli) Leshem and Dr. Etai Hass. The panelists were members of leading insolvency firms in Israel and Europe. Dr. Etai Hass is the legal advisor of the Ministry of Justice and the official receiver department and is involved in writing the new insolvency code in Israel.

The panelists mainly focused on the theme of '*Cross border Insolvency*' with the goal of analysing how to successfully conduct complex cross-border insolvency cases involving EU and Israeli entities and to bring to an effective harmonisation the decisions taken by the different courts. The panelists also discussed the determination of COMI via EU law and Israeli law.

In today's global village, cross-border insolvency is necessary to handle fraud, especially when there are countries which operate as 'debtor shelter' (paradise for bankruptcies). It is important to achieve law harmony between countries and strengthen cooperation in insolvency.

A view from the bench

Towards the end of the day there was a panel about cross-border insolvencies: A View from the Bench. In Israel, as in other advances economies, business is international, particularly in the case of the critical Israeli high-tech industry.

Israeli businesses are listed on the US and UK stock exchanges and have US and other bondholders/ shareholders/ bankers. Businesses often become insolvent or get into financial problems and need to be rescued or restructured, or, if necessary, liquidated. Where business is

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international, so are insolvency proceedings, at least in principle

The prevailing concepts are unity and universalism. Unity means just one insolvency or rescue/restructuring procedure for one debtor at his domicile, historically interpreted for corporations as the place of registration, but now perhaps better understood as the '*Centre of main interests*' (COMI). Universalism means that in principle that one procedure should be recognised/assisted judicially in other countries.

This panel included a current and retired judges from the US, UK, Germany and Israel, who gave relevant examples from their judicial experiences, of how their jurisdictions deal with such problems and explained what recognition and judicial assistance their jurisdictions can offer to foreign insolvency proceedings and foreign insolvency practitioners.

In this panel participated the honorable judge Malcolm Davis-White Qc, judge Martin Glenn, the honorable judge Heinz Vallender (retired), the moderator being Gabriel Moss.

Advanced planning and coordination

Another interesting panel was about advanced planning and coordination across jurisdictions having to do with multinational companies, a panel led by Adv. Ron Meisler and with participation of Adv. Debora Dandeneau, Adv. Marshall Huebner and Adv. James H.M. Sprayregen.

The panel discussed current issues of multinational businesses and the choice of forum, with reference to the applicability of the US Chapter 11 procedure and also the relevant parts of Chapter 15.

The panel was brainstorming with the participation of a lively audience that included the best minds from around the world, including judges and leading lawyers.

The seminar was closed with an interesting lecture by General Yom Tov Samia, who elaborated on the story of Israel's foundation and the geo-political situation in the Middle East.

The delegates also had the opportunity to visit historical sites like Jerusalem, Bethlehem, Tiberias, Nazareth and Masada as well as the bustling city of Tel Aviv, the white city that never sleeps.

The Organising Committee was chaired by Eitan Erez, who was assisted by his colleagues Shaul Kotler and Ofer Shapira. ■

"THE PANEL DISCUSSED CURRENT ISSUES OF MULTINATIONAL BUSINESSES AND THE CHOICE OF FORUM"

Joined-up insolvency and restructuring in Brussels

Myriam Mailly, INSOL Europe Technical Officer,
reports on the 6th European Insolvency & Restructuring Congress

MYRIAM MAILLY
INSOL Europe Co-Technical Officer

The 6th European Insolvency & Restructuring Congress took place in Brussels on 29 & 30 June 2017. The congress was organised by the Insolvency Law and Restructuring section of the German Bar Association (DAV) through its Working Group Europe and in cooperation with INSOL Europe.

The congress started with a keynote speech of Věra Jourová, European Commissioner for Justice, Consumers and Gender Equality. Firstly, the Commissioner reminded the added value of the EU action in insolvency matters, in particular with the entry into force of the (recast) insolvency Regulation on 26th June 2017. Secondly, emphasis was put on the main themes and on the main objectives of the European Commission's Directive proposal published on 22 November 2016 (hereafter the 'Directive proposal'). The Commissioner also informed the audience that the Council of the European Union made a call for more flexibility on certain aspects of the Directive proposal while considering it at the same time as a priority.

Rescue culture

Prof. Dr. Reinhard Bork then delivered a lecture to put the Directive proposal into the context of the 'rescue culture' adopted by almost all Member States in the European Union. Prof. Dr. Bork described the core features of the Directive proposal and its core deficits, in particular the lack of justification for interference in the creditors' legitimate rights in the restructuring (not insolvency!) world. Prof. Dr. Bork finally deplored the risk of a race to the bottom due to the time pressure on the legislative process, and especially with regard to the high degree of divergence in national laws.

It was then the turn of Dr. Andreas Stein, Head of the Civil Justice Unit at DG Justice to update the audience on the adoption process of the Directive proposal, in particular following the outcomes of the June meeting of the Council of the European Union. Dr. Andreas Stein also referred to the agenda of the European Parliament which held a meeting on 12 July 2017 and to the draft report of the Rapporteur which would be available in September 2017. The debate within the European Parliament could then start early 2018. Following this agenda, a political agreement could be reached under the Bulgarian presidency in June 2018. In conclusion, Dr. Andreas Stein confirmed that the European Commission services are constantly open for discussion aiming at implementing a European 'rescue' approach in all Member States.

After the coffee break, the participants were updated on the pending legislation in Italy and on the legislative reform process which has started since 2005 to stick to the European rescue approach. Indeed, Italy has adopted new regulations following the need to update its national legislation from a legal and an economic standpoint in order to attract investments but also to improve the quality of credit.

Peter Hoegen also welcomed the intention of the authors of the Directive proposal to encourage the amicable sale of a company as a going concern as part as the restructuring process. However, he also deplored some inconsistencies in the Directive proposal, and in particular the one in relation with the best interest test used for the valuation process (liquidation or rescue value) and the lack of provisions in relation to the international jurisdiction and the treatment of guarantees for groups of companies. In conclusion, Peter Hoegen called for some propositions to be (re)considered and for the extension of some proposals already included into the Directive proposal.

Flexibility

Before the closure of the morning panel session, Dr. Andreas Stein underlined that the Directive proposal contained enough flexibility to ensure that common principles are to be adopted by all Member States while the details still remained at the discretion of each national legislator. In that connection, it was reminded that the provisions relating to the extension of the stay (general or targeted) will remain the sole decision of each Member State.

The congress continued in the afternoon by three workshops which gave a chance to the delegates to initiate an interactive discussion.

The first workshop aimed at identifying and discussing the key features and principles included in the Directive proposal, namely efficiency, transparency, fairness

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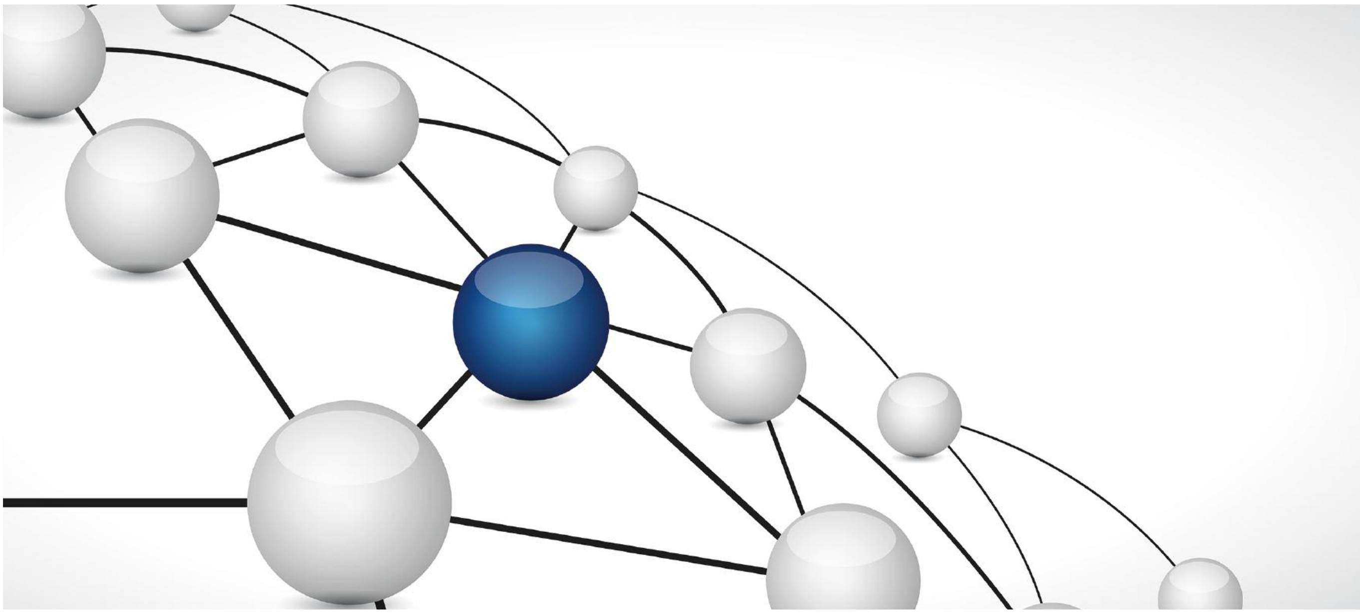


and sustainability, while the second workshop focused on the chances and risks of virtual secondary proceedings under the European Insolvency Regulation (recast). The third and last workshop highlighted the differences in terms of functions between insolvency administrators and restructuring professionals in preventive restructuring proceedings. The view was expressed that there is a future role for insolvency administrators through an extension of their traditional function at national level.

The first part of the second day of the congress was dedicated to the last CJEU case law. Lucas Kortmann made comments on the questions which were raised in particular with regard to the case on employees' rights where prepacks have been designed to produce effects after a declaration of insolvency (Federatie Netherlandse Vakvereiniging, C-126/16). Then he commented the interpretation of Article 13 EIR by the CJEU in the context of an Italian case (Vynils Italia SpA, C-54/16).

The update on CJEU and other landmark decisions based on the European Insolvency Law was then followed by the banks' view on the changes in insolvency laws. Dr. Thomas Bauer focused on the latest developments in the Swiss restructuring law which aimed at enhancing the prevention of debtors' crisis as well as at facilitating the recognition of foreign procedures (re the requirement of reciprocity).

Effects of Brexit

At the end the conference focused on the potential effects of Brexit on the European cross-border insolvency law and the possible solutions in case there will be no agreement by May 2019. Putting aside the political controversy, Mr Justice David Richards first underlined the long lasting tradition in the UK of recognising foreign proceedings (the universality principle was reaffirmed recently by the UK Supreme Court on the basis of the IA s.426).

Difficulties were also mentioned, in particular the uncertainty for the UK proceedings to be recognised on the continent as far as other Member States do not have the same tools in their national legislation (IA s.426 or Common Law). In the opinion of Chris Laughton, 27 separate agreements might be necessary to deal with cross-border situations involving the UK. As far as Germany was concerned, Frank Tschentscher made it clear that recognition of foreign proceedings would be possible under the scrutiny of the German courts so as to ensure that German private international law requirements or the five procedural civil tests were met. Robert Van Galen reminded that there were no legislative provisions on recognition in the Netherlands but only a practice based on case-law of the Supreme Court which was rather restricted but which has been more flexible since the Yukos case (especially in relation to the violation of the public policy). Then participants expressed their disagreement on whether schemes of arrangements would be recognised either under the Lugano Treaty, the European Regulations (Brussels/Rome) or under each national private international law, relying in the latter case on a strengthened court-to-court cooperation and communication.

Daniel Fritz closed the conference by expressing the view that the EU would certainly need more solidarity after the Brexit episode and that the priority attributed to the Directive proposal by the European Council is expected to improve both international and national law and practice.

> “27 SEPARATE AGREEMENTS MIGHT BE NECESSARY TO DEAL WITH CROSS-BORDER SITUATIONS INVOLVING THE UK”

High-Level Course on Insolvency Law in Eastern European Jurisdictions

Radu Lotrean and Niculina Somlea report on the successful launch of our educational project

RADU LOTREAN
CITR, Bucharest, Romania

NICULINA SOMLEA
CITR, Bucharest, Romania

Practicing insolvency means acting on a complex and changing playing field; during a reorganisation or liquidation process all relationships of a company are in a high state of tension and every aspect of a company is under severe scrutiny.

This is what makes it so interesting, but also so challenging. And the challenges are not only at a national level. It has become increasingly difficult to talk about national insolvency laws in the globalisation era. There are also gaps between best practices of different European countries, due to the different stages of the economical and political environment.

INSOL Europe's answer to this riddle? A high-level course separated into three different modules, each with a different, but complementary, component that will convey the main elements of international best practice and deepen the knowledge and interpretation of the local system of a given country. All training has a theoretical base but fundamentally a practical approach. The idea is also to use a case-study methodology for each module.

The classes are seminar-based and fully interactive. The course is designed for a maximum of 80 delegates, all high-level insolvency stakeholders in each country. The target participants are all professionals involved in the insolvency practice of the jurisdiction, with special focus on high-level lawyers and IPs. Judges and state officials have also been welcomed.

The trainers are well known international and local experts chosen by INSOL Europe.

Launch pad

As with all things, this course started with an idea, the desire/need to offer insolvency professionals a physical space for discussing international best practices in restructuring and insolvency. We are grateful to convert this great idea into a reality.

This ambitious new project, the '*INSOL Europe' High-Level Course on Insolvency Law in Eastern European Jurisdictions*', was first held in Romania, representative both in view of the jurisdiction's legal tradition and for its recent reforms in the insolvency area. The professionals participating have not only learned essential comparative aspects of the law, but also the scope of the insolvency legislation related to the business, economic, political and social development of each country. They also realised that a different approach in the national law might be possible. This provides a profound understanding of all insolvency institutions.

Opening lectures

The first module started on Thursday, 2 February 2017, 14:00. During the 30 minutes registration time, the course room filled with 61 participants: insolvency practitioners, lawyers, professors and judges, all eager to share their knowledge of international best practice and comparative examples.

The course was opened by the Deputy President of INSOL Europe, Radu Lotrean, and by Professor Ignatio Tirado. The General Director of the course then began with the panel headed by Prof. Riz Mokal (Barrister, South Square Chambers, London Honorary Professor, University College London Visiting Professor, and University of Florence) on Insolvency law. Why have it? What does it do? What does it require from the stakeholders? Professor Irit Mevorach (Professor of International Commercial Law University of Nottingham) delivered the lecture '*Who may go bankrupt and how*' – and Professor Michael Veder (Professor of Insolvency Law, Radboud University, Nijmegen, The Netherlands) followed next with the '*Effects on the debtor and the "build-up" of the estate*', challenging the participants with apparently simple questions, such as what assets will be included in the estate, questions that have very different answers depending on the jurisdiction discussed.

Each professor brought his/her own energy and plunged the participants in this fascinating, never ending discussion that touched the basic questions in insolvency.

Further discussions

On Friday, the course continued with discussions on '*Contracts and secure creditors in insolvency*', '*Informal workouts in the shadow of the law*' and '*Business Rescue inside formal proceedings*'.

The participants were also able to immerse themselves in cross-border insolvency informal workouts and the respective extensive case studies. We were very fortunate to have a lecture by

Share your views!

Mihaela Carpus-Carcea from the European Commission, the Directorate-General for Justice and Consumers about the Directive Proposal on preventive restructuring, second chance and efficiency measures COM(2016)723. This was a unique opportunity for the Romanian professionals to have a live, informal discussion with the policy-maker.

Second module

The second module of INSOL Europe's High-Level Course on Insolvency Law in Eastern European Jurisdictions took place from 29 June-1 July, in Bucharest, Romania, at the hotel Caro.

This module was devoted to the analysis of a selected number of especially relevant topics of the local insolvency system, such as: how and why the new insolvency law was shaped, the necessary corrections after three years of practice, pre-insolvency and problematic aspects regarding the insolvency of groups of companies, opening the insolvency proceedings and its effects, avoidance actions, directors liability, IOH liability, the restructuring plan, the current claims, the compliance of the current Romanian system with the Directive Proposal on Insolvency, Restructuring and Second chance, and so on.

The course took the form of a dialogue between the local and the international expert, thus encouraging the audience to actively participate in the presentation. This is the best way to ensure that proper theoretical and practical elements are conveyed at a high level.

The subjects were tackled by Simona Milos, the president of the National Institute for Practitioners Training, Irina Șarcane, member of the leading board of the national institute for the training of insolvency practitioners, Flavius Motu, syndic judge, Andrea Deli-Diaconescu, member of the scientific board of the national institute for the training of insolvency practitioners, Vasile Godinca-Herlea, president of the national practitioners' organisation, Cluj branch, CITR CEO, Bogdan Biter, experienced insolvency practitioner and Mihaela Carpus Carcea, legislative officer at the European commission.

Acting as a co-discussant was Professor Janis Sarra, from the University of British Columbia, Professor Christoph Paulus, from the Humboldt-University of Berlin and former INSOL Europe President, Alberto Nunez-Lagos, partner at Uria Menedez Spain.

International experience

The presentations for the second module were based on the local law and the speakers were highly skilled professionals, with a rich experience in the insolvency field: IOHs, high court judges, insolvency law doctors and lawyers.

As a general aspects presentation, the local experts had the difficult job of presenting material that will be attractive for both the local professionals and the international experts. It was a tight line between the detailed controversial aspects regarding the local law and the general aspects/ideas that could be discussed comparatively.

Given the participants' background – all highly skilled and experienced professionals in the field of insolvency – this module was an incredible experience. The audience (IOH, high court judges, and lawyers) could and have swapped places with the speakers on numerous occasions. We could only describe it as a group of people coming together and discussing various controversial aspects and possible solutions offered both from the national point of view and from the international experience.

The participants' feedback was great, they appreciated the contents of the course, the structure and the organisation and especially the interactivity and the overall learning experience. The international speakers have offered us a memorable and refreshing experience by sharing their unique point of view on some of Romanian insolvency law's most controversial aspects. In our profession, constantly dealing with the debtors in their time of need, one can never get comfortable, regardless of our years of experience and this course certainly helped put things into perspective. With this in mind, we look forward to attending the third module of the course in November, when the participants will present their work on given topics.

This will conclude the first INSOL Europe High-Level Course on Insolvency Law in Eastern European Jurisdictions held in Romania, organised by the general director, Ignatio Tirado, with the support of Emmanuelle Inacio and the local director, Radu Lotrean, Vice-President of INSOL Europe, with the support of Niculina Șomlea.

Next, the EECC course will take place in Hungary and then in Latvia, with the same success, we hope! ■

> THE INTERNATIONAL SPEAKERS HAVE OFFERED US A MEMORABLE AND REFRESHING EXPERIENCE BY SHARING THEIR UNIQUE POINT OF VIEW ON SOME OF ROMANIAN INSOLVENCY LAW'S MOST CONTROVERSIAL ASPECTS

Virtual secondary insolvency proceedings under the Recast EIR

Professor Dr. Dominik Skauradszun outlines the first steps in their preparation according to Article 36 EIR

DOMINIK SKAURADSZUN
Fulda University and Of Counsel, Gleiss Lutz, Germany

The 6th European Insolvency & Restructuring Congress (German Bar Association in cooperation with INSOL Europe) provided the opportunity to further analyse the issue of dealing with the new virtual secondary insolvency proceedings according to Article 36 EIR.

Currently, it appears that the most urgent question for insolvency practitioners is the preparation of such virtual proceedings. As this task requires comprehensive preparation, pursuant to Article 36 (10) EIR, also including avoiding personal liability, the article outlines the first steps to take.

Since the provisions became applicable from the end of June this year, insolvency practitioners (IP) throughout Europe have added virtual (synthetic) secondary insolvency proceedings to their toolbox. The background is easily explained: real secondary insolvency proceedings may hamper efficient administration (recital 41) and jeopardise overall restructuring. Hence, the IP is now entitled to give a promise – called *undertaking* – in order to avoid the opening of real secondary insolvency proceedings. Pursuant to Article 36(1, 3, 4) EIR the IP makes a unilateral declaration in writing and must use the official language of the state in which the virtual secondary proceedings takes place. It is also clear that the *undertaking* concerns the assets in the state of the virtual secondary proceedings and respects the state's distribution and priority rights.

> "SINCE THE PROVISIONS BECAME APPLICABLE FROM THE END OF JUNE, IPs HAVE ADDED VIRTUAL (SYNTHETIC) SECONDARY INSOLVENCY PROCEEDINGS TO THEIR TOOLBOX"

Preparation of the "factual assumptions"

The far more difficult part is that the undertaking shall specify the "factual assumptions" on which it is based, particularly in respect to the value of the assets located in the Member State in question and the available options to realise such assets (Article 36(1) sentence 2 EIR).

The preparation of the virtual secondary proceedings commences with the assessment of the mandatory factual assumptions, which are the local creditors' basis for approving or disapproving the undertaking pursuant to Article 36(5) EIR. Certainly, the approval procedure itself is worth examining in detail.[1] However, Art. 36(5) EIR stipulates that the national rules on restructuring plans are to apply. The approval procedure therefore will differ between the Member States. Furthermore, a wrong presentation of the factual assumptions may cause a claim for damages pursuant to Article 36(10) EIR. Hence, the IP must take this requirement very seriously.

Options to extend the narrow time frame

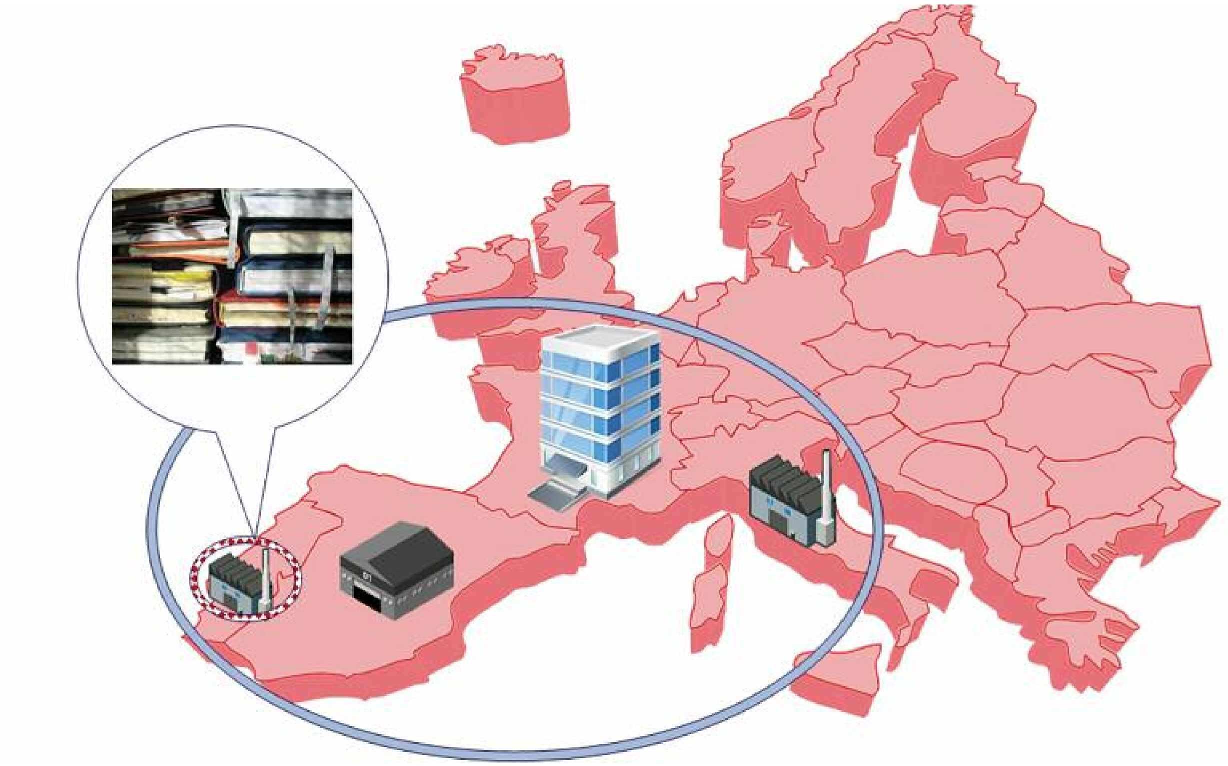
The measurement of factual assumptions is usually time consuming. As cross-border insolvency proceedings in particular have a very narrow time frame, the IP's assessment of the factual assumptions will consequently be of a prognostic nature, which may be incomplete or incorrect. Avoiding a real secondary insolvency proceedings becomes increasingly unlikely the longer this process lasts.

Currently, there are no directly applicable statutory provisions based on which the IP could effect a temporary stay of a request to open secondary insolvency proceedings. However, it may be an option referring to Article 38(3) EIR *mutatis mutandis*. Pursuant to this provision the IP may request a stay of the opening of secondary insolvency proceedings for a period not exceeding 3 months. Literally taken, this provision is only applicable in the event of a temporary stay of individual enforcement proceedings which has been granted in order to allow for negotiations between the debtor and the creditors.

On the other hand, Article 38(3) EIR is the provision most related to the problem in question. Both situations are comparable (ongoing negotiation on the one hand, undertaking as a compromise on the other), hence they shall be treated equally. Without a temporary stay of secondary insolvency proceedings, the new instrument of the undertaking cannot be used effectively, undermining the *effet utile* principle. Therefore, it is to be recommended to request a stay pursuant to Article 38(3) EIR *mutatis mutandis* in order to prepare the factual assumptions.[2]

Time and place specifications of the assets concerned

Art. 36(1) sentence 2 EIR demands that "the undertaking shall specify the factual assumptions on which it is based, particularly in respect to the value of the assets located in the



Symbolised here is a company with headquarters in France and three establishments in Europe. The IP wants to give an undertaking regarding the assets located in Portugal because he wants to restructure the company as a whole. Firstly, he has to figure out the value of the assets situated in Portugal and the options to realise.

Member State" in which the secondary proceeding could be opened. Determining the assets located in that Member State allows for two possible interpretations: either assets are those *which belong* to the establishment situated in the Member State, or the assets do *not need to belong* to the establishment. Following the wording of Art. 36(1) sentence 1 EIR, the second interpretation is more convincing. Hence, all assets which are physically located in the Member State are comprised.

Furthermore, the time of affiliation of the assets must be clarified. Basically, this is the point in time in which the undertaking is expressed, yet the risk remains that once a secondary insolvency proceedings is looming, assets are moved to the Member State in which the main insolvency proceedings is taking place. Should this occur, the approval of the undertaking by the local creditors is in jeopardy.

Data base for factual assumptions

The EIR does not mention how the IP should determine the correct data base for the value of the assets. Depending on whether the establishment is obliged to keep its own trading books (e.g. a foreign company's establishment in Germany), or if the headquarters' books include the assets in question, the data base changes. Since it is not regulated otherwise, the IP can choose from either. In many cases it will be easier for the IP to access the trading books of the headquarters.

Are national or international accounting standards relevant?

The obligor's trading books are kept in accordance with national or international accounting standards, often even both at the same time. Due to different underlying accounting principles, the valuation of the same asset may vary.[3] It may be assumed that the local creditors will argue for the higher valuation. The EIR does not regulate the relevant accounting standard.

A solution approach may be to consider the *prime* accounting standards of the debtor's headquarters as binding, as the IP of the main insolvency proceedings will be familiar with the local prime accounting standards. Additionally, undertakings may be given in different Member States. Following this method of resolution would allow the IP to maintain the same accounting standard in all Member States.[4]

Are the book values or market values of the assets relevant?

Aside from possible differences in the book value, the achievable selling price on the free market could be higher or lower than the value in the books. Some national

> **THE EIR DOES NOT MENTION HOW THE IP HAS TO DETERMINE THE CORRECT DATA BASE FOR THE VALUE OF THE ASSETS**

"THERE IS NO PROVISION OR RECITAL DEALING WITH THE QUESTION WHETHER THE IP SHALL WORK WITH CONTINUATION OR LIQUIDATION VALUES"

accounting standards, like the German Commercial Code, only allow companies to activate assets up to their initial cost (purchase and production costs). However, revaluation models of international standards, like IFRS, enable companies to activate higher values in case an impairment loss is recovered.

A first step solution could be to take the book value, but to mandatorily use the market value of an asset if the IP gets the information that the values differ. This understanding would be in line with the wording of Article 36(1) sentence 2 EIR which explicitly mentions the "factual" assumptions and not the former situation.[5] Additionally, Article 36(1) sentence 2 EIR requires the IP to explain the options available to realise the assets. The free market will only pay the market value. This is why the IP has to choose the market values if they differ from the book values.

Are liquidation values or continuation values relevant?

There is no provision or recital dealing with the question whether the IP shall work with continuation or liquidation values. It is obvious that the local creditors will claim for the continuation values, since these values are generally higher than the liquidation values. This is at least true for most of the machinery, furniture, vehicle fleet and other used goods. The IP might also be interested in using the continuation values since he/she can take them easily from the trading books whereas the liquidation values are to be evaluated, often with the assistance of further experts.

According to the view expressed here, the focus shall lie on the (virtual) *secondary* insolvency proceedings. This is exactly what Article 36(1) EIR does. The creditors' legal position should be equal to a real secondary proceedings, but not better. Hence, continuation values seem to be the right choice only if the establishment has an economic viability in the case of a real secondary insolvency proceedings. If the establishment lacks economic viability (e.g. if it is merely a warehouse that is not economically independent and therefore cannot survive), then liquidation values shall be used. In order to determine which value is the right one to use, the truly relevant question is whether the establishment is economically viable or not.[6]

Applicable law for the realisation of assets

The applicable law for the realisation of assets is the law of the Member State in which the main insolvency proceedings are opened. This complies with the basic principle pursuant to Article 7(2)(i) EIR and the principle of universality according to recital 23 and the IP's powers (Art. 21(1) sentence 1 EIR). The IP therefore explains the options available to realise the assets under the law of the state in which the main proceedings were opened.

Other factual assumptions

Other factual assumptions exceeding the information required by law may include information about the debtor's liabilities, the number of known creditors or the overall amount of liabilities. Providing information about lodged claims, pending actions and challenged transactions and if assets have been moved out of the Member State in which the secondary insolvency proceedings could have been opened, is also possible.[7]

Consequences of non-compliance with the assumed facts

In the event that the assumed facts do not comply with the true situation, the local creditors may apply court proceedings according to Article 36(7, 8, 9) EIR.[8] Furthermore, the basis for a claim for damages pursuant to Article 36(10) EIR, whose eligibility criteria are not finally examined, could be applicable.

However, the IP only undertakes to comply with the distribution and priority rights, which is a *legal* position.[9] Even if the underlying factual assumptions of the undertaking are incorrect from the outset (e.g. an asset cannot be realised since there is no potential buyer), the local creditors' position is secured. Therefore, the European legislator's decision to refrain from ruling in Article 36 EIR that the IP undertakes concrete amounts was wise.

Conclusion

The preparation of all virtual secondary insolvency proceedings starts with the specification of the factual assumptions. If this first step fails, the undertaking does not even reach the next step: the proposal and approval. Hence, on the one hand the IP must take the preparation seriously; on the other hand, the court should grant appropriate time for the preparation if requested by the IP, pursuant to Article 38(3) EIR *mutatis mutandis*. ■

Footnotes:

1 See *Mangano*, in: Bork/v. Zwieten, EIR, Oxford 2016, Article 36 at 36.16 et seq.
2 *Skauradszun*, "The 'factual assumptions' of the undertaking according to Art. 36 para. 1 s. 2 EIR recast", ZIP 2016, p. 1563.
3 *Schmid*, DStR 2005, p. 80.
4 See footnote 2 at p. 1568.
5 See footnote 2 at p. 1569.
6 See footnote 2 at p. 1570.
7 *Mankowski*, "Undertaking in order to avoid secondary insolvency proceedings pursuant to Article 36 EIR – Synthetic secondary proceedings", NZI 2015, p. 961, 964.
8 *Skauradszun*, "Provisional and protective measures according to Art. 36 para. 9 EIR recast", KTS 2016, p. 419 et seq.
9 See footnote 2 at p. 1573.

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Pre-Packs in Poland: 18 months on

Karol Tatara, Marcin Kubiczek and Mateusz Kaliński comment on the convenient judicial proceedings after the first year and a half since implementation

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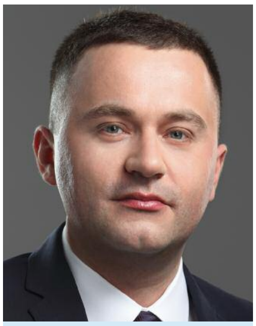

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The pre-packaged liquidation/administration proceedings often shortened simply to 'pre-packs' – have been in force in the Polish Insolvency Law framework since 1 January 2016.

Pre-packs are, in Poland, judicial proceedings, where the decision whether to approve sale-purchase conditions is made by the Bankruptcy Court, together with the decision regarding declaring bankruptcy. The main feature of pre-packs is the possibility to sell the insolvent debtor's assets to the investor, within bankruptcy proceedings, without auction or tender. Pre-packs are intended for selling the enterprise as a going concern, with execution sale effect, meaning that the investor is not liable for old liabilities and commitments of the debtor.

The first year and a half of functioning of this legal institution is a now an occasion for some summary and evaluation, together with some proposals of amendments to the law.

In Poland, this legal institution is yet not as popular as for example in the USA or UK, where around 25% of all administration is pre-packed, and some of the highest value acquisitions are made within pre-packaged liquidation proceedings. However, there are solid grounds to predict that the pre-packs should also be very popular in Poland.

Short timescale

First of all, sale-purchase operations within the pre-pack proceedings are really quick – not only compared to the sale-purchase within traditional bankruptcy proceedings, but also to a traditional asset deal, when, for instance, long due diligence is highly recommended. When acquiring assets within pre-packs, as mentioned above, the investor enjoys execution sale effect, which means that the investor is not liable for old liabilities and commitments of the debtor, and as a consequence there is no long and complicated due diligence.

From a practical point of view, the pre-pack proceedings last approx. four months when there is no complaint filed in the Court, and approx. eight to nine months when the Higher Instance Court will decide about a complaint. Taking into consideration Polish standards, timing is very attractive to potential investors. The trustee, generally, shall enter into sale-purchase agreements, on the terms approved by the Court, no later than within thirty days of the day on which the decision became valid and final.

Moreover, in pre-pack proceedings the subject of the

sale-purchase agreement may be the company as a going concern or just some of the important assets of the insolvent company. Therefore, the investor has a wide range of possibilities depending on what assets draw his attention. This is also a matter of quickness, because in traditional bankruptcy proceedings, the trustee was obliged to try to sell in the first place the enterprise as a whole, and could move to another asset when there was no party interested in acquiring it. This significantly lengthened the proceedings.

Thanks to pre-packs, the investor can negotiate the terms of the acquisition with the debtor from the very beginning, choosing only those assets which he deems interesting for him. However, not every single asset can be the subject of a pre-pack sale, but only those that comprise important parts of the enterprise – like real estate or machinery used for production purposes.

The investor acquires an already functioning company, ready to continue to conduct business. In traditional bankruptcy proceedings this was not frequent, and the trustee usually stopped the operating business of the debtor, and fired the crew. In pre-packs there is even the possibility of immediate release of the pre-pack subject to the acquirer – upon the Court's decision, when a proof of payment of the full price into the court's deposit account has been attached to the motion to approve the purchase conditions.

This means that pre-packs are beneficial for the whole economy in Poland, because the worst situation is when there are non-working assets – empty enterprises, shut-down machines etc.

Valuation

Another advantage of the pre-pack proceedings is that the affiliated companies can participate in the sale-purchase process. In this case the price should not be below the price estimated by the Court's expert, this being completely different from the insolvency proceedings where no expert estimation is recommended.

Affiliation and association

Affiliation and association are treated as in other bankruptcy cases, namely according to Article 128 of the Bankruptcy Law[1].

A statement on affiliation with the investor should be attached to the motion for the approval of the sale-purchase conditions.

Furthermore, in the sale-purchase to non-affiliated entities (which is the general, model situation) the price can be lower than the valuation of the expert appraiser when it is warranted by an important public interest or if the debtor's enterprise could be thus preserved. As a general rule, the price should be higher than an amount obtainable in bankruptcy proceedings through liquidation according to general principles, where the costs of the proceedings are to be deduced..

Fair price

As a result, the price should be realistic, including a fair sale discount, which should be treated as something natural and should not raise questions which sometimes appear in bankruptcy situations, especially as it is quite easy to find arguments for sale-purchase conditions with a lower price than the one indicated by the expert appraiser.

Also important is that the details of the transaction remain confidential, because it is only mandatory to indicate to the Court the price and the identity of the buyer, the draft of the agreement not being required.

The circle of bidders is also limited due to the fact that the Court receives information about the potential investor/acquirer and the price and is not expected to intervene. In other words, the role of the Court is not to set the highest possible price, or to organize an auction of tender for

"NOT EVERY SINGLE ASSET CAN BE THE SUBJECT OF A PRE-PACK SALE, BUT ONLY THOSE THAT COMPRISE IMPORTANT PARTS OF THE ENTERPRISE – LIKE REAL ESTATE OR MACHINERY"

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> "PRE-PACKS ARE THE FUTURE OF POLISH INSOLVENCY/ BANKRUPTCY PROCEEDINGS"

all interested entities, but simply to evaluate and approve concrete transaction details (the price and the identity of the acquirer.). This limitation can be beneficial for the potential investor, especially when competitors file unrealistic price proposals just to delay the Court's decision or to create the impression that the assets could be sold at a higher price. Such declarations are usually unrealistic, and sometimes are made in bad faith.

On the other hand, the transaction is under the control of the Court, and thus should not be questioned as favourable or unfair.

Efficient procedure

From the Bankruptcy Courts' point of view, pre-packs are beneficial mainly because they avoid long and costly bankruptcy proceedings. In pre-packs, after the conclusion of the sale-purchase agreement, the trustee has only to list the creditors, to distribute the sums obtained and close the proceedings.

In 2016, the Bankruptcy Courts in Poland received 30 motions to declare bankruptcy together with motions to approve sale-purchase conditions. Such motions can be filed both by the debtor and by the creditors. Only in one case, the Court decided to refuse sale-purchase conditions, in all other cases it approved such conditions. However, in one case the Higher Instance Court decided to refuse sale-purchase conditions after analysing the complaint filed by the creditor. These cases are rare incidents, which proves that the motions are well-prepared and the Courts are careful to be impartial.

Weaknesses

The current regulation of Polish pre-packs also presents some weaknesses.

It is not clear whether pre-packs can be used in consumer bankruptcy proceedings, which are more popular in Poland. In the opinion of the authors of this article, there is no legal obstacle, but some experts believe that pre-packs are only for entrepreneurs.

Another weakness is a practical one, because the banks do not have a special model of financing pre-pack acquisitions and treat them as traditional asset deals, not including the differences and nuances of the nature of the transaction, especially the need to secure the full price amount before the transaction.

There are also some legal concerns whether existing contracts of the enterprise can be acquired, mainly because of Article 317 of the Polish Bankruptcy Law which regulates: "*The acquirer of the bankrupt's enterprise shall acquire it in a condition free from encumbrances and shall not be liable for the bankrupt's liabilities*'. In the view of the authors this is not a legal problem, but some experts disagree, therefore this issue can be controversial.

Legislature intervention may overcome the legal disadvantages, and the practical aspects can be solved by simply higher popularity of pre-packs, while the banks will clearly support this kind of proceedings.

Conclusion

The indicated disadvantages and weaknesses cannot change the authors' opinion that pre-packs are the future of Polish insolvency/ bankruptcy proceedings, because of the benefits for all interested parties – insolvent debtors, creditors, the economy and the judiciary. ■

Footnotes

1 Article 128 of the Bankruptcy Law: "a relative by blood or by affinity in the direct line, a relative by blood or affinity in the collateral line up to the second degree, a person cohabitating with the bankrupt, maintaining a common household with him, or with an adoptee or an adoptive parent as well as partnership or company in which the bankrupt is a member of the management board or, as the case may be, the sole partner or shareholder, and with partnerships or companies in which persons referred to in above are management board members, or the sole partners or shareholders and also partnership or company performed with another partnership or company, where one of the companies was the controlling company, also where the same company is the controlling company in respect of the bankrupt and the other party to the act, together with partnership, company, or legal person transacted with its partners or shareholders, their representatives or spouses of the same, also with related partnerships or companies, their partners or shareholders, representatives, or spouses of the same".

Asset security and the insolvency connection: Time to harmonise?

Paul Omar discusses the further benefits of harmonisation of insolvency laws across Europe

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The role of asset security in the funding of business is essential where debt finance is one of the few options for businesses intending to expand.

While creditors would prefer, obviously, to have the sums lent repaid, the availability of a "Plan B" that palliates the risks of non-performance or insolvency, in theory also reducing the cost of access to credit, has long been attractive for lenders. For that reason, the mediaeval strictures of the *pari passu* principle have been avoided, almost from the outset, for creditors, consensual security being one of the avenues recognised at law for the mitigation of the doctrine, the other usually being preferences, the latter normally of statutory origin or creation.[1] The importance attached to security as a tool for the support of lending, especially for developing countries, is seen in its reflection in key international texts, such as the World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes.[2] In the World Bank's view, the creditor's ability to bargain for the transfer of security rights enabling enforcement over the debtor's property is the "simplest [and] most effective means" of ensuring the principle of prompt payment. It is certainly more effective, they say, than would be the prospect of insolvency proceedings with attendant procedural complexity and delays.[3]

The desire to enable direct enforcement by the creditor may explain the popularity at common law, historically, of institutions like receivership, granting direct access to the debtor's property (and later the entirety of their business), as a method for circumventing recourse to more formal (and usually collective) proceedings. It might also explain the concern, even within formal proceedings, with preserving the creditor's rights by segregating or exempting secured assets, as many systems in fact do, thus creating two pools of assets, which may be termed "general" and "encumbered", the latter being normally only available to the creditor in whose favour the security has been created. In an environment where liquidation is the norm, such separate pools cause few problems, although rules need to be made for what happens if assets in the "encumbered" pool are insufficient to meet the value of the security: will the creditor be able to claim against assets in the "general" pool and on what basis, i.e. is the secured status preserved? Different systems answer these problems in slightly different ways. Where rescue procedures are available, segregating assets may be inefficient and counter-productive in the case of a sale of the business as a going concern and many systems, but not all, favour a form of reintegration of the otherwise segregated assets, subject to continued respect for the creditor's priority.

Recognising this difference in treatment has meant, as the phenomenon of cross-border insolvencies has grown, dealing with the issue of what happens to security interests at international level. The European Insolvency Regulation ("EIR"), first adopted in 2000, chose to deal with the problem by a reference back to a relevant domestic law. In Article 5 (and Articles 6 and 7 on quasi-security), the rule was expressed as being that the law of the location of the assets over which an *in rem* right could be exercised should govern the outcome of the bargain.[4] Thus, while Article 4 identified the *lex concursus*, it was entirely possible that Article 5 invited the application of a different law. The EIR did not, however, delineate in precise terms the articulation between the provisions, particularly whether Article 4's governance of issues such as the composition of the estate, the opening and closure of proceedings and effect on third-party rights etc. had a potential bearing on the exercise of rights governed by a different law, never mind the thorny question of transactional avoidance. There is certainly potential for conflict, although the limited amount of case-law, including references to the European Court of Justice, suggests that the problem was largely side-stepped by pragmatic treatment of (and perhaps deference to) secured creditors, whose consent was usually needed for most rescue procedures to stand a chance of success. As such, the position in the Recast EIR, adopted in 2015, and its Articles 8-10, replicating the previous regime, is perfectly explicable by an unwillingness to undermine the position of secured creditors. There, the position stands for now.[5]

What are the options?

Going forward, however, what could be the options available? Classically, there seem to be two: a harmonisation of the concept (and types) of security and/or a

harmonisation of the treatment of security in private international law. In relation to the first, although most Western European legal systems boast an inheritance from Roman law and its insistence on classifying security into real and personal, also incidentally determining whether the security constituted a real right to the property or simply a privileged claim, the gulf in modern days between the civil law and common-law perspectives seems too wide to bridge. In the way the latter has moved to the creation of an intermediate class of interests (based on equitable principles) and the availability of security over classes or collections of assets, the differences are palpable.[6] Furthermore, the prohibition of European Union competence in the matter of real property,[7] on which real security rests, could pose an obstacle to the holistic treatment of all forms of security for the purposes of any harmonisation. An alternative way of dealing with this difficulty might be to explore how the personal property security interest framework, a development originating in North America, could have application, given it has been adopted by some mixed legal systems, such as Jersey.[8] However, this might be a step too far for jurisdictions in which lending practices have revolved around the availability of certain models of security, while the transition to new models might be, arguably, costly in terms of altering not just contract clauses, but also behaviour and expectations.

In relation to the harmonisation of private international law rules, the argument might be made that the EIR framework, in both its versions, already constitutes an attempt at dealing with the issue by identifying the law that applies. In that light, it appears no different to the other instruments in the private international law arena adopted by the European Union, including the Rome I and Brussels I Regulations.[9] However, as noted above, the uncertain articulation between the *lex concursus* and the law applicable to security is a less than perfect situation and leaves unresolved a considerable number of issues that have yet to be fleshed out by the jurisprudence. In the context of the *Ius Commune* project, which has sought to identify common principles for the harmonisation of European private law, the question has also been asked as to whether private international law should be harmonised.[10] There, unfortunately, the question has remained, with no great positive answer forthcoming, apart from the discrete developments already mentioned. It seems unlikely that there will be a major initiative taken here without further work on harmonisation of the underlying private law concepts.

In any event, the debate over harmonisation and its desirability may be ceding ground to a different approach, that seen in the Financial Collateral Directive,[11] which seeks to immunise financial collateral from the consequences of the application of domestic insolvency law rules. As such, this approach, which is the norm for arrangements in favour of regulated lenders, may well come to influence the lending dynamic entirely, including influencing the terms of contracts for lending and the treatment of collateral in all other situations. This would incidentally remove the need for consideration for underlying harmonisation, given that such arrangements, whether involving financial collateral or not, would effectively lead to the segregation of such assets from insolvency. This still leaves the question of asset integration open, particularly where this may constitute the *sine qua non* for rescue and which would otherwise lead to tying indissolubly the fate of rescue to the views of the secured lender. Whether this is in all circumstances desirable remains an open question. ■

"THE UNCERTAIN ARTICULATION BETWEEN THE LEX CONCURSUS AND THE LAW APPLICABLE TO SECURITY IS A LESS THAN PERFECT SITUATION"

Footnotes:

1 This article is based on a conference paper delivered at the University of Santiago da Compostela, Spain on 15 April 2016.
2 See the 8 Principles in Part A of the text (2015 Revision).
3 Executive Summary, World Bank Principles, at 5.
4 For Article 6, the rule was slightly differently worded, being "the law applicable to the claim", since set-off is usually only available in the case of mutual claims (a species of choses in action).
5 There have been, however, two reviews by different consortia of Universities, both led by the Leeds Law School and funded by the European Commission, into (i) the issues surrounding Article 5 and its application and (ii) transactional avoidance. The outcome of the recommendations, as well as any timeframe for reforms, is not yet known.
6 Curiously, the Mauritian Civil Code manages to accommodate both classic civil law forms of security and, in Book III, Title XVIII, Chapter X, *sûretés flottantes* (floating security, i.e. the floating charge).
7 Article 345, TFEU (Old Article 295, EC Treaty).
8 In the Security Interests (Jersey) Law 2012.
9 Regulation (EC) 593/2008 and Regulation (EC) 44/2001 respectively.
10 A. Fiorini, "The Codification of Private International Law in Europe: Could the Community Learn from the Experience of Mixed Jurisdictions?" (2008) 12(1) *Electronic Journal of Comparative Law*.
11 Directive 2002/47/EC.

Ongoing IVA Trusts: Where are we now?

Kathryn Maclennan wonders if debtors can take any comfort from the recent ruling by the Court of Appeal

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In March of this year the Court of Appeal ("CoA") handed down the long awaited decision in the case outlined below. This provided clarity to the IVA (Individual Voluntary Arrangements) industry on the issue of trusts within a duly completed IVA and the purpose of a certificate of completion provided to debtor.

What comfort can debtors actually take from this document in respect of their liabilities, their assets and how they can know whether their IVA is actually "complete"?

Facts of the Case

Mr Wright entered into an IVA with his creditors in 2007 and met all obligations under the contract. This was an "all assets" IVA: any assets which would have been comprised within a bankruptcy estate were now comprised within the IVA unless specifically excluded. The IVA created a trust to the effect that assets comprised within the arrangement were held on trust for the benefit of creditors.

The definition of "assets" within the IVA was the same as that for bankruptcy. The right to pursue the PPI mis-selling claims was in existence in 2007 when the IVA was entered into, therefore an asset was comprised within the IVA. This is regardless of the fact that the debtor or the supervisor may not have been aware of the existence of any such claims when the IVA terms were agreed.

In 2013 the IVA concluded successfully. A final dividend was paid to creditors and Mr Wright received his certificate of completion. He had complied with all his obligations under the contract and the certificate confirmed that he had no further liability to the creditors bound by the IVA. Months later two PPI mis-selling claims were upheld and funds in the region of £24,500 were paid by the respective banks. Those funds were paid to the supervisor of the IVA.

The lower courts held the funds were due and payable to the debtor. A certificate of completion was conclusive and it brought to an end the debtor's liability to those creditors, the IVA and any trust created by it.

Court of Appeal

The Court of Appeal ("CoA") overturned the decision of the lower court and ruled the funds were due to the supervisor. There were a number of key issues addressed.

Does an IVA trust survive completion?

Yes. If there is no specific provision within the IVA terms to confirm what will happen to a trust on completion, then it will survive. The CoA took the view that despite Green v Wright dealing with due completion, as opposed to termination, the debtor faced the same burden as in N T Gallagher & Son Ltd v Tomlinson [2002] EWCA Civ 404 i.e. to demonstrate why a fully constructed trust should come to an end where the contract does not provide for that outcome.

Who are the beneficiaries?

The debtor's position was that due completion brought the trust to an end and that even if it did not,

and the trust survived, there were no beneficiaries under such trust as the creditors has accepted the dividend payments under the IVA in full and final settlement of his liabilities.

The CoA decided the IVA creditors remained as beneficiaries under the trust and it considered the fundamental definitions of "creditor" and "debt" in reaching this conclusion. Any reference to "creditor" was to be fixed by reference to those owed at the commencement of the IVA.

What does a certificate of discharge achieve?

The debtor had received his certificate and all creditors had been notified of completion of the IVA in accordance with the Insolvency Rules 1986. The debtor took the view that he had no further liability to the creditors which sat alongside his argument that therefore the creditors could

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not be beneficiaries under any trust. The CoA has clarified that a certificate of completion is to have the same effect as a certificate of discharge in bankruptcy. Section 281 (1) of the Insolvency Act 1986 confirms that a certificate of discharge in bankruptcy releases the bankrupt from his liability for the bankruptcy debts but it has no effect on the bankruptcy estate and the Trustee's position.

The bankruptcy debts continue notwithstanding the certificate of discharge and assets which have vested in the Trustee remain so vested and available for realisation to pay those debts.

The CoA has drawn a parallel between the certificate of completion in an IVA and that of discharge in a bankruptcy. However, it is worth noting that Rule 5.34 of the Insolvency Rules 1986 (Rule 8.31 Insolvency Rules 2016) sets out the procedural requirement for completion of an IVA and is silent on the effect of the certificate. The CoA concluded that the certificate of completion will have the same effect as that for discharge in that it will separate the debtor from his liabilities. He would be free from any liabilities but his pledged assets within the IVA would remain subject to the on going trust until realised. The difficulty with this assessment is that in bankruptcy the assets remain vested in the Trustee pursuant to section 306 of the Insolvency Act 1986. There is no such vesting in an IVA. Any PPI claims remain vested in the debtor (in the absence of assignment), so the debtor is not free from his obligations – as a bankrupt arguably would be – as he continues to be subject to the obligation of holding the assets in question on trust.

Current position

This decision has brought some long needed clarity to the IVA sector. IVAs which were kept open pending this decision can now be dealt with and long awaited certificates of completion can be issued to debtors. This decision was welcomed by the insolvency profession for the clarity it provided but matters may not be as straightforward as they seem and the decision could, in the short term, create more problems than it solves.

This decision does not affect every IVA. There is no statutory requirement for an IVA to create a trust and, although many of them do, there will be some arrangements with no trust. It is too simplistic to say that Green v Wright affects every case and is a vehicle for PPI realisations to be collected by the IP post closure in every case. IP's will need to consider the terms of each case and decide whether there is a trust and whether it has been terminated. They will need to exercise caution in any view they can claim post closure realisations without undertaking this exercise. If they do not, then they risk claiming, receiving and distributing post closure realisations they have no entitlement to leading to claims against them by the affected debtors.

Green v Wright considers the R3 standard conditions applicable to the arrangement of Mr Wright. Other terms and conditions which contain different trust provisions which might lead to a different outcome. The most common being the IVA Protocol terms which include a trust provision but this is "*whilst the arrangement is in force.*" These words were not considered in Green v Wright so there is no authority on their effect on any trust on completion. It is possible to interpret these words as ending the trust on completion or, equally, they can be viewed as allowing the trust to continue – an arguable case can be made either way. This ambiguity in such widely used terms and conditions is not helpful to IP's or consumers and different interpretations are already appearing.

Variations are also a cause for concern. There are instances of IP's contacting debtors where an IVA was concluded early due to a one off payment. The debtor may take the view that such payment was in lieu of all obligations under the IVA (which would include any obligation to continue to hold assets on trust) but some IP's are taking a different view and maintaining the variation did not end the trust, therefore any post closure PPI would still be caught by that trust.

IPs may well find themselves holding PPI realisations which have awaited distribution pending Green v Wright. However, they may also find there is no provision for them to be paid any fees in respect of post closure realisations. IP's are then faced with having to reach agreements with creditors as to what fees will be paid from trust assets.

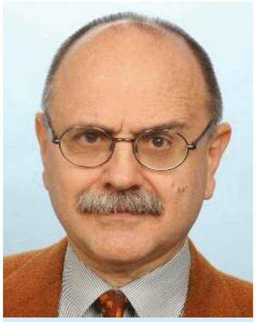
There will be a significant number of trusts out there. The trustee will be the supervisor who was in office when the IVA concluded. This causes practical problems when IP's move on etc. A block transfer order is appropriate to transfer the office of supervisor but it may not be the correct mechanism for transferring the role of trustee of any on going trust. This will have an impact on the movement of appointments and sale of IVA books particularly where a provider has decided to exit the market completely. That provider and the book purchaser will want to ensure that the role of trustee passes to the purchaser along with all rights and obligations associated with that office.

The FCA has confirmed the deadline for submission of PPI claims is August 2019 and it is anticipated there will now be an increase in numbers as consumers must act before this cut-off date. Lenders are setting aside millions in additional funding to cover these claims. These are big numbers and it seems that, given the existence of on going trust and the amounts involved, PPI claims will continue to be a prominent issue within the IVA industry ■

> **THERE IS NO STATUTORY REQUIREMENT FOR AN IVA TO CREATE A TRUST AND, ALTHOUGH MANY OF THEM DO, THERE WILL BE SOME ARRANGEMENTS WITH NO TRUST**

"Festina lente" in NPL management in Italy

Giovanni Matteucci reports on how meditated and patient non-performing loans management can achieve good results



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"*Festina lente*", ("make haste slowly") was one of the favourite sayings of the Roman emperor Augustus related to military operations[1]. It could also be useful in the management of Non-Performing Loans.

The International Monetary Fund says, in Italy: "*NPL reduction strategies and targets need to be ambitious and credible, aided by supervisory assessments of banks' capacity to resolve NPLs in a realistic and timely manner*[2]". "*Timely*", that is, "*quickly*".

Usually, a quick solution for managing NPLs is their sale. One of the main problems is the "fair" transfer price. In Italy, buyers would like to pay less than 10% of the nominal value, a very low price, because the legal recovery proceedings last no less than four or five years, during which servicers must support management costs and pay interests on funding raised for the business. For sellers, this low prize would result in a strong capital loss.

In Italy, the impaired loans were €146 billion at the H1[3] 2010, 341 at H2 2015, and 324 at Q4 2016. The impaired loans/total assets ratio increased from 9.4% at H1 2011 to 18.7% at H1 2015, with a very small decline to 18.0% at Q4 2016[4]. Experts forecast an explosion of NPL deals in 2017.

Deal price in Q1 2017 was, on average, less than 10% of nominal value. Deal price in forecasts for 2017 are: 11% consumer, 33% secured[5].

But it seems that Italy is on the way to recovering a "*meditated, patient NPL management*" as well, as already tested; it will not be very quick, but it will bring interesting results.

In 1996 Banco di Napoli, one of the biggest Italian banks, had strong financial problems and its assets were almost completely cleared. The rescue plan was very complex. Amongst others:

- €6.3 billion impaired debts (38,000 risk positions) transferred to a special vehicle (*Società per la Gestione delle Attività S.G.A. s.p.a.*), at a transfer value in line with the expected realisations, i.e. 70 (Seventy) % of the nominal value (i.e. €4.4 billion); and
- a funding by the Bank of Italy to purchase the bad loans at a 1% borrowing rate; money to be invested in BTP-public bonds (7% interest rate), to be pledged to guarantee the funding.

Twenty years later, in 2016: €5.6 billion impaired debts (34,000 risk positions) recovered, i.e. 89% of the price paid to acquire them in 1996, with various recovery ratios (revenues/price paid) according to the different cluster of risk positions:

- up to €154,000, 140% recovery ratio (22,300 risk positions);
- from €155,000 to €515,000, 93%;
- from €516,000 to €2,600,000, 87%; and
- over €2,600,000 thousand, 83%.

This means an average recovery ratio of 92%, which lowers to 89%, if you consider a 3% related to the costs of legal proceedings (a very low amount). And, last but not least, it means a €500 billion profit reserve[6].

How was it possible? There are four main reasons:

- In 1996 the impaired debts transferred to the S.G.A. had already been written off by 30%.
- From 1996 to 2007 the values of real estate rose twice as much (and from 2008 to 2016 they fell by 30%).
- Until the early Nineties the mortgage loan to value was rarely higher than 50% (it increased until 90-95% in the subsequent years, until 2008).
- The financing by the Bank of Italy for the purchase of bad loans was granted at a 1% borrowing rate, the revenue was at 7% ("*a kind of quantitative easing 'ad bancam*'"[7]).

Nonetheless, in my opinion, there is another reason: the very low amount of the cost of legal proceedings, as a result of "*a meditated, patient management*" (Bank of Italy)[8]. According to Roberto Romagnoli, who was S.G.A. leader for many years, "*Legal actions must be taken but every debtor is a person and it is necessary to pursue, with infinite patience and diplomacy, a communication with him or her, looking for a compromise*".

Therefore, **negotiation in bankruptcy** doesn't only prove useful to prevent NPLs,[9] but also to manage them. And S.G.A., from now on, will have an essential role in developing a balanced asset management in Italy.

Another interesting initiative is the Bill filed in Parliament in March 2017. For debts up to €500,000 each (€59 billions overall, about 10 million risk positions), the debtor might ask

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the bank to buy the debt, written among NPLs, at the value entered in the bank's balance sheet or at the price at which it would be sold to third parties[10]. A potentially huge saving in judicial proceedings, time and money. Will it be approved? ■

> “ NEGOTIATION IN BANKRUPTCY DOESN'T ONLY PROVE USEFUL TO PREVENT NPLS BUT ALSO TO MANAGE THEM ”

Footnotes:

1 “*Nihil autem minus perfecto duci quam festinationem temeritatemque convenire arbitrabatur. Crebro itaque illa iac-tabat: σπεῦδε βραδέως (Speude bradeos). …. Et, sat celeriter fieri quidquid fiat satis bene*”, *Suetonius, De Vita Ce-sarum*, 25.4 http://www.latin.it/autore/svetonio/de_vita_caesarum/!02!divus_augustus

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“ *… in Italy there are so many problems that the value of loans drops. The first is the slowness of the legal system: … if bankruptcy procedures could be reduced by two years (currently last on average 7.8 years), prices would increase by 10-12%. ….. The second is the inefficiency of banks in handling these claims; .. it should be necessary a sort of 'face lift' for portfolios bad loans, this means sorting the loans by computer, breaking them down by type of loan and by geographic area. ….. Then, there's the real estate problem; .. there are 500,000 real estate executions pending, but in the 2015 auctions were closed for only 12,000 properties … and there is a huge problem related to values of real es-tate in areas on city outskirts, .. which are very depressed*”.
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Insolvency of Banks in Russia: A threat to the economy?

Dmitry Konstantinov reports on the Central Bank of Russia's reforms intended to significantly reduce the number of banks... but have they worked?

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After the collapse of the Soviet Union the banking sector in Russia was quickly developing and at the start of the twenty first century it consisted of more than 1,000 banks.

Most of these banks had been established to serve the main business of the shareholders or for money laundering. Some, of course, did classical banking business, but frequent failures of such banks were harmful to the market. Finally, the Central Bank of the Russian Federation announced the new policy – strong financial requirements for the banks were introduced. The Deposit Insurance Agency became the liquidator of banks and since that time almost 70 bank licensees have been cancelled every year. Surprisingly, the process still goes on, and there are about 600 banks in the market. Less surprisingly, the Central Bank has been widely criticised for many of its activities in the field.

Deposit insurance in Russia covers only deposits of individuals while businesses are not protected by the scheme

In 1998 the Russian government faced with the social protest caused by the loss of savings in the failed banks; banks, nevertheless, remained the only way to save money and the deposit insurance scheme became a political issue. When in 2004 the scheme finally appeared, the Deposit Insurance Agency (DIA) protected only the deposits of individuals and only to the limit of 100 000 rubles (about 3000 euro at that time). Undoubtedly, such conditions were imposed only to the poorest bank depositors, who, probably, were the key electorate of the government. However, in the next 13 years the government managed to increase insured sums to 1 400 000 rubles and even gave protection to accounts of auto-entrepreneurs. At the same time, the banks' insolvency regime was changed - individuals were ranked as the first class priority creditors and, therefore, their claims were to be recovered before any other claims[1].

In the case of a bank's failure, companies do not get compensation from the deposit insurance scheme and their claims are very unlikely recovered through insolvency liquidation.

The majority of businesses have not enjoyed the deposit insurance; and even suffered from that. Deposit insurance encouraged people to choose the banks not

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because of their financial stability and companies initially followed them. When the banks failed, the individuals recovered their money from DIA, but the companies did not. What is more, after the DIA has made the insurance payment, they replaced the individuals as creditors; and businesses lost the chance to recover deposits. Let's look at the figures: 34.2% of claims in bank insolvencies have first priority; from the previous years we know that about 74% of the first priority claims belong to the DIA[3]. The liquidator of the banks recovers 65% of the first class claims and only 16% of the third class claims; in other words, DIA as the liquidator of banks normally pay only to themselves.

Therefore, companies in Russia are forced to choose state-owned banks whose financial condition is actually guaranteed by the government; even subsidiaries of the multinational banks are not an option as they are currently leaving the market. For example, the state-owned banks (Sberbank, VTB-24, Rosselchozbank, Gazprombank) have received more deposits from companies than the private-owned banks[4], even though the overall assets of the state-owned banks are smaller[5]. This disproportion is raising - deposits in such banks as Sberbank increase much quicker than in the market[6].

Thus, the current insolvency regime of banks put their corporate clients in an unfavourable position; to avoid the risk of bank failure, they need to use banks owned and supported by the government. It clearly influences the banking market and creates additional costs for the businesses.

In the first years of the banking reform, mainly small banks were removed from the market, but in the last years some banks from the national top 100 lost their licenses.

Initially the Central Bank declared that the reform of the banking sector was aimed at supporting ordinary banking business and removing from the market banks involved in money laundering and fraud, while in order to protect banks facing financial difficulties the new restructuring scheme was introduced.

But the government followed the programme only in the first few years; then the Central Bank cancelled licenses of some key players. So far, six banks from top-100 2010 have lost their licensees (TranskapitalBank, Tatfondbank, Master-Bank, VneshpromBank, AMT Bank (BTA Bank-Russia), Investbank); all these banks went into liquidation. More banks were restructured and among them, two (Bank of Moscow and Bank Uralsib) were from the top-20. What is worse, the process of license cancelation and insolvency restructuring of banks is not accountable.

Even though the Central Bank's regulations contain the formal requirements for banks, the key question is how the regulator supervises compliance with these requirements. Almost in every bank insolvency, it appeared that the bank did not meet the capital requirements and falsified its books for years[7]. There are two possible explanations of this fact: the Central Bank of the Russian Federation is not able to supervise banks, or the regulator does not normally respond to the breach of the requirements unless it decides to do so. But the outcome is the same – the vast majority of banks might be faced with license cancellation. The situation creates significant uncertainty for the banks and their clients and might have a negative economic effect.

The option to insolvency liquidation is restructuring; however, this procedure is even less predictable. For example, restructuring with participation of the state (sub. 4 sec. 1 art. 189.9 of Russian Insolvency Law) is made on a decision of the Central Bank of the Russian Federation; such a decision is not controlled and cannot be challenged. The total funding made by the government under such uncontrolled process is of 1,229,98 billion rubles[8]. Probably, bank restructuring was expected to serve the "too big to fail" concept, but the choice of "big" banks is still unclear. Currently 25 banks are under restructuring proceedings, and some of them are much smaller that the listed banks whose licenses have been cancelled.

Following the global mainstream, Russia has a different insolvency regulation for banks and other debtors; however, it created a number of new problems. The regime of bank insolvency is firstly aimed at protecting individuals as deposit holders and this function has been fulfilled perfectly. Nowadays, deposits by most individuals are covered by the deposit insurance scheme, and their claims have the highest priority through the insolvency liquidation. The dark side of the regime is the weak position of other creditors, mainly businesses that are forced to keep their liquidity in the banks, but are not protected by the deposit insurance scheme and are very unlikely to be paid through the insolvency. The companies are forced to select banks whose licenses are not expected to be cancelled, and the first choice is the state-owned banks. At the same time, the Central Bank is cancelling the licenses of unstable banks, but the process is becoming a threat to the whole market.

In conclusion, when deciding to cancel a license or restructure a bank, the Central Bank of the Russian Federation appears to be absolutely unpredictable and unaccountable. ■

“ COMPANIES IN RUSSIA ARE FORCED TO CHOOSE STATE-OWNED BANKS WHOSE FINANCIAL CONDITION IS ACTUALLY GUARANTEED BY THE GOVERNMENT ”

Footnotes

1 The second-class priority has been given to employees and all other creditors are third class priority.
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3 https://www.asv.org.ru/agency/annual/2012/en/page3/page35/index.html
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5 http://www.forbes.ru/sp_data/2017/rating-bank/all.html
6 Compare: http://www.cbr.ru/statistics/UDStat.aspx?TblID=302-21&pid=sors&sid=ITM_30761 and http://www.sberbank.com/ru/investor-relations/reports-and-publications/key-data
7 https://www.asv.org.ru/agency/appearance/322554/
8 https://www.asv.org.ru/sanation/. This figure is comparable to the whole amount of commercial banks' deposits in the Central Bank. http://cbr.ru/hd_base/?PrtId=ostat_base&pid=idkp_br&sid=itm_31037.

Chapter 15: A sword and a shield

David Conaway discusses some recent cases that show how Chapter 15 has primarily been utilised by foreign debtors to both assert claims and protect their assets

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"COMPANIES DOING BUSINESS GLOBALLY WILL INEVITABLY ENCOUNTER ISSUES WITH THEIR CUSTOMERS OR COUNTER-PARTIES IN THE SUPPLY CHAIN"

The ruling: Chapter 15 Debtors can assert avoidance actions under state law

On March 23, 2017, the United States Bankruptcy Court for the Southern District of Florida, Miami Division, ruled that a foreign debtor could use Chapter 15 to assert "avoidance actions" in the US under state law (in this case New York fraudulent conveyance statutes).

In 2010, the United States Fifth Circuit Court of Appeals similarly ruled that a foreign debtor could use Chapter 15 to assert "avoidance actions" in the US based on foreign law. My article in the International Committee Newsletter of the American Bankruptcy Institute ("ABI") dated November 2011 discusses the Fifth Circuit case, *Condor Insurance Ltd.*, in detail. By contrast, the statutory language of Chapter 15 is clear that foreign debtors cannot assert "avoidance actions" based on the provisions set forth in the US Bankruptcy Code, specifically including Sections 547 (preferences) and 548 (fraudulent conveyances).

Chapter 15: Background

Companies doing business globally will inevitably encounter issues with their customers or counter-parties in the supply chain.

Such issues include foreign insolvency proceedings of such a customer or counter-party in their "home" country. Since there is no uniform global insolvency law, the outcome for the company is primarily dependent on the insolvency law in the foreign jurisdiction. If the potential risk to exposure of the company is material, participating in the foreign proceeding is advisable.

Global companies are likely to have assets, liabilities, contracts, property or employees throughout the world. If such a company initiates insolvency proceedings in its home country, it is likely the company will also need to address issues in the other countries. In recognition of this, and to promote comity among countries, in 1997, the United Nations Commission on International Trade Law (UNCITRAL) published its Model Law on Cross-Border Insolvency. To date, 43 countries have adopted the Model Law, including the US, which adopted the Model Law in 2005 as Chapter 15.

Proceedings under the US Chapter 15 are ancillary to a foreign main proceedings regarding the debtor company's overall restructuring. As such, Chapter 15 is a powerful tool for foreign debtors to deal with assets and claims in the US Chapter 15 has primarily been utilised by foreign debtors both as a sword, and as a shield. As a sword, Chapter 15 allows a foreign debtor to assert claims and to obtain discovery with respect to companies or assets in the US

As a shield, Chapter 15 allows a foreign debtor to protect its US assets by invoking the "automatic stay" of Section 362 of the US Bankruptcy Code, which is a broad injunction against any claims or lawsuits against the foreign debtor or its US assets. In fact, some US Bankruptcy Courts have also applied the "automatic stay" extraterritorially, to debtors' assets outside the US.

Federal law vs. State law in the US

Sections 547 and 548 of the US Bankruptcy Code allow for the avoidance and recovery of "preferential payments" and "fraudulent conveyances", including conveyances that are "constructively" fraudulent, or made for "less than reasonably equivalent value".

Many US states also have state corporate or insolvency laws that include a state law preference provision, applicable to debtors who utilise such state laws as an alternative to Chapter 11. In addition, the Uniform Law Commission, within the National Conference of Commissioners of United States Laws, over the years has adopted various uniform commercial laws for all US states to consider adopting by state legislatures. Notably, based on England's Fraudulent Conveyance Action of 1571 (Statute of 13 Elizabeth), the Uniform Law Commission has adopted the Uniform Fraudulent Conveyance Action (1918), the Uniform Fraudulent Transfer Act (1984) ("UFTA") and the Uniform Voidable Transactions Act (2014) ("UVTA"). At this point, most US states have adopted the UFTA, with the prediction that most states will migrate to the UVTA in coming years. Generally, all of these state laws provide for the avoidance and recovery of "fraudulent conveyances", based on actual and constructive fraud. Such claims can be pursued without a pending Chapter 11 case. However, Section 544 of the US Bankruptcy Code allows debtors' estates to utilise state law avoidance laws in addition to those in the Bankruptcy Code.

The Banco Cruzeiro Do Sul S.A. bankruptcy ruling

The US Bankruptcy Court in Miami, in the Chapter 15 proceedings of Brazilian bank *Banco Cruzeiro Do Sul S.A.* ("BCSUL"), expanded the "sword" for foreign debtors by allowing BCSUL's trustee to assert a fraudulent conveyance claim under the New York law to recover a New York City penthouse apartment.

Ownership of BCSUL was controlled by the Indio da Costa family, and managed by Felippe and Octavio Indio da Costa. According to allegations in the trustee's complaint in the Chapter 15 adversary proceedings, Felippe purchased a New York apartment with funds improperly diverted from BCSUL. The apartment was subsequently conveyed to a BVI Company, Alina Corporation ("Alina"), controlled by Felippe.

In response, Alina filed a motion to dismiss the adversary proceedings, in part arguing that Chapter 15 does not permit a foreign debtor to assert "avoidance actions", based on an express exclusion of Sections 547 and 548 in Chapter 15. The Bankruptcy Court rejected this argument, and denied the defendant's motion to dismiss on this issue. The Court concluded that as a matter of statutory construction, Chapter 15 expressly excludes the specified avoidance provisions in the US Bankruptcy Code, and nothing more. Thus, the clear intent of Chapter 15 was to not exclude avoidance actions based on other law. The Bankruptcy Court also noted a Chapter 15 foreign debtor's right to sue and be sued in the US.

However, In *In Re Hellas Telecommunications (Luxembourg)* II SCA, 524 B.R. 488, 495 (Bankr. S.D.N.Y.) adhered to, 526 B.R. 499 (Bankr. S.D.N.Y. 2015) (Hosking I), the US Bankruptcy Court for the Southern District of New York ruled that a Chapter 15 foreign representative lacked standing to assert state law avoidance claims in a Chapter 15 case. In connection with an LBO transaction involving Hellas Telecommunications, Greece's largest telecommunications company, Hellas migrated its COMI (Center of Main Interest) from Luxembourg to the U.K. and initiated insolvency proceedings under U.K. insolvency law. The foreign representative then filed Chapter 15 proceedings in the US Bankruptcy Court for the Southern District of New York. The Hellas foreign representative filed fraudulent conveyance claims under the New York state law to recover approximately 1.57 billion Euros. The Bankruptcy Court skirted the issue of whether a Chapter 15 foreign representative could pursue claims under applicable US state law, and noted the *Condor Insurance* case mentioned above.

In a Chapter 11 case, *FAH Liquidating Corp. f/k/a Fisker Automotive Holdings, Inc.*, the Delaware Bankruptcy Court, on June 13, 2017, allowed the trustee to assert claims extraterritorially against BMW for fraudulent conveyance under Section 548 of the Bankruptcy Code in the amount of $793,761, and for unjust enrichment for $32.5 million. The Court concluded that the payments to BMW occurred in Germany because the development work was by a German company performed in Germany, it was a German contract applying German law, delivery under the contract was in Germany, and payment was owed in Euros. That payments originated in the US did not overcome the German "center of gravity".

Benefit to non-US debtors

These cases have an impact for the European companies that are in insolvency proceedings in the EU but also seek relief under Chapter 15 in the US showing them how to use the automatic stay, to seek discovery or to assert claims against third-parties located in or with assets in the US.

The Chapter 15 case law is clear that such Chapter 15 debtors may not utilise Sections 547 and 548 of the US Bankruptcy Code to enhance the value of the insolvency estates. However, the cases discussed herein indicate that such Chapter 15 debtors are able to utilise (1) avoidance actions under the insolvency laws of the jurisdiction of the foreign main proceedings, and (2) US state laws. As such, foreign debtors in a Chapter 15 case are able to increase the value of their estates for the benefit of the creditors.

Takeaway

The *Condor Insurance* and the *Banco Cruzeiro* cases make clear that foreign debtors in those jurisdictions are entitled to assert avoidance actions in the US based on applicable US state law and based on the avoidance laws of the foreign jurisdiction.

Since 2005, US Bankruptcy Courts have broadly interpreted Chapter 15 to allow foreign debtors maximum flexibility in protecting assets and pursuing claims. It is predictable that other courts will follow *Condor Insurance* and *Banco Cruzeiro*, encouraging foreign debtors to assert avoidance actions in Chapter 15 cases under state law in the US and under foreign law, to enhance the value of insolvent debtors' estates. The recent Fisker's decision indicates that a Chapter 11 estate may apply avoidance actions including Section 548, and likely also Section 547 (preferences), extra-territorially to payments in connection with foreign transactions.

A company with material risk associated with a customer or counter-party in overseas insolvency proceedings is advised to participate in the foreign proceedings regarding its claims, contracts, and risks. In addition, the company should monitor any Chapter 15 filing of the foreign debtor in the US, which could increase "avoidance action" risk. ■

"THESE HAVE AN IMPACT ON EUROPEAN COMPANIES THAT ARE IN AN INSOLVENCY PROCEEDING IN THE EU BUT ALSO SEEK RELIEF UNDER CHAPTER 15 IN THE US"

Share your views!

Debt Restructuring

Second Edition

Bilal Kurbanov reviews the second edition of the OUP's book on Debt Restructuring, the only book to cover bank, corporate and sovereign restructuring in a single volume

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Publisher:
Oxford University Press
2016

848pp, £195

ISBN 9780198725244

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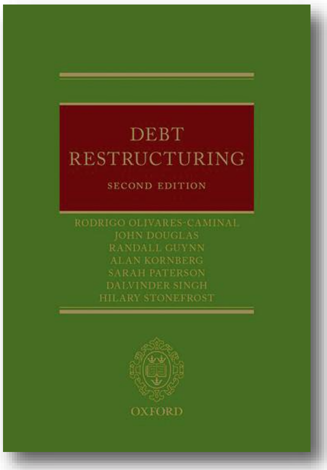
Share your views!

The last world financial crisis has indicated the importance of having adequate restructuring and insolvency laws in place in order to prevent national economics from going to the bottom and to ensure that the companies in distress[1] make effective decisions.

The authors have devoted their work to the modern mechanisms of restructuring, on which the financial crisis of 2008-2009 has left a mark. Structurally, the book is divided into three parts: corporate restructuring; bank resolution; sovereign debt restructuring. That makes this book a sort of desktop guide on the restructuring issues.

In Part I the issues of corporate restructuring in three jurisdictions are considered: the USA, the United Kingdom, and the European Union. The analysis begins with the comparative review of legal positions of directors on the eve of insolvency, the transaction avoidance rules in the US and the UK. Having common law traditions in both countries does not prevent an existence of some considerable divergences on those issues. Furthermore, the authors contemplate the functioning of out-of court and court-supervised restructurings and available restructuring tools under both jurisdictions. It is worth noting that Chapter 11, with its debtor-oriented approach, is unique – we cannot see elsewhere in the world something like that[2]. However, English schemes of arrangements and pre-pack administrations, as well as CVAs, due to the flexibility and pragmatic approach of English courts, also afford to reach



the effective decisions for businesses that are usually made in financial distress. This book describes the advantages and disadvantages of each rescue procedure in both jurisdictions. Moreover, the book provides a sweeping review of judicial practice, which could be extremely valuable for the understanding of the reasoning that drives the decision-making process in both jurisdictions.

Additionally, the authors are addressing the restructuring questions in the European Union context. The EIR Recast and the Brexit process require some rethinking on the cross-border insolvency issues within the European Union. COMI is still a reference point in the updated Regulation and that means that COMI-shifting is still on the present-day agenda, because some jurisdictions are seen as preferable for restructuring[3] purposes. Indeed, the modern law of restructuring is based more on the elaborations of the common law, and some European countries are accordingly amending their insolvency laws so that they should be more competitive in order to prevent insolvency tourism to common law countries[4].

This book also provides guidelines for managing the insolvency of groups of companies and the application of the EC Regulation to a rescue plan. At the end, the authors consider the implications of the UNCITRAL Model Law on Cross-Border Insolvency. They address issues pertaining to the use of Chapter 15 provisions with the purpose of restructuring and the challenges that exist in this area, especially on the issue of the recognition of Schemes of Arrangements in the American bankruptcy courts. The judicial practice review on the key cross-border insolvency aspects will allow the interested reader to monitor the progress made by US courts in the issues considered in this chapter. As for the previous questions, the authors also consider the English approach on the cross-border insolvency issue.

The world financial crisis has inflicted plenty of changes in bank regulation that aim to improve the resilience of the banking system. Exactly those questions are considered in Part II, where the reader can trace the key changes in the US and the UK. At first, the authors acquaint the audience with the regulation of the banking system in both jurisdictions, then they contemplate the role of the financial measures that are taken in order to prevent the crash of the banks, when possible, especially if the rescue of the bank has an importance for the national financial stability, or, alternatively, to ensure an efficient exit of the failed bank from the market. To attain those goals, the regulators in the US, as well as in the UK, could take a wide range of actions *ad libitum* and some of these measures are analyzed in greater details in the book. To complete the picture of bank resolutions, Part II contains a review of the European Bank Resolution Regime with the analysis of the applicable resolution tools within the EU.

Traditionally, the classic literature on insolvency law does not contain a chapter about sovereign debt restructuring. However, this book did not follow the same principle. Part III of the book shows, on a case-study basis, how the modern world handles sovereign debt restructuring, what tools are utilised, what hurdles there exist and in which legal environment these actions are exercised. Of course, in the sovereign debt restructuring issues there is a space for politics. Nevertheless, such instruments like exchange offer, collective action and *pari passu* clauses are widely applied and can be effectively used to successful restructuring.

The author considers the matters of litigation, transactional aspects of sovereign debt restructuring, choice of law and jurisdiction provisions and their implementation. The latter have an enormous role, because this concerns such delicate questions as sovereign immunity. Versatile scrutiny of these issues provides the interested reader with an analytical material, useful in practical terms as well as in academic research.

Conclusion

The lifeblood of corporate reorganisations is and always has been negotiation. This seems to be true. Nevertheless, we should not ignore the role of the legal or, more generally speaking, institutional environment, to which we attribute in this context a legal framework as well as a judicial system.

The authors have scrutinised the institutional environment and, substantially, provided us with a comprehensive practical user guide on restructuring issues, be they tied with a private company, a bank holding or a whole state. This is something different to what we have seen before, but can be credited to this book as a merit. ■

> “THE WORLD FINANCIAL CRISIS HAS INFLICTED PLENTY OF CHANGES IN BANK REGULATION THAT AIM TO IMPROVE THE RESILIENCE OF THE BANKING SYSTEM”

Footnotes

1 Nowadays we can see some warnings about forthcoming crisis, that can be more ruinous then the crisis of 2008-2009. See, for example, Volker Beissenhirtz, Bedingt sanierungsbereit. Restrukturierung, Sanierung und Insolvenzverwaltung im Umbruch, ZInsO 2016, 1778 - 1796 (Ausgabe 36 v. 08.09.2016).

2 However, the academics from the USA often signalise that the times have changed and Chapter 11 is no more consistent with the new reality. See, for example, Douglas G. Baird & Robert K. Rasmussen, 'Antibankruptcy'. 119 Yale L.J. 648 (2010); Rasmussen, Robert K., 'The End of Bankruptcy. Revisited' (August 11, 2016). USC CLASS Research Paper No. CLASS 16-26; USC Law Legal Studies Paper No. 16-28. Available at SSRN: https://ssrn.com/abstract=2821838 or http://dx.doi.org/10.2139/ssrn.2821838.

3 Armour, ‘Who Should Make Corporate Law? EC Legislation versus Regulatory Competition’, 58 (2005) Current Legal Problems 369, 408.

4 See, for example, the reasoning for German insolvency law reform from 2012 Diskussionsentwurf für ein Gesetz zur weiteren Erleichterung der Sanierung von Unternehmen. Available at http://www.bundesgerichtshof.de/SharedDocs/Downloads/DE/Bibliothek/Gesetzesmaterialien/17_wp/Esug/diske.pdf;jsessionid=133DE827F06A5434D599153B6400EA1F.2_cid368?__blob=publicationFile

Country Reports

Autumn 2017

Updates from The Netherlands, France, Russia, Czech Republic

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THE TRUSTEE IS OBLIGED TO REPORT BANKRUPTCY FRAUD TO THE PUBLIC PROSECUTOR

The Netherlands: Multidisciplinary approach to combat bankruptcy fraud; Fraud Consulting hours and the International Expert Centre for Bankruptcy Fraud

Previously in Eurofenix (*Edition 57, Autumn 2014*) I reported that the Minister of Security and Justice of the Netherlands announced in 2012 a recalibration of the Dutch Insolvency Law, among which a multidisciplinary approach to combat bankruptcy fraud.

The Dutch Minister's announcement of a multi-disciplinary approach to combat bankruptcy fraud has lead to a legislative programme that went into force last year, wherein the duty of the trustee is extended to combat bankruptcy fraud.

In that respect the trustee has to investigate and report irregularities (e.g. fraud) to the bankruptcy judge. The Trustee is obliged to report bankruptcy fraud to the public prosecutor when he or the supervisory bankruptcy judge find such action necessary. Additionally, when confronted with irregularities that lead to the conclusion of mismanagement (e.g. fraud) by the director, the trustee is given the authority to request the director's disqualification in civil proceedings. As soon as this request is approved by the court, the director's disqualification (for a maximum period of five years) will be published in a public register. Furthermore, the means to obtain information by the trustee have been reinforced, e.g. the group of persons who are obliged to provide the trustee with all relevant information regarding the bankrupt company is extended (based on case law).

The Dutch Minister's announcement of a multi-disciplinary approach to combat bankruptcy fraud has also led to several initiatives in practice, for example consulting hours about insolvency fraud, during which trustees can address questions (in order to obtain information) to several chain partners (the public prosecutor, the representative of the tax authority, a supervisory bankruptcy judge and an experienced anti-fraud trustee) re combat the fraud (in order to retrieve assets and to report possible fraud).

In the meantime, all Dutch courts have successful initiated such consulting hours, and thus this has become a permanent institute in the Netherlands. These consulting hours – among other consultations offered by the Dutch Courts – are proposed by the Platform 'Bankruptcy Fraud' that we have set up in the Netherlands. This Platform has now founded the 'International Expert Centre for Bankruptcy Fraud' (www.bankruptcyfraude.eu).

This international platform aims to create an international community of professionals who in their profession deal with bankruptcy fraud, such as bankruptcy trustees, forensic accountants, criminal defence lawyers, law enforcement officers, (supervisory) judges, lawyers form the Ministry of Justice, representatives of the tax authority and the police departments.

One of the subjects that will be food for discussion in this Platform will be the *nemo tenetur* principle. In Eurofenix *Edition 57, Autumn 2014* I wrote that the Supreme Court of the Netherlands has rendered two judgements that limit the possibilities to coerce the information duties towards the trustee, based on the *nemo tenetur* principle. These judgements have also an impact on the multidisciplinary approach to combat bankruptcy fraud in general and are relevant for all European Member States.

For questions about the International Expert Centre for Bankruptcy Fraud, you can contact me via wvannielen@recoup.nl ■

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France:
Latest judgements in insolvency matters rendered by the French Supreme court

Individual entrepreneurs

According to a recent case, the liquidator may be able to initiate a lawsuit against an individual entrepreneur debtor for avoiding the prohibition of seizure of his/her personal flat or home.

The court added that this action is possible but only if it can be demonstrated that legal publications are not valid (Cass. com., 15 Nov. 2016).

Transfer of a company as a going concern

A recent case illustrates the conditions in which the transfer of the troubled company or of a branch of its activities as a going concern may be valid.

Under French rules, only interested persons without any direct or indirect link with the company may file an offer (C. com., art. L.642-3). In other words, any affiliates or relatives of a debtor company or its managers are prohibited from purchasing that company. Against that background, the *Cour de cassation* has recently ruled that the *former* manager cannot be qualified as a third party (Cass. com., 8th March 2017).

The French Supreme court has then reminded a very important rule which is subject only to very limited exceptions (e.g, agricultural activity). Indeed, it is important to note that the law provides an exemption from this general ban. This option is however available only in very specific cases, at the request of the public prosecutor, after having heard the views of the creditors acting as "contrôleurs" and only on the basis of a well-motivated judgment.

Emphasis on rights of secured creditors

In several cases delivered by the *Cour de cassation*, secured creditors were granted legal certainty.

Retention of title

Under French rules (C. com., art.L.624-9), the seller of a movable tangible property secured by a retention of title is legally authorised to file for getting back the encumbered asset in case of insolvency proceedings. A legal time limit is however provided by the law: no longer that 3 months after publication of the order for opening insolvency proceedings.

On 9 March 2017, the *Cour de cassation* has considered that such a time limit complies with the law, and in particular with property rights (Com. 9 March 2017).

Validity of an assignment of a financial claim securing a loan concluded during the suspect period

The second decision relates to the secured rights of banks. On 22 March 2017, the *Cour de cassation* ruled that the assignment of a financial claim aiming at securing a loan cannot be qualified properly as a "*payment*".

By way of consequence, the Cour de cassation held that such an assignment cannot be avoided even if it was concluded during the suspect period, meaning before the opening of insolvency proceedings (Com. 22 March 2017). ■

> ANY AFFILIATES OR RELATIVES OF A DEBTOR COMPANY OR ITS MANAGERS ARE PROHIBITED FROM PURCHASING THAT COMPANY

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Russia:
Directors of insolvent companies to face increased liability risks

Russian insolvency law provides that directors (and other controlling persons) can be held liable for the failure to file for insolvency in a timely manner and for actions (or inaction) that prevented full repayment of the creditors' claims.

The amendments to the insolvency law, introduced by the Federal Law No. 266-FZ on 29 July 2017 further systematise rules on directors' liability, elaborate them and provide for effective tools to fight abusive and opportunistic managerial behavior.

The number of claims filed against directors of failed companies in Russia has been on the rise in recent years. While in 2014 there were only 2,090, in 2016 their quantity exceeded 2,800. The rate of satisfied liability claims has also increased from just 4% at the end of 2014 to 20% in the first half of 2017. Despite this trend, the general insolvency recovery rate remains incredibly low, barely surpassing 3%. The need to stimulate efficient resolution of insolvency cases has triggered the reform of rules on directors' liability, which is now specifically addressed in a new Chapter III.2 of the Russian insolvency law.

> THE NEED TO STIMULATE EFFICIENT RESOLUTION OF INSOLVENCY CASES HAS TRIGGERED THE REFORM OF RULES ON DIRECTORS' LIABILITY

Controlling person

Chapter III.2 introduces the term "*controlling person*" (CP), which encompasses any legal or natural person who has the right to give mandatory instructions to the debtor or otherwise determines its actions.

Apart from CEOs, majority shareholders (50%+) and board members, the notion of CP may include persons acting on the basis of a power of attorney, chief accountants, CFOs and those benefitting from illegal or bad faith actions of the mentioned persons. Thus, the law expands the category of potentially liable persons. As part of the reform, Chapter III.2 targets real, as opposed to nominal directors. The latter are given a chance to escape or decrease liability, if they help reveal a real CP (who usually has deeper pockets).

Liability presumption

In certain scenarios, it is presumed that insolvency has resulted from actions (inaction) of CPs. For instance, such a presumption exists when a CP concluded fraudulent or preferential transactions, or when the debtor's accounting information is missing or otherwise distorted.

Under the amended law, in addition to these, the liability presumption has been extended to cover situations of missing documentation (mandatory under securities or corporate law) and incomplete information about the debtor in federal registers. The last point is particularly topical, as the amended insolvency law obliges CEOs to publish a notification in the public register (Fedresurs), whenever the signs of insolvency appear. This new obligation should inform creditors on the debtor's financial difficulties.

Procedural guarantees

Chapter III.2 provides additional procedural guarantees to creditors, who can now file their claims against CPs at any stage of insolvency.

The time limit for bringing such claims is three years (instead of one year) after the discovery of liability grounds, but maximum three years after the end of insolvency proceedings. Such claims can be launched outside formal insolvency proceedings provided that the latter ended or were terminated due to lack of funding ("*insolvent insolvencies*"). ■

Czech Republic: Debt relief under the amended Czech Insolvency Act

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On 1 June 2017, a significant and extensive amendment to the Czech Insolvency Act came into force which brought, among other things, changes to debt relief as a means of resolving insolvency.

The Insolvency Act in its previous manifestation determined that a debtor's debt due to business operations does not prevent the resolution of the debtor's bankruptcy by debt relief providing that the creditors of the corresponding receivables give their consent. Under the amended rules, the default assumption is that the creditors consent unless they expressly inform the court, along with their application for registration of their claims, that they do not agree with the resolution of the bankruptcy by debt relief, giving reasons for their opinion.

Permission of debt relief

Another change concerns the proposal for the permission of debt relief. Under the current rules, the proposal for the permission of debt relief must be written and submitted on behalf of the debtor by an attorney-at-law, notary, court bailiff, insolvency trustee, or accredited person (whereas "*accredited person*" means a legal entity that has been granted accreditation by the Ministry of Justice for providing services in the area of debt relief under the Insolvency Act).

The remuneration for drafting and filing of the proposal for the permission of debt relief (including all related services) is due to the respective attorneys-at-law, notaries, insolvency trustees and court bailiffs. Its amount is limited to CZK 4,000 excluding VAT (CZK 6,000 excluding VAT for joint debt relief for spouses). The remuneration also covers all steps related to submission of the proposal for the permission of debt relief, including consultations with the client as well as removing errors in the proposal. On the other hand, if the proposal for the permission of debt relief is processed by an accredited person (for example, a non-profit organisation in the form of a debt counselor or a civil counselor), the proposal is free of charge for the client. The aforementioned remuneration is not paid in cash by the client, but the party who draws up the proposal enters into the insolvency proceedings with a claim towards the estate.

Under the current rules, the insolvency trustee must withhold from the debtor's monthly payments an amount corresponding to his or her remuneration and reimbursement of his or her expenses for six months (to the detriment of all creditors), and deposit this amount in a special account.

Court hearing

Another substantial change related to debt relief is the replacement of the review meeting in the form of a court hearing by a report on the review. A formal review meeting will now only be convened upon the request of an absolute majority of registered creditors whose receivables (in terms of their amount) account for an absolute majority of all unsecured claims.

If the insolvency court does not approve debt relief, it need not automatically declare the debtor to be bankrupt. Bankruptcy is to be declared only in specific cases as defined in the Insolvency Act.

Finally, the Insolvency Act now explicitly enshrines the combination of a repayment schedule and the monetisation of the asset (or part of it) which may be permitted upon explicit request by the debtor. ■

> "A FORMAL REVIEW MEETING WILL NOW ONLY BE CONVENED UPON THE REQUEST OF AN ABSOLUTE MAJORITY OF REGISTERED CREDITORS"

Applying the Regulation (EU) 2015/848 on insolvency proceedings (Part 2)

Myriam Mailly writes about what insolvency actors need to know before applying the Regulation (EU) 2015/848 of 20 May 2015 (OJ L 141 of 05.06.2015, p. 19-72) on insolvency proceedings (hereafter "EIR 2015 (recast)") entered into force on 26 June 2017

MYRIAM MAILLY
INSOL Europe Co-Technical Officer

"THESE SOFT LAW INSTRUMENTS SHOULD ENCOURAGE AN EFFECTIVE COMMUNICATION BETWEEN COURTS IN INSOLVENCY CASES WITH CROSS-BORDER EFFECTS"

Cooperation

Pursuant to Recital 48 of the EIR 2015 (recast) a proper cooperation between the actors involved in cross-border insolvency proceedings "*implies the various insolvency practitioners and the courts involved cooperating closely, in particular by exchanging a sufficient amount of information (…). When cooperating, insolvency practitioners and courts should take into account best practices for cooperation in cross-border insolvency cases, as set out in Principles and Guidelines on Communication and Cooperation adopted by European and international organisations active in the area of insolvency law, and in particular the relevant Guidelines prepared by the United Nations Commission on International Trade Law (UNCITRAL).*"

If a majority of (if not all) insolvency practitioners appointed in cross-border insolvency proceedings is already familiar with the guidelines published by UNCITRAL, and in particular the explanatory texts entitled "*UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective (2011)*" and "*UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009)*", other texts should however be taken into consideration.

Principles and Guidelines

Indeed, a number of non-binding recommendations exists in the area of cross-border communication and cooperation and is (or can be) used in European jurisdictions (and beyond).

First of all, one should remember that the *European Communication and Cooperation Guidelines For Cross-Border Insolvency* (also well known as 'CoCo Guidelines') (2007) were drafted to provide some substantial and procedural guidance to those involved in main and secondary insolvency proceedings in the context of the EU Insolvency Regulation (2000). These Guidelines were used for example in the *Nortel* case (See CJEU, case C-649/13 and especially the opinion of the Attorney-General).

That is why in 2015, the *EU Cross-Border Insolvency Court-to-Court Cooperation Principles* (also known as the 'EU JudgeCo Principles and Guidelines') have been adopted. These guidelines were specifically drafted to be

used in the context of the EU Insolvency Regulation (recast). The text is divided into two parts: a first one which contains 26 Principles including subjects such as cross-border sales or cross-border reorganisation plans, and a second one, containing 18 Guidelines related to the EU Cross-Border Insolvency Court-to-Court Communications Guidelines, intended to facilitate communications in individual cross-border cases.

Along these "European" guidelines, the *American Law Institute/International Insolvency Institute (ALI-III) Global Principles and Guidelines* (2012) may also be useful. These updated guidelines are suitable for being used in a global context (common law or civil law jurisdictions).

In addition, Guidelines designed mostly for common law jurisdictions have also been published: *The Judicial Insolvency Network Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters* ('JIN Guidelines'). These guidelines aim at facilitating protocols which improve court-to-court communication and cooperation on a case-by-case basis.

These soft law instruments should encourage an effective communication between courts in insolvency cases with cross-border effects. As the EU Insolvency Regulation (recast) is now applicable, let it work! ■

Links relating to this article and other relevant information are available on the INSOL Europe website at: www.insol-europe.org/technical-content/europeaninsolvency regulation

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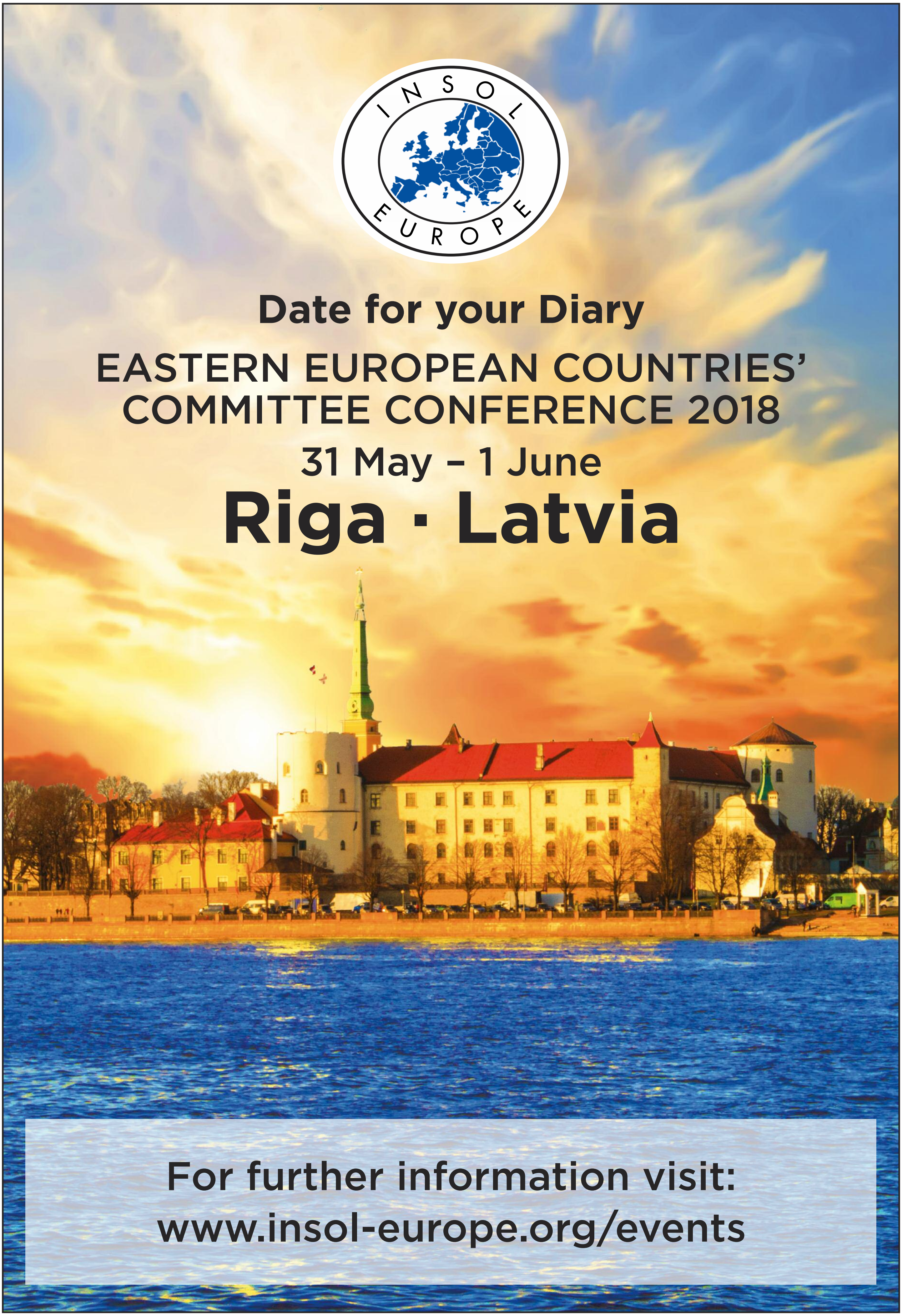
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