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Intra-group financial support in insolvency: Finding the balance between group interest and protection of creditors' rights

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AGENDA

Problem	Transaction avoidance rules in the EU and rescue support in times of financial distress
Solution?	Directive on preventive restructuring frameworks and its regime for rescue financing
Group context	Application of the Directive's rescue financing regime in the context of corporate groups
BRRD	Intra-group financial support and group support arrangements in banking groups
Conclusion	

PROBLEMS

1) Lack of harmonised transaction avoidance and claim subordination rules in the EU → legal uncertainty, increased transaction costs

2) Interim and new financing (rescue financing) is discouraged → despite vast empirical evidence of positive effects of rescue financing*

3) Successful rescue attempts may be prevented due to the above problems

* S. Dahiya, K. John, M. Puri, G. Ramírez, Debtor-in-possession financing and bankruptcy resolution: Empirical evidence, Journal of Financial Economics, Vol. 69, Issue 1, 2003, pp. 259-280; U. Dhillon, T. Noe, G. Ramírez, Debtor-in-possession financing and the resolution of uncertainty in Chapter 11 reorganizations, Journal of Financial Stability, Volume 3, Issue 3, October 2007, pp. 238-260. The World Bank Doing Business Report, 2016, p. 102. See also L. Stanghellini, R. Mokal, C. Paulus, I. Tirado (eds.), Best Practices in European Restructuring. Contractualised Distress Resolution in the Shadow of the Law, Wolters Kluwer, 2018, p. 60.

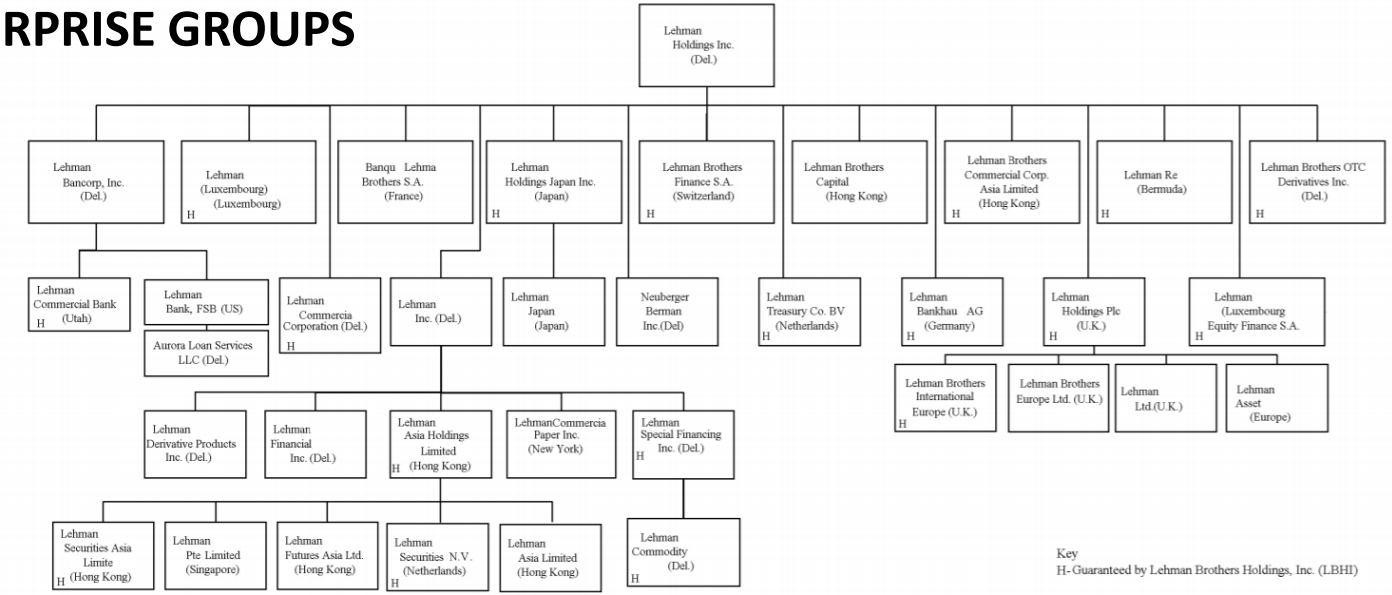
SOLUTION?

Proposal for Directive, 2016 → General approach, 2018 → Final Directive, 2019

1) Partial harmonisation of transaction avoidance rules in the EU: "Interim financing and new financing should therefore be exempt from avoidance actions which seek to declare such financing void, voidable or unenforceable" (Recital 66)

2) Harmonisation of rules on rescue financing, which shall encourage extension of financial support in crisis and saving of viable but distressed companies (Article 17: Protection for new financing and interim financing)

GLOBAL ENTERPRISE GROUPS



Lehman Brothers Corporate Structure, 2007

QUESTIONS

1) Does the Directive's rescue financing support framework extend to financial support provided within corporate groups (intra-group financial support)?

2) What should be the most appropriate regulatory framework for intra-group financial support, to facilitate rescue of viable businesses and prevent abusive behaviour?

METHODOLOGY

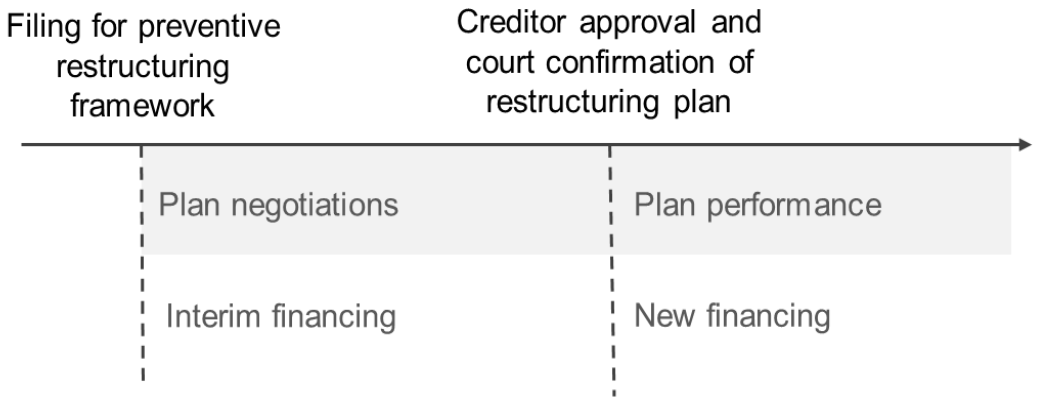
Principles-based approach*

- Equal treatment of creditors
- Optimal realisation of debtor's assets (maximization of the estate value)
- Protection of trust and certainty of transactions

* R. Bork, Principles of Cross-Border Insolvency Law, Intersentia, 2017

DIRECTIVE'S RESCUE FINANCING FRAMEWORK

Articles 2 (definitions), 17



- Protection against avoidance actions
- Protection against civil/administrative/criminal liability for grantors of rescue financing
- Broad category, that includes provision of new money, third-party guarantees, supply of stock, materials, etc.

Proposal for Directive, 2016 → General approach, 2018 → Final Directive, 2019

LIMITATION OF INTRA-GROUP RESCUE SUPPORT

Recital 67 Directive: the Directive does not affect "other grounds for declaring new or interim financing void, voidable or unenforceable, or for triggering civil, criminal or administrative liability for providers of such financing"

!

"Such other grounds could include, among other things, fraud, bad faith, a certain type of relationship between the parties which could be associated with a conflict of interest, such as in the case of transactions between related parties or between shareholders and the company"

LIMITATION UNWARRANTED AND OVERREACHING

1) Rules on avoidance of related party transactions significantly vary among EU MS (but in general related-party transactions are prone to challenge)

2) Shareholder claim subordination rules (Germany, Austria, Sweden, Portugal, Spain, Slovenia, Italy and Poland)

3) Efficient intra-group rescue financing will be discouraged, while discrepancies between applicable rules will remain – **TWO PROBLEMS UNSOLVED**

The insolvency system should "permit an enterprise group member subject to insolvency proceedings to provide or facilitate post-commencement finance or other kind of financial assistance to other enterprises in the group which are also subject to insolvency proceedings"

"The insolvency law should specify that […] post-commencement finance may be obtained from an enterprise group member subject to insolvency proceedings by another group member subject to insolvency proceedings"

BANK RECOVERY AND RESOLUTION

1) Recovery and resolution planning
2) Early intervention powers
3) Resolution tools
4) Resolution financial arrangements
5) Communication and cooperation in the group resolution context

Bank Recovery and Resolution Directive (BRRD)

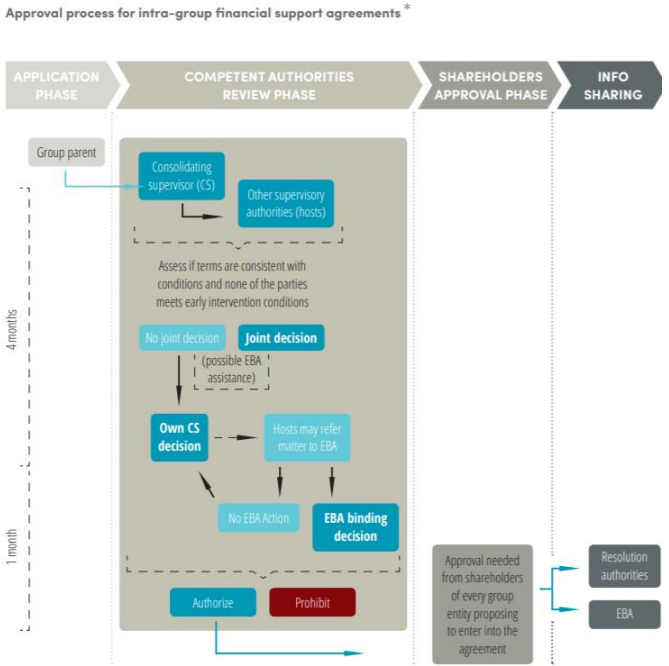
Chapter III (Intra group financial support)

Article 19 (Group financial support agreement): "Member states shall ensure that a parent institution […] and its subsidiaries […] may enter into an agreement to provide financial support"

"Member states shall remove any legal impediment […] to intra-group financial support transactions that are undertaken in accordance with this Chapter"

GROUP FINANCIAL SUPPORT AGREEMENTS UNDER BRRD

1) Different forms (loan, guarantee, collateral)
2) Financial support can be provided downstream, upstream or cross-stream
3) "Pre-emptive transaction" - may only be concluded if none of the parties meets the conditions for an early intervention
4) The procedure for concluding and executing intra-group financial support agreements is rather complicated



* World Bank, Understanding Bank Recovery and Resolution in the EU: A Guidebook to the BRRD, April 2017.

PROS AND CONS OF BRRD's GROUP FINANCIAL SUPPORT FRAMEWORK

Pros	Cons
Acknowledgement of the group context	The procedure for concluding and executing group support agreements is complex, time-consuming, multi-level/multi-actor
Extension of financial support regime to cover intra-group transactions	Ex ante character of support agreements can make them ill fit for a particular crisis situation
Ex-ante preparation (including entering into group support agreements) plays an educational and a disciplining role, encouraging early action	Limitations related to the solvency of the entity providing support (as a general rule, solvency of the providing entity should not be at risk)

"GROUP INTEREST" IN INTRA-GROUP RESCUE FINANCING

1) Elevated approach to an "individual" interest to include group considerations

2) The best interest of the providing entity, including direct and indirect benefits resulting from the stabilisation of the group as a whole and a restoration of the financial soundness of the receiving entity

3) Calculation of risks related to destabilisation of the group as whole resulting from the failure of the (receiving) entity

4) "The analysis should include potential damage to franchise, refinancing and reputation and benefits from efficient use and fungibility of the group's capital resources and its refinancing conditions"

CONCLUSION

1) Extend the Directive's rescue finance protective framework to cover intra-group financial support

2) Recognise at the European level the value and importance of the category of a group interest in the context of intra-group rescue financing

3) Establish an ex ante approval mechanism for certain pre-insolvency group support transactions

4) Adopt a guidance with relevant factors that restructuring experts, creditors and finally courts may take into account when considering and approving intra-group financial support

TAK SKAL DU HAVE!

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Implications of the General Data Protection Regulation during Insolvency Proceedings

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The implications of the GDPR for insolvency practitioners

- Overview of the GDPR
  - Introduction
  - Principles
  - Obligations
  - Exceptions
- Case
  - Sales of customer data

The GDPR

- Twofold aim:
  - Protect natural persons
  - Ensure free movement of personal data

- Key concepts:
  - Personal data (data subject) (*art. 4(1)*)
  - Processing (*art. 4(2)*)
  - Controller (*art. 4(7)*)

Personal data

- Any information
- Relating to
- An identified or identifiable
- Natural person

Source: https://bit.ly/2kIR3Q7

Processing

- Any operation
- Performed on personal data

Such as collection, recording, organization, structuring, storage, adaptation, alteration, retrieval, consultation, use, disclosure, dissemination, alignment, combination, restriction, erasure, destruction

Controller

- The natural or legal person
- Which alone or jointly with others
- Determines
- The purposes and means of the processing of personal data

The insolvency practitioner and personal data

Sources: https://fitsmallbusiness.com/personnel-file/; https://bit.ly/2kEaXvr; https://bit.ly/2lExvfP.

The GDPR - principles

- Data protection principles: (*art. 5(1)*)
  - **Lawfulness**, fairness and transparency
  - **Data minimisation**
  - **Purpose limitation**
  - Accuracy
  - Storage limitation
  - Integrity and confidentiality

Lawfulness of processing (*art. 6*)

- **Consent** (*art. 7*)
- Contract
- Vital interests of a person
- Public task
- **Legal obligation**
- **Legitimate interests**

Data minimisation

- Adequate
- Relevant
- Limited to what is necessary

Purpose limitation

- Specified, explicit and legitimate purposes
- Not processed further in incompatible manner

Insolvency practitioner and data protection principles

The GDPR – obligations (1)

- Accountability (*art. 5(2)*)
  - *Responsible for compliance*
  - *Able to demonstrate compliance*

- Record processing activities (*art. 30*)

The GDPR – obligations (2)

- Provision of information (*art. 13 & 14)*
- Notify in case of data breach (*art. 33*)

Special categories of data

- Special categories of personal data: (*art. 9*)
  - Racial or ethnic origin
  - Political opinions
  - Religious of philosophical beliefs
  - **Trade union membership**
  - Genetic and biometric data
  - **Health**
  - Sex life or sexual orientation
- Processing is forbidden, unless one of the grounds of art. 9(2) GDPR applies

Criminal convictions data

- Personal data relating to criminal convictions (*art. 10*)
  - Criminal convictions and offences
  - Related security measures
- Processing is forbidden, unless it is authorised by EU or MS law providing for appropriate safeguards

Source: http://bestellen.sho.nl/

Applicability GDPR?

- Personal data?
- Processing?

Lawful basis

- Legal obligation?
  - Prescribed by law?
  - Legal task or legal obligation?
- Consent
  - Free, specific, unambiguous
  - Active

Lawful basis (2)

- Legitimate interests
  - Balancing of interests
    - Purpose limitation
    - Lawful basis debtor?
    - Data minimization
    - Information obligations
    - Special categories of data?

"Before I write my name on the board, I'll need to know how you're planning to use that data."

Thank you for your attention!

Questions and suggestions?

Coffee break

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Fourth Session:
Affecting and protecting creditors

Chair: Professor Rolef de Weijs
University of Amsterdam and Houthoff Buruma, The Netherlands

Fairness Standards of the Cross-class Cram-down Mechanism in the Restructuring Directive

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Summary

- Justification for a cross-class cram-down mechanism
- The fairness of the plan: APR vs. EU RPR
- A proposal for a different model introduced
- Elements of the Directive that are consistent with the suggested model
- Elements of the Directive which create an obstacle to the suggested model

The cross-class cram-down: justification and functioning

- The need for a cram-down in restructuring: veto rights and hold-out problems
- One solution: the majority rule
  - The majority rule works well if: information and homogeneity of interests → classes of claimants
- The majority rule does not work across different classes → the need for a cross-class cram-down = the class is bound not because the majority has so decided but because of **the court's action**
- Under which conditions? The court must verify that the plan is fair. When is a plan fair?

The Fairness Issue: APR vs. EU RPR

- The Draft Directive 2016 and the APR = the plan is binding because it respects the negotiated pre-existing entitlements
- The Council of the EU and the EU RPR = it is sufficient for the plan to respect only partially the applicable priority rules
- The final compromise: MSs can choose APR or EU RPR
  - preference for the EU RPR;
  - the no more than 100% rule;
  - the non-discrimination rule and the APR;
  - no reference to a separate treatment of secured creditors (≠ US)

EU RPR [Art. 11, par. 1, lett. (c)]	APR (Art. 11, par. 2)
"dissenting voting classes of affected creditors are treated at least as favorably as any other class of the same rank [non-discrimination rule] and more favorably than any junior class [EU RPR]"	"the claims of affected creditors in a dissenting voting class are satisfied in full by the same or equivalent means where a more junior class is to receive any payment or keep any interest under the restructuring plan"

The APR

- Strong legal tradition in the US
- After 1978: a normative negotiation framework

PROS	CONS
Complies with the CBT: honours negotiated entitlements and avoids opportunistic use of bankruptcy	Costly and time consuming because of the valuation problem
Protects the market of credit by respecting priorities	It wipes out essential shareholders
Improves decision-making efficiency because it helps to align risk-bearing with benefits-sharing	It is a day of reckoning → the US RPR ($\neq EU\ RPR$)

The EU RPR

ARGUMENTS IN FAVOUR	But…
Less costly because no valuation of the firm RV	It requires to compare the treatment assigned to different types of claimants (e.g. SH and creditors)
SHs may retain their interests and be involved in the restructuring	Wealth-transfer and opportunistic behaviour, moral hazard, financial leverage. Inconsistent with corporate law rules (limited liability)
Plan confirmation more likely (especially when strong presence of preferential creditors)	True, but the problem is only in those systems where you can cram down only the minority of the classes (≠ all minus one like in the U.S.)
Correct because the debtor not yet insolvent	True, but debt's haircut and discharge need safeguards
Correct because it is flexible and restructuring needs to balance different interests	It lacks a solid legal basis and is contradictory
	Unpredictable, brings uncertainty, forum shopping

The solution to the contrast

- RPR: probably right reasons, wrong mechanism
- The problem: the decision of <u>whether to alter the pre-existing entitlements</u> falls to the parties (**self-regulation**)
- Ex: Debtor owes 80 to senior, 50 to junior. LV= 20, RV=100

Liquidation	Reorganization under APR	Reorganization under RPR
Senior=20	Senior=80	Senior=80
Junior=0	Junior=20	Junior=11
Sh=0	Sh=0	Sh=9

Why let the parties decide on this?

Under the EU RPR, if this is the result of hold-up behaviour, the court is not able to block the plan (but is forced to confirm it)

- Proposed model: APR applied in principle (*default protection rule*), subject to *alterations* under the control of the court
- The decision on the alteration should be scrutinized by the court (**public regulation**).
- Alteration subject to *evidentiary burdens* (Casey) → strict *duty to explain*
- No hold-up threats + efficient
- If the burden of proof is met, the court is able to cram down the dissenting class
- Importance of procedural rules and judicial oversight in debt restructuring
- Case-by-case valuation. Large corps vs SMEs. Entrepreneur-SH vs investor-SH. Competing plans issued?

Examples

1) the SHs are needed for the maximization of the RV

- Tollenaar: SH's 'soft variables' no part of the RV. True.
- Same result: the decision falls to **the court**

2) overall normative framework: requirement that the majority of the classes approve the plan [impossibility to cram down all the classes (minus one)] (wrong from a theoretical point of view): hold-out powers are added to the game → compliance with APR is problematic → Court's intervention

The Directive's consistency with the model

- **Recital 56**: MSs "should be able to derogate from the absolute priority rule, for example where it is considered fair that equity holders keep certain interests under the plan despite a more senior class being obliged to accept a reduction of its claims or that essential suppliers covered by the provision on the stay of individual enforcement actions are paid before more senior classes of creditors".
- **Recital 58**: "equity holders of SMEs that are not mere investors, but are the owners of the enterprise and contribute to the enterprise in other ways [by providing "soft variables"], such as managerial expertise, might not have an incentive to restructure under such conditions. For this reason, the cross-class cram-down should remain optional for debtors that are SMEs". **Why making optional the entire cross-class-cram-down and not only the APR?**
- **Recital 59**: " the restructuring plan should, for the purposes of its implementation, make it possible for equity holders of SMEs to provide non-monetary restructuring assistance by drawing on, for example, their experience, reputation or business contacts".

- **Article 11, par. 2**: MSs may introduce provisions derogating from the APR "where they are necessary in order to achieve the aims of the restructuring plan and where the restructuring plan does not unfairly prejudice the rights or interests of any affected parties".

- These provisions show that the Directive already provides for a model that is fair and flexible at the same time → there is no need for the EU RPR

The Directive's obstacles to the model: some misconceptions (part 1)

- **Recital 57**: "Member States that exclude equity holders from voting should not be required to apply the absolute priority rule in the relationship between creditors and equity holders".
- Confusion of two different levels = to give the right to vote as a tool to make the plan binding vs the vertical order of priorities. They cannot be interdependent.
- Absurd consequences in terms of coherency and fairness
- **Recital 57**: "restructuring measures that directly affect equity holders' rights, and that need to be approved by a general meeting of shareholders under company law, are not subject to unreasonably high majority requirements…"
- Inclusive vs exclusive models to impair SHs' rights
- Lowering the threshold not enough; SHs have hold-out powers

(Part 2)

- **Article 9**: debtors *shall* have the right to submit a plan vs creditors *may* have the right to submit a plan
- **Article 11**: cross-class cram-down available *upon the proposal of the debtor* or *with the debtor's agreement* (this *may* be limited to cases where debtors are SMEs)
- **Recital 53**: if debtor is a legal person: debtor = management board or a certain majority of SHs.
- Misconception: cross-class cram-down should benefit the in-the-money claimants, not the debtor (see US)

→ Hold-out problems

Thank you!

Trade Credit vs. New / Interim Financing in the Context of the Preventive Restructuring

Judge Flavius-Iancu Motu
Specialized Court of Cluj, Romania

Dr. Andreea Deli-Diaconescu
National Institute for Training Insolvency
Insolvency Practitioners, Romania

- **Directive 2019/1023: "FINANCIAL ASSISTANCE":**
- Although not defined in Art. 2, the concept of 'financial assistance' "*should be understood in a broad sense, including the provision of money or third-party guarantees and the supply of stock, inventory, raw materials and utilities, for example through granting the debtor a longer repayment period*" (Recital 66) => includes trade credit;
- Art. 2, para 8: 'interim financing' means any new financial assistance, provided by an existing or a new creditor, that includes, as a minimum, financial assistance during the stay of individual enforcement actions, and that is reasonable and immediately necessary for the debtor's business to continue operating, or to preserve or enhance the value of that business;
- Art. 2, para. 7: 'new financing' means any new financial assistance provided by an existing or a new creditor in order to implement a restructuring plan and that is included in that restructuring plan.

- **INTERIM FINANCING:**

- Recital (68) *"When interim financing is extended, the parties do not know whether the restructuring plan will be eventually confirmed or not. Therefore, Member States should not be required to limit the protection of interim finance to cases where the plan is adopted by creditors or confirmed by a judicial or administrative authority. To avoid potential abuses,* ***only financing that is reasonably and immediately necessary for the continued operation or survival of the debtor's business or the preservation or enhancement of the value of that business pending the confirmation of that plan should be protected****. Furthermore, this Directive should not prevent Member States from introducing an ex ante control mechanism for interim financing. [...] An ex ante control mechanism for interim financing or other transactions could be exercised by a practitioner in the field of restructuring, by a creditor's committee or by a judicial or administrative authority. Protection from avoidance actions and protection from personal liability are minimum guarantees that should be granted to interim financing and new financing. However, encouraging new lenders to take the enhanced risk of investing in a viable debtor in financial difficulties could require further incentives such as, for example, giving such financing priority at least over unsecured claims in subsequent insolvency procedures."*

- **INTERIM FINANCING**:
- Suppliers bound by contracts containing *IPSO FACTO* clauses:
- Art. 7 para. 5: *"Member States shall ensure that creditors are not allowed to withhold performance or terminate, accelerate or, in any other way, modify executory contracts to the detriment of the debtor by virtue of a contractual clause providing for such measures, solely by reason of:*
- *(a) a request for the opening of preventive restructuring proceedings;*
- *(b) a request for a stay of individual enforcement actions;*
- *(c) the opening of preventive restructuring proceedings; or*
- *(d) the granting of a stay of individual enforcement actions as such*."

- **INTERIM FINANCING**:

- Suppliers bound by **'essential' executory contracts** (Art. 7 para. 4): *"Member States shall provide for rules preventing creditors to which the stay applies from withholding performance or terminating, accelerating or, in any other way, modifying essential executory contracts to the detriment of the debtor, for debts that came into existence prior to the stay, solely by virtue of the fact that they were not paid by the debtor. 'Essential executory contracts' shall be understood to mean executory contracts which are necessary for the continuation of the day-to-day operations of the business, including contracts concerning supplies, the suspension of which would lead to the debtor's activities coming to a standstill. The first subparagraph shall not preclude Member States from affording such creditors **appropriate safeguards** with a view to preventing unfair prejudice being caused to such creditors as a result of that subparagraph. Member States may provide that this paragraph also applies to non-essential executory contracts."*

- Suppliers bound **by 'essential' executory contracts containing *ipso facto* clauses**: (Art. 7 para. 5): *"Member States shall ensure that creditors are not allowed to withhold performance or terminate, accelerate or, in any other way, modify executory contracts to the detriment of the debtor by virtue of a contractual clause providing for such measures, solely by reason of: (a) a request for the opening of preventive restructuring proceedings; (b) a request for a stay of individual enforcement actions; (c) the opening of preventive restructuring proceedings; or (d) the granting of a stay of individual enforcement actions as such."*

- **INTERIM FINANCING**:
- Recital (40) *"When a debtor enters an insolvency procedure, some suppliers can have contractual rights, provided for in so-called ipso facto clauses […]. Ipso facto clauses could also be triggered when a debtor applies for preventive restructuring measures. Where such clauses are invoked when the debtor is merely negotiating a restructuring plan or requesting a stay of individual enforcement actions or invoked in connection with any event connected with the stay, early termination can have a negative impact on the debtor's business and the successful rescue of the business. Therefore, in such cases, it is necessary to provide that creditors are not allowed to invoke ipso facto clauses which make reference to negotiations on a restructuring plan or a stay or any similar event connected to the stay".*
- Recital (41) *"Early termination can endanger the ability of a business to continue operating during restructuring negotiations, especially when contracts for essential supplies such as gas, electricity, water, telecommunication and card payment services are concerned. Member States should provide that creditors to which a stay of individual enforcement actions applies, and whose claims came into existence prior to the stay and have not been paid by a debtor, are not allowed to withhold performance of, terminate, accelerate or, in any other way, modify essential executory contracts during the stay period, provided that the debtor complies with its obligations under such contracts which fall due during the stay. Executory contracts are, for example, lease and licence agreements, long-term supply contracts and franchise agreements."*

- **INTERIM FINANCING**
- => UNLESS the executory contracts contain 'pay on delivery' / 'cash on delivery' clauses:
- => (at least) the 'essential' executory contracts are "locked" and suppliers are bound to perform, thus offering the debtor compulsory (?) 'financial assistance'
- => *ipso facto* clauses are rendered inefficient. As a consequence, the 'non essential' suppliers are bound to perform, thus offering the debtor compulsory (?) 'financial assistance'
- What are the *'**appropriate safeguards** with a view to preventing unfair prejudice being caused to such creditors'* ?

- **UNCITRAL LEGISLATIVE GUIDE** (Part Two, para. 101): Suppliers of goods and services would only continue to supply those goods and services to the insolvency representative on credit if they had a reasonable expectation of payment ahead of pre-commencement unsecured creditors. In some cases, such a priority is afforded on the basis that the new credit or lending is extended to the insolvency representative, rather than to the debtor, and thus becomes an expense of the insolvency estate.
- **Directive 2019/1023** did not embrace the approach 'the new credit or lending is extended to the insolvency representative'; at most, an *ex ante* control is set in place.
- => the 'appropriate safeguards with a view to preventing unfair prejudice being caused to such creditors' = the *ex ante* control ? What other safeguards ?
- the appropriate safeguards ≠ super-priority ?

- **INTERIM FINANCING**:
- Art. 17 para. 4: *"Member States may provide that grantors of new or interim financing are entitled to receive payment with priority in the context of subsequent insolvency procedures in relation to other creditors that would otherwise have superior or equal claims*" = super-priority
- Providers of interim cash financing vs. suppliers bound by executory contracts: which one has priority ?
- Our answer: it's complicated
- a) The Directive seems to qualify only 'voluntary' granting of financing / as 'financial assistance', *per a contrario* placing the performance of a supplier bound by an executory contract outside the scope of 'financial assistance'
- b) If the supplier bound by an executory contract performs under *the same conditions* as before, where is the 'assistance' ?
- => interim financing cash suppliers (seem to) have priority over suppliers bound by executory contracts

- **INTERIM & NEW FINANCING**: EQUAL PROTECTION

Recital (66) *"The success of a restructuring plan often depends on whether financial assistance is extended to the debtor […]. Interim financing and new financing should therefore be exempt from avoidance actions which seek to declare such financing void, voidable or unenforceable as an act detrimental to the general body of creditors in the context of subsequent insolvency procedures."*

Recital (67) *"National insolvency laws providing for avoidance actions of interim and new financing or providing that new lenders may incur civil, administrative or criminal sanctions for extending credit to debtors in financial difficulties could jeopardize the availability of financing necessary for the successful negotiation and implementation of a restructuring plan. This Directive should be without prejudice to other grounds […] Such other grounds could include, among other things, fraud, bad faith, […] conflict of interest […], and transactions where a party received value or collateral without being entitled to it at the time of the transaction or in the manner performed."*

NEW FINANCING

❑ **Directive 2019/1023**

- Recital (68): *"However, encouraging new lenders to take the enhanced risk of investing in a viable debtor in financial difficulties could require further incentives such as, for example, giving such financing* ***priority*** *at least over unsecured claims in subsequent insolvency procedures*"
- Article 17 para. 4: *"Member States may provide that grantors of new or interim financing are entitled to receive payment with* ***priority*** *in the context of subsequent insolvency procedures in relation to other creditors* ***that would otherwise have superior*** *or equal claims*."

❑ **UNCITRAL, Part Two, para 101 – 104**

- administrative expense;
- super-priority;
- priming lien.

NEW FINANCING

- **The World Bank Principles for Effective Insolvency and Creditor/Debtor Rights System (Revised, 2015)**

- B3.2: *"Encourage lending to, investment in, or recapitalization of viable financially distressed enterprises"*;
- C9.2: *"Subject to appropriate safeguards, the business should have access to commercially sound forms of financing, including on terms that afford a repayment priority under exceptional circumstances, to enable the debtor to meet its ongoing business needs."*

IS THERE ANY DIFFERENCE IN THE LEGAL TREATMENT OF *INTERIM FINANCING* AS OPPOSED TO *NEW FINANCING*?

- The moment of granting;
- The restructuring framework / stage of the proceedings and the bodies authorized to approve the granting;
- The foreseeable effects in the overall operations of the debtor;
- The extent to which the key-objective "*recognition of existing creditor rights and establishment of clear rules for ranking priority claims*" is affected.

FINANCING CREDITOR'S POSITION AS OPPOSED TO TRADE CREDIT SUPPLIERS

- *Interim financing* is granted during the : on-going negotiations / preventive restructuring frameworks when the debtor enjoys the stay of the individual enforcement actions => the debtor's recovery chances are *uncertain*
- The confirmation of a restructuring plan => *higher certainty* of the debtor's recovery chances than during the previous stage(s)
- *Post confirmation:* the mechanisms allowing the survival of the debtor's business are defined and become operational;
- The difference between the *voluntary* granting of financing and the "*mandatory*" providing the financing in performing an executory ongoing contract;
- **new financing, if granted => the new financer's secured position over the prior secured creditors.**

PRIORITY OVER THE PRIOR SECURED CREDITORS

- The funding granted in the past by a creditor with a security interest in a specific asset or in a functional set of assets is already spent. Its recovery requires the granting of new financing, secured with "dynamic" assets ("core assets" => going-concern value);
- "The valuation" of the security *before* and *after* the granting of the financing;
- Purpose: to enhance the "entropy" of the collateral(s) as a business operational ensemble of assets;
- Analysis: in the absence of new financing, the prior secured creditor will only obtain the **liquidation value of the collateral**, whereas if new financing is granted, the preior secured creditor has a higher chance of recovering the **market value of the collateral**;
- **The baseline**: the value of the collateral if already affected by the absence of an adequate **going-concern value**.
- **Two conditions** set out by Directive 2019/1023 by reference to the applicable definition of "interim financing", and "new financing", *mutatis mutandis*: *"is reasonable and immediately necessary for the debtor's business to continue operating, or to preserve or enhance the value of that business*".

CONCLUSIONS

- There are certain situations in which the difference between financial assistance and trade credit is difficult to grasp. This is why Directive 2019/20123 allows a *lato sensu* definition; the appropriate instrument intended to make the difference is the **visualization of effects**;
- The *super-priority* of financial assistance and trade credit or *pari passu*?

pros and *cons*

- In all cases, fresh financing must be reasonable and immediately necessary for the business to continue to operate. The coordinates encompassing the super-priority of fresh financing are: **fairness** and **rationality**;
- "Plan B" solution (*next-best-alternative scenario in the absence of a plan*) = granting an interim financing for a viable business transfer (preventing a piecemeal dismemberment) simultaneously with the commencement of liquidation?
- Other applications? Still, the exclusion principle of Pauli ...

EQUILIBRIUM IN RESTRUCTURING FRAMEWORKS

Lunch

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Fifth Session:
Administering the restructuring process

Chair: Luigi Lai
National Information
Processing Institute, Poland

Mediation in restructuring and Insolvency

Prof. Reinout Vriesendorp

Leiden University/De Brauw Blackstone Westbroek (The Netherlands)

Gert-Jan Boon

Leiden University, The Netherlands

Agenda

1. Mediation: what's the role in restructuring and insolvency
2. Mediation at the EU stage
3. Singapore Convention on Mediation
4. Research project design
5. Project governance
6. Framework for study of mediation
7. Next steps

1 Mediation: what's the role in restructuring and insolvency

Mediation seems on the rise:

1. In US it has become 'common' practice

2. In EU context relevance of mediation is in development
    1. EU legislator
    2. National legislators
    3. Recommendations by ELI Business Rescue Project

3. INSOL International's College of Mediation (cross-border cases)

2 Mediation at the EU stage (I)

Commission Recommendation on a new approach to business failure and insolvency (2014)

- Recital 17

  '(…) to avoid unnecessary costs and reflect the early nature of the procedure, debtors should in principle be left in control of their assets and the appointment of a mediator or a supervisor should not be compulsory, but made on a case-by-case basis.'

- Recommendation 9(a)

  'The appointment of a mediator or a supervisor by the court should not be compulsory, but rather be made on a case by case basis where it considers such appointment necessary:
  (a) in the case of a mediator, in order to assist the debtor and creditors in the successful running of negotiations on a restructuring plan; (…)'

2 Mediation at the EU stage (II)

Proposal for the EU directive on restructuring an insolvency (2016) (Proposal 2016)

- Reiterating the position of the Commission in the Recommendation:

  Recital 18

  '(…) The appointment of a restructuring practitioner, whether a mediator supporting the negotiations of a restructuring plan or an insolvency practitioner supervising the actions of the debtor, should not be mandatory in every case, but made on a case-by-case basis depending on the circumstances of the case or on the debtor's specific needs. (…).'

- Article 25(1)

  'Member States shall ensure that mediators, insolvency practitioners and other practitioners appointed in restructuring, insolvency and second chance matters receive the necessary initial and further training in order to ensure that their services are provided in an effective, impartial, independent and competent way in relation to the parties.'

2 Mediation at the EU stage (III)

What is a mediator?

- Proposal 2016: No definition of mediator.
- Impact assessment 2016, Glossary:

  Mediator = "A person who **assists the debtor and creditors in negotiations on a restructuring plan**".
- Article 2(15) of Proposal 2016

  Definition of the practition in the field of restructuring (PIFOR):
  '(…) means any person or body appointed by a judicial or administrative authority to carry out one or more of the following tasks:

  (a) to **assist the debtor or the creditors in drafting or negotiating a restructuring plan;**

  (b) to supervise the activity of the debtor during the negotiations on a restructuring plan and report to a judicial or administrative authority;

  (c) to take partial control over the assets or affairs of the debtor during negotiations.'

2 Mediation at the EU stage (IV)

And the 'mediator' disappears …

- Supporters
  From the Commission public consultation it follows that support for involving a mediator on a case-by-case basis was supported, in particular, by:
  - Businesses and business support organisations
  - Credit and financial institutions
  - Most EU Member States (AT, BE, EE, DE, EL, HU, IE, FR, FI, IT, LV, LT, PL, SK, SI)

- But, here came the critiques
  - **Council**
    - During Council Working Group Discussions, EU Member States discuss deletion of 'mediator'
    - As of 15 May 2018, the 'mediator' is deleted from draft texts
  - **EP** supports inclusion of mediation for a long time, but is deleted as of 24 September 2018 in its draft report

2 Mediation at the EU stage (V)

Why was it removed?

- **Council discussions:**
  - Swedish delegation:
    "We suggest that the word "mediator" is deleted, in accordance with the working group discussions"
  - UK delegation:
    "Mediators are not subject to mandatory professional regulation in the UK and we would prefer the reference to mediators to be removed."
- **PIFOR** is considered an umbrella including the mediator
  - Note of explanation finds requirements for PIFOR 'too descriptive', and prefers a principle-based approach.
  - Leaving room to the interpretation of Member States
- **Compromise**:
  - introduce general principles with a margin of interpretation for Member States

2 Mediation at the EU stage (VI)

What could the consequences be?

- Clear definition of a 'mediator' is missing
- Mediation is mostly left to the interpretation of Member States
- Article 2(12) states on the PIFOR:
  - 'practitioner in the field of restructuring' means **any person or body appointed by a judicial or administrative authority** to carry out, in particular, one or more of the following tasks:
    (a) **assisting** the debtor or the creditors in drafting or **negotiating a restructuring plan**; (…)'

2 Mediation at the EU stage (VII)

Appointed mediator; an oxymoron?

Voluntary nature is essential element of mediation

- Possible approaches:

1. Judge suggests mediation, leaves choice of mediator to the parties
2. Mediators are chosen by a debtor, creditors or by a creditors' committee from a list or a pool that is pre-approved by a judicial or administrative authority
    - (Recital 88 of the Directive)
3. Parties suggest a mediator of their choice, judge appoints if eligible

3 Singapore Convention on Mediation

Recitals:

- Value for international trade of mediation as a method for settling commercial disputes with assistance of a third person to settle the dispute amicably
- Mediation is increasingly used in international and domestic commercial practice as an alternative to litigation
- Use of mediation results in significant benefits, such as reduction of termination of commercial relationships, facilitation of administration of international transactions by commercial parties and savings in the administration of justice by States
- Establishment of a framework for international settlement agreements resulting from mediation (acceptable to States with different legal, social and economic systems) would contribute to the development of harmonious international economic relations

Definition:

- “Mediation” means a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons (“the mediator”) lacking the authority to impose a solution upon the parties to the dispute.

4 Research project design

Aim

To make an inventory of available legislation and to design (elements of) a legal framework regarding the use of mediation as a tool to encourage parties to reach alternative solutions for businesses in financial distress. Such a framework would focus primarily on:

- voluntary, out-of-court, restructurings as well as pre-insolvency proceedings within court led restructurings;
- proceedings with elements of cross-border issues.

Structure

- Stage 1: Development of a **questionnaire**
- Stage 2+3: 10-15 **national** inventory reports + **international** inventory report
- Stage 4: **Report on mediation** in restructuring and insolvency

5 Project governance

Project Team:

1. Prof. Reinout Vriesendorp
2. Erik Selander
3. Gert-Jan Boon
4. Defne Tasman

Advisory Committee

1. Jan Adriaanse
2. Jasnica Garasic
3. Alan Gropper
4. Stephan Madaus
5. Mincke Melissen
6. Nicoleta Mirela Nastasie
7. Ignacio Tirado
8. Jean-Luc Vallens
9. Bob Wessels

National Correspondents

A group of national correspondents will be involved in preparing inventory reports

6 Framework for study of mediation (I)

Study of international instruments dealing with mediation, mediators and/or actors in insolvency:

1. UNCITRAL Conciliation Rules, 1980
2. UNCITRAL Legislative Guide on Insolvency Law, Part II, 2004
3. Directive 2008/52/EC of 21 May 2008 on certain aspects of mediation in civil and commercial matters
4. INSOL Europe Insolvency Office Holder Project, 2014
5. INS0L Europe Restructuring and Turnaround Professional Project, 2015
6. European Law Institute, Instrument on Rescue of Business in Insolvency Law, 2017
7. Directive (EU)2019/1023 of 20 June 2019 on Restructuring and Insolvency

6 Framework for study of mediation (II)

- **Introductory questions**
  - Existing legal framework for mediation
- **When and how to**
  - commence mediation
  - involve a mediator
- **Selection, appointment or involvement, and removal of mediator**
  - Licensing of mediators
  - Liability/insurance
  - Assignment with a mediator
  - Informing third parties of mediation
  - Duty/right to be heard (in legal proceedings)
  - Remuneration
  - Costs and expenses
  - Accountability of a mediator
  - Replacement/removal of a mediator

6 Framework for study of mediation (III)

- **Process of mediation**
  - Effects of commencing mediation on involved/third parties
  - Access to information by mediator
  - Settlement agreement
  - Supervision/oversight of mediator
- **Roles & responsibilities**
  - Powers of a mediator
  - Duties of a mediator
  - Relation of mediator and third parties (and vice versa)
  - Communication by/with mediator (internal and external)
- **Professional standards**
  - Education
  - Professional skills/qualifications
  - Professional ethics
  - Disciplinary action against a mediator

6 Framework for study of mediation (IV)

- **Post-mediation**
  - Admissibility of evidence/information in other proceedings
  - Termination of mediation
  - Enforcement of (mediation) settlement agreement

- **Cross-border mediation**
  - Recognition
  - Enforcement
  - Mediators in cross-border settings

7 Next steps (I)

- Preparing questionnaire
- National Correspondents
- But first …..

7 Next steps (II)

- Preparing questionnaire
- National Correspondents
- But first …..

  ….. questions, remarks, suggestions and other ideas

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HARMONISATION OF INSOLVENCY AND RESTRUCTURING LAWS IN THE EU

Financial Distress Resolution and the Role of Insolvency Practitioners: Unearthing Best Practices and Crystallizing Regulation

Animesh Khandelwal
Surbhi Kapur
Insolvency and Bankruptcy Board of India

Background

- Lord Acton's reflection, *"**power tends to corrupt, and absolute power corrupts absolutely**"*
- **Creative destruction** is an important feature of well-functioning economies
- **Evolving role** of IPs in the EU as well as other jurisdictions vis-à-vis the new norms of preventive restructuring.

Overview

The new EU Directive on preventive restructuring frameworks[1]		
published in the *Official Journal of the European Union*	26 June 2019; and	entered into force on 16 July 2019.

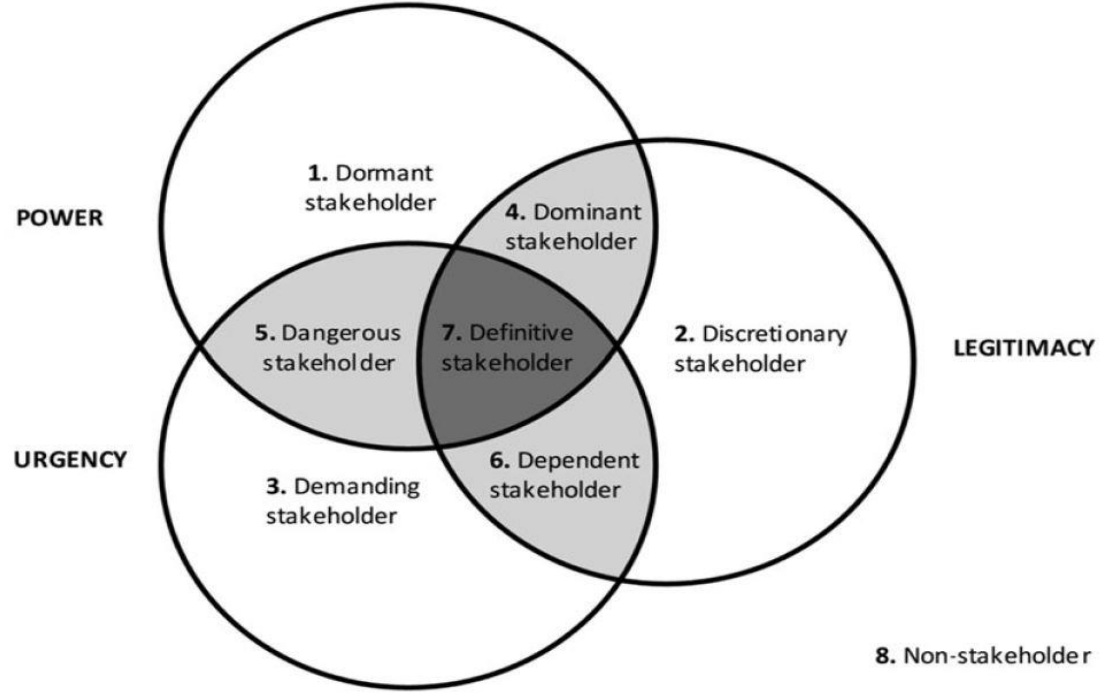
Objective

- Harmonize the laws and procedures of EU member states concerning preventive restructurings, insolvency and the discharge of debt.
- first major step in the process of harmonizing Europe's diverse insolvency laws.

Stakeholders: An Invasive Perspective

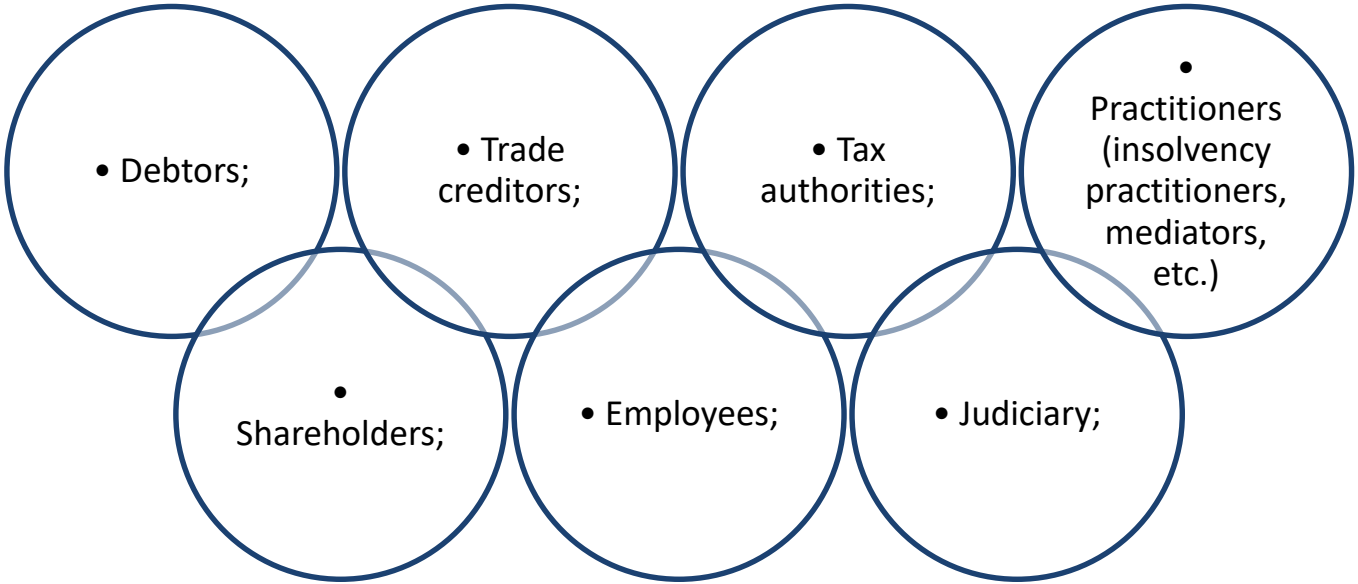
- Two (not mutually exclusive) types of stakeholders:
  - (i) Individuals and groups- affect the drafting process of a legislative measure on insolvency law,
    - The Council, the Parliament and the Member States; and
  - (ii) Individuals and groups- affected by a legislative measure on insolvency.
    - Companies, employees, insolvency practitioners and judges

Qualitative Classes of Stakeholders (Matchell, Agle and Wood)



Discretionary stakeholder (attribute: legitimacy)

- Legitimacy for various stakeholders is based on their direct involvement in insolvency and restructuring proceedings, as is the case for



Definition of IP as per the Directive

"Any person or body

Appointed by a judicial or administrative authority

To assist the debtor and its creditors

To draft or negotiate a restructuring plan,

Supervise the activity of the debtor during negotiations on a restructuring and/or

Take partial control over the affairs and assets of the debtor"

Need for Regulation of the Insolvency Practitioners

Lack of trust- erosion of trust of the insolvency process

Ensure- competence and impartiality

Protect consumers- information asymmetry

Entry barriers- ensure Standards and quality

Great responsibility- balanced by proper regulation

Positive externality of better utilisation of judicial time

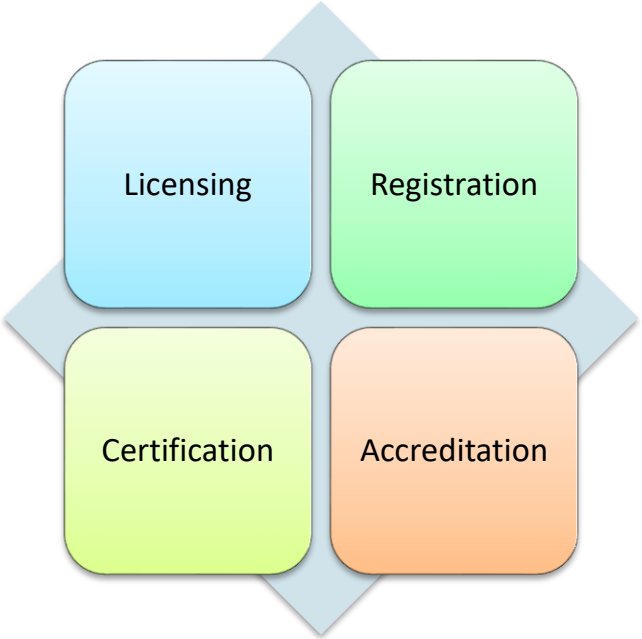
Mitigation of risks- collusion between the CD and the IP or by FCs

Role of the State (Government) and the regulatory or supervisory bodies

:Consumer protection

- Competition- efficiency gains
- Performance requirements
- Compliance with legal apparatus

Addressing the entry requirements



Competence, ethics and integrity

Straightforward and honest

- professional and business dealings

Objectivity –should not allow overriding his business or professional judgment

- Bias;
- Conflict of interests;
- Undue influence of others;

The Regulation of Insolvency Practitioners

A Conspectus of Emerging Issues in Different Jurisdictions

United Kingdom

Insolvency is a regulated profession under:

- the Insolvency Act 1986 (as amended),
- the Insolvency Rules 1986 (as amended), and
- the Enterprise Act 2002 (as amended).

Only a licensed insolvency practitioner (IP) may be appointed in relation to formal insolvency procedures for individuals and businesses.

Only a licenced IP can act as:

- a liquidator,
- an administrative receiver or administrator (in respect of company insolvencies), or
- a trustee in bankruptcy (in respect of personal insolvencies)

Availability of preventive restructuring procedures

The procedures available in the UK include:	1)Schemesof Arrangement
	2)Administration (including pre packaged administration)
	3)Company Voluntary Arrangements
	4)Consensual agreements

United Kingdom: Regulatory authorities

- Secretary of State for Business Innovation and Skills Department (BIS)
- Recognised Professional Bodies (RPBs)
- The Institute of Chartered Accountants in England and Wales- Accountants
- Lawyers: Law Society of England and Wales

India

- The Insolvency and Bankruptcy Code, 2016- two-tier regulatory regime- Sections 17 (2) (e), 18, 23(1), (2), 206
- Pre- registration and Post-registration conduct
- Code of Conduct
- Regulation 7(2) – IBBI (Insolvency Professionals) Regulations, 2016- First Schedule
- IBBI (Model Bye laws and Governing Board of IPA) Regulations, 2016

Enforcement and Adjudicatory Mechanisms

- Orders by the Disciplinary Committee- IBBI
- Orders by the Adjudicating Authority
  - *Advance Power infra Tech Limited ;*
  - *Tirupati Jute industries Limited;*
  - *Madhucon Projects Limited;*
  - *Hahnemann Housing and Development Private Limited;*
  - *Apna Scientific Supplies Pvt. Ltd.*
  - *Shivam Water Treaters Pvt. Ltd.*

Remuneration of IP

- *Section 208(2)(a)* of the Code stipulate that an IP has to take reasonable care and diligence while performing his duties, including incurring expenses.
- Regulations 25, 25A, 26 and 27- Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016

Japan

- Ranked as no. 1 by the World Bank Rankings in “Resolving Insolvency”.
- Debtor is allowed to continue operations during the restructuring proceedings. (Minji Saisei). In preventive restructuring, the role of the Insolvency Practitioner is therefore to work in close coordination with the debtor.
- Japanese Courts are involved to a large extent in appointing, reviewing and setting the Insolvency Practitioner’s remuneration.
- This is key during pre-packaged and informal insolvency resolutions.

Germany

- The insolvency regime is regulated by the German Insolvency Act- *Insolvenzordnung,* InsO.
- Each Insolvency Practitioner is in the role of an administrator with powers ranging from claw back of transactions option, arranging a pre-pack sale, privileged insolvency claims etc.

France

- Law relating to Bankruptcy was extensively reformed in the year 2005.
- The aim was to encourage promoters to re-organize at a preventive stage and prompt creditor to take a pro-active role.
- The Insolvency Practitioner are in the role of *Mandataire Judiciaire, Liquidateur, Administrateur Judiciaire, Judge Commissaire.*

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HARMONISATION OF INSOLVENCY AND RESTRUCTURING LAWS IN THE EU

JCOERE- Judicial Co-Operation in the European Union: Insolvency and Rescue

Professor Irene Lynch Fannon

Principal Investigator-JCOERE

Dr Jennifer L. L. Gant

Post Doctoral Researcher- JCOERE

Project No. 800807

This project is funded by the European Union's Justice Programme (2014-2020).

The Core Research Question

- Based on existing experience with restructuring (eg IRELAND) obstacles to court co-operation will arise from substantive rules which are particular to preventive restructuring.
- In addition some of these problems pertain to existing procedural obstacles which will be exacerbated in the preventive restructuring context.

The Irish Examinership process…Companies (Amendment) Act 1990, now Part 10 Companies Act 2014.

- Modelled on Chapter 11 of US Bankruptcy Code
- Contains all of the features included in the PRD 2019/1023 and with a ‘robust’ approach to rescue.
- STAY
- INTRA and CROSS CLASS CRAMDOWN
- PROTECTION for NEW FINANCING
- APPROVAL of COMPROMISE
- Some examples from 30 YEARS of CASE LAW

This project is funded by the European Union's Justice Programme (2014-2020).

Appointing and examiner and imposing the stay…the threshold question

Re Vantive Holdings Ltd. [2009] IEHC 384 and [2009] IESC 68
Re Kitty Hall Ltd and Ors and the Companies Acts [2017] IECA 247

- Conditions are that the company is 'unable to pay its debts' or 'likely to be unable to pay its debts.'
- No order for winding up.
- No receiver appointed for more than 3 days.
- There is a 'reasonable prospect of the survival of the company' or companies (group).

Cram down: Secured Creditors (including with rights in rem).

Re Holidair [1994] 1 I.R. 416

- Secured creditor with right to appoint a receiver (usually considered a right in rem).
- Receiver appointed by AIB and was removed on appointment by court of an Examiner.
- During examinership interim financing given priority.
- Rescue successful.

Approval of compromise or settlement- formality of court approval.

Re McInerney Homes Ltd. [2011] IESC 31 O'Donnell J.
Re SIAC Construction Ltd. [2014] IESC 25

- Under Irish law the court will approve a scheme where it satisfies the consent requirements and where the court is satisfied that the scheme is not 'unfairly prejudicial to any creditor or class of them'.
- McInerney the final scheme not approved on the basis of 'unfair prejudice'.
- SIAC – Scheme approved. What does the 'unfair prejudice' test entail?
- APR or RPR- What does this mean considered against the reality of court approval?

Cross Class Cram down

Re Kitty Hall Ltd and Ors and the Companies Acts [2017] IECA 247

Court to Court co-operation, practitioner to court co-operation – what difference Do these obligations make?

www.ucc.ie/en/jcoere/research and click on the Judicial Wing Case Study

Lynch, Marshall and O'Ferrall: Corporate Insolvency and Rescue (Butterworths, 1996)
Lynch Fannon and Murphy: Corporate Insolvency and Rescue (Bloomsbury 2012)
O'Donnell and Nicholas Examinerships (2017)

The Preventive Restructuring Directive 2019/1023 and other member states.

- Questionnaire addressing what we consider to be substantively important rules in the context of court to court co-operation.
- And addressing what we consider to be procedurally important rules in relation to the same question.

- www.ucc.ie/en/jcoere/research and click on link JCOERE Questionnaire (Jurisdictions)

This project is funded by the European Union's Justice Programme (2014-2020).

JCOERE Invitation

- Any ideas or suggestions? Join our network!
- Thank you.

This project is funded by the European Union's Justice Programme (2014-2020).

Lynch, Marshall and O'Ferrall: Corporate Insolvency and Rescue (Butterworths, 1996)

The Edwin Coe Practitioners Forum: Scope and limits of the stay

Chair: Florian Bruder
DLA Piper, Germany

Taming the secured creditors: Restraints and protection during the pre-insolvency stay

Dr. Vincent van Hoof
Radboud University, The Netherlands

Bank with non-possessory pledge

€

Debtor

€

Third parties

€

Supplier with retention of title

Transfer of encumbered assets in the ordinary course of business

Article 6

Stay of individual enforcement actions

1. Member States shall ensure that debtors can benefit from a stay of individual enforcement actions to support the negotiations of a restructuring plan in a preventive restructuring framework.

Member States may provide that judicial or administrative authorities can refuse to grant a stay of individual enforcement actions where such a stay is not necessary or where it would not achieve the objective set out in the first subparagraph.

2. Without prejudice to paragraphs 4 and 5, Member States shall ensure that a stay of individual enforcement actions can cover all types of claims, including secured claims and preferential claims.

3. Member States may provide that a stay of individual enforcement actions can be general, covering all creditors, or can be limited, covering one or more individual creditors or categories of creditors.

Where a stay is limited, the stay shall only apply to creditors that have been informed, in accordance with national law, of negotiations as referred to in paragraph 1 on the restructuring plan or of the stay.

Article 6

Stay of individual enforcement actions

4. Member States may exclude certain claims or categories of claims from the scope of the stay of individual enforcement actions, in well-defined circumstances, where such an exclusion is duly justified and where:

(a) enforcement is not likely to jeopardise the restructuring of the business; or

(b) the stay would unfairly prejudice the creditors of those claims.

Article 7

Consequences of the stay of individual enforcement actions

4. Member States shall provide for rules preventing creditors to which the stay applies from withholding performance or terminating, accelerating or, in any other way, modifying essential executory contracts to the detriment of the debtor, for debts that came into existence prior to the stay, solely by virtue of the fact that they were not paid by the debtor. 'Essential executory contracts' shall be understood to mean executory contracts which are necessary for the continuation of the day-to-day operations of the business, including contracts concerning supplies, the suspension of which would lead to the debtor's activities coming to a standstill.

The first subparagraph shall not preclude Member States from affording such creditors appropriate safeguards with a view to preventing unfair prejudice being caused to such creditors as a result of that subparagraph.

Member States may provide that this paragraph also applies to non-essential executory contracts.

Article 7

Consequences of the stay of individual enforcement actions

5. Member States shall ensure that creditors are not allowed to withhold performance or terminate, accelerate or, in any other way, modify executory contracts to the detriment of the debtor by virtue of a contractual clause providing for such measures solely because of

Ipso facto clauses

(a) a request for the opening of preventive restructuring proceedings;

(b) a request for a stay of individual enforcement actions;

(c) the opening of preventive restructuring proceedings; or

(d) the granting of a stay of individual enforcement actions as such.

Bank with non-possessory pledge

Supplier with retention of title

Debtor

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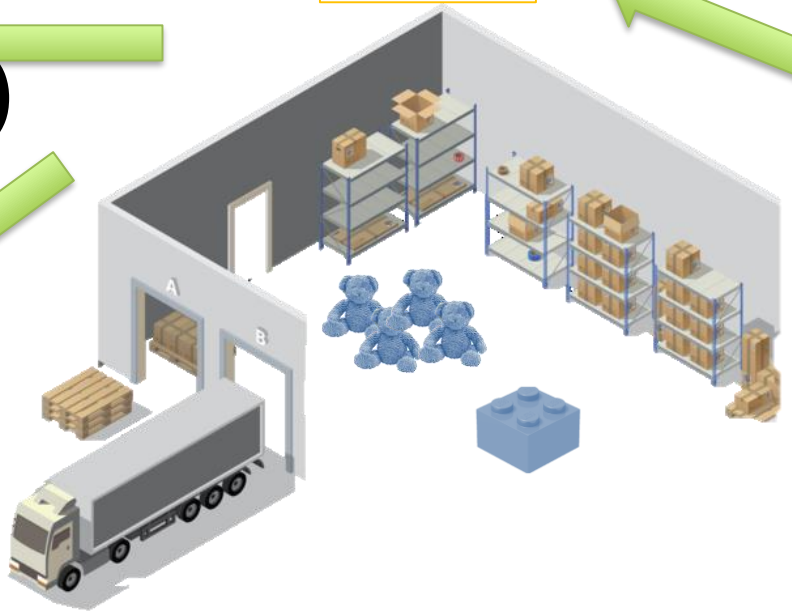
?

Third parties



Pre-insolvency stay

A comparative analysis of the stay in formal insolvency procedures

- Austria (cf. Germany)
- Belgium (cf. France)
- The Netherlands

Austria

- Creditors with a right of pledge or fiduciary ownership cannot enforce their rights during the stay, but they will have preference over the proceeds of collateral sold by the trustee.
- The contract of sale with a retention of title is an executory contract in the sense of article 21 IO, since ownership is yet to pass. The debtor is not required to cure past breaches of the contract (prior to the insolvency proceedings)
- If the seller gave the debtor permission to freely sell the assets in its ordinary course of business prior to the opening of the insolvency proceedings, the permission is not automatically withdrawn by the opening of the procedure

Belgium

- Functional approach to security rights (pledge and retention of title)
- Secured creditors can prohibit their debtor from disposing of collateral during the stay by means of contractual provisions.
- Even if the debtor acts without the creditor's permission, the creditor's security right will extend to the receivable which replaces the asset (zakelijke subrogatie).

The Netherlands

The Act on the Confirmation of Private Plans

Article 377

Continued use of encumbered property in the ordinary course of business 1. A debtor who had the right to use, expend or dispose of property or to collect claims prior to the ordering of the stay as meant in Article 376 shall retain this right during the stay, provided this falls within the debtor's ordinary course of business.

2. The debtor may exercise the right described in Article 377(1) only if the interests of the third parties affected are adequately protected.

11 U.S. Code § 361 Adequate protection

When adequate protection is required under section 362, 363, or 364 of this title of an interest of an entity in property, such adequate protection may be provided by—

(1) requiring the trustee to make a **cash payment** or periodic cash payments to such entity, to the extent that the stay under section 362 of this title, use, sale, or lease under section 363 of this title, or any grant of a lien under section 364 of this title results in a decrease in the value of such entity's interest in such property;

(2) providing to such entity an **additional or replacement lien** to the extent that such stay, use, sale, lease, or grant results in a decrease in the value of such entity's interest in such property; or

(3) granting such **other relief**, other than entitling such entity to compensation allowable under section 503(b)(1) of this title as an administrative expense, as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property.

The Edwin Coe Practitioners Forum: Scope and limits of the stay

Prof. Tomáš Richter

Clifford Chance/Charles University's Institute of Economic Studies, Czech Republic

The Edwin Coe Practitioners Forum: Scope and limits of the stay

Simeon Gilchrist

Edwin Coe, UK

Closing Address

Professor Michael Veder
Radboud University / RESOR, The Netherlands;
Chair of the INSOL Europe Academic Forum

Coffee

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