Academic Forum Sponsors

EdwinCoe LLP
LAW FIRM

ACADEMIC FORUM
INSOL Europe
Academic Forum Conference
1-2 October 2008
Arts Hotel, Barcelona
Academic Forum Sponsors
EdwinCoe LLP

Welcome Back

Prof Bob Wessels, University of Leiden

Third Session: Intersection of Insolvency and Company Law

Chair: Prof Ulrich Haas, University of Zurich

Pensions and Insolvency Law: A Functional Comparison of US, UK and Canadian Legal Regimes

Prof Ron Davis, University of British Columbia

Credit Derivatives: Risk Management, Control Rights and the Implications for Insolvency Workout Proceedings

Prof Janis Sarra, University of British Columbia

Transformation and Relation of Corporate Law and Liquidation in Terms of the European Approximation of Laws

Dr Ilona Aszódi, Professor, Budapest Business School

Revision of the regulations on corporate and company law

- Started at 2003 to replace the Corporate and Company Code made in the 1990's
- Revision turned to a recodification during the process
- The recodification lasted two years.

Objectives and principles I.

- The European Charter for small enterprises
- The report of the committee led by Wim Kok, ex Dutch Prime Minister, published in November 2004

Objectives and principles II.

- The conditions of the comprehensive operation of companies should be established: while ensuring the publicity of companies in the widest range possible for the sake of the security of economic turnover and the interests of creditors.

Objectives and principles III.

- The Court of Registration becomes entitled to order even a supervisor in order to restore the lawful operation of the company.
- The termination of companies retaining their solvency without legal successor also belongs to the sphere of authority of the Courts of Registration.

The regulation of corporate law as a competition factor I.

- The harmony of corporate law with company law, the law on liquidation and definitive settlement and capital market law as a key issue
- The institute of the so-called wrongful trading in order to, when close to bankruptcy, the management of the company be retained from assumption of risk at an unjustified level, prejudicing the interest of creditors.

The regulation of corporate law as a competition factor II.

- Solvency test for the sake of strengthening the responsible behaviour of the managing director.
- The provision of assets aims at the preference of the member to the creditors (concealed dividend) the same way as unlawful provision of assets, if the member of the company performs the formal provision of assets not in accordance with the legal relationship with the limited liability company but looking for a civil law legal title.

The regulation of corporate law as a competition factor III.

- Domestic share law harmonised with the EU regulation on the protection of creditors.
- Ensures the legal protection of the shareholder investors in one hand, and, on the other hand, improves the legal conditions of external market control.

The legacy of the new Code

- The renewed corporate law together with the modified and amended law on liquidation and definitive settlement ensures the appropriate enforcement of the interests of the creditors.

Coffee Break

Fourth Session: Intersection of Insolvency and Company Law

Chair: Prof Miguel Virgos, Madrid Autonomous University

Inapplicability of the Provisions on Entailing Personal Liability in Insolvency Proceedings and Intervention of the Companies Act in Romania

Dr Lavinia Iancu, Tibiscus University Timisoara

Between 2006-2007, the Romanian legislator modified, totally or partially, the existing legal provisions for the purpose of aligning the Romanian legislation to the European one.

The Companies' Law 31/1990 has been profoundly altered by the 441/2006 Law and The reorganisation and judicial liquidation Law 64/1995 was abrogated in 2006, when the new Insolvency Code (85/2006 Law) came into force.

Deliberate dissolution and liquidation

The 235 article of the companies' law allows the partners to establish a date for the company's dissolving and it's liquidation modality, that is to say they will decide regarding the distribution of the social assets after paying of the passive (debts) - liquidation without liquidator.

Difficulties:

- the partner quality in a company is not restricted by the acquirement of a minimum accountancy, valuation, liquidation knowledge
- distribution of the company's assets initiated by the partners, which is not based on a valuation made by an expert on the field,
- the creditors' situation
- fiscal certificate/report released by The Administration of the Public Finances
- transmission of the property right over the assets remained after the payment of the creditors

The judicial dissolution - special causes

- The company doesn't have the statutory organs anymore or they can't reunite anymore;
- The company didn't submit the annual accounts at the Trade Register Office;
- The company has ceased its activity, has no longer an official known headquarter, the partners have disappeared or can no longer be found at their residence;
- The company did not complete its registered capital according to the law
- The company did not change the registration and fiscal registration certificate.

- Dissolution decision shall be registered at the Trade Register Office where the company was registered in the first place, shall be published in the Official Gazette of Romania – the 4th part – and communicated to the General Direction of Public Finances
- The partners or any other interested party will enjoy a 3/6 months term for appointing a liquidator.

1. In case **nobody complies with this legal obligation**, in that to hand in a request for appointing a liquidator, the company shall be **erased** from the Trade Register Office.

- the access at the Official Gazette's database is allowed only by subscription
- the favouring of one creditor
- through this procedure have been erased many companies that still registered a lot of debts towards their creditors

2. The companies for which **the appointment of a liquidator is requested**, those will begin the **liquidation procedure**

Every time the company's debts will be paid, it will be liquidated accordingly to the 31/1990 Law

Art. 270.1 from the Companies' Law, states that, in case the company entries the liquidation state, the liquidator must request the opening of the insolvency proceedings on the basis of the 85/2006 Law

- the appointed liquidator is obligated to file the insolvency procedure's opening request when the real, liquid and exigible debts overcome the minimum quantum of 10,000 RON or when the company no longer can pay its exigible debts?
- the liquidators have solicited the insolvency procedure's opening for minute debts, 10-15 Ron (3-4 Euros).

- **The insolvency procedure**

The entailing of the management's members personal liability in the insolvency procedure is possible only by complying simultaneously with 4 conditions:

- the illicit fact
- the prejudice
- the causal connection
- the guiltiness

The analyze element consists of the causal connection Syntagm "have contributed" is substituted with "has caused"

Acts such as: keeping a fake accounting, hiding accountant documents, not keeping an accounting according to the law, hiding assets in order protect them from the creditors, increasing the passive by registering fake debts, paying, preferably, certain amounts to some of the creditors on the month before the payment cease, do not fulfill the condition of illicit acts that could directly cause the insolvency state.

Synthesizing, this paper's conclusions are fully concordant with the European Commission's Report on Romania regarding the justice, presented in July 2008, which states that

"the judicial framework is fragile, it has to be stabilised and consolidated",

"the reform of the judicial process is slowly advancing and the progresses are unequal",

"the performance of the Romanian judicial system stumbles on the judicial insecurity caused by many factors, including the irregular application of the law"

Reconciling the European Registered Capital Regime with a Modern Corporate Reorganizations Law: Experience from the Czech Insolvency Reform

Dr Tomáš Richter, Charles University Prague

ACADEMIC FORUM INSOL Europe
Academic Forum Conference
1-2 October 2008
Arts Hotel, Barcelona
Academic Forum Sponsors
EdwinCoe LLP

Introduction

What happens …

- **Upon company's insolvency**
- **In reorganisation proceedings**
- **Under the Second Company Law Directive**
- **Under the Prospectus Directive**

ACADEMIC FORUM INSOL Europe
Academic Forum Conference
1-2 October 2008
Arts Hotel, Barcelona
Academic Forum Sponsors
EdwinCoe LLP

Upon company's insolvency

- The shareholders' interests are wiped out
- The residual interest "moves on" to creditors
- The law reflects that (creditor voting rights, trustee as new agent)

ACADEMIC FORUM INSOL Europe
Academic Forum Conference
1-2 October 2008
Arts Hotel, Barcelona
Academic Forum Sponsors
EdwinCoe LLP

In reorganisation

- Assets (usually) remain in place
- Right-hand side of B/S is changed
- Debt is reduced/rescheduled
- New equity is injected
- Or both

ACADEMIC FORUM INSOL Europe
Academic Forum Conference
1-2 October 2008
Arts Hotel, Barcelona
Academic Forum Sponsors
EdwinCoe LLP

Under the 2nd Directive

- Shareholders must approve all increases of share capital (Art. 25)
- Shareholders have pre-emptive rights over newly issued shares (Art. 29)
- No exception for insolvency proceedings (Art. 41)
- Or is there one?

ACADEMIC FORUM INSOL Europe
Academic Forum Conference
1-2 October 2008
Arts Hotel, Barcelona
Academic Forum Sponsors
EdwinCoe LLP

The ECJ Case Law

- The "Greek" factor
- C-367/96 (Kefalas), C-441/93 (Patifis), C-381/89 (Syndesmos Melon), C-134/91 & C-135/91 (Kerafina), C-19/90 & C 20-90 (Karella)
- The distinguishing factor

The ECJ Case Law

- Straightforward rejuvenation measures (Karella) *versus*
- "Execution measures" for the protection of creditors (Patifis)
- "Normal Structure" of the company (Syndesmos Melon, Karella)
- Conclusion!

The Prospectus Directive

- 2003/71/EC
- Definition of public offer (Art. 2(1)(d))
- Exemptions (Art. 4(1)(b) and (c))
- No exemption for offers of securities in insolvency proceedings
- Remedy?

Questions?

- Questions?
- Answers?
- Thanks.

The Role of Norms in Identifying Legitimate Risk-Taking under Director Disqualification and Restriction Provisions in Irish Company Law

Prof Irene Lynch-Fannon, Cork University

Edwin Coe Prizes for Outstanding Legal Research

Presented by Edwin Coe representative

Lunch

ACADEMIC FORUM
INSOL Europe
Academic Forum Conference
1-2 October 2008
Arts Hotel, Barcelona
Academic Forum Sponsors
EdwinCoe LLP

Introduction of Guest Speaker

Marc Udink, INSOL Europe General Secretary

ACADEMIC FORUM
INSOL Europe
Academic Forum Conference
1-2 October 2008
Arts Hotel, Barcelona
Academic Forum Sponsors
EdwinCoe LLP

Edwin Coe Lecture

Prof Jay Westbrook, University of Texas

ACADEMIC FORUM
INSOL Europe
Academic Forum Conference
1-2 October 2008
Arts Hotel, Barcelona
Academic Forum Sponsors
EdwinCoe LLP

Closing Address

Dr Paul Omar, University of Sussex

ACADEMIC FORUM
INSOL Europe
Academic Forum Conference
1-2 October 2008
Arts Hotel, Barcelona
Academic Forum Sponsors
EdwinCoe LLP

Academic Forum Sponsors

EdwinCoe LLP
LAW FIRM

ACADEMIC FORUM
INSOL Europe
Academic Forum Conference
1-2 October 2008
Arts Hotel, Barcelona
Academic Forum Sponsors
EdwinCoe LLP