# The inauguration of a new year in insolvency

Paul Omar and Myriam Mailly report on the second online Academic Forum conference

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**The second Academic Forum Webinar took place on 20 January 2021, attracting 55 participants from 23 different jurisdictions.**

Following a welcome by Marcel Groenewegen (INSOL Europe President), Professor Tomáš Richter (IEAF Chair; Charles University Prague) then began proceedings with an introduction to the papers and explanation of Zoom protocol. Appreciation was also forthcoming for the continued support by Edwin Coe LLP. The technical programme contained two presentations, the first by Professor Gerard McCormack (Leeds), speaking on stays under the Directive, with the second by Professor Antonio Leandro (Bari) focusing on the harmonisation of insolvency regimes in light of investment imperatives.

## Directive stays and the Covid-19 effect

CIGA 2020, the new UK legislation, received attention at the outset for its blend of temporary and permanent elements, arguably and despite Brexit, "implementing" the Directive, the latter's stay structure being very similar to the new Part 26A enhanced scheme. The UK text is viewed as at the forefront of international insolvency developments, as is also the intention for the Directive.

In turn, both texts (Directive and CIGA 2020) can be said to be inspired by the US Chapter 11, heralded by commentators (in particular Senator Warren and Professor Westbrook) as the "punchmark" of the US corporate insolvency system.

Dealing with the framework set out in the Directive Articles 6 and 7 and Recitals 32-41, the observation can be made that there is a great deal of optionality in the text, more pathways than potentially enacting states. Pursuant to the Article 6, the stay on individual enforcement is only to the extent necessary to support negotiations (thus not automatic/comprehensive, but also applicable potentially to secured/preferential creditors). Its duration is extendable and it is possible to lift it. There is an unfair prejudice element offering a challenge to a stay, redolent of UK wording in an analogous procedure.

The rationale for the Directive framework can clearly be seen from the common pool/prisoner's dilemma/anticommons problem, its utility being to offer a free space and protection from creditor threats to block business continuity through taking action. In fact, the Directive can be viewed as building on a restructuring strategy which is founded upon the premise that the interests of a few may need to suffer in the service of the needs of the many.

International parallels can be drawn with the Chapter 11 equivalent (sections 361-362) and Recommendation 50 in the UNCITRAL Legislative Guide suggesting a secured creditor should have relief if encumbered assets are not necessary for proceedings. The US stay is automatic and comprehensive, while the UK scheme without a stay is an exemplar of opposing practice. The US worldwide effect is interesting, but potentially creating conflict between courts because of its "extra-territorial" effect. Examining the Directive Recital 35 outlining the need for a fair balance between the debtor and creditors, the question can be posed as to what should be the impact on non-debtor parties: e.g., guarantors? Given the Directive Article 6 limitations, should all legal and enforcement actions be included?

Moreover, what is a desirable impact on collateral? Should secured assets be released to creditors? What about compensation for a decline in the value of security, which the Directive Recital 37 suggests should not occur for foreseeable decreases because of the stay? Referring to unfair prejudice, can this be employed here as a method for challenging the impact of the stay? In conclusion, the detailed (and yet sketchy) structure of the Directive offers considerable scope for variation. Is this desirable? Given the imminency of the July 2021 deadline, it is likely that extensions will be sought to resolve this and other outstanding questions.

## Insolvency harmonisation

Describing the interconnection between harmonising insolvency law and investment law in Europe, reference was made to a Commission Communication of 2018 stressing how primary/secondary rules offer protection for cross-border investors, while protecting other legitimate interests. The freedom of movement of capital within

EU law, though protected, has witnessed the current trend seeing a shift from exclusive protection of investment through arbitration to justiciability before national courts. In this light, what might be the impact of insolvency proceedings on investment decisions (including investors from outside the EU/3rd countries)? Arguably, there is a need to harmonise the "normative space", in which investment happens, to ensure attractiveness to investors (whether from Member States or from external sources).

The advent of the Directive offers the context for a harmonisation initiative, which would enhance the Capital Markets Union (CMU), thus improving access to credit, creating predictable outcomes and ensuring compliance with "fair and equitable treatment" standard. A CMU Communication of 2020 points out that divergence between insolvency law regimes constitutes a "longstanding structural barrier" to investment. A harmonisation initiative could transform current competition between Member States into the creation of a "Unique European Space of Investments" enabling the EU to become a common host entity for third country investors.

Nonetheless, problems exist with harmonisation: how should Member State laws be revised, if action at that level is contemplated; how can divergent member state policies with respect to investment and insolvency be reconciled; and, if action at the EU level is preferred, would it be politically acceptable. A side issue comes from forum shopping in insolvency, which could be seen as inimical to the formation of an EU-wide unique investment space for third countries.

In summary, many questions need to be resolved before an initiative could be contemplated. One novelty which could arise is whether insolvency practitioners will need, in the near future, to act in a way to protect investments or, alternatively, recover assets, which could consist of claims against a member state for infringement of investment standards.

## Envoi

Ending the session, following questions from the audience, Professor Richter thanked the speakers for their thought-provoking presentations and also invited further expressions of interest for future webinars being planned. ■

*The presentation slides and a link to the conference recording are available via the Academic Forum page at: www.insol-europe.org/academic-forum-events.*


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