



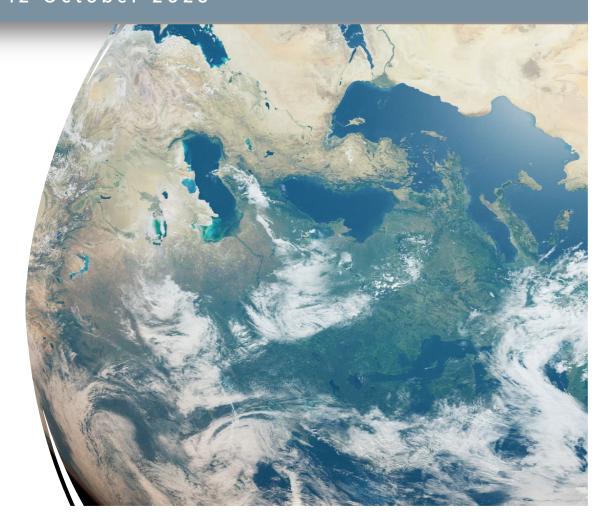
### Academic Conference MSTFDNAM

11-12 October 2023



A Principled
Approach towards
the Disclaimer of
Environmental
Liabilities: Lessons
from Europe (and the
Rest of the World)

- Dr Dr David Ehmke (Willkie Farr & Gallagher LLP)
- Dr Eugenio Vaccari (Royal Holloway, University of London)







#### Academic Conference

### AMSTERDAM 11-12 October 2023

MAIN SPONSOR

Edwin Coolin





Protection of the environment and maximization of creditors' dividends may give rise to a "conflict of near polar extremes"







#### Academic Conference

#### **AMSTERDAM**

11-12 October 2023



### Ranking of Environmental Claims in Germany

- Administrative law perspective:
  - Priority if so qualified under administrative law
  - Case law (e.g., BVerwG, decision of 23.09.2004 – 7 C 22.03)
- Insolvency law perspective
  - Priority if claim originates (esp. from action) during procedure
  - Case law (e.g., BGH, decision of 18.04.2002 - IX ZR 161/01)







## Academic Conference AMSTERDAM



## Disclaimer in German Insolvency Law

- Unitary approach across different procedures (no differentiation between administration and liquidation)
- Disclaimer of onerous property is possible: therefore, no liability arising from ownership/possession of "polluted assets" removed from insolvency estate







# Academic Conference AMSTERDAM 11-12 October 2023



# Environmental Claims in the UK (1)

- Disclaimer of onerous property under s.178 IA 1986 (liquidation only)
- Environmental Agency v Stout (1999): lex specialis (EPA 1990) derogate legi generali (IA 1986)
- Re Celtic Extraction (CA, 2001): "there is no statutory or equitable rule that can force a liquidator or polluter to pay where there is no money to meet any environmental liabilities"







## Academic Conference AMSTERDAM 11-12 October 2023

MAIN SPONSOR



# Environmental Claims in the UK (2)

- Re Baglan Operations (2022): can disclaimers be effected if they result in environmental damage to local communities?
- Issue: what powers do official receivers (and liquidators) have?
- Held: "official receivers should operate in a manner that is fair, principled and honourable"







# Academic Conference AMSTERDAM 11-12 October 2023

MAIN SPONSOR



## A Matter of Priorities?!?

- Orphan Well v Grant Thornton (SC, 2019): environmental protection prevails over secured creditors' interests
- Tubbs v Futurity Investments (1998): insolvent estate funds should be used in priority for environmental claims
- Dooning (2018): remediation costs arising from the company's environmental liabilities had priority ranking over other liquidation expenses







#### Academic Conference

### AMSTERDAM

MAIN SPONSOR



#### Avoid externalisation of business failure

- •statutory interpretation is not sufficient
- •an approach based solely on priorities is inadequate

#### Insolvency proceedings can have wide aims

- •disclaimers can save viable businesses
- •environmental concerns shall not be dismissed

#### Human Rights Due Diligence?

- •2011 United Nations Guiding Principles on Business and Human Rights (UNGPs)
- •EU Directive on corporate sustainability due diligence (CSDDD)
- Queensland's Environmental Protection (Chain of Responsibility) Amendment Act 2016 (CoRA)

