

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

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The treatment of environmental claims in insolvency is a particularly controversial topic, as the goals of maximising the return to creditors conflicts with the public policy duty to protect the environment. But also, the interests to give viable businesses a second chance, avoid loss of jobs, distress to local communities may conflict with the interest to prioritise the protection of the environment through means of the insolvency law.

The insolvency administrator's right to disclaim onerous property (and thus the environmental liabilities which arise as consequence of the administrator's possession of the polluted property) is generally accepted in Germany.<sup>1</sup> In England and Wales, liquidators (but not administrators)<sup>2</sup> can unilaterally (i.e., without the need for a court sanction)<sup>3</sup> disclaim onerous property pursuant to s.178 IA 1986.<sup>4</sup>

Different jurisdictions adopt different strategies for dealing with environmental liabilities. The Canadian Supreme Court recently prevented the sale of an insolvent company's assets when environmental liabilities needed to be discharged.<sup>5</sup> Other common law countries follow the Canadian view that, where the insolvency estate has sufficient funds, these should be used in priority to meet environmental liabilities.<sup>6</sup> This is in contrast with English case law, which does not consider the disclaimer of environmental liabilities as an obstacle for terminating the procedure.<sup>7</sup> The case of *Re Baglan Operations Ltd* [2022]<sup>8</sup> seems to suggest a shift in the attitude of English courts. In Germany, the ranking of environmental claims has been hotly debated. According to the Federal Administrative Court, environmental claims qualify as claims incumbent on the assets of the estate provided the criteria under the respective liability provision are fulfilled (e.g., as the case may be by the operation of the polluting facility or the possession of the polluted property).<sup>9</sup> The Federal

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<sup>1</sup> BVerwG, decision of 23. 9. 2004- 7 C 22/03.

<sup>2</sup> s.178(2), IA 1986 and *Re P&C and R&T (Stockport) Ltd* [1991] BCC 98 (Ch). For a discussion on the evolution of the law, see: P Omar, 'Disclaiming Onerous Property in Insolvency: A Comparative Study' (2010) 19 I.I.R. 41, 42-43. The same power is also granted to trustees in bankruptcy cases: ss.315-321 IA 1986.

<sup>3</sup> *Firmin v Aardvark Tmc Ltd* [2013] EWHC 1774 (Ch).

<sup>4</sup> For an exhaustive analysis: I Fletcher, *The Law of Insolvency* (5<sup>th</sup> edn, Sweet & Maxwell 2017) 742-747.

<sup>5</sup> *Orphan Well Association v Grant Thornton Ltd* (2019) SCC 5 (Sup Ct (Can)), as commented by T Farber, 'Insolvency and Environmental Law Collide in Canada: Supreme Court of Canada Rules in Favour of Environmental Protection over the Interests of Secured Creditors' (2019) 16(4) Int. C.R. 225.

<sup>6</sup> *Tubbs v Futurity Investments* [1998] 1 N.Z.L.R. 471.

<sup>7</sup> *Re Wilmott Trading Ltd* (No.1) [2000] B.C.C. 321.

<sup>8</sup> *Re Baglan Operations Ltd* [2022] EWHC 647 (Ch).

<sup>9</sup> BVerwG, decision of 23. 9. 2004- 7 C 22/03.

Court of Justice instead held that claims relating solely to the possession of an already polluted property should be considered ordinary insolvency claims.<sup>10</sup>

This presentation conducts a comparative analysis of the principles governing English, German and European insolvency and environmental law to offer a principled approach for the use of disclaimer powers and the ranking of (environmental) claims in insolvency. It analyses whether different approaches, such as recognizing a preferential status to environmental claims and the disclaimer of onerous property, are effective in balancing the different goals of insolvency law. It concludes by arguing that a promising alternative solution may be offered by employing business and human rights due diligence for dealing with environmental issues that impact local communities and the society at large.

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<sup>10</sup> BGH, decision of 5. 7. 2001 - IX ZR 327/99; BGH, decision of 18. 4. 2002 - IX ZR 161/01.