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**New Horizons: Insolvency III, Winding-up of
Insolvent EU Inc. and beyond**

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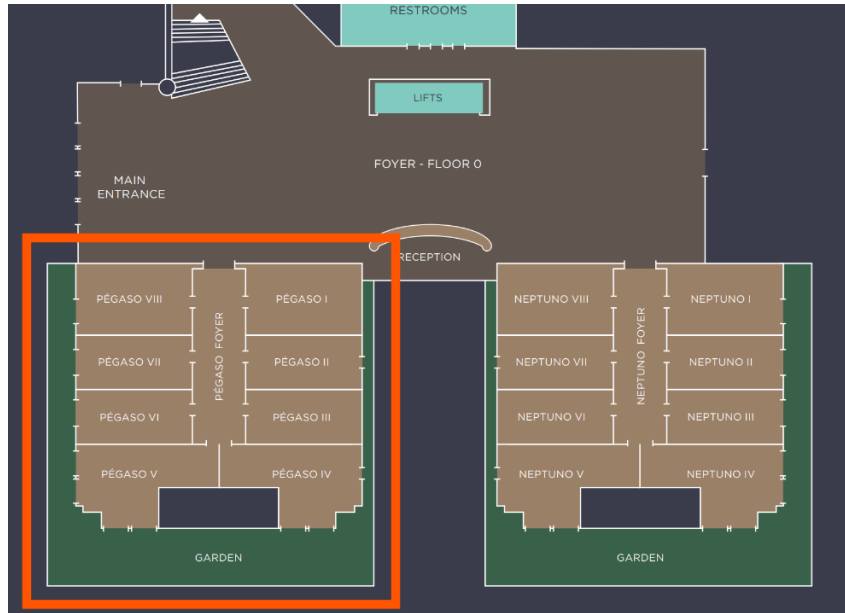
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Academic Welcome Coffee



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The Academic Conference will be taking the whole of the Pégaso space as outlined in red below:





Academic Locations

Academic Conference room : Pegaso

Academic Coffee breaks: Pegaso Foyer

Academic Lunch: The Voyage Restaurant



Academic materials (including latest updated technical programme)
available from <https://www.insol-europe.org/academic-forum-documents>

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Technical programme as at 14 October 2026

Speaker materials - Wednesday 14 October

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WIFI CODE

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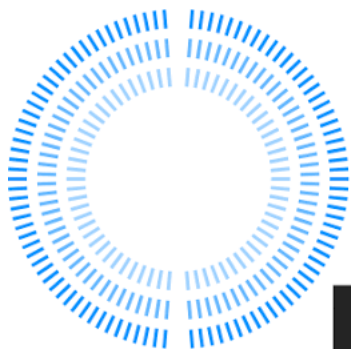
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Session Three – Who Bears the Loss? Avoidance, Subordination, and Fairness in European Insolvency

Thursday 09:00 – 10:30



Giulia Ballerini
Session Chair



Gerard McCormack
“A terrible beauty is born”
– a new harmonised EU
law on insolvency
transactional avoidance



Oriana Casasola
Minimum Harmonisation,
Maximum Divergence?
Evaluating the EU’s 2026
Transaction Avoidance Rules
Against the UNCITRAL
Legislative Guide



Rebecca Parry
Shareholder Loan
Subordination in European
Insolvency Law:
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**Cruz Amado
de la Riega**
Equity likes and
insolvency: a missed
opportunity?



INSOL Europe - Vilamoura

Gerry McCormack

**'A terrible beauty is born?' - transactional
avoidance in the EU**



- EU Directive to harmonise certain aspects of substantive insolvency law - Directive (EU) 2026/799
- Transactional avoidance aspects
- 'making haste slowly' tradition - still no common Europe-wide definition of insolvency
- transactional avoidance provisions in Articles 7-9
- Proposal first appeared in December 2022 [\[](#) revised proposal November 2024

Transactional Avoidance

- Article 7 'preferences' - legal acts such as payments and the granting of security benefitting creditors can be declared void if perfected within 3 months prior to submission of request for opening of insolvency proceedings and certain other conditions have also been fulfilled. Exceptions include legal acts performed directly against fair consideration to the benefit of the insolvency estate
- Article 8 - transactions at an undervalue whereby transactions of the debtor for no or manifestly inadequate consideration may be declared void where perfected within 12 months prior to submission of request for opening of insolvency proceedings or after the submission of such request
- Article 9 - acts intentionally harming creditors - legal acts by which debtor has intentionally caused a detriment to general body of creditors can be declared void where (i) those acts were perfected either within 2 years prior to submission of request for opening of insolvency proceedings or after submission of such request
- 2 years reduced from 4 years in initial draft
- Counterparty must have known about debtor's intent to cause detriment to general body of creditors - knowledge is presumed if counterparty closely related to debtor
- Legal act' defined as any deliberate human behaviour producing legal effects

Transatlantic comparisons

- US bankruptcy code broadly equivalent to EU norms on transactional avoidance with some variants.
- S 547 US Bankruptcy Code directed against preferences
- S 548(1)(A) attacks intentionally fraudulent transactions
- Ss 548(1)(B) is directed against what in the US is referred to as constructively fraudulent transactions i.e. transactions at an undervalue
- UK Insolvency Act provisions in s 238 (transactions at an undervalue), s 239 (preferences) and s 423 (putting assets outside the reach of creditors) broadly equivalent to EU norms though with differences in details

Background and overall effect of EU transactional avoidance norms

- EU Directive located within EU's Capital Markets Union project
- But transactional avoidance elements leave room for additional avoidance grounds under national law.
- Other avoidance grounds potentially available
- Directive has ostensibly a principles based approach
- Differs from EIR which makes avoidance difficult to accomplish
- Under EIR effectively a 'double avoidance' requirement
- Avoidance must be possible under the law of the State that opens the insolvency proceedings- *lex fori concursus* – and under law of the State to which the relevant transaction is subject - *lex causae*



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Minimum Harmonisation, Maximum Divergence? Evaluating the EU's 2026 Transaction Avoidance Rules Against the UNCITRAL Legislative Guide

Dr. Oriana Casasola

Associate Professor of Commercial, Corporate and Banking Law
University of Leeds



RESEARCH QUESTIONS

- To what extent do the EU transaction avoidance rules align with the nine key principles of the UNCITRAL legislative guide on insolvency?
- What can be done to increase alignment?



Key objectives of the UNCITRAL legislative guide on insolvency

1. Legal certainty
2. Maximisation of the value of assets
3. Balance between liquidation and reorganisation
4. Equitable treatment of similarly situated creditors
5. Timely, efficient and impartial resolution of insolvency
6. Preservation of the insolvency estate
7. Transparent and predictable insolvency law
8. Recognition of existing creditor rights and establishment of clear rules for ranking of priority claims
9. Establishment of a framework for cross-border insolvency

1.PA
2.PA
3.IA
4.A
5.PA
6.PA
7. PA
8. IA
9.NA



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Article 6: General provisions regarding avoidance actions

Member States shall ensure that legal acts which have been **perfected** prior to the opening of insolvency proceedings to the detriment of the general body of creditors are void, voidable or unenforceable under the conditions laid down in Chapter 2.

Member States may provide that a legal act, the effects of which are conditional upon **its entry in a public register**, is considered to have been perfected as soon as all the other requirements for its effectiveness have been met.

1. PA
2. PA
3. NA
4. A
5. PA
5. PA
7. PA
8. IA
. NA



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Article 7 Preferences

1. Member States shall ensure that **detrimental legal acts benefiting a creditor or a group of creditors by satisfaction or collateralisation** are **void, voidable or unenforceable where they were perfected**:

a) **within the three months prior** to the submission of the request that led to the opening of the insolvency proceedings or, in the absence of such a request, **within the three months prior to the date of the resolution to commence insolvency proceedings**, provided that the debtor **was unable to pay its debts as they fell due in accordance with national law**; b) after the submission of the request or the date of the resolution referred to in point (a) and before the opening of insolvency proceedings.

2. If a due claim of **a creditor was satisfied or secured as owed**, Member States shall ensure that detrimental legal acts are void, voidable or unenforceable at least if:

(a) The conditions laid down in paragraph 1 are met; and (b) **that the creditor knew that the debtor was unable to pay its debts as they fell due in accordance with national law**, that a request for the opening of insolvency proceedings had been submitted or that, in the absence of such a request, a resolution to commence insolvency proceedings had been made. For the purposes of the first subparagraph, point (b), such knowledge shall be presumed if the creditor was a **party closely related to the debtor**. That presumption shall be rebuttable.

1.PA

2.A

3.NA

4.IA

5.A

6.A

7.A

8.IA

9. NA



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Article 8 Legal acts in exchange for no or manifestly inadequate consideration

1. Member States shall ensure that where legal acts of the debtor are performed in exchange for no or manifestly inadequate consideration, those legal acts are **void, voidable or unenforceable** where they were perfected:
 - (a) **Within 12 months** prior to the submission of the request that led to the opening of insolvency proceedings or, in the absence of such a request, within the 12 months prior to the date of the resolution to commence insolvency proceedings; or
 - (b) after the submission of the request or the date of the resolution referred to in point (a) and before the opening of the insolvency proceedings.
2. Paragraph 1 shall not apply to gifts and donations of symbolic value

1.PA

2.PA

3.NA

4.IA

5.PA

6.PA

7.PA

8.IA

9.NA



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Article 9 Legal acts intentionally detrimental to creditors

Member States shall ensure that legal acts by which the debtor has intentionally caused a detriment to the general body of creditors are void, voidable or unenforceable where both of the following conditions are met:

(a) those acts were perfected either within the **two years** prior to the submission of the request that led to the opening of the insolvency proceedings or, in the absence of such a request, within the two years prior to the date of the resolution, to commence insolvency proceedings, or after the date of submission of such a request or the date of such a resolution and before the opening of the insolvency proceedings;

(b) The other party to the legal act knew of the debtor's intent to cause detriment to the general body of creditors.

For the purposes of the first paragraph, point (b), such knowledge shall be presumed if the other party to the legal act was a party closely related to the debtor. That presumption shall be rebuttable.

	Art 6	Art 7	Art 8	Art 9
1. Legal certainty	PA	PA	PA	PA
2. Maximisation of the value of assets	PA	PA	A	PA
3. Balance between liquidation and reorganisation	IA	NA	NA	NA
4. Equitable treatment of similarly situated creditors	A	A	IA	A
5. Timely, efficient and impartial resolution of insolvency	PA	PA	A	PA
6. Preservation of the insolvency estate	PA	PA	A	PA
7. Transparent and predictable insolvency law	PA	PA	A	PA
8. Recognition of existing creditor rights and establishment of clear rules for ranking of priority claims	IA	IA	IA	IA
9. Establishment of a framework for cross-border insolvency	NA	NA	NA	NA

Considerations

1. The proposed *de minimis* harmonisation falls short of increasing cross-border predictability and confidence
2. McCormack, Keay, and Brown, as well as Bork and Veder's studies, demonstrate that Member States already share common principles in transaction avoidance regimes. The differences across Member States lie in the procedural details.
3. Transaction avoidance claims are a procedural tool in a subject matter (insolvency law) that has long been considered a procedural area. Harmonisation on the topic required more careful **procedural considerations**.



What can be done to increase alignment?



Clarify

Commission
Recommendation/Decision with
guiding definitions for core
avoidance law concepts:

- Insolvency
- Deliberate legal act
- Detriment
- Perfection
- Manifestly inadequate consideration
- Awareness and intention



Monitor

Establish a comparative
observatory to:

- Monitor judicial practice across Member States
- Track presumptions and defences (fair value, good faith)
- Highlight areas of divergence



Coordinate

- in transposition phase (e.g. CERIL October 26)
- in application phase through increased judicial comparative understanding of the tool

Recommendations for Member states



Provide a closed list of presumptions for the subjective criteria, reflecting the commercial realities of Member States



Foster judicial capacity by providing training and materials for judges and insolvency practitioners on valuation standards, evidentiary presumptions, and cross-border implications.



Increase transparency into the outcomes of avoidance proceedings (e.g., reports or online repositories) could enable empirical reviews to refine suspect periods and presumptions, ensuring that national choices are evidence-led



Thank you for listening... Any questions?

[An Analysis of the 2026 EU Avoidance Rules and an
Evaluation against the UNCITRAL Legislative Guide on
Insolvency](#)

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Shareholder Loan Subordination in European Insolvency Law: A Model for Rescue-Focused Reform

Rebecca Parry

Professor, Nottingham Law School

Aditiya Jain

Associate, Chambers of Advocate Sumant Batra, Delhi

Dhaniya Jha

Associate, Cyril Amarchand Mangaldas, Mumbai

Fragmentation in European Subordination Regimes

- Germany: Automatic subordination (InsO § 39(1) No. 5)
- Spain: Subordination only post-acquisition (TRLC Arts. 281, 283)
- Italy: Qualitative debt-equity imbalance tests (Civil Code Art. 2467)
- Austria: Repayment block, not ranking subordination (EKEG)
- England & Wales: No subordination absent veil-piercing
- 2019 Restructuring Directive: Deliberately silent

- Question: Is this divergence beneficial or problematic?



Shareholder Loans: Core Tension

- Shareholders have informational advantages over external creditors
- They can potentially exploit control to extract value pre-insolvency
- In insolvency: they may recover ahead of (if claim secured), or alongside, external creditors



Shareholder Loans: Counterpoint

- But:
- Not all shareholder lending is mala fide
- Shareholder loans many serve genuine business purposes
- Shareholders can support company survival and rescue and may have incentive to do so



EU Rescue Culture Context

2019 Restructuring Directive Philosophy:

- Shifted from liquidation-focused to rescue-focused approach
- Preventive restructuring plans encouraged
- Moratorium on creditor enforcement
- Safe harbours for rescue transactions from avoidance (Arts 17(1)(a) new/interim finance & 18(1) other restructuring related transactions)
- Directive is silent on shareholder loan subordination
- How does automatic subordination align with rescue culture?



Safe Harbours: Inconsistent Protection

- Rescue Transactions Are Protected from Avoidance:
 - Protected by safe harbour (Restructuring Directive, Article 17: new financing and interim financing 'shall not be declared void, voidable or unenforceable')
- Shareholder Rescue Loans from Subordination:
 - No protection (depends on national law transposition)

Result: Perverse incentives—shareholders potentially deterred from rescue financing

Germany's InsO § 39(1) No. 5: Automatic subordination during crisis

Scenario: Rescue Financing Potential Deterrent?

- Shareholder provides €5M to keep company afloat
- Claim subordinated automatically
- Ranks below external creditors
- Limited recovery prospects

Consequence: Shareholders might be hesitate to provide crisis capital



Rescue Exception

- InsO § 39(4): 'A creditor who acquires a membership right shall not be subordinated'
- Only protects:
 - External creditors who become shareholders
 - Does not protect existing shareholders providing loans
- The Gap:
 - Shareholder of distressed company cannot use this exception
 - Asymmetry: Outsider investing in equity protected; insider rescuing via loan unprotected

Spain's Temporal Limitation

- TRLC Arts. 281, 283: Subordination only for claims accrued after acquiring related party status
 - Advantage:
 - Pre-existing creditors not subordinated
 - Incentivises lending before shareholder relationship gained
 - For Rescue Finance:
 - But: Subordinates new shareholder loans during crisis
 - Doesn't fully solve rescue financing deterrent

Italy's Qualitative Approach: Debt-Equity Imbalance

- Civil Code Art. 2467: Subordination based on insufficient capital
- Advantages for shareholder financing:
 - Qualitative
 - Examines actual business reality
 - Could distinguish rescue loans from extractive lending
- Challenges:
 - Requires fact-intensive inquiry
 - Uncertainty on what constitutes 'clearly insufficient'

Austria's Hybrid Mechanism: EKEG

- Crisis loans treated as 'equity replacement' but:
 - Legally remain debt
 - Rank *pari passu* with ordinary creditors
 - Cannot be repaid until restructuring complete
 - Repayments clawed back
- Not subordinated below creditors, but blocked from pre-insolvency repayment
- Assessment: Protects rescue lending better than automatic subordination



Comparative Perspective: The US Model

- Section 510(c) Bankruptcy Code: Equitable Subordination
- Courts can subordinate claims where:
 1. Inequitable conduct by creditor
 2. Harm to other creditors or unfair advantage
 3. Subordination not inconsistent with Code
- Key Features: Conduct-based (not categorical), flexible, case-by-case
- Trade-off: Less predictable than automatic rules



Emerging Approaches: China

- *Deep Rock* Doctrine Transplanted via Judicial Development
- Timeline: 2015 Shagang case → 2018 SPC guidance → 2024 Draft codification
- Four Scenarios Warranting Subordination:
 1. Insufficient shareholder capital contribution
 2. Using loans to evade contribution obligations
 3. Related party abuse of corporate independence
 4. Undercapitalized company relying on shareholder loans



Global Diversity: Who Subordinates?

- Automatic Subordination: Germany, parts of EU
- Conduct-Based: US, China (emerging), common law jurisdictions
- Temporal Limitations: Spain, some EU states
- Qualitative Tests: Italy, some civil law countries
- No Subordination: England & Wales, most common law jurisdictions
- Takeaway: No global consensus; divergence driven by different policy choices

The Business Reality Check: European Diversity

- Family Business Prevalence:
 - Southern Europe: 85%
 - Nordic countries: 40-50%
 - Central Europe: Mixed, corporate groups prevalent
- Implication:
 - Family-dominated economies: related party lending more commonplace
 - Corporate groups: intra-group financing important for restructuring

One rule doesn't fit all European contexts



Rescue Financing Considerations

1. Bridge capital during restructuring
 2. Funding payroll, supplier payments
 3. Group Restructuring: Inter-company financing between affiliated entities
 4. Going-Concern Preservation: Capital to stabilise before formal proceedings
- All of these:
 - Benefit company and external creditors
 - Preserve employment and value
 - Yet may be automatically subordinated under rigid rules

Impact of Subordination on Rescue Attempts

Efficient attempt at rescue	Inefficient attempt at rescue
Prevented by subordination (Type II error)	Prevented by subordination
Efficient attempt at rescue	Inefficient attempt at rescue
Not prevented by subordination	Not prevented by subordination (Type I error)

- Source: Martin Gelter & Jürg Roth, 'Subordination of Shareholder Loans from a Legal and Economic Perspective' (2007) CESifo DICE Report, ISSN 1613-6373



Forum Shopping Incentive?

- Fragmentation Incentivises Jurisdictional Arbitrage
- Distressed company with subsidiaries in:
 - Germany → faces automatic subordination
 - Spain → temporal exception may apply
 - England → no subordination
- Managers may choose restructuring venue
- Shareholders select forum minimising subordination exposure
- Predictability undermined



Best Practice Convergence (NOT Harmonisation)

- Why Formal Harmonisation Is Problematic:
 - Lowest-common-denominator compromise
 - Freezes rules that should evolve
 - One-size-fits-all unsuitable for diverse business structures
 - Harmonisation of avoidance laws met resistance
- Alternative: Best Practice Convergence
 - Jurisdictions adopt core principles voluntarily
 - Implementation tailored to national contexts
 - Competition drives innovation and learning
 - Relevance to regulatory competition for restructuring



Revisiting the open method of coordination

- **Each Member State reviews** its subordination regime
- **Against shared principles** (rescue-focused ethos)
- **Through comparative benchmarking** (learning from others)
- **With flexibility** in implementation to suit national contexts
- **Iterative refinement** as evidence accumulates
- Aligns with subsidiarity, regulatory competition, evidence-based policymaking and the rescue culture.



Principles for Subordination OMC Approach

- Rescue financing should not be deterred by categorical subordination
- Creditor protection against value extraction remains essential
- Subordination rules must align with Restructuring Directive's rescue ethos
- Ex ante clarity on claim treatment enhances predictability

Illustration: Subordination around Objective Criteria

- **Solvency Loans:** Company balance sheet positive equity, cash flow solvent, standard commercial terms – no subordination
- **Crisis Loans Substituting for Equity:** Documented financial distress, lack of written terms, no concurrent capital increase - Automatic subordination
- **Rescue Finance:** Formal restructuring, written loan agreement, documented crisis-specific use, concurrent equity increase, explicit subordination accepted - Safe harbour
- **Preferential Repayments:** Within look-back period, insolvency at time of repayment, insider benefit - Existing preference laws



Regulatory Competition Benefits

- Jurisdictions experimenting with different calibrations:
 - Germany: Strict automatic approach - data on deterrent effects
 - Spain: Temporal exception - evidence on incentive impact
 - Italy: Qualitative tests - insights on flexibility benefits
 - Austria: Repayment block - alternative mechanism effectiveness
- Potential for best practices to emerge through competition, not legislation



Key Takeaways

1. Automatic subordination potentially undermines the rescue culture despite Restructuring Directive's philosophy
2. European divergence reflects policy differences across diverse business structures
3. Formal harmonisation risky; best practice convergence preferable
4. Framework to distinguish rescue finance (safe harbour) from value extraction (subordinated)
5. Regulatory competition can drive beneficial innovation if facilitated by EU soft law

Conclusion: Towards a Rescue-Focused Framework

- The 2019 Restructuring Directive opened a new chapter for European insolvency law.
- By leaving shareholder loan subordination unaddressed, it created an anomaly: rescue funding is protected from avoidance, but shareholder rescue lending remains subordinated.
- Under a soft law, open method of coordination, approach Member States adopt best practice principles voluntarily, tailored to national contexts.



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ACADEMIC FORUM • TECHNICAL PAPER

Hybrid Financing Instruments, Insolvency Law and EU Inc.

From Participating Loans to SAFEs: why capital design matters in insolvency

Cruz Amado de la Riega

Partner, Fieldfisher Spain

[fieldfisher](#)

ROADMAP

Where we start, and where we are going

01

The problem

The mismatch between economic design and legal treatment of hybrid financing

02

Spain

Participating loans: hybrid in theory, debt in restructuring

03

Delaware

SAFE: contingent equity designed to fall outside insolvency

04

EU Inc.

A missed opportunity to align corporate flexibility with insolvency law

The problem

Instruments designed to absorb enterprise risk, forced into rigid creditor taxonomies once insolvency arrives.

I. THE PROBLEM

Financing of last resort, at the edge of insolvency

One of the most persistent sources of friction in contemporary insolvency law:

The mismatch between the economic design of certain financing instruments and their legal treatment once financial distress materialises.

Case study (Spain): participating loans illustrate how instruments that assume enterprise risk ex ante are re-classified as debt ex post, precisely when that risk materialises.

Source: Alemany Pozuelo, D. and Agudo García, J.A. (2025)

II. SPAIN

Participating loans: hybrid in theory, debt in practice

Economic design:

- Remuneration linked to the debtor's performance
- Restricted amortisation
- Traditionally described as “quasi-equity”

Yet once restructuring commences:

Being structured formally as loans, they generate a repayment obligation — sufficient to draw them irreversibly into insolvency proceedings.

Designed as equity, treated as debt

DEBT

EQUITY

II. SPAIN

A divided body of case law

Automatic subordination

Courts treat the participating loan as subordinated by its very economic nature.

Express subordination

An explicit contractual clause is required for subordination to operate.

Practical consequence: identical instruments may receive radically different treatment depending on the competent court. The viability of a restructuring may hinge on judicial geography.

II. SPAIN

What is actually at stake

1**Creditor classes**

Classification determines the composition and formation of classes under the plan.

2**Absolute priority rule**

Its application turns on how the instrument is classified.

3**Disproportionate sacrifice**

A basis for challenging restructuring plans before the courts.

III. DIAGNOSIS

Not a drafting flaw: a structural feature

Insolvency law tends to privilege formal legal characterisation over economic substance.

Instruments drafted as debt are almost inevitably treated as such at failure, irrespective of their functional proximity to equity.

→ **Against this background, Delaware law offers a particularly instructive alternative.**

IV

Delaware: SAFE

Contractual pre-equity, not debt — by design, not by accident.

IV. DELAWARE

The SAFE: a market-driven instrument

Simple Agreement for Future Equity — introduced by Y Combinator in 2013 to facilitate early-stage financing without repayment pressure, maturity risk or insolvency exposure.

✓ Not a loan

✓ Accrues no interest

✓ No maturity date

✓ No obligation of repayment

It is not a statutory instrument: it operates under the general flexibility of Delaware corporate law.

IV. DELAWARE

The statutory foundation: DGCL Section 157

Authorises corporations to issue rights or options to acquire shares on terms determined by the board — including terms dependent on future events ascertainable outside the instrument.

Event-driven equity conversion

An explicit legal basis for conditioning conversion on future milestones.

Rights ≠ claims for money

A clear separation between a right to future shares and an enforceable debt.

If the triggering event never occurs, the instrument simply fails: a contingent equity expectation, not deferred debt.

IV. DELAWARE

Insolvency consequences: extinction, not ranking

No accelerated obligation

No provable claim

No ranking issue

The SAFE simply **expires worthless**. It never enters the creditor hierarchy: it is neither subordinated nor crammed down.

Designed as equity, treated as equity

DEBT

IV. Delaware

EQUITY

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V. COMPARISON

Why SAFEs avoid the participating-loan trap

	Participating loan (ES)	SAFE (Delaware)
Economic nature	Quasi-equity	Risk capital
Legal form	Debt from inception	Not debt from inception
Insolvency treatment	Re-classified ex post	Falls outside insolvency
Outcome	Litigation and classes	Extinction, no ranking

VI. EU INC.

EU Inc.: corporate flexibility without insolvency clarity

EU Inc. (the proposed 28th regime) draws openly on Delaware corporate law: flexible capital structures, elimination of rigid capital-maintenance doctrines, and facilitation of venture-style financing.

- ✗ Does not address participating loans
- ✗ Does not explicitly recognise SAFE-like instruments
- ✗ Provides no guidance on their insolvency position

Corporate flexibility without insolvency alignment remains incomplete — precisely where predictability is most needed.

KEY TAKEAWAY FOR INSOL EUROPE MEMBERS

Insolvency outcomes are largely determined by capital design.

Hybrid instruments structured as debt will almost inevitably generate classification disputes in restructuring. Instruments designed as contingent equity avoid those disputes altogether.

If EU Inc. is to replicate the success of the Delaware venture ecosystem, it will need to confront the insolvency implications of capital innovation.

Thank you

Questions and discussion

Cruz Amado de la Riega

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Fieldfisher Spain

[fieldfisher](#)



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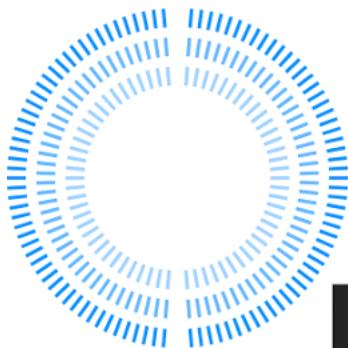
**New Horizons: Insolvency III, Winding-up of
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***New horizons: Insolvency III,
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EU Inc. and beyond***

Session Four – Insolvency law on new frontiers: shipwrecks, crypto crashes and space debris

Thursday 11:00 – 12:30



Gerard McCormack
Session Chair



Matthew Chippin
Marine Environmental
Disasters: The Necessary
Relationship Between
Maritime and Insolvency Laws



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Montoya**
Crypto-Assets and the Private
International Law Dimension of
CASPs' Cross-Border Insolvency





Marine Environmental Disasters: The Necessary Relationship Between Maritime and Insolvency Laws

Dr. Matthew Chippin, PhD, Postdoctoral Researcher, University of Haifa
Columbia-Haifa Global Markets Research Group



THE CENTRAL PROBLEM

- When a major marine environmental disaster occurs and the responsible shipowner becomes insolvent:
 - Who pays for cleanup and restoration?
 - Environmental claims often rank low in insolvency proceedings (depending on jurisdiction in theory at least)
 - Costs shift to states, coastal communities, and taxpayers
 - The polluter-pays principle is undermined in the insolvency context



WHY NOW? THE ARCTIC CONTEXT

- Northwest Passage traffic increased 44% (2013-2019)
- Climate change making new Arctic routes viable
- Canada's Major Projects Office investing in Churchill port
- Arctic ecosystem uniquely fragile and slow to recover



CASE STUDY: EXXON VALDEZ (1989)

- \$2.2 billion cleanup costs in Prince William Sound
- Thousands of animals killed, shoreline devastation
- Decades of litigation over punitive damages
- Exxon recovered significant costs through insurance



CASE STUDY: MV PRESTIGE (2002)

- Spain's biggest environmental disaster
- €1.5 billion in compensation ordered (2018)
- Captain and P&I insurer held liable
- 16 years of litigation to establish responsibility
- This all seems rather inefficient!
- Also, what happens if a shipping company with insufficient assets were to cause damage?

The Current Literature

- **Greening insolvency & environmental priorities**
Sarra, Madaus & Mevorach develop the “insolvent polluter still pays” principle and analyse super-priorities for environmental claims and their limits when assets are exhausted.
- **Environmental obligations beyond the debtor-entity**
Mevorach’s work on environmental activism by parent companies highlights how group structures and separate legal personality impede effective recovery, underlining the need for ex ante funding mechanisms rather than relying on veil-piercing after value has been extracted.
- **Comparative environmental priorities in insolvency**
Schytzer and Coordes map how Canada, Sweden and others prioritise environmental claims (including Redwater-style super-priorities), showing both strengths and gaps across systems.
- **Maritime–insolvency conflicts and cross-border tools**
Sources like Davies, Athanasiou and de Waegh examine clashes between maritime law and insolvency instruments (EU Insolvency Regulation, enforcement of security interests). Less attention is paid to environmental claims.



This project

- **Derivatives and maritime risk**

Existing work notes extensive use of forward freight agreements and related derivatives to hedge freight and price risk, not to pre-fund environmental liabilities or treat spills as systemic financial risk.

- **Gap this project addresses**

There is still limited sustained account of how maritime and insolvency regimes jointly allocate environmental risk in marine disasters, or how derivative-based mechanisms could provide ex ante, bankruptcy-remote funding for cleanup.

- The project aims for more sophisticated coordination between different areas of law.

RESEARCH QUESTIONS (PART 1)

- **RQ1:** How do cross-border mechanisms differ between insolvency and maritime laws?
- **RQ2:** What priorities are given to environmental claimants across jurisdictions (Right now looking at Canada, Sweden, Malta, and the UK)?



RESEARCH QUESTIONS (PART 2)

- **RQ3:** How do these mechanisms deal with environmental claims in practice?
- **RQ4:** How can we ensure adequate funding through derivative-based mechanisms treating environmental risk as systemic?

WHY THESE JURISDICTIONS?

- **Canada & Sweden:** Super-priority for environmental claims (in theory at least)
- **Malta:** Common flag state of choice
- **UK:** Foundational maritime jurisdiction and key insolvency center
- All have significant Arctic and/or maritime interests

METHODOLOGICAL APPROACH

- Comparative doctrinal analysis of legal frameworks
- Case study reconstruction of actual disasters
- Normative financial instrument design
- Analysis of cross-border coordination mechanisms

WHO BEARS THE COST?

- Project examines cost distribution among:
 - Coastal and Indigenous communities
 - National governments and taxpayers
 - P&I clubs and insurers
 - Secured and unsecured creditors

FAILURE MODE 1: JURISDICTIONAL MISMATCH

- Maritime law and insolvency law evolved separately
- Different cross-border recognition mechanisms
- Vessel arrest vs. automatic stay conflicts
- Environmental claims squeezed when assets frozen

FAILURE MODE 2: P&I DESIGN LIMITS

- Protection & Indemnity clubs work for ordinary risks, but:
 - Not designed for climate-intensified worst-case scenarios
 - Coverage caps and reinsurance assume diversified risks
 - Arctic routes create correlated catastrophic exposure
 - Responds ex post, not a guaranteed fiscal backstop

FAILURE MODE 3: REGULATORY GAPS

- Super-priorities only help if assets remain in estate (a problem in insolvency)
- Veil-piercing fails once value extracted pre-disaster
- Mandatory bonding faces political and competitiveness limits

THE REDWATER PROBLEM

- Orphan Well Association v Grant Thornton Ltd (Canada):
 - Companies can declare insolvency to avoid environmental obligations
 - Even with super-priority, insufficient assets remain
 - "Insolvent polluter still pays" principle needs ex ante funding
 - See the critique by Girgis et. al.

WHY DERIVATIVES? SOLVENCY SEPARATION

- Derivatives separate funding from polluter's solvency:
 - Traditional model: payout requires shipowner solvent at disaster time
 - Derivatives: counterparties commit today to pay on objective trigger tomorrow
 - Centrally cleared with continuous margin posting

WHY DERIVATIVES? SYSTEMIC RISK FRAMING

- Link to systemic environmental risk, not individual vessels:
 - Analogous to credit default swaps for correlated events
 - Tie pricing to route-specific factors (traffic, ice conditions)
 - Spread risk across wider financial base than P&I clubs

WHY DERIVATIVES? LEGAL HARD-WIRING

- Ex ante design possibilities:
 - Payouts flow to ring-fenced environmental response funds
 - Funds bankruptcy-remote from polluter and counterparties
 - Explicit exemptions for securities and swap agreements exist in many insolvency statutes

EXISTING MARITIME DERIVATIVE INFRASTRUCTURE

- Build on established shipping derivatives:
 - Forward Freight Agreements (FFAs) widely used
 - Can be adapted with environmental triggers
 - London already hub for maritime derivatives trading

EXAMPLE: NORTHWEST PASSAGE CATASTROPHE SWAP

- **Trigger:** Certified spill >1000 tonnes in designated Arctic zone
- **Payout:** \$500M to Canadian Arctic Response Fund
- **Premium:** Mandatory participation by vessels using passage
- **Margin:** Continuous posting by shipping finance providers

LIMITATIONS: NOT A SILVER BULLET

- Can create new systemic vulnerabilities if badly designed
- Governance challenges: who sets triggers, manages funds?
- Risk of speculation undermining environmental goals
- Not a replacement for regulation or insurance



POLICY RELEVANCE

- Identifies where current frameworks fail affected communities
- Shows when environmental obligations survive insolvency
- Clarifies distribution of costs among stakeholders
- Relevant to legislators, regulators, international bodies and business.



CONCEPTUAL QUESTIONS

- Should environmental claims always have super-priority?
- How to balance creditor rights with environmental protection?
- Is the systemic risk framing appropriate for marine disasters?



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When the EU Insolvency Framework Meets Outer Space: The Recast EIR, the Insolvency III Directive, and the Case for a Dedicated EU Space Insolvency Instrument

Dr Charles Mak

Lecturer (Assistant Professor)

University of Bristol Law School



When EU Insolvency Law Meets Outer Space

Insolvency law



Space regulation



International liability

Core question

What happens when a European commercial space operator becomes insolvent?



Why a space operator failure is different

Continuing supervision

Launching State liability

Registers without title

- Article VI keeps States responsible for private space activities.
- The Liability Convention may keep public liability alive after private failure.
- Space registers identify objects and States, but they do not usually record ownership or security rights.

Main point

Insolvency may transfer a commercial risk to the public, while control of the operator moves to an office holder.



The Recast EIR does not fit the orbital estate

1 COMI uncertainty

Management, finance, customers, licences, and ground stations may point to different States.

2 No legal situs in orbit

Article 8 protects rights in assets situated in another Member State. A satellite in orbit is not in any Member State.

3 Article 14 closed list

The rule covers immovable property, ships, and aircraft, but not space objects. Space registers do not record proprietary rights.

Result

The periphery of the estate is localised. The core asset is nowhere.



New instruments leave the gap open

Insolvency III Directive

- Pre-pack sales may preserve value.
- No special rule for space assets.
- No fast licence transfer route.

Proposed EU Space Act

- Creates authorisation and a Union Register.
- No insolvency chapter.
- No continuity or transfer route.

Space Assets Protocol

- Purpose built for space finance.
- Not in force.
- EU competence blocks Member State action.

Main point

The Union has a restructuring tool, a space law proposal, and an international route, but none yet gives a complete answer.



IRIS² shows why reform matters

Stress test

- One distressed consortium member could raise disputes over jurisdiction, authorisation, asset control, and State liability.
- Legal uncertainty may increase financing costs and public risk.

Reform package

- Amend the Recast EIR to cover registered space objects.
- Add an operator insolvency chapter to the EU Space Act.
- Adopt a Union position on the Space Assets Protocol.

Closing line

The legal gap can be filled. The question is whether the Union acts before the first failure exposes it.



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Crypto-Assets and the Private
International Law Dimension of
CASPs' Cross-Border Insolvency





SESSION 4

Where Does a Crypto-Exchange Die?

**Crypto-Assets and the Private International Law
Dimension of CASPs' Cross-Border Insolvency**

Prof. Dr. Cayetana Santaolalla Montoya

Public University of Navarra · European Law Institute Fellow

Joint research with Dr Pier Mario Lupinu, University of Glasgow





THE PROBLEM • ONE BITCOIN AT FTX

Paid ≠ Restored

Paid • FTX petition date, Nov 2022 • claim valued in dollars, plus interest (interest not shown)

**\$16,800**

Value • same 1 BTC at distribution, 2025

*appreciation not restored to the customer***\$90,000+**

Paid in full. Never restored.

Bars to scale. Figures rounded, as stated in the talk.



INTRODUCTION

The thesis

**BUILT**

**MiCA built a regulatory
perimeter.**

authorisation · passport · custody duties · wind-down
plans

**MISSING**

**It did not build a conflict-of-
laws architecture for failure.**

which court · under which law · at which moment

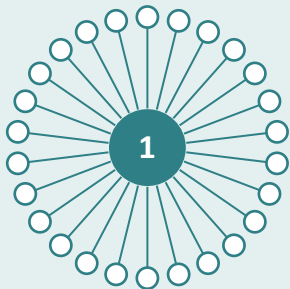
Without the second, the first will not hold at the very moment it is needed.



WHY NOW • FROM 1 JULY 2026

A single market for services. Not for failure.

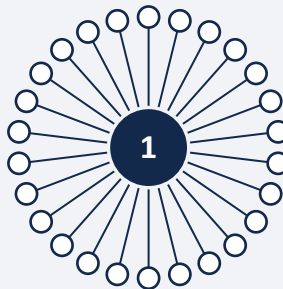
SERVICES • MiCA



**One authorisation,
27 markets**

Art. 59(7) MiCA • no physical
presence in the host State

FAILURE • REGULATION (EU) 2015/848



**One *lex concursus*
for all**

No establishment (Art. 2(10)) →
no secondary proceedings (Art.
3(2))



ROADMAP

Four questions



1 • JURISDICTION

**Where does a
CASP fail?**



2 • OWNERSHIP

**Whose are the
assets?**



3 • VALUATION

**When is the
coin valued?**

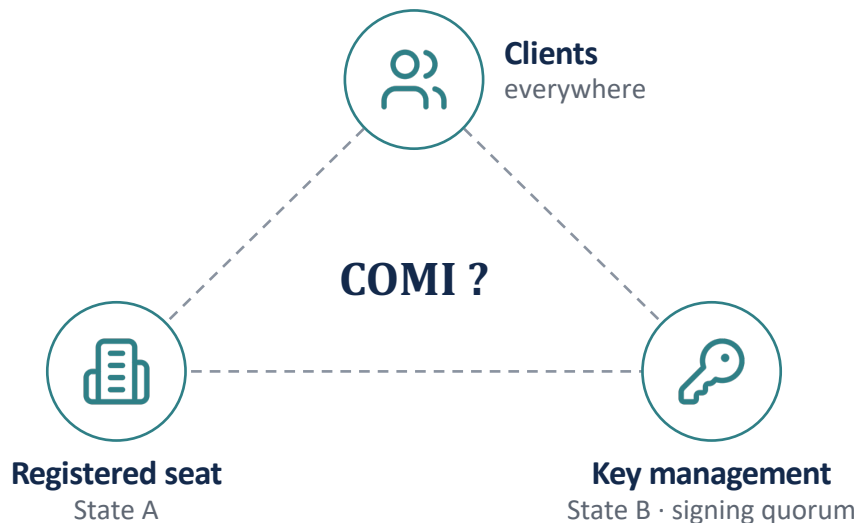


4 • WIND-DOWN

**What is a
burial plan
worth?**

CHALLENGE 1 • JURISDICTION

1 • Where does a CASP fail?



COMI was built for a factory.

EXISTING LAW

Registered-office presumption, rebutted by objective factors ascertainable by third parties (*Eurofood*, *Interdil*)

MiCA anchors: Art. 59 · authorisation · ESMA register

PROPOSAL

Locus of effective key control

cf. Recital 22 MiCA: “performed, provided or controlled”



CHALLENGE 2 • OWNERSHIP

2 • Whose are the assets?

Client asset or estate asset?



Decided by **contract** × **segregation**

CLIENT ASSET

Client property

excluded from the insolvency estate

ESTATE ASSET

Unsecured claim

the client ranks among the creditors



CHALLENGE 2 • OWNERSHIP • THE CASE LAW

Same coins. Opposite fates.

***Celsius***

US Bankr. Ct. S.D.N.Y. • 2023

Earn terms transferred title

Creditor***Ruscoe v Cryptopia***

High Court of New Zealand • 2020

Trust inferred; shortfall shared
pro rata, asset by asset**Owner*****BitGrail***

Tribunale di Firenze • 2019

Irregular deposit, yet a 100%
reserve duty**Creditor*****Re Gatecoin***

Hong Kong CFI • 2023

Same wallets: turned on which
version of the terms was
accepted**Owner or creditor**

Proprietary fate decided by drafting.



CHALLENGE 2 • OWNERSHIP • APPLICABLE LAW

Four laws, not one

Lex contractus

Rome I

Lex proprietatis

outside Rome I

Lex concursus

Art. 7 EIR

Lex protocolli

PROPOSAL

Kept separate

→ the client is protected

Collapsed

→ absorbed into the estate



CHALLENGE 2 • OWNERSHIP • REGULATION (EU) 2015/848

The Article 8 trap

ART. 2(9) • EXHAUSTIVE SITUS RULES



Token on a
permissionless
ledger



✗ Registered shares

✗ Book-entry instruments

✗ Cash in accounts

✗ Public registers

✗ European patents

✗ Copyright

✗ Tangible property

✓ **Claims****Proprietary**

→ no situs

Claim→ no right *in rem*

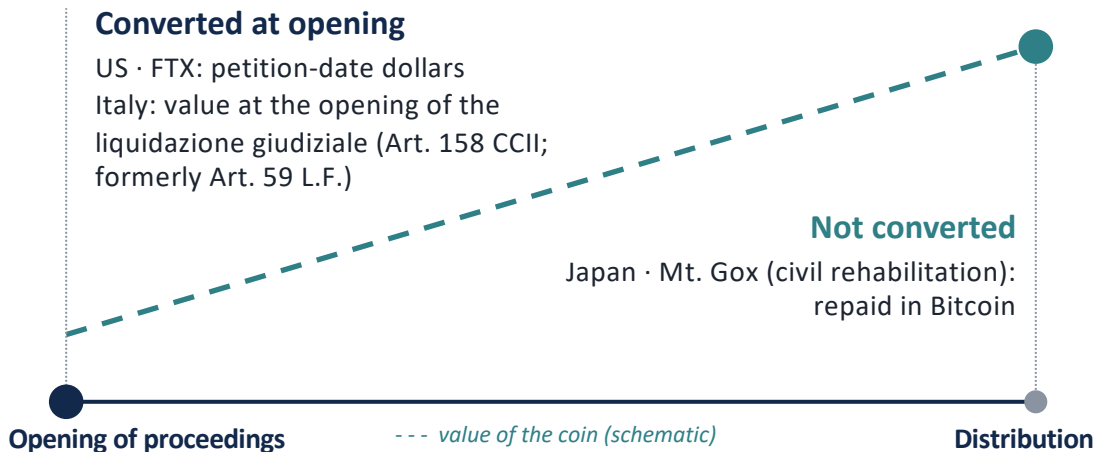
Protection or localisation.
Never both.

PROPOSAL**Locus of key control as the situs**

Space law chose a register (2012 Space Protocol, adopted). Crypto custody: control.

CHALLENGE 3 • VALUE AND TIME

3 • When is the coin valued?



The *lex concursus* decides
value, not only procedure.

**A proprietary claim to
Bitcoin is a claim to
Bitcoin.**



CHALLENGE 4 • WIND-DOWN PLANS

4 • The burial plan

Art. 74 MiCA

The plan

Continuity or
recovery of
critical activitiesOrderly
wind-down*... without undue economic harm to clients*

- ✓ It tells the supervisor **how** the CASP stops.
- ✗ It does not tell a court **whose** the assets are.

Today's question: **what is it worth across borders?**Source: P.M. Lupinu, 'Article 74 MiCAR', in M. Lehmann & C. Kumpan (eds), *European Financial Services Law* (2nd edn, Nomos 2026)



CHALLENGE 4 • WIND-DOWN PLANS

What is the plan in the conflict of laws?

A will drafted without knowing the law of succession.

THREE CANDIDATES

- ✗ ***Lex specialis*** presupposes insolvency law
- ✗ ***Art. 9 Rome I*** no right in rem
- ✗ ***Lex fori*** only if COMI = authorising State



Within and through the *lex concursus*

PROPOSAL

A conflict-of-laws map in every plan



COMI and *lex concursus*



Key management • proprietary law



Each sub-custody link • Art. 75(9)



Recognition in third States



THE PROPOSAL

Anchoring by designation

The instrument that creates the right must name its law.

Art. 75(7) MiCA

“in accordance with applicable law” ... which law?

Re Ipagoo

a duty to safeguard is not a trust

Hague 1985, Art. 3

statutory trusts do not travel





REFORM AGENDA • THE SPEAKER'S PROPOSALS

An agenda in five points

**A situs rule for
ledger-based assets****ART. 2(9) EIR**anchored in the locus of
control**Anchoring by
designation + an EU
floor of proprietary
exclusion****EU LAW**segregation as a property
right, not merely a
supervisory duty**In-kind distribution
by default****DISTRIBUTION**Mt. Gox shows it is possible,
though slow**Burial plans with a
conflict-of-laws map****ART. 74 MiCA**the reviewed plan as
objective evidence in the
COMI assessment**Insolvency at the
HCCH Digital Tokens
table****HCCH**UNIDROIT Principles 13 and
19 into a binding instrument



CONCLUSIONS

Conclusions

Insolvency is the stress test of custody law.

The outcome depends less on regulatory status than on two quiet questions of private international law:



**Which law decides
whose the coin is?**



**Which law decides
when it is valued?**



MiCA has told CASPs to plan their own funerals.

Private international law must now tell us
which law will read the will.

Thank you

Prof. Dr. Cayetana Santaolalla Montoya
Public University of Navarra



SSRN Author Page



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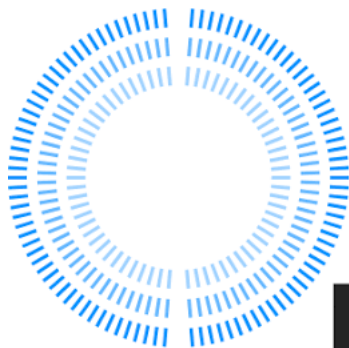
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*New horizons: Insolvency III,
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EU Inc. and beyond*

Session Five – Decision-Making in Insolvency: Courts, Mediators, and Corporate Directors

Thursday 13:30 – 15:00



Catarina Serra
Session Chair



Paul Lewis
The U.S. Supreme Court
and the Public Policy
Exception



Stephen Ware
Amicable Settlement in
Insolvency



Diederik Bruloot
New Developments in
Directors' Duties in the
Vicinity of Insolvency: ESG
and Beyond





The U.S. Supreme Court and the Public Policy Exception

Paul B. Lewis

Professor of Law and Director of International Programs

University of Illinois Chicago School of Law



OVERVIEW

- A. Focus on Disparity Between How U.S. Supreme Court and Bankruptcy Courts Address Interpretation of Bankruptcy Code.
- B. The Famous case of *Harrington v. Purdue Pharma* and the Public Policy Exception Aftermath is a Good Illustration.
- C. A Lot of This Comes Down to the Nature of Statutory Interpretation.
 - 1. Particularly in the Areas of Equitable Discretion and “Gaps” in the Bankruptcy Code

Overview (continued)

1. Brief Chapter 11 Overview
2. Chapter 15 of the Bankruptcy Code (the UNCITRAL Model Law)
3. Purdue Pharma – What did the Supreme Court do, what did they not do, and why did they do what they did?
4. The Public Policy Exception Follow-Up
5. What all this Illustrates about Bankruptcy Code Interpretation



CHAPTER 11

1. Restructuring Debt
2. Automatic Stay
3. Equitable Powers of the Court
4. Discharge
5. Debtor Obligations

CHAPTER 15 (UNCITRAL Model Law)

- A. Promote cooperation between the United States courts and parties of interest and the courts and other competent authorities of foreign countries involved in cross-border insolvency cases;
- B. Establish greater legal certainty for trade and investment;
- C. Provide for the fair and efficient administration of cross-border insolvencies in order to protect the interests of all parties in interest;
- D. Protect the estate and assure maximum value of the estate's assets;
- E. Rescue economically troubled business entities.

Chapter 15 (continued)

- A. An ancillary case is commenced under chapter 15 by a "foreign representative" filing a petition for recognition of a "foreign proceeding."
- B. Chapter 15 gives the foreign representative the right of direct access to U.S. courts for this purpose.
- C. After notice and a hearing, the court is authorized to issue an order recognizing the foreign proceeding as either:
 - (1) a "foreign main proceeding" (a proceeding pending in a country where the debtor's center of main interests are located),
 - or
 - (2) a "foreign non-main proceeding" (a proceeding pending in a country where the debtor has an establishment, but not its center of main interests).
- D. Upon recognition of a foreign main proceeding, certain provisions of the Bankruptcy Code take effect.



The Public Policy Exception

- A. Section 1506 of the Bankruptcy Code states that “Nothing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States.”
1. Presumably this means either:
 - A. It would violate US law, or
 - B. It contradicts the most fundamental policies of the United States

Harrington v. Purdue Pharma

- A. Non-Consensual Third-Party Releases
- B. Key Code Sections:
 - 1. Section 105(a) is entitled “Power of Court” and it states in relevant part: “The court may issue **any order, process, or judgment** that is necessary or appropriate to carry out the provisions of this title.”
(emphasis added)
 - 2. Section 1123(b)(6) states a plan of reorganization may: “include **any other appropriate provision not inconsistent** with the applicable provisions of this title.”
(emphasis added)

Harrington v. Purdue Pharma

- A. The specific question in the Purdue Pharma case was whether the Sackler Family, the former owners of Purdue Pharma, L.P., could be released from all future claims of liability in connection with OxyContin due to their potential contributions to victims of the opioid crisis through Purdue Pharma's Chapter 11 bankruptcy proceedings despite the fact that the Sacklers were not debtors in the Bankruptcy proceeding.
 - 1. The company Purdue Pharma filed for bankruptcy.
 - 2. The individual members of the Sackler family did not file for bankruptcy but sought to have their potential liability eliminated through the Company's Chapter 11 process.



Harrington v. Purdue Pharma

- The critical part of the confirmation plan was section 10.7, which reads in relevant part:
- “[T]he Shareholder Released Parties . . . shall be conclusively, absolutely, unconditionally, irrevocably, fully, finally, forever and permanently released . . . by the Releasing Parties from any and all Causes of Action ...”

Harrington v. Purdue Pharma

- A. The Bankruptcy Court confirmed the proposed plan holding that it is empowered to enter such an order if doing so is in the best interest of the insolvency restructuring.
- B. On Appeal, the United States District Court reversed the Bankruptcy Court and nullified the confirmation of the Chapter 11 plan:
 - 1. The Court found no justification, in the text of the Bankruptcy Code or otherwise, for allowing the nonconsensual third-party releases granted by the Bankruptcy Court.
- C. The United States Court of Appeals for the Second Circuit in turn reversed the District Court, finding that the Bankruptcy Code granted bankruptcy courts residual equitable authority to modify third-party relationships that could affect party funds in Bankruptcy.

Harrington – Supreme Court Opinion

The Supreme Court overruled the Second Circuit and held that the Bankruptcy court did not have the authority to authorize the nonconsensual release of the opioid victims' claims against the Sacklers.

- The catchall provision in section 1123(b)(6) does not mean that any other provision can be inserted into a plan of reorganization.
- Instead, the Court noted that the Bankruptcy Code is designed for the benefit and protection of debtors, and even debtors must surmount obstacles to obtain these releases.



Harrington – Supreme Court Opinion

Case decided on textual analysis, not on either:

1. Constitutional Considerations or
2. Public Policy Grounds

This is relevant for Section 1506 analysis.



Purdue Pharma

A. Possible Constitutional Law Arguments

1. The Substantive Due Process Provision of the Fifth Amendment
2. Procedural Due Process
3. Article III Judicial Power

Public Policy Exception

- A. *Purdue Pharma* – focus on statutory interpretation rather than constitutional law and public policy is instructive.
 - 1. It suggests that while such releases are not permitted in a Chapter 11 proceeding, it does not foreclose recognition of such provisions in foreign restructuring plans.
 - 2. Indeed, where a foreign jurisdiction's law allows for such provisions, countervailing considerations of international comity at the forefront of Chapter 15 analyses weigh in favor of recognition.
- B. Shortly after *Purdue* was decided, such cases started reaching American courts.

Impact of Supreme Court's Harrington Approach

- A. It is clear that the US Supreme Court's ruling striking down nonconsensual third-party releases in *Harrington v. Purdue Pharma* will have a meaningful impact on larger Chapter 11 cases, as such releases have become common in larger restructurings.
- B. Ruling is also likely to encourage more multi-national companies to file bankruptcy outside of the United States as a number of popular foreign bankruptcy regimes permit nonconsensual third-party releases.
- C. This circuitous route to obtaining relief that Purdue now prohibits under Chapter 11 would be possible because the Purdue ruling focuses on the statutory text of Chapter 11, sidestepping other constitutional and due process issues that might have implicated Chapter 15's public policy exception.



Bankruptcy Courts and Supreme Court Statutory Construction

- A. Two Topics:
 - 1. The first is the Supreme Court's dominant method of statutory construction, known as textualism.
 - 2. The second is the role of bankruptcy courts in business restructuring cases and the divide between a textual approach to court powers and an approach that recognizes the unique nature of bankruptcy courts.

What is Textualism

- A. It does not, as it sometimes accused of, support isolating statutory language from its surrounding context.
- B. Not “intentionalism” based on what is seen as different goals of statutory interpretation.
- C. Textualists care only about the “objective” meaning of the statutory text.
- D. Statutory texts must be understood in light of their contexts
- E. Consistent with Wittgenstein’s *Philosophical Investigations* § 43 that the "meaning of a word is its use in the language."
 - 1. This implies that words have no intrinsic meaning, but instead are only meaningful when they are used in a particular context.

Textualism (continued)

- A. It is predicated on the argument that it is unwise and inefficient to try to fathom the lawmaking process.
 - 1. Rather, judges should stick to their area of expertise of interpreting legal texts by focusing on enacted statute.
- B. So textualists urge courts to apply widely shared linguistic conventions (e.g., dictionary definitions and standard grammar), including a presumption that Congress uses words to communicate their ordinary semantic meaning to a reasonable reader of a particular statute, with its distinctive subject matter.
- C. It rejects argument that “It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.” *Church of the Holy Trinity v. United States*, 143 U. S. 457 (1892)



Textualism (continued)

To quote Justice Scalia, “[W]hat judges believe Congress ‘meant’ (apart from the text) has a disturbing but entirely unsurprising tendency to be whatever judges think Congress *must* have meant, i.e., *should* have meant.” *Zuni Public School District v. Department of Education* (emphasis in original)

Textualism and Bankruptcy

A. A key argument in favor of textualism thus is that it constrains judges from basing their decisions on personal policy preferences.

1. Reliance on legislative history as a basis for interpreting statutes gives judges wide leeway to reach the results that they prefer on nonlegal grounds.

B. While there are certainly gaps in the Bankruptcy Code, structural textualism calls for these gaps to be filled with principles derived from the statute's text and structure.

Textualism and the Uniqueness of Bankruptcy Courts

- Are Bankruptcy courts special as courts of equity? Three justifications:
 1. Bankruptcy cases implicate numerous, varying public interests that bankruptcy judges have to balance;
 2. The Bankruptcy Code is something of a common law statute that invites courts to interpret it equitably in light of changing circumstances; and
 3. Bankruptcy cases are uniquely complex.



Bankruptcy Courts vs. Other Federal Courts

- A. Bankruptcy judges are Article I judges
- B. The Courts are effectively subsidiary units of the federal district courts.
- C. Bankruptcy cases generally are not structured like other legal disputes.
- D. Docket has little in common with the docket in federal district courts.
- E. The Code provides for all sorts of unique areas of relief.
- F. Argument that bankruptcy courts have an equitable obligation in their adjudication which other federal courts do not have.
 - 1. The Code, provides a broad – but not unlimited – grant of equitable discretion in a number of ways.

Purdue Pharma and the Bankruptcy Court

A. Bankruptcy Court opinion was a classic illustration of how many academics and judges view bankruptcy.

1. It was consistent with a view of bankruptcy that strongly favors resolving complex commercial cases via value-maximizing compromise.

2. Consistent with this view is the idea that instead of imposing stringent requirements, courts should employ flexible tests that increase the likelihood that a plan could be negotiated and confirmed.

B. Empirical research has found that such views are widely shared by bankruptcy judges, are widely shared.

Alternate Argument

A. The idea that there is something unique about bankruptcy law is generally less evident in Supreme Court opinions than in decisions of bankruptcy courts.

B. In addition, there are good reasons to think a consistent approach to textual interpretation among bankruptcy courts and other federal courts is desirable.

1. Bankruptcy courts are frequently called upon to decide questions of state law alongside questions of federal bankruptcy law.

2. Similarly, federal district courts and courts of appeals must frequently decide bankruptcy issues alongside all of the other legal issues.

Textualist Approach to Bankruptcy

- A. While Code only uses open-ended phrases such as “according to the equities of the case” or “in the interests of justice” in specific provisions, this isn’t an invitation to deviate from text and structure.
- B. In Purdue Pharma, the Supreme Court held that neither section 105(a)’s grant of equitable powers or section 1123(b)(6)’s provision allowing for the inclusion of any other appropriate provision inconsistent with the Bankruptcy Code justifies deviating from what the Code provides.
- C. Finding a gap in the Bankruptcy Code is not an invitation for a Bankruptcy judge to resort to equitable power to craft remedies necessary to fulfilling bankruptcy’s broader purposes.
 - 1. The filling of any gap in the Code is done by examining the immediately surrounding statutory text, with the understanding that Congress must have already specified all the exceptions that it intended should apply.
 - 2. In other words, ordinary axioms of statutory interpretation should close any gap.

Conclusion

To again quote Justice Scalia, “[t]he Bankruptcy Code standardizes an expansive (and sometimes unruly) area of law, and it is our obligation to interpret the Code clearly and predictably using well established principles of statutory construction.” *RadLAX Gateway Hotel v. Amalgamated Bank*:



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*New horizons: Insolvency III,
winding-up of insolvent
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Session Five – Decision-Making in Insolvency: Courts, Mediators, and Corporate Directors

Thursday 13:30 – 15:00



Catarina Serra
Session Chair



Paul Lewis
The U.S. Supreme Court
and the Public Policy
Exception



Stephen Ware
Amicable Settlement in
Insolvency



Diederik Bruloot
New Developments in
Directors' Duties in the
Vicinity of Insolvency: ESG
and Beyond





Amicable Settlement in Insolvency Cases

Stephen J. Ware

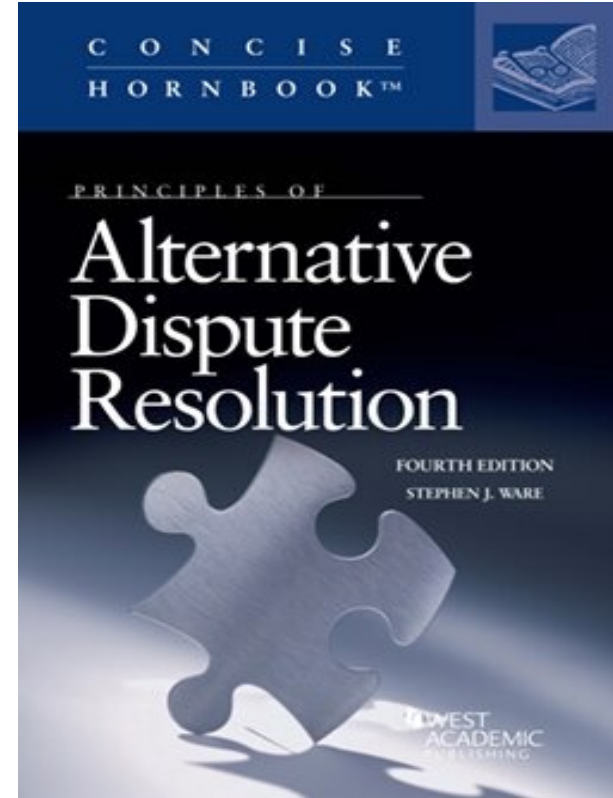
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While I've taught Insolvency ("Bankruptcy" in the US) law and Secured Transactions for over 30 years, my main area of research and writing is Alternative Dispute Resolution (ADR).

I think I am the only law professor in the US who regularly teaches and writes on both ADR and Insolvency/Bankruptcy.



ADR in Insolvency Research Thread

1. Ware, *Arbitration Agreements as Executory Contracts in Bankruptcy*, 96 Am. Bankr. L. J. 769 (2022)
2. Ware, *International Arbitration Agreements in Insolvency: Seeking a Happy Medium*, PROCEEDINGS OF INSOL EUROPE ACADEMIC FORUM 2025
3. Ware, *Reconciling Bankruptcy Law with Enforceable Arbitration Agreements* (unpublished draft)
4. Ware, *Arbitrating Bankruptcies* (unpublished draft)
5. Ware, *Amicable Settlement in Insolvency Cases* in PROCEEDINGS OF INSOL EUROPE ACADEMIC FORUM 2026 (forthcoming 2027)
6. Ware, *International Arbitration of Insolvency Claims Verification and Claims Against Non-Creditors* in RESEARCH HANDBOOK ON INTERNATIONAL INSOLVENCY LAW (forthcoming 2027)

ADR Contracts out of Litigation Default

In most developed nations, litigation is the “default” process of dispute resolution in the sense that everyone has the right to litigate—unless they contract away that right. ADR contracts away that right to litigate:

- Arbitration agreements
- Negotiated settlements
- Mediated settlements

All three need a contract to make dispute resolution legally binding, in contrast to litigation, which does not need a contract to be binding. So, contracts are central to ADR. (I teach Contracts—others may have different perspectives!)

Today's ADR Topics

In most developed nations, litigation is the default process of dispute resolution in the sense that everyone has the right to litigate—unless they contract away that right.

ADR contracts away that right:

- Arbitration agreements
- Negotiated settlements (why often forgotten or omitted?)
- Mediated settlements



Amicable Settlement

Disputing parties agree (in negotiation or mediation) on resolution
= (amicable) settlement

“Amicable Settlement” or just “Settlement”

US lawyers would delete the word “amicable” because:

- “amicable” means “friendly”, which does not describe most settlement negotiation and mediation in the US, where lawyers routinely settle lots of cases by negotiated or mediated agreements that are hard fought, not friendly,
- in the US, the word “settlement” commonly implies “by agreement, rather than adjudication,” but maybe in other places and languages “dispute settlement” includes by adjudication, so the phrase “amicable settlement” is needed to clarify settlement by agreement.

These points about the US are also largely true elsewhere in the common law “Anglosphere” (England & Wales, Canada ex. Q, Australia, NZ)

Settlement Rates (% of court cases that end by agreement of parties)

Chang & Klerman, 'Settlement Around the World: Settlement Rates in the Largest Economies' (2022) 14(1) *Journal of Legal Analysis* 80–175:

- “Common law countries, such as the U.S., U.K., and Australia, tend to have the highest settlement rates.”
- “Countries with legal systems based on French civil law, such as France and Belgium, tend to have the lowest settlement rates.”
- “Countries with legal systems in the German or Nordic civil law families, such as Germany, China, and Sweden, tend to have middling settlement rates.”

Settlement Rates (% of court cases that end by agreement of parties)

Are these differences across jurisdictions caused by differences in:

1. legal rules,
2. litigation costs, or
3. culture?

Or by all three?

Ware & Slawicki, '[Enforcement of Negotiated and Mediated Settlements in the EU and in the Anglosphere: A Comparative Approach](#)' (2026) 111 *Studia Iuridica Varsoviensis* 73.



Plaintiff's Claim as a Sell-Able Asset

Plaintiff's (P's) claim v. Defendant (D) is P's asset that P can sell, typically (in non-insolvency cases) only to D.

When P ("amicably") settles, P trades or "sells" the claim to D in exchange for whatever D provides P, which is typically money.

Is this a distinctly common law perspective? Or even a distinctly US perspective?

Settlement Negotiation in the “Shadow of the Law”

1. A settlement is the “sale” of a claim by Plaintiff (P) to Defendant (D) (US scholars: Hylton; Rave). Common law systems more claim-centric than civil?
2. If a claim is not 'sold' in negotiation, P can “force a sale” through litigation (or arbitration) — the court's judgment transfers the claim and sets the price.
3. So, settlement negotiation is shaped by each party's expectations about what a court will decide (the “Shadow of the law”) if no settlement agreement occurs.

Settlement Negotiation in the “Shadow of the Law”

Settlement negotiation occurs in the “Shadow of the law” (Mnookin & Kornhauser, 88 Yale L.J. 950 (1979)).

The expected outcome of litigation gives each party “bargaining chips — an endowment of sorts”

Parties considering whether to make or accept a settlement offer compare that possible deal with the expected outcome of litigation.

BATNA in Settlement Negotiation

Best Alternative To a Negotiated Agreement (BATNA) in Settlement Negotiation is continued litigation:

- P can turn down D's settlement offer to continue pursuing litigation
- D can refuse to make a settlement offer, recognizing that this refusal likely persuades P to continue pursuing litigation

BATNA in Settlement Negotiation

To know their “bottom lines” in settlement negotiation, P and D each asks its lawyer to help: What is the expected value of continued litigation or arbitration?

Client asks lawyer to “value the case” by predicting results of continued litigation or arbitration.

Rule on Lawyer Fees Affects BATNA in Settlement Negotiation

Determining BATNA in Settlement Negotiation under US rule of each side pays its own lawyer (win or lose):

- Plaintiff's BATNA is the expected result of litigation minus costs of P paying P's lawyer and other litigation costs
- Defendant's BATNA is expected result of litigation plus D paying D's lawyer fees and other litigation costs

Determining BATNA in Settlement Negotiation more complex under rule of “loser pays winner's lawyer's fees”: will court award 100% of lawyer fees or lower%? Will award of fees be collectible?

Two More Possible Causes of Varying Settlement Rates:

	Pre-trial Discovery	D Gets Permanent Dismissal of P's Claims
Common Law Anglosphere	Party-driven, extensive, expensive	Even if terms of settlement are confidential from court
Civil Law Jurisdictions in Europe	Court-driven, less extensive and costly	Only if court examines the settlement terms? (except novation)

Settling Civil & Commercial Cases via Negotiation & Mediation in the US (and in the Anglosphere more Broadly?)

- Negotiated settlement is the usual way litigation ends
- Routine in US civil and commercial cases: litigating and negotiating simultaneously (“litigotiation”)
- Mediation is just a slightly different way of doing what has long been routine for lawyers, negotiating a settlement
- Mediated settlements are largely governed by the same law as negotiated settlements (follow precedent)

Settling Civil & Commercial Cases via Negotiation & Mediation in the Civil Law Jurisdictions of Europe

- Negotiated settlement is not so common
- Last 20 years or so have seen laws that encourage mediation but not negotiation, such as Directive 2008/52/EC “encouraging the use of mediation” “in cross-border disputes, to civil and commercial matters”
- Mediated settlements are in many jurisdictions governed by separate law from law governing negotiated settlements

Bankruptcy (Insolvency) Mediation in the US

In the US, mediation is often used to resolve “two party” disputes that have long been negotiated:

- claims allowance (verification, admission)
- avoidance actions & other claims by Debtor or Trustee (Administrator)
- creditor’s request for relief from stay (moratorium)
- disputes about the valuation of collateral

Are these really “two party” disputes?

Nation, State, City or
other Government
entity

SC1

SC2

Insolvency
Debtor/
Administrator

USC1

USC2

USC3

Employees Council or
Labor Union

USCs 4 – 1000 or more?

Does Court Need to See Settlement Terms to Permanently Resolve the Dispute?

Not ordinarily in US civil and commercial litigation, but in an insolvency (“bankruptcy”) case, Rule 9019 says “On the trustee's motion and after notice and a hearing, the court may approve a compromise or settlement.”

This enables rival creditors and the court to police whether the trustee's or DIP's settlement with one creditor was a bad deal for the bankruptcy estate and thus for other creditors.

Top Down



Mediation

Court (or State or society)
requires mediation because
it wants issues resolved
without court having to rule

Bottom Up



Parties hire mediator
because they want a faster,
cheaper, better outcome
than court likely to produce

Moving to Court-Driven Multi-Party Mediation

Insolvency mediation (and negotiation) can be party-driven and multi-party: “Negotiated deals among the debtor and its creditors, such as restructuring support agreements (RSAs) and pre-packaged or pre-negotiated bankruptcies, have come to characterize much of modern chapter 11 practice.” Laura Coordes, *Chapter 11 Mediation* (2025) 41 Emory Bankr. Dev. J. 153, 155

Insolvency mediation can be court-driven and multi-party: “the judge in San Bernardino's bankruptcy appointed a colleague to oversee mediation efforts, and after thousands of hours of mediation, all impaired classes of creditors voted to accept the plan of adjustment by wide margins” Coordes, *Formalizing Chapter 9's Experts* (2018) 116 Mich. L. Rev. 1249.

Top Down



Mediation

Court (or State or society)
requires mediation because
it wants issues resolved
without court having to rule

A concern is delaying justice for plaintiffs (creditors)
because defendant (debtor) or rival creditor slows
mediation, while the court stays litigation.

“Justice Delayed is Justice Denied”

- “Sometimes, a judge may push for mediation even when the parties do not want it.”
- Mediations “can drag on for years”
- Some “cases show the willingness of judges to continually push mediation, even when faced with evidence that mediation is not progressing.”

Laura Coordes, ‘Chapter 11 Mediation’ (2025) 41 Emory Bankr. Dev. J. 153

So, IMHO, Mediation should:

- start soon,
- involve negotiators with authority to settle,
- be confidential from the court so negotiators speak more freely,
- not much slow litigation.

I want judges to tell disputing parties, “Get me a signed settlement by Monday 09:00, or I’ll hear evidence and argument in my court then and decide this issue by Monday evening.”

U.S. Bankruptcy Court (Southern District of NY)

Procedures Governing Mediation

1.1 The Court may order assignment of a matter to mediation

Notwithstanding assignment of a matter or proceeding to mediation,
it shall be set for the next appropriate hearing on the Court docket in
the normal course of setting required for such a matter.

1.2 Any matter may be referred to mediation upon stipulated order
submitted by counsel of record or by a party appearing pro se.

....

U.S. Bankruptcy Court (SDNY) Mediation Procedures

3.1 ... the [initial mediation] conference shall be set as soon after the entry of the mediation order and as long in advance of the Court's final evidentiary hearing as practicable. ...

3.2 A representative of each party shall attend the mediation conference, and must have complete authority to negotiate all disputed amounts and issues. The mediator shall report any willful failure to attend or participate in good faith in the mediation process or conference. Such failure may result in the imposition of sanctions by the Court.

U.S. Bankruptcy Court (SDNY) Mediation Procedures

3.3 The mediator shall have no obligation to make written comments or recommendations; provided, however, that the mediator may furnish the attorneys for the parties and any pro se party with a written settlement recommendation. Any such recommendation shall not be filed with the Court.

U.S. Bankruptcy Court (SDNY) Mediation Procedures

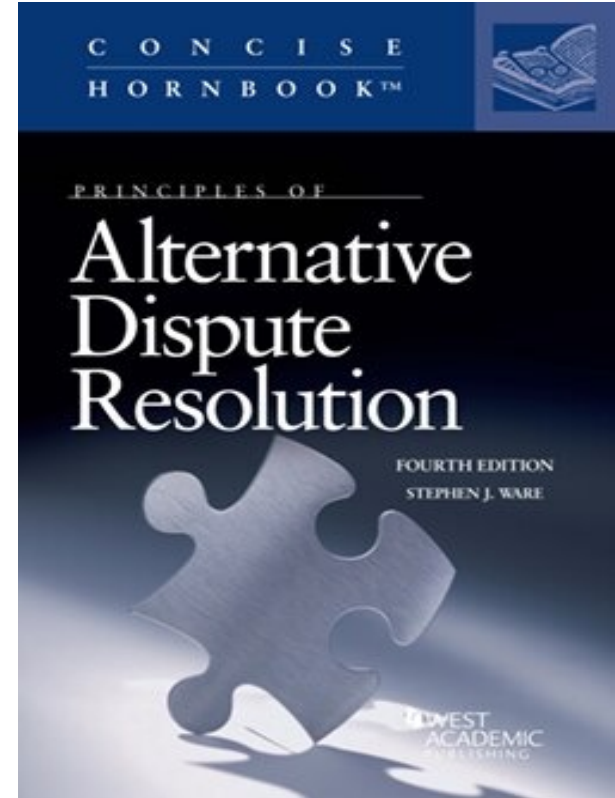
3.4 If in the mediation the parties reach an agreement regarding the disposition of the matter, they shall determine who shall prepare and submit to the Court a stipulated order or judgment, or joint motion for approval of compromise of controversy (as appropriate), within twenty-one (21) days of the conference. If the mediation ends in an impasse, the matter will be heard or tried as scheduled.

U.S. Bankruptcy Court (SDNY) Mediation Procedures

5.1 Confidentiality as to the Court and Third Parties. Any **statements** made by the mediator, by the parties or by others **during the mediation** process **shall not be divulged** by any of the participants in the mediation (or their agents) or by the mediator **to the Court** or to any third party. ...

Is a pre-pack ADR?

Is a 'consensual' restructuring plan ADR?





Amicable Settlement in Insolvency Cases

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New Developments in
Directors' Duties in the
Vicinity of Insolvency: ESG
and Beyond



New Developments in Directors' Duties in the Vicinity of Insolvency: ESG and Beyond

Prof. dr. Diederik BRULOOT

Ghent University (Belgium) – DLA Piper LLP

PLAN

I. Theoretical framework

II. Impact of the Insolvency III Directive

III. ESG & wrongful trading

I. DIRECTORS AND CREDITORS

- **Starting point**
 - Creditors are best protected by a company's business continuity
 - Company law rules for directors to protect creditors can remain limited to
 - Distributions to shareholders (asset shifting)
 - Vicinity of insolvency (asset shifting + gambling for resurrection)



DIRECTORS' DUTIES IN THE VICINITY OF INSOLVENCY

- **Regulatory strategies**
 - General duty of directors to act in the interests of the company
 - With the interests of the company = the interests of the creditors as residual claimants in the vicinity of insolvency
 - Duty to file for bankruptcy
 - 1 of 0
 - Wrongful trading rule
 - Acting carefully beyond the point of no return
 - Combination

II. INSOLVENCY III DIRECTIVE

- **Directors' duty to file** (art. 40-43 Ins. III)
 - *“Member States shall ensure that the directors of a company which becomes insolvent in accordance with national law have a duty to submit a request for the opening of insolvency proceedings, with the exception of preventive restructuring proceedings.”*
 - Cf. annex A EIR
 - *“[...] within three months of the directors having become aware, or being reasonably expected to have become aware, that the company is insolvent in accordance with national law.”*
 - Exceptions (art. 41)
 - Directors' liability under national law

INSOLVENCY III DIRECTIVE

- **Some observations**
 - Scope
 - Quid voluntary liquidation?
 - 3 months = debtor/director friendly
 - Depending on national starting point
 - Who can invoke a breach?
- **Impact on available regulatory strategies?**
 - Wrongful trading remains more relevant



III. WRONGFUL TRADING & ESG

- ESG & insolvency law
- Core question for boards of (industrial) corporate groups
 - *How to run off environmentally harmful activities (= “brown” business) without triggering directors’ liability?*
- Multiple potential approaches (4)



RUNNING OFF “BROWN” BUSINESS

- **A. Single-entity approach**
 - Limited liability risk
 - Negative impact on profitability and risk for long-term viability of the company
- **B. Ringfence and restructure approach**
 - Ringfencing “brown” activities
 - Trying to restructure the new “brown” entity (e.g. sale for low price incl. implied liabilities)
 - Risks
 - Creating a new entity without sufficient liquidity can trigger liability (incl. wrongful trading)
 - Can a restructuring result in a business that is not future proof?



RUNNING OFF “BROWN” BUSINESS

- **C. Inverse ringfence and restructure approach**
 - Ringfencing future-proof activities in a NewCo
 - Restructuring the old “brown” company
 - Advantages for shareholders and “new” creditors
 - Risks
 - NewCo can be liable for “old debts”
 - Reconversion can prove to be impossible
 - High wrongful trading risk for “old” directors





RUNNING OFF “BROWN” BUSINESS

- **D. Ringfence and liquidate approach**
 - Ringfencing “brown” activities
 - Liquidating this “brown” NewCo
 - Clear & straightforward, saves economic value
 - Risks
 - Creating a new entity without sufficient liquidity can trigger liability (incl. wrongful trading)
 - Parent company liability
 - Avoidance actions
 - Risk of shifting costs to society (cf. NL Thermphos case)

RUNNING OFF “BROWN” BUSINESS

- **Policy perspective**
 - Real and current problem
 - Nexus of interests: creditors, shareholders, employees, but also society at large
 - Existing instruments perform well (wrongful trading, liability within groups, EU demerger regulation, avoidance actions)
 - Interventions to be considered
 - Accounting treatment of “brown” activities
 - Providing comfort/mechanisms to/for insolvency practitioners to consider societal interests in addition to creditors’ interests



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CONCLUSIONS



New Developments in Directors' Duties in the Vicinity of Insolvency: ESG and Beyond

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Harmonisation Directive – Stress Points from the Judiciary's View

Thursday 15:30 – 17:00 *Also open to all Congress delegates*



Catarina Serra
Session Chair



Caterina Macchi
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Division of the Ordinary
Court of Milan, Italy



Dominik Skauradszun
Judge of the Insolvency
Division of the Higher
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