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Re-Imagining Rescue

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Third Session:
Corporate rescue and the practitioner

Chair: Prof Dr Frits-Joost Beekhoven van den Boezem
(Top Specialist Legal, ING Bank, Netherlands / Professor in Company and Financing Law, Radboud University Nijmegen, Netherlands)

Speakers:

Nicolaes Tollenaar (Partner, RESOR, Netherlands)

Adrian Thery (Partner, Garrigues, Spain)

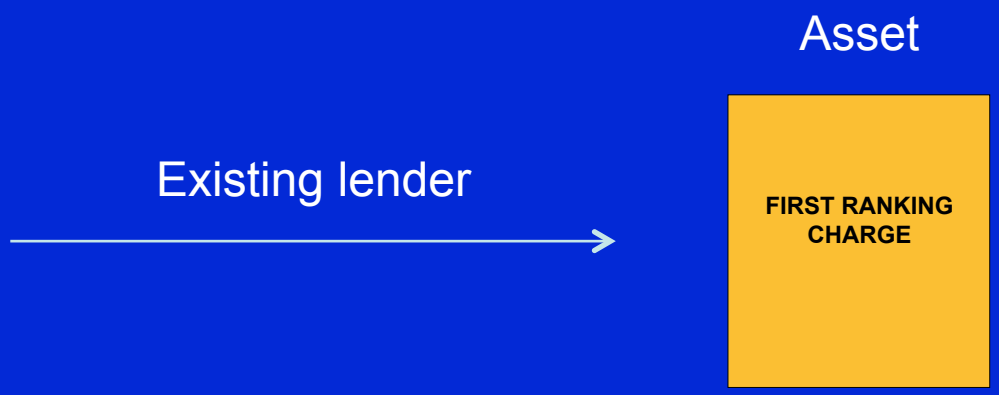
Mark Fennessy (Partner and Head of the European Restructuring Group, Proskauer, UK)

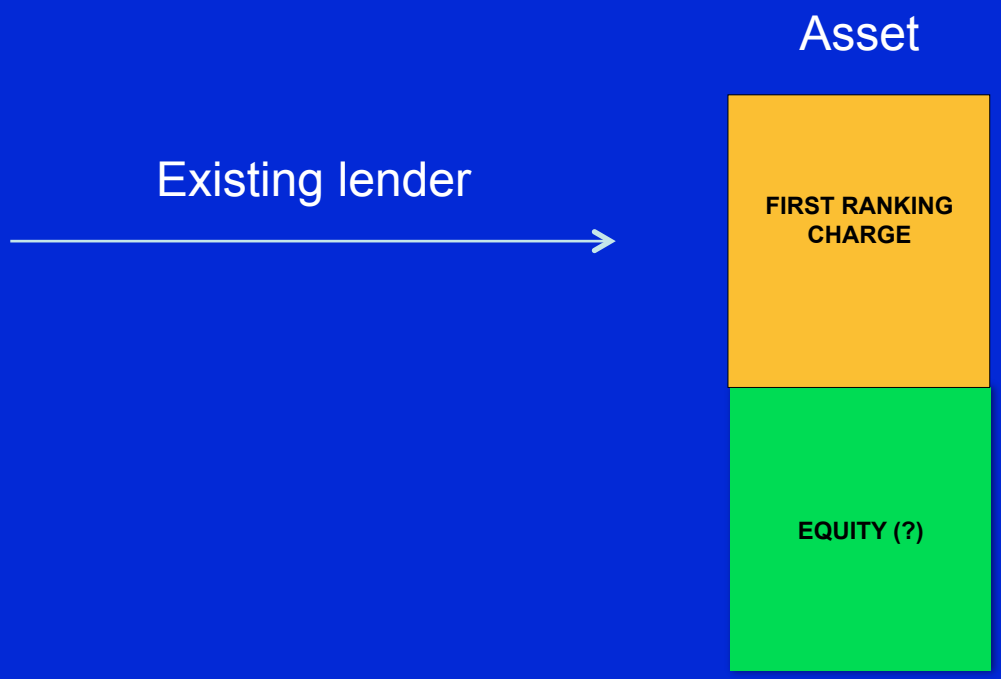
Dr Michael Nienerza (Partner, Goerg, Germany)

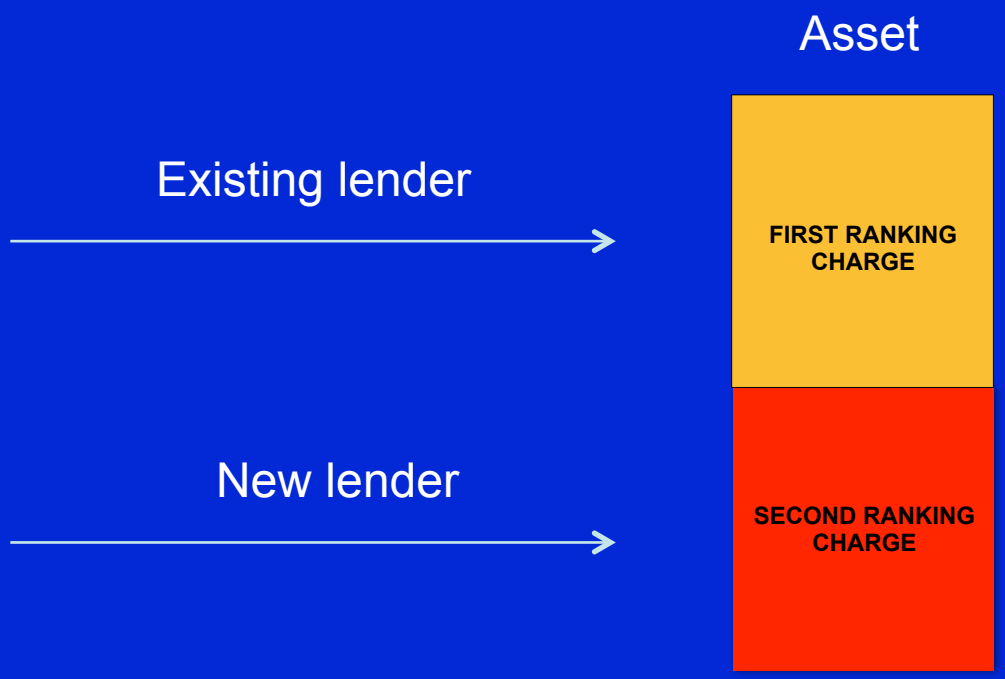
Motion 1:

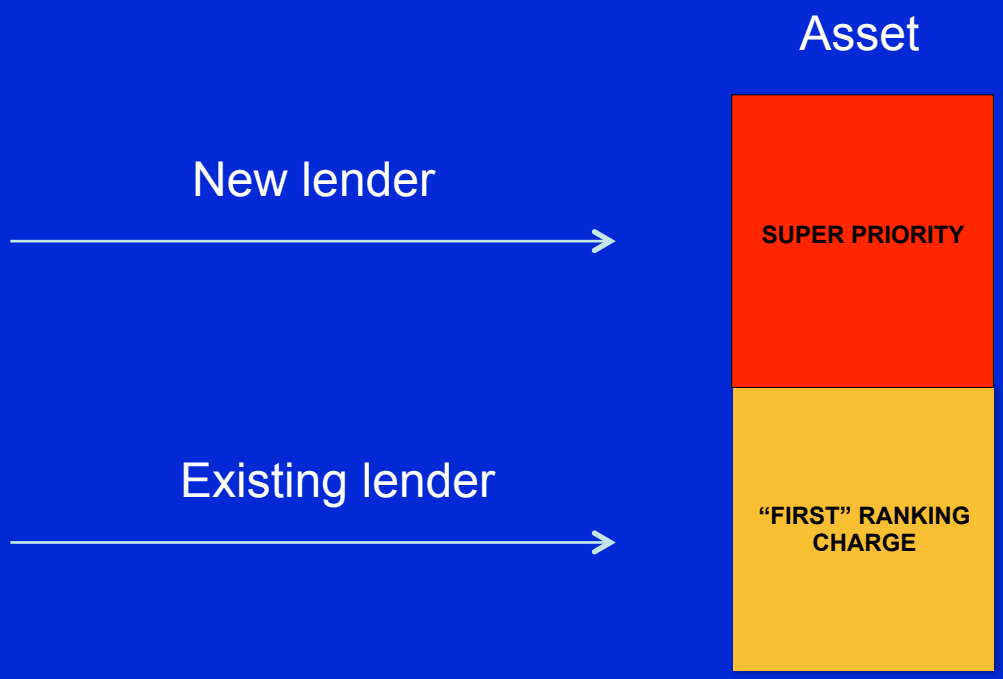
Superpriority of post-petition financing should be part of every rescue-oriented insolvency law.

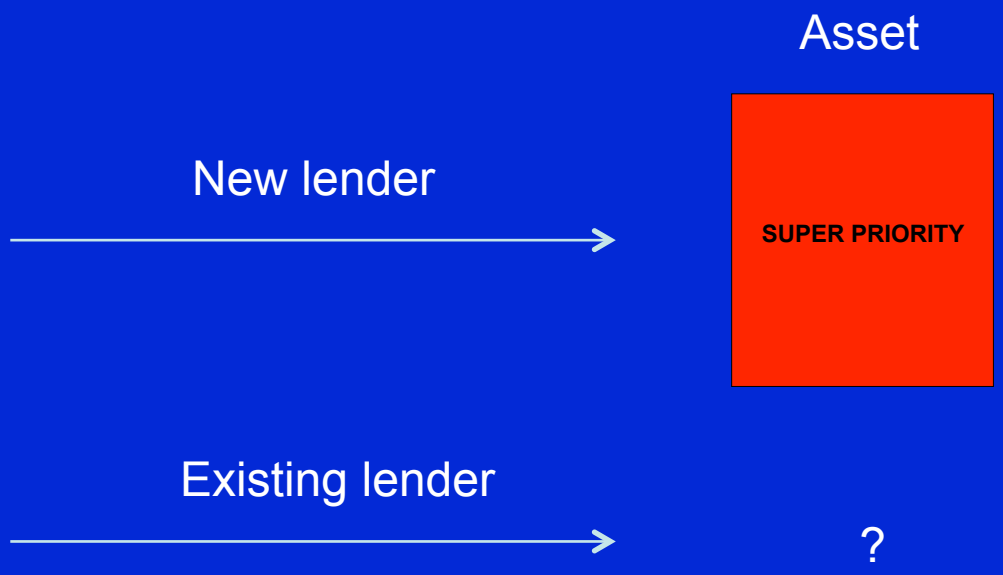
Joint Insolvency Conference, 25-26 June 2015, “Re-imagining rescue”


Asset
Existing lender
FIRST RANKING CHARGE


Asset
Existing lender
FIRST RANKING CHARGE
EQUITY (?)


Asset
Existing lender
FIRST RANKING CHARGE
New lender
SECOND RANKING CHARGE


Asset
New lender
SUPER PRIORITY
Existing lender
“FIRST” RANKING CHARGE

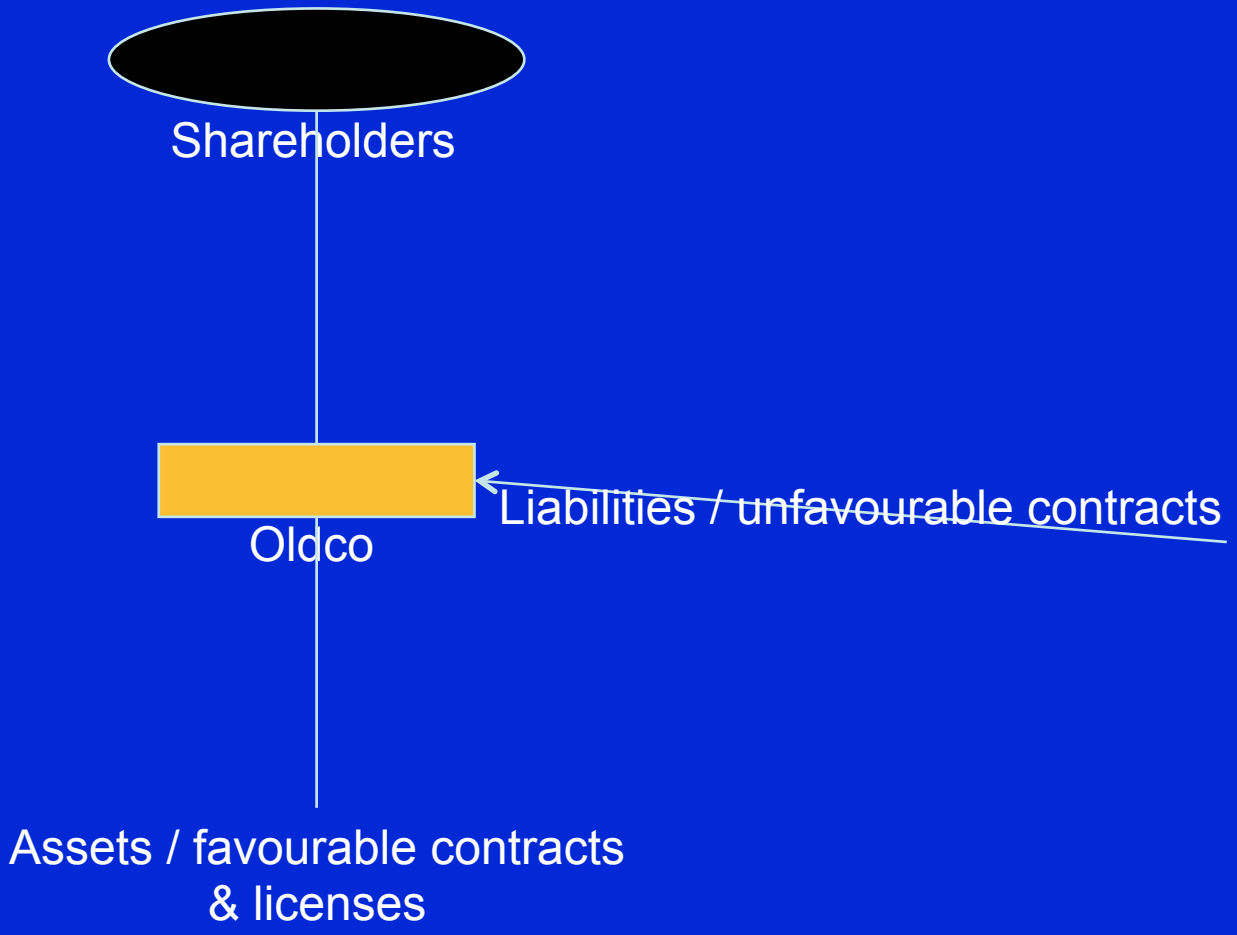

Asset
New lender
SUPER PRIORITY
Existing lender
?

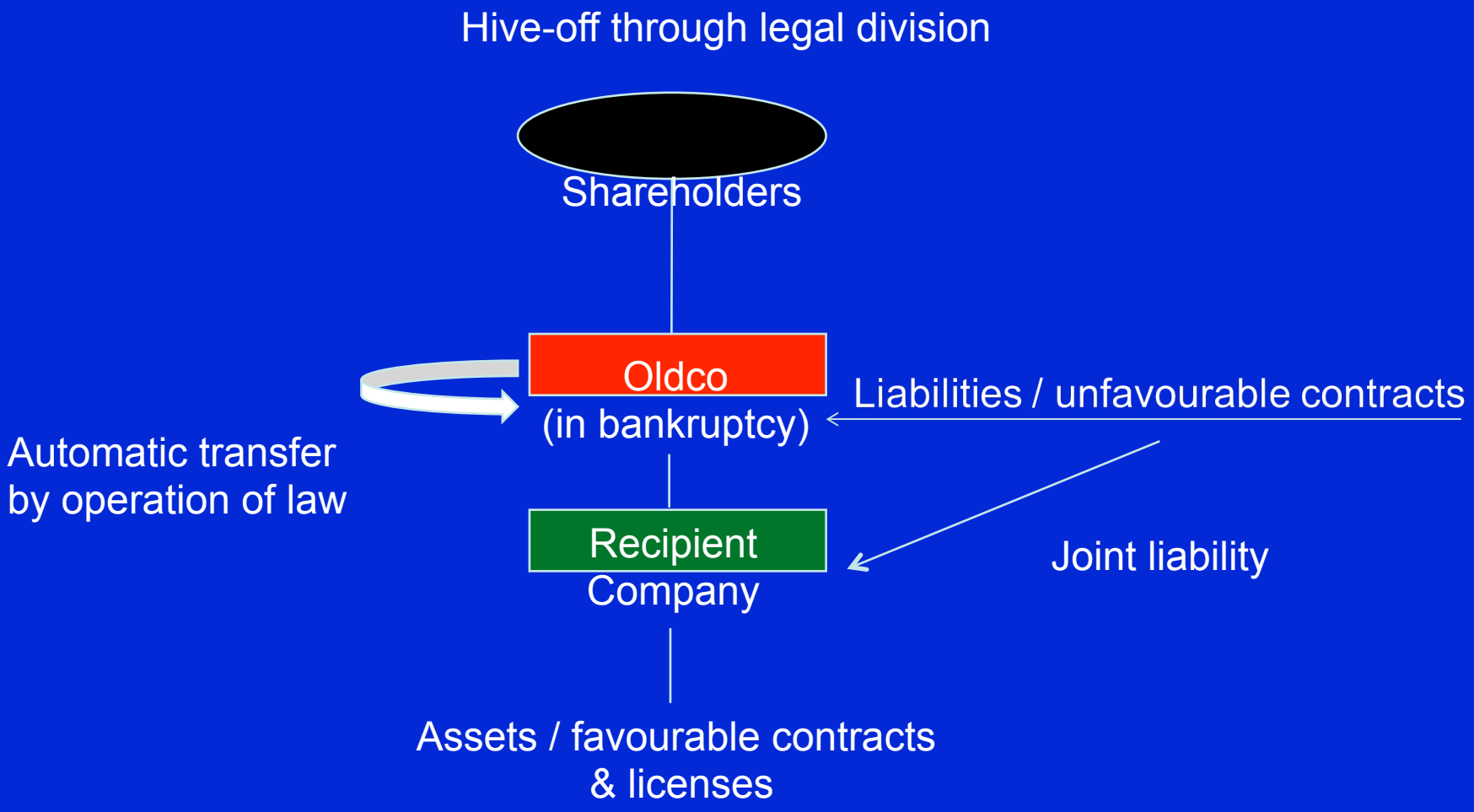
Motion 1:

Superpriority of post-petition financing should be part of every rescue-oriented insolvency law.

Motion 2:

Splitting of the legal entity is the new pre-packing.


Shareholders
Oldco
Liabilities / unfavourable contracts
Assets / favourable contracts
& licenses


Hive-off through legal division
Shareholders
Oldco
(in bankruptcy)
Liabilities / unfavourable contracts
Automatic transfer
by operation of law
Recipient
Company
Joint liability
Assets / favourable contracts
& licenses

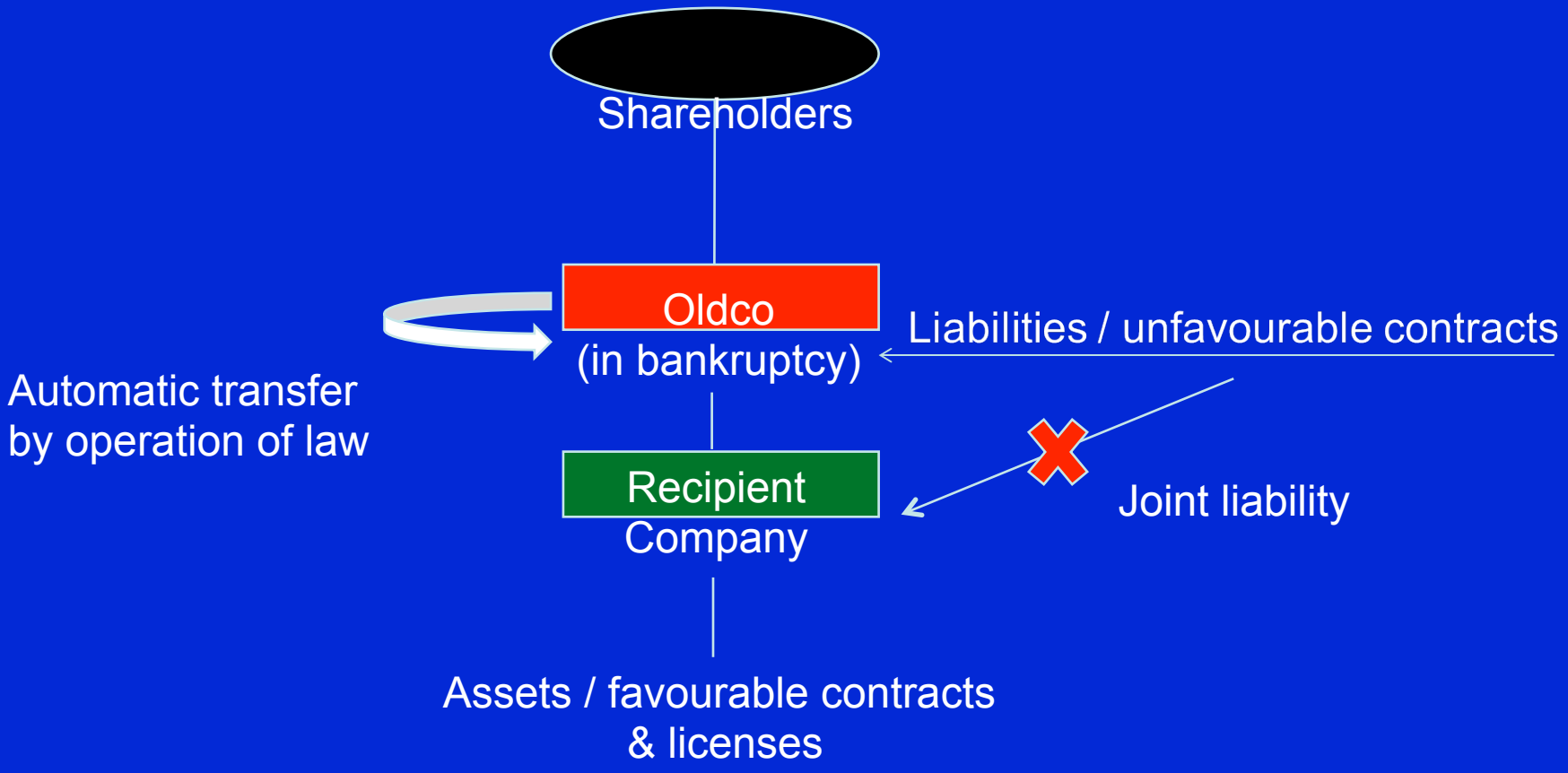
Sixth company directive (82/891/EEC)

- Resolution of general meeting required
- One month notice period
- Recipient companies jointly and severally liable for old debts
- Unless court supervision and 75% of the creditors consent ("scheme exception")
- Sixth company directive only applicable to public not private limited liability companies

In insolvency

- Sixth company directive not applicable
- Administrator can effect a division without a resolution of the general meeting being required
- Notice period can be abolished
- Liability of recipient company can be removed

Hive-off through legal division



Hive-off through legal division

Motion 2:

Splitting of the legal entity is the new pre-packing.

Motion 3:

There should be a mandatory online European marketplace for insolvent businesses.

Motion 4:

In case of financial distress, a company should have complete freedom to cherry-pick and dismiss employees.

Motion 5:

The moratorium as proposed by the EC would increase the chances of success of pre-insolvency restructuring plans.

Motion 6:

Valuation disputes should be settled by private mechanisms.

Coffee Break

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Fourth Session:
Pre-insolvency arrangements: A comparative perspective

Chair: Prof Paul Omar (Professor of International Comparative Law, Nottingham Law School, Nottingham Trent University, UK)

Speakers:

Prof Juana Pulgar Ezquerra (Professor in Commercial Law, Universidad Complutense de Madrid, Spain)

Prof Melissa Vanmeenen (Professor in Insolvency Law and Commercial Law, University of Antwerp, Belgium)

Dr Alexandra Kastrinou (Senior Lecturer, Nottingham Law School, Nottingham Trent University, UK)
and Lézelle Jacobs (Lecturer, University of the Free State, South Africa)

Pre-insolvency Spanish Workouts

Juana Pulgar Ezquerra
(Professor in Commercial Law,
Permanent Member of the Spanish Law Commission,
Of Counsel "Ashurst", Spain)

BACKGROUND

Reference must first be made to a series of issues before analyzing how pre-insolvency arrangements are regulated in the Spanish model

- When debtors cannot pay creditors: Is the best solution for the situation to be 'resolved' amicably, or are insolvency proceedings more appropriate?

- Traditional Insolvency Law based on "par condicio creditorum" and a private conception viewed the solution as residing in legal proceedings

- Legal proceedings can be lengthy and expensive, company value may fall, and jobs can be lost during the process, which in addition to affecting creditors, can have an impact on the general interest as regards saving and maintaining jobs, if the companies are large

- That is why a paradigm change is underway, involving a shift from traditional Insolvency Law to restructuring Law for companies in insolvency or pre-insolvency, as reflected by the European Commission recommendation of 12 March 2014

THE EUROPEAN COMMISSION'S RECOMMMENDATION OF 12 MARCH 2014

- A new approach to business failure and insolvency (2014/135UE)
- A potential first step towards harmonized European insolvency law?
- The new paradigm seems to be twofold:
  - A contractual approach to over-indebtedness or insolvency problems
    - Business restructuring mechanisms outside the traditional judicial insolvency proceedings
    - The European Commission's request for EU Member States to develop pre-insolvency arrangements (i.e. refinancing debts)
  - Ensuring responsible lending and providing for the discharge of individuals as an exception to the principle of universal liability
- The focus here will be on restructuring

FACTORS OF RELEVANCE TO THE SPANISH MODEL

- "Southern Europe" does not exist as a legal area in insolvency law
- Spain has a different approach to insolvency compared to Italy, Portugal and Greece
- The Troika has not intervened in Spain
- The role of the Troika has been limited to special legislative supervision
- Five insolvency law reforms have been passed in 2014/2015:
  - Royal Decree-Law 4/2014
  - Royal Decree-Law 11/2014
  - Law 17/2014 of the 30th of September which instigates the adoption of urgent measures concerning the refinancing and restructuring of company debt
  - Royal Decree-Law 1/2015 of the 27 of February, second chance for individuals
  - Law 9/2015 of the 25 of May the latest spanish insolvency reform

THE EVOLUTION OF SPANISH LAW REGULATING PREINSOLVENCY ARRANGEMENTS

- The regulation of workouts in Spanish Law has been progressive and on occasions been prompted by “specific cases”
- Spanish Insolvency Law 22/2003 did not regulate workouts in its original wording, in accordance with the German model included in the Inso (concept of imminent insolvency)
- This model was ineffective

THE EVOLUTION OF SPANISH LAW REGULATING PREINSOLVENCY ARRANGEMENTS

- In 2009, Spain's unemployment rate was very high.
- Consequently, the initial regulation of workouts centred on regulating 'refinancing agreements for large companies'.
- It was not until five years later in 2014 that out of court agreements for small and medium-sized enterprises (SMEs), entrepreneurs and consumers were regulated)

MODELS EMPLOYED FOR REGULATING WORKOUTS

- For large companies → Schemes of arrangement
  Refinancing agreements → United Kingdom
  → In Court Voluntary arrangement
  → Out of Court
  (arts. 71.bis, DA 4ª Spanish Insolvency Law 22/2003)

- For small companies → French "Conciliation"
  Individual entrepreneurs (art. L.611-41 (Com)
  Consumers "Mediation"
  (art. 13 Belgian Law 31 Jan 2009
  on the continuity of companies)
  → Out-of-court payment agreements (pre-insolvency mediation)
  (Art. 235 Spanish Insolvency Law 22/2003)

- Judicial insolvency arrangements → Voluntary arrangements United Kingdom

"REFINANCING AGREEMENTS" AND "OUT-OF-COURT PAYMENT AGREEMENTS". IN CONJUNCTION WITH:

- Debtor duty to apply for insolvency when currently insolvent (arts. 2.2 and 5 Spanish Insolvency Law)
- Ability of debtors to bring forward the insolvency application for situations of imminent or future insolvency (art. 2.3 Spanish Insolvency Law).
- Inexistence of a legal or trustee duty framework for company directors as opposed to creditors in insolvency or imminent insolvency situations

PARALLELS AND DIFFERENCES

ENGLISH SCHEMES

- Regulated in the framework of Company Law (companies act, section)
- Possible for current or imminent insolvency
- They need not involve "pari passu" payment to creditors
- Court approval to penalize the implementation of the scheme → Slow and costly procedure
- Binding dissenting secured creditors to the scheme → Superseding privity of contracts
- There must be double-majority creditor acceptance: numerical and representing the liabilities

SPANISH SCHEMES

- Regulated in the framework of insolvency law (arts. 71.bis and DA 4ª Spanish Insolvency Law 22/2003)
- Possible for current or imminent insolvency
- They need not involve "pari passu" payment to creditors
- Two potential methodologies:
  → Out of Court → Autonomy of will
  → In Court → not a legal procedure, but rather a voluntary act of jurisdiction, which is quick and involves no costs
- Binding dissenting secured creditors to the scheme → Superseding privity of contracts
- Simply majority as regards the percentage of the liabilities represented by the credits of those subscribing the agreement

PARALLELS AND DIFFERENCES

ENGLISH SCHEMES	SPANISH SCHEMES
- General division of creditors into classes	- Division into classes of only creditors with privileges
- Not included in Annex A of the European Insolvency Regulation	- Included in Annex A of the European Insolvency Regulation from the modification of the Regulation in June 2015, coming into force in 2017
- Do not freeze executions → major handicap of English schemes	- Freeze executions, even in rem securities, during the negotiation stage of the agreement, notification of start of negotiations by art. 5.bis Spanish Insolvency Law

PARALLELS AND DIFFERENCES

SPANISH MEDIATION

- Lacking the privilege of fresh money or new money; the money injected in the framework for the agreement reached through the pre-insolvency mediation
- Handicap of the Spanish model → The pre-insolvency mediation is directed using the same regulation for different persons

  → 1. SMEs → a restructuring function in tandem with Spanish arrangements
  → 2. Individual entrepreneurs/consumers
  ↓ Restructuring is not the aim, but rather the use of mediation as a requirement for accessing liability exoneration mechanisms in potential insolvency proceedings → key topics for SMEs such as "fresh money" are not regulated

FRENCH CONCILIATION (art. L 611-41 C Com) BELGIAN MEDIATION

- Privilege of fresh money or new money as regards financing injected in the framework of the agreement reached through the mediation
- Tool aimed at ensuring business restructuring by means of mediation

LEGAL INCENTIVES FOR PROTECTED REFINANCING WORKOUTS

- Protecting debt renegotiations: Automatic Stay art. 5 bis Ley Concursal
- Claw-back protection
- Fresh Money
  - New financing is 100% pre-deductible until 2016 including contributions made as loans from shareholders
  - After 2016 50% pre-deductible, and loans from shareholders are excluded

INCENTIVIZING DEBT-TO-EQUITY SWAPS

- Negative incentives
- Insolvency deemed wrongful if there is no reasonable cause justifying the debt-to-equity swap refusal
- Possible liability of shareholders who unjustifiably refuse debt-to-equity swaps
- The beginning of pre-insolvency director's duties

THE INEXISTENCE OF "SOLVENCY RULES" AS A LIMIT TO DIVIDEND DISTRIBUTION

- The Spanish model can be classified within the so-called capital system
- Limits are set for the distribution of profits, based on the traditional minimum correspondence principle between share capital vs assets (article 273 of the Spanish company law)
- "Solvency rules/solvency tests" are not envisaged in the Spanish model
- A right of individualized separation in order to avoid potential shareholder majority abuses (article 348 bis)
- The jurisprudence of the Spanish supreme court is progressively introducing "solvency rules"

LEGAL INCENTIVES FOR PROTECTED PRE-INSOLVENCY MEDIATION

(Out-of-court payment agreements)

- Protecting debt renegotiations. Automatic stay art. 5.bis Spanish Insolvency Law
- Claw-back protection
- To date, the "privilege of fresh money", regulated for refinancing agreements, has not been regulated in out-of-court payment agreements for small and medium-sized enterprises → major handicap for SMEs, accounting for more than 99,88%, 1th January 2014 of Spanish business, which requires financing and must be incentivized

IN CONCLUSION

- Spanish model is an ongoing process

Pre-insolvency Arrangements: the Belgian Perspective

Prof Melissa Vanmeenen (Professor in Insolvency Law and Commercial Law, University of Antwerp, Belgium)

Re-Imagining Rescue

- The concept of pre-insolvency arrangements
- Pre-insolvency arrangements in Belgium: brief overview
- Effective business rescue in Belgium?

Re-Imagining Rescue

I. What is "Pre-insolvency"?

- Insolvency: ambiguous concept
  - In-solvere (Latin): not able to pay
  - Insolvency sensu stricto: 'being insolvent' – insolvency test
  - Insolvency sensu latu: 'facing (financial) difficulties' – 'potential risk of insolvency'
- Pre-insolvency
  - Cf. INSOL Europe Study on a new approach to business failure and insolvency May 2014

Re-Imagining Rescue

- 'Insolvency' in the Insolvency Regulation (Recast) n° 2015/848
  - No definition
  - Art. 1 EIR
  - *public collective proceedings which are based on laws relating to insolvency […]*
  - Extended to proceedings which provide for restructuring of a debtor at a stage where there is only a 'likelihood of insolvency', *their purpose shall be to avoid the debtor's insolvency or the cessation of the debtor's business activities.*
- 'Insolvency' in the EC Recommendation New approach on business failure and insolvency - 12 March 2014
  - No definition
  - Preventing insolvency and ensuring continuation of business
  - Viability but likelihood of insolvency

Re-Imagining Rescue

- 'Insolvency' in the Belgian legislation
  - No definition
  - Sensu stricto: insolvent debtor = not able to pay his debts ("cessation of payment") & no credit < bankruptcy procedure
  - Sensu latu: insolvency proceedings: broad scope:
    - Reorganisation: imminent or potential continuity threat, including state of bankruptcy

      AND
    - Liquidation: not able to pay his debts & no credit
- Working hypothesis of this presentation
  - Pre-insolvency = pre-liquidation (traditional piecemeal sale)
  - Corporate rescue only

II. Pre-insolvency arrangements in Belgium: overview

- Corporate Insolvency legislation
  - Business Continuity Act ('BCA') of 31 January 2009 (Loi relative à la continuité des entreprises/Wet betreffende de continuïteit van de ondernemingen)
    - Act of 27 May 2013 – reform of BCA: more prevention - reduce abuses – better protection of creditors
  - [Bankruptcy Act of 8 August 1997 (Loi sur les faillites/ Faillissementswet)]

Re-Imagining Rescue

PRE-INSOLVENCY ARRANGEMENTS ?

Informal reorganisation/ Out-of-court	**Formal Judicial reorganisation procedure**			**Liquidation**
No procedure No stay	Court supervised procedure Moratorium period - general stay for all creditors Debtor in possession			Court supervised procedure Liquidator
<u>Amicable settlement</u> Art. 15 BCA	<u>Amicable settlement</u>	<u>Collective reorganisation plan</u>	<u>Transfer of business under court supervision</u>	<u>Bankruptcy</u> Bankruptcy Act Annex A EIR
<u>Business mediator</u> Art. 13 BCA	Art. 43 BCA Annex A EIR	Art. 44-58 BCA Reorganisation plan Vote by creditors Court confirmation Annex A EIR EC Recommendation	Art 59-70/1 BCA Going concern sale Annex A EIR	<u>Company liquidation</u> Companies Code Annex A EIR

COURT CONTROL

INFORMAL OUT-OF-COURT REORGANISATION

- Confidential & low cost rescue tools
- No (strict) regulation
- OPTIONS

– Amicable settlement (art. 15 BCA)
    - Free content – minimum 2 creditors - voluntary
    - Safe harbour provisions when settlement is filed at the Commercial Court

– Assistance of a business mediator (art. 13 BCA)

– Commercial investigation: early warning mechanism operated by Commercial Court (art. 8-13 BCA)

– Appointment of interim administrator (art. 14 BCA)

FORMAL JUDICIAL REORGANISATION PROCEDURE

- Access: 'continuity threat', but also 'insolvent' debtor (state of bankruptcy)
- Public procedure initiated by debtor (1 exception)
- Debtor in possession
- General stay (including secured creditors) - max. 12 months - exceptionally 18 (or 24) months
- OPTIONS: Amicable settlement; collective reorganisation plan; transfer of business under court supervision
- No pre-pack provisions!

CONCLUSION: BUSINESS RESCUE IN BELGIUM?

- Comprehensive legal framework, but effective business rescue???
- Informal reorganisation: confidential < no statistics available
- Formal judicial reorganisation procedure:
  - Average of 1200 procedures opened/year, but 75% end up in bankruptcy
  - Compare to more than 11,000 bankruptcies/year

CONCLUSION: BUSINESS RESCUE IN BELGIUM?

Legislation could be fine-tuned, but will this make a difference?

Need for change of mindset rather then change of legislation: expedient and early recourse to reorganisation procedure

AND MORE IMPORTANT

in many (minor) cases a timely and swift liquidation is still the best way forward!

Joint International Insolvency Conference
25-26 June 2015 • Nottingham, UK
Re-Imagining Rescue

A comparative analysis of the pre-insolvency procedures of the United Kingdom & South Africa

Dr Alexandra Kastrinou (Senior Lecturer, Nottingham Law School, Nottingham Trent University, UK)
and Lézelle Jacobs (Lecturer, University of the Free State, South Africa)

The advantages of pre-insolvency rescue

Meaning/function of 'rescue'???

- Confidentiality (no stigma, protection of value)
- Quick/ cheap(er)
- Flexibility (minimum court involvement)

Corporate rescue culture

- **UK**
- Enterprise Act 2002 & Insolvency Act 1986/2000
- Company Voluntary Arrangement s.1 IA 1986
- Scheme of arrangement s.896 CA 2006

- **South Africa**
- No healthy rescue culture
- Largely unsuccessful rescue procedure known as Judicial Management replaced with Business Rescue in the Companies Act of 2008
- It remains to be seen whether the new procedures are conducive for establishing a rescue culture

Company Voluntary Arrangement

Debtor-in-possession procedure

- There is no insolvency requirement
- Initiated by the directors
- Directors to draft proposal & 'statement of affairs under the supervision of a nominee.
- Nominee to draft report & be satisfied that the proposal has a real prospect o being implemented.

Content of proposal: a) reasons why a CVA is desirable; b) duration of the CVA; c) dates of distributions to creditors; d) remuneration of the nominee; e) nature & amount of liabilities.

Creditors' meeting to consider & approve the proposal/ (approval: 75%) (Single class of creditors)

Agreement binding on creditors, entitled to vote (including dissenting creditors).

Secured claims remain unaffected-unless they waive expressly their rights.

Role of the court- to assess whether there has been a material irregularity at meetings or unfair prejudice

Company Voluntary Arrangement(Cont.)

- Moratorium= available for small companies
- Directors may apply for a moratorium but must submit evidence that the CVA has reasonable prospects of success.
- Directors' application for moratorium is subject to the nominee's commercial judgment (i.e. is the proposal likely to be approved?)
- Nominee to prepare and file his report to the court.

Effectiveness of the procedure

- DIP in a creditor friendly legal system?
- Never embraced by practitioners
- Costs
- Practical deficiencies for small companies: 'too little too late'

Schemes of arrangement

- Less stigmatised than the CVA --s.896 CA 2006
- No requirement of impeding insolvency.
- Mainly used to allow solvent companies to hive –off underperforming elements.

- **3 stage process**:

a) The board of directors proposes a scheme & applies to court for a meeting to be summoned;
b) Creditors vote on the proposal;
c) Court sanctions the scheme – Court to ensure procedural requirements have been complied with; all classes fairly represented at creditors' meeting ; terms of scheme must be fair.

Court is not obliged to sanction the scheme- But…once sanctioned, a scheme and becomes binding on all creditors.

As opposed to CVA, schemes are not vulnerable to challenge

Schemes of arrangement (Cont.)

Approval of the scheme (stage two):

Creditors' & members' meeting for approval of the scheme;

Approval of 75% by all classes of all creditors (s.899 CA '06) .

Complex voting structure-creditors divided in classes.

- A class includes persons whose interests are not dissimilar as to make it impossible for them to consult together (*Sovereign Life Assurance & Co v Dodd* [1982] 2 QB 573)
- No need to consult any class of creditors who have no real economic interest in the company (*Re My Travel Group Plc* [2004] EWHC 2741;[2005] 1 WLR)

- **Effectiveness of the procedure**

Popularity over the CVA may be owed to the effect of the court's approval

Pre-Insolvency procedures in South Africa

- Nothing similar to the CVA or Scheme as in the UK
- Two procedures that are available to financially distressed companies (Companies Act 71 of 2008)
  - Business Rescue proceedings; and
  - S 155 Compromise with creditors

Business Rescue

- More traditional "administration"- type procedure
- Heavy reliance on the Business Rescue Practitioner (BRP)
- Regarded as being management-friendly

S 155 Compromise with creditors

- Compromises provide for an alternative option with no practitioner involvement and barely any involvement from the court
- Reminiscent of the US Chapter 11 DIP, although it is much more simplistic
- More flexible framework – target selected creditors rather than all
- Can even be used by companies that are not financially distressed
- Drawbacks

Business Rescue

- Initiated by either the company or the affected persons
- Court involvement has been minimised
- Business Rescue Practitioner who takes over control of the management - mixed model
- Directors will remain in office
  - incentive for early filing
  - Conducive for development of a rescue culture

Business Rescue (Cont.)

- The Practitioner is responsible for a business rescue plan
- Business rescue regarded as more inclusive in nature than the Judicial Management system
- Participation by “Affected persons”
- Creditor-friendly

Compromise with creditors

- Reminiscent of Chapter 11 – Debtor in possession
- Debtor responsible for drafting "rescue" proposal not a practitioner
- Creditors vote on proposal
- Proposal to be sanctioned by the court

Compromise with creditors (Cont.)

- Drawbacks - reason why the procedure is not used as often
- Does not afford the company or other stakeholders with the same protection
- Moratorium

Conclusion

- The UK has a very sophisticated corporate rescue system in place; choice of a wide range of procedures, so as to facilitate rehabilitation of troubled companies
- South Africa lacks a sophisticated rescue regime, particularly at the 'pre-insolvency' stage.
- Could transplantation of UK rescue procedures encourage the evolution of a rescue culture in South Africa?

Lunch

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Fifth Session:
Re-imagining cross-border rescue in the EU

Chair: Richard Sheldon QC (South Square, UK / Visiting Professor, Nottingham Law School, Nottingham Trent University, UKK)

Speakers:

Prof Gerard McCormack (Professor of International Business Law, University of Leeds, UK)

Prof Francisco Garcimartin (Chair Professor of Private International Law, Universidad Autónoma de Madrid, Spain)

Prof Michael Veder (Professor of Insolvency Law, Radboud University Nijmegen, Netherlands / Advisor, RESOR, Netherlands / Visiting Professor, Nottingham Law School, Nottingham Trent University, UK)

Groups of companies and the recast Insolvency Regulation

Gerard McCormack
(University of Leeds, UK)

Separate COMI determination for each group member

- A conflict of laws rather than substantive law instrument
- Each company in a group is a separate legal entity
- No provision for pooling of assets
- COMI of each company in a group to be determined separately
- Presumption that COMI equals location of registered office
- No procedural consolidation

Eurofood test

- Mere fact economic choices of subsidiary controlled by parent not enough to rebut presumption
- Different for 'letter box' companies
- Mediasucre - a single COMI could not automatically be inferred from intermixing of property of two companies- this could be organised from two management and supervision centres in two different States
- Single COMI for highly integrated corporate groups – Daisytek – recital 53 in recast

Cooperation in group insolvencies

- Cooperation principles in respect of main and secondary proceedings extended to groups
- IPs cooperate with each other and with courts
- Courts cooperate with each other
- IPs – cooperate by exchange of non-confidential information, protocols, possibility of a coordinated restructuring plan – Art 56
- Courts can cooperate by information exchange, protocols, coordinating conduct of hearings etc – Art 57 – should be compatible with the different procedural rules

Cooperation 2

- IP has standing in other group insolvencies, can request stay, propose restructuring plan and attend meetings of creditors
- Possibility though remote of procedural chaos
- Competing restructuring plans
- Could cooperation duties lead to conflict and more transaction costs?

Group coordination proceedings

- Brainchild of Euro Parl – added to original Commission proposals
- Not clear if big take up- 'voluntaristic' in nature
- Group proceedings sit alongside separate insolvency proceedings
- Coordinator qualified IP but cannot be an IP for separate company- no conflict of interest – Art 71
- Super mediator – resolve intra-group disputes
- Ambitiously – group coordination plan with integrated approach for resolution of insolvencies – Art 72 – but no consolidation of estates – Art 72(2)(3)

Potential obstacles

- Group proceedings possible in any State administering an insolvency – Art 61
- Court first seised can make appointment – Art 62
- But at least 2/3rds of IPs can confer jurisdiction on particular court – Art 66
- Individual IPs can opt out of group proceedings at commencement stage – Arts 64 and 65
- Plan not binding on individual IPs even those who had opted in
- But duty to consider recommendations and explain deviations – Art 70

Potential obstacles 2

- Possibility of stay up to 6 months on separate insolvency proceedings – Art 72(2(e)
- Does stay bind opt outs? – possible ambiguity
- Costs – to be met by participating companies at end of proceedings – Art 77
- Individual IPs might dispute payment if they have effectively opted out while opting in at commencement
- Noble in intention – nobody is obliged to participate – court has to be satisfied proceedings are appropriate and no creditor financially disadvantaged – Art 63
- Big question whether used much in practice

Conclusion

- Europe 2020 – high political priority for sustainable growth and prosperity
- In insolvency sphere – 3 prongs
- Recast Insolvency Regulation
- Recommendation on new approach to business failure and insolvency
- Possible measures of substantive insolvency law harmonisation
- Despite sweeping rhetoric series of incremental steps

The EIR Recast

Prof Francisco Garcimartin

(Universidad Autónoma
de Madrid, Spain)

EIR Recast

- Commission´s Report on the application of the 2000 EIR

> "The Commission concludes that the Regulation is generally regarded as a successful instrument for the coordination of insolvency proceedings in the Union. Its fundamental choices and underlying policies are largely supported by stakeholders"

- Five key issues:
  - Pre-insolvency proceedings
  - Concept of COMI and its relocation
  - Coordination between main and secondary proceedings
  - Publicity
  - Groups of companies

Scope

- Scope: the inclusion of pre-insolvency or hybrid proceedings

The 2000 EIR

Art 1 (1) "*This Regulation shall apply to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator.*"

The EIR Recast

New Definition Art 1 (1): rescue and second chance culture

Recital 10 proceedings for the restructuring of the debtor at a pre-insolvency stage (ie where there is only a likelihood of insolvency) and which are of a debtor-in-possession nature (ie leave the debtor in control of his assets and affairs) + proceedings providing for a debt discharge or a debt adjustment of consumers and self-employed persons.

+ Annex A

Scope

- Scope: the inclusion of pre-insolvency or hybrid proceedings

The EIR Recast

New Definition Art 1 (1):

"*public collective proceedings, including interim proceedings, which are based on a law relating to insolvency and in which, for the purpose of rescue, adjustment of debts, reorganization or liquidation,*

(a) the debtor is totally or partially divested of his assets and a liquidator is appointed;
(b) the assets and affairs of the debtor are subject to control or supervision by a court; or
(c) a temporary stay of individual enforcement proceedings is granted by a court or by operation of law in order to allow for negotiations between the debtor and his creditors, provides that the proceedings in which the stay is granted (i) provides for suitable measures to protect the general body of creditors and (ii) are preliminary to one of the proceedings referred to under points (a) or (b) if no agreement is reached"

Scope

- Scope: the inclusion of pre-insolvency or hybrid proceedings
  - Collective
  - Public
  - Including interim
  - Insolvency related proceedings
  - Which provoke certain effects on the individual rights of the debtor and/or creditors
  - And are included in Annex A

Scope

- Definition of insolvency proceedings
  - Collective

Article 2 (1): "collective proceedings" means proceedings which include all or a significant part of a debtor's creditors, provided that, in the latter case, the proceedings do not affect the claims of creditors which are not involved in them" (see also Recital 14)

  - Public

Recital 13: "Accordingly, insolvency proceedings which are confidential should be excluded from the scope of this Regulation. While such proceedings may play an important role in some Member States, their confidential nature makes it impossible for a creditor or a court located in another Member State to know that such proceedings have been opened, thereby making it difficult to provide for the recognition of their effects throughout the Union.

Scope

- Definition of insolvency proceedings
  - Interim

Recital 15: “This Regulation should also apply to proceedings that, under the law of some Member States, are opened and conducted for a certain period of time on an interim or provisional basis before a court issues an order confirming the continuation of the proceedings on a non-interim basis. Although labelled as "interim", such proceedings should meet all other requirements of this Regulation.”

  - Insolvency related proceedings

Article 1 (1): “ …which are based on laws relating to insolvency and in which, for the purpose of rescue, adjustment of debt, reorganisation or liquidation…”

Recital 16: This Regulation should apply to proceedings which are based on laws relating to insolvency. However, proceedings that are based on general company law not designed exclusively for insolvency situations should not be considered to be based on laws relating to insolvency. Similarly, the purpose of adjustment of debt should not include specific proceedings in which debts of a natural person of very low income and very low asset value are written off, provided that this type of proceedings never makes provision for payment to creditors.

Scope

- Definition of insolvency proceedings
  - Effects

Article 1 (1): "…

(a) a debtor is totally or partially divested of its assets and an insolvency practitioner is appointed;

(b) the assets and affairs of a debtor are subject to control or supervision by a court; or

(c) a temporary stay of individual enforcement proceedings is granted by a court or by operation of law, in order to allow for negotiations between the debtor and its creditors, provided that the proceedings in which the stay is granted provide for suitable measures to protect the general body of creditors, and, where no agreement is reached, are preliminary to one of the proceedings referred to in point (a) or (b).

Where the proceedings referred to in this paragraph may be commenced in situations where there is only a likelihood of insolvency, their purpose shall be to avoid the debtor's insolvency or the cessation of the debtor's business activities"

  - Annex A

FACULTEIT DER RECHTSGELEERDHEID

Re-imagining cross-border rescue in the EU

Secondary proceedings in the EIR recast

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26 June 2015

RESOR

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Secondary proceedings: the current EIR

- Objectives of secondary proceedings
  - Protection of local interests
  - “auxiliary proceedings” to the main proceeding
- Practical issues
  - Sale of a business as a going concern or adoption of a composition/reorganisation plan in multiple proceedings
  - Secondary proceedings must be liquidation proceedings

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Secondary proceedings: the current EIR

- Prevention of secondary proceedings?
  - CJ EU 22 November 2012, case C-116/11, ECLI:EU:C:2012:739 (Bank Handlowy and Adamiak)
  - CJ EU 4 September 2014, case C-327/13, ECLI:EU:C:2014:2158 (Burgo Group / Illochroma)
  - “synthetic secondaries” (Collins & Aikman, Nortel)

Secondary proceedings: the EIR recast

- Secondary proceedings no longer need to be liquidation proceedings
- Insolvency test?
  - Where the main insolvency proceedings required that the debtor be insolvent, the debtor's insolvency shall not be re-examined in the Member State in which secondary insolvency proceedings may be opened. (art. 34)
- Enhanced rules on cooperation and communication (art. 41 et seq.)

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Secondary proceedings: the EIR recast

- "Synthetic secondaries" are given a statutory basis (art. 36)
  - Unilateral undertaking
  - Requirements of form, substance and language
  - The undertaking must be approved by the known local creditors

Secondary proceedings: the EIR recast

- Insolvency practitioner or debtor in possession in the main insolvency proceedings must be given the opportunity to be heard on the request (art. 38 (1))
- BUT grounds to reject or suspend the opening of secondary proceedings are limited
  - art. 38 (2): rejection in case of undertaking ex art. 36
  - art. 38 (3): temporary suspension in case of temporary stay to facilitate negotiations on a plan in main proceeding
- local criteria as to appropriateness (CJEU Burgo Group / Illochroma)?

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Closing address

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