eurofenix

The journal of INSOL Europe
Winter 2014/15

The rescue of a Dutch landmark

Also inside this edition:

Istanbul Congress Reports
Debt Restructuring in India
Psychological Support Unit
Defining the role of the CRO

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Welcome from the Editors


ANNEROSE TASHIRO


GUY LOFALK

Dear readers,

We live in turbulent times of change, from the climate to the global economy. We affect the globe's climate and economy in ways we don't really control. This applies to the main actors in Central Banks who approve a gigantic speculation trend hoping to avoid a downturn in the economy, to every person in the world who contributes to the changes of the globe's weather through their actions. We, humans, are good at starting things we do not control, but hopefully, we are also good at learning from our mistakes. Thus, we are forever optimistic about the future, but I guess this also keeps insolvency practitioners busy!

Talking about the development in Europe, with a declining birth rate, our younger members get to be more and more important for the organisation's development and future. I hope we will be able to embrace and support the Younger Members Group which you can read about in this issue (*page 7*).

Of course, we have the new President's column with important information about the year to come and his plans for the forthcoming months. The new President also underlines that under the helm of Catherine Ottaway, who served as President in 2014, the organisation had a very successful period.

Next, we have a very interesting column provided by our Technical Officers Myriam Mailly and Emmanuelle Inacio. There you can keep an eye on the tools our organisation can provide you with for access to information and the possibility of interacting with other members.

An article I read with great pleasure was the one about the Annual Congress in Istanbul by John Willcock (*see page 14*), reminding me of all the knowledge that was shared during the Congress by our speakers and panels. Especially, I would read carefully about the bond restructuring to come. Very interesting!

The article that maybe captured my interest the most was the one by my friend, Stephen Taylor (*page 24*), one of the nestors of restructuring, possessing unsurpassed expertise and experience in the European restructuring market. The practical and structural aspects of a CRO are crucial to use and understand in order to be successful in restructurings.

You will find on page 26 a completely different article, about small business entrepreneurs and their need for psychological support. It was not too early to put this into focus. The pressure on these individuals goes sometimes beyond what we understand, since it is often their own and their families' financial survival that is on the table when they take risk to provide society with jobs that are very needed and in demand. Other people, who lose their jobs and income, have a support net around them, provided by companies and society. Why not the entrepreneurs?

And last but not least, we are happy to have all the other articles showing the expertise of our members around Europe and elsewhere, providing us with useful information from changes in local legislation to the scope of the EIR. We appreciate all these contributors and thank them for their time and effort.

Guy Lofalk

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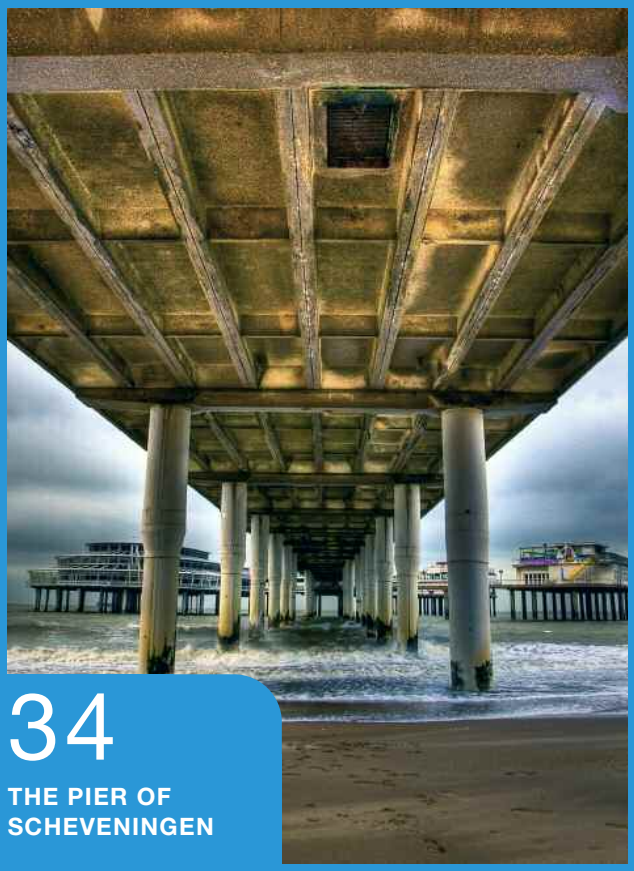

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Welcome from the new President

ROBERT VAN GALEN
INSOL Europe President

Robert van Galen looks forward to an eventful new year

> AFTER OUR SUCCESSFUL ANNUAL CONGRESS IN ISTANBUL IT IS TIME TO LOOK INTO THE FUTURE

Dear members of INSOL Europe

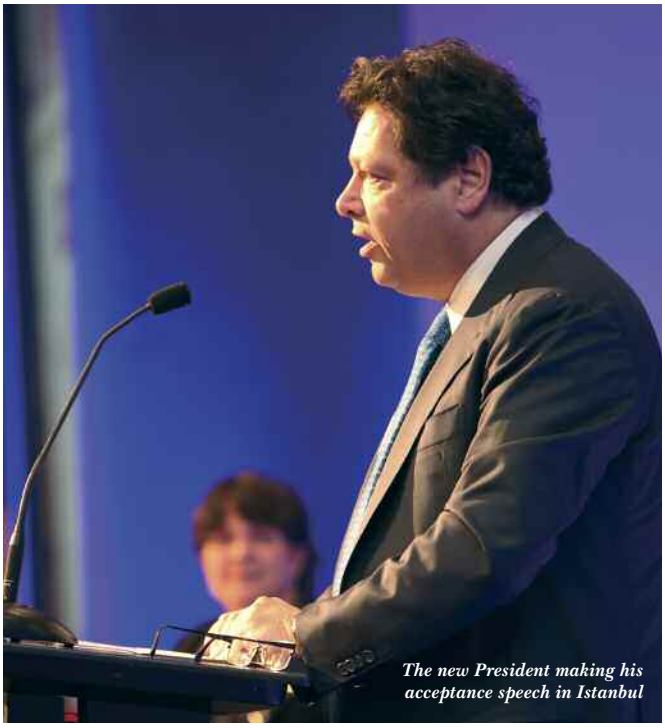
After our successful Annual Congress in Istanbul it is time to look into the future.

A new Insolvency Offers Holders Forum has been created which is chaired by Marc André (France), Daniel Fritz (Germany) and Stephen Harris (United Kingdom). The forum has quite a bit of work on its plate. The university of Leiden issued its final report named "The Statement of Principles and Guidelines for Insolvency Office Holders in Europe" just after the Istanbul conference and the IOH-Forum will now advise on how to proceed. Furthermore, a new study is envisaged on Appointment, Rotation and Supervision of Insolvency Office Holders. Several Universities have shown interest in this project and the IOH-Forum will be involved in the selection process.

As to the Turnaround Wing, a new study on Turnaround Guidelines was granted to Leiden University.

In the meantime, the programme for the EECC conference on 15 May 2015 in Vilnius (Lithuania) is ready and we have found a number of excellent speakers for that occasion. You are very welcome to join the event. The mid-year conference of the Academic Forum will take place on 25 and 26 June in Nottingham.

Another important initiative is the tender for a EU project on Substantive Insolvency Law which was submitted by INSOL Europe. The team that contributed to the business failure project last year was so enthusiastic that virtually all participants from the Member States signed up for this project as well. There are seven other applicants and we will have to bite our nails for a while before we know which organisation gets the project.



The new President making his acceptance speech in Istanbul

For the first time INSOL Europe was invited to participate in the deliberations of UNCITRAL's Working Group V, which took place in Vienna on 15-19 December 2015. Our delegation consisted of Ilona Aszódi (Hungary), Rita Gismondi (Italy), Alberto Núñez-Lagos Burguera (Spain) and myself (the Netherlands). Topics were legislation and guidelines on director's liability, recognition of insolvency proceedings with respect to group companies and recognition and enforcement of insolvency related judgments.

Finally, the preparation for next year's Annual Congress is in full swing. The theme chosen for this conference is "Harmonisation and Innovation" and there will be ample coverage of the revised European Insolvency Regulation, the Substantive Law Project and issues concerning Insolvency Office Holders. The venue will be Berlin and the dates are 1-4 October 2015.

I wish you all a very good new year. ■

Share your views!

Young members building up their network

Sabina Schellenberg & Slavomir Cauder, Co-Chairs of INSOL Europe's Young Members Group, provide an update on their recent activities to-date

INSOL Europe's Young Members Group (YMG) was established in October 2013 with the aim to support younger insolvency professionals in building up a network where they can establish international contacts and exchange experience and knowledge.

The first gathering of this fresh initiative took place at the INSOL Europe Annual Congress in Paris. The next get-together was organised on the occasion of the annual INSOL Europe Eastern European Countries' Committee (EECC) one-day seminar in Prague in April 2014, in cooperation with AIJA (International Association of Young Advocates/Association Internationale des Jeunes Avocats). The "leitmotiv" of the Conference was "Time for Change" and included attractive sessions and case studies. A fascinating case study involving the bankruptcy of the Czech national lottery SAZKA could be heard. One remarkable panel covered energy sector challenges and dealt with pending problems of renewable energy installations and operators. Another enriching intervention was "Challenges for Reconstructing in Automotive Sector" panel where the panellists discussed the key factors of maintaining the supply chain.

After the inspiring seminar, a small reception for the YMG took place in a nearby restaurant. Networking and the lively atmosphere between the members of the YMG was exciting. After the reception, the participants enjoyed an informal dinner followed by an adventurous night in the streets of Prague.

Slavomir Cauder (centre) developing the YMG network in Istanbul

The second YMG meeting after the Annual Congress in Paris was truly valuable. The members now know each other better and have taken away enriching experiences and contacts.

Due to the rising success of the YMG, its third and latest session was held at the INSOL Europe Annual Congress in Istanbul on Friday, 10 October 2014. Since the Paris and Prague get-togethers, the number of Young Members has rapidly increased and over 60 participants registered to celebrate the 1st anniversary! This time, the Young Members were also active participants in the Congress itself. They were involved as speakers in the panels as well as in the technical session seminars.

The highlight of the YMG meeting was again an outstanding reception in the Hilton Sports Bar in the presence of the president of INSOL Europe, Catherine Ottaway, and kindly sponsored by the company CITR, based in Bucharest, Romania. Afterwards, an informal dinner of the participants took place in the magical and impressive Anjelique Restaurant located right on the shores of the Bosphorus.

As the YMG is still growing and the interest of new members is constantly increasing, a YMG LinkedIn group has been established. The group is also accessible and well visible through the website of INSOL Europe, listing countries of operation and contacts of the YMG members. The group's main aim remains to facilitate potential networking and future referrals of work amongst the young members, but might soon grow beyond that. Moreover, the YMG's Mission Statement (after INSOL Europe's internal approval) is planned to be placed onto the website soon.

The next YMG gathering, in-between INSOL Europe's Annual Congresses, is being planned again at the EECC's conference in Vilnius, Lithuania, on 15 May and, ultimately, another "Young members' plenary meeting" at the Annual Congress in Berlin in October 2015. We look forward to seeing you again and reporting on further developments.

For more information contact: Sabina Schellenberg, email: sschellenberg@froriep.ch or Slavomir M. Cauder, email: cauder@giese.cz

SABINA SCHELLENBERG
Co-Chair of INSOL Europe's Young Members Group

SLAVOMIR CAUDER
Co-Chair of INSOL Europe's Young Members Group

News

Send in your news to paulnewson@insol-europe.org

INSOL Europe now has several LinkedIn groups which you can join and then engage with its members:

- INSOL Europe (main group)
- Eurofenix: The Journal of INSOL Europe
- INSOL Europe Turnaround Wing
- INSOL Europe Lenders Group
- Eastern European Countries' Committee
- INSOL Europe Anti-Fraud Forum

To join one of the groups, visit: **www.linkedin.com** and search for the group by name.

Make a comment!

Share your views!

You will have noticed that we have added QR Codes to every main article to encourage readers to give us their views. The QR codes take you the LinkedIn group for Eurofenix (see above).

Of course, you are welcome to pass on your comments to any member of the Executive Committee, whether by email or in person!

2014 Council Elections

Retirements and changes to the Executive Officers

At the close of the Istanbul Congress in October (*see full report on page 16*), Catherine Ottaway (France) stepped down as President to become Immediate Past President, Robert van Galen (The Netherlands) became the new President, Alberto Nunez-Lagos (Spain) became the Deputy President and Steffen Koch (Germany) was elected by Council as the incoming Vice President.

Following the 2014 Council Elections, there were also some changes to the structure of Council. The Italian reserved seat holder, Giulia Pusterla, retired after completing her maximum of two 3-year terms of office and Antonio Tullio was duly elected as her successor. Martine Gerber (Luxembourg) completed her first 3-year term of office as a non-reserved seat holder and was re-elected for a further 3-year term.

Additionally, Marc André (France), Carlos Mack (Germany), Michael Thierhoff (Germany), Patricia Godfrey (United Kingdom), Chris Laughton (United Kingdom) and Jim Luby (Ireland) were all re-co-opted to Council for a further year, together with Daniel Staehelin (Switzerland) who had completed his year as Immediate Past President.

We welcome proposals for future articles and relevant news stories at any time. For further details of copy requirements and a production schedule for the forthcoming year, please contact Paul Newson, Publication Manager: paulnewson@insol-europe.org

Eastern European Countries' Committee Conference 2015: **Vilnius**

INSOL Europe would like to thank the following conference sponsors at the time of printing, for their generous support of EECC Vilnius 2015.

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With thanks to our Conference Supporters:
AIJA (International Association of Young Lawyers) – www.aija.org
National Association of Business Administrators in Vilnius – www.nvaa.lt

If you are interested in sponsoring an event at this conference, please contact Hannah Denney: hannahdenney@insol-europe.org

Henry Page new appointment for Mercer & Hole, London (UK)

Henry Page has been appointed a director in Mercer & Hole's Restructuring & Insolvency team. Since joining the firm as a graduate trainee in 2005, Henry has qualified as a chartered certified accountant and a licensed insolvency practitioner and gained a wealth of experience in a range of restructuring and insolvency situations.

As an insolvency appointment taker, Henry will be working alongside Mercer & Hole's R&I partners, Steve Smith, Peter Godfrey-Evans and Chris Laughton, in pursuing the team's philosophy of the constructive use of insolvency process, and in aiming to find practical, positive solutions for financially stressed and distressed businesses and their stakeholders.

Henry made an integral contribution to several of the business rescue solutions detailed in Mercer & Hole's case studies brochure, which highlight the positive approach we take to overcoming difficult financial circumstances.

Miguel A. Loinaz Ramos becomes the first Uruguayan President of the UIA

At the close of the 58th annual congress of the Union Internationale des Avocats (*International Association of Lawyers – UIA*) on 1 November 2014 in Florence, Italy, the Uruguayan Miguel A. Loinaz Ramos took over the presidency of the association from Stephen L. Dreyfuss. Mr Loinaz is the first Uruguayan lawyer to preside the oldest international lawyers' association.

Miguel Angel Loinaz Ramos is a founding member and Managing Partner of ALS Global Law & Accounting. Mr Loinaz has been a member of the UIA for over 10 years. After holding the position of Advisor to the President and Director of International Relations, he was elected as First Vice President at the 2012 Dresden Congress. He was appointed as President at the Florence Congress. During his investiture speech on 1 November 2014, Mr Loinaz announced the main goals for his forthcoming presidency, including the development of the UIA's relations with major inter-governmental organisations such as UNESCO, the WTO, the OECD, the Organization of American States and the International Organization for Migration (IOM).

Bob Wessels made Honorary Member of Dutch Insolvency Association

At its Annual conference in Amsterdam, 6 November 2014, the members of the Netherlands Association for Comparative and International Insolvency Law (NACIIL) have unanimously elected professor Bob Wessels as Honorary Member.

Prof. Wessels has contributed greatly to the success of NACIIL. Its goal is to promote the interest for and the knowledge of comparative and international insolvency law. The association has for this purpose held conferences and organised lectures and courses, supported student initiatives and the publication and distribution of reports. As many of the initiatives are in English, the association also reaches out to professionals, scholars and students (with their COMI) outside the Netherlands in an aim to further jointly the development of comparative and international insolvency law.

Until his retirement early 2014 Bob Wessels was professor of international insolvency law, University of Leiden (Netherlands), and initiator, joint-founder and the first Chairman of NACIIL, which presently has close to 200 members. In 2011 the Council of INSOL Europe elected professor Wessels as Honorary Member for his contributions as Chairman to the development of INSOL Europe's Academic Forum (2007-2010), including the creation of the Younger Academics Network. As chair of NACIIL he has been succeeded by prof. Michael Veder (Radboud University, Nijmegen).

INSOL Europe at the UNCITRAL Working Group V's (Insolvency Law) Forty-sixth session: the floor is open now!

by Alberto Núñez-Lagos Burguera Uría Menéndez

INSOL Europe has participated in the forty-sixth session of the Working Group V, held in Vienna from 15 to 19 December 2014, in its capacity as invited international non-governmental organisation together with the American Bar Association, the European Law Students Association, INSOL International, the International Bar Association, the International Swaps and Derivate Association, the International Women's Insolvency and Restructuring Confederation, the Law Association for Asia and the Pacific and Union Internationale des Avocats.

The INSOL Europe delegation was headed by its President, Robert Van Galen.

The working group deliberated on three topics: (a) obligations of directors of groups of companies in the period approaching insolvency on the basis of document A/CN.9/WG.V/WP.125 (b) the cross-border insolvency of multinational groups of companies on the basis of document A/CN.9/WG.V/WP.124; and (c) the recognition and enforcement of insolvency-derived judgment on the basis of document A/CN.9/WG.V/WP.126.

All three documents have been prepared by the Secretariat and are available on the UNCITRAL website (www.uncitral.org) and specifically on the Working Group V page in the "Working Groups" section.

The discussions on each of these issues were very intensive. Certain decisions were taken on very relevant questions such as that insolvency proceedings could not be commenced without an appropriate connection to the commencing jurisdiction. The INSOL Europe delegation participated in all the discussions and made several suggestions and proposals which where welcomed by both delegates and the chair of the working group.

HERMANN and hww become one

On 1 January 2015 the restructuring and insolvency service provider hww wienberg wilhelm and the commercial law and insolvency administration firm HERMANN Rechtsanwälte Wirtschaftsprufer Steuerberater will merge to form hww hermann wienberg wilhelm.

The merger of two large and highly regarded market players will produce one of the biggest providers of legal consultancy, restructuring, insolvency administration and receivership services in Germany. The new Group will have around 400 staff members, more than 120 of them professional practitioners, spread across 24 German cities and business centres.

A logical response to the liberalisation of the insolvency market

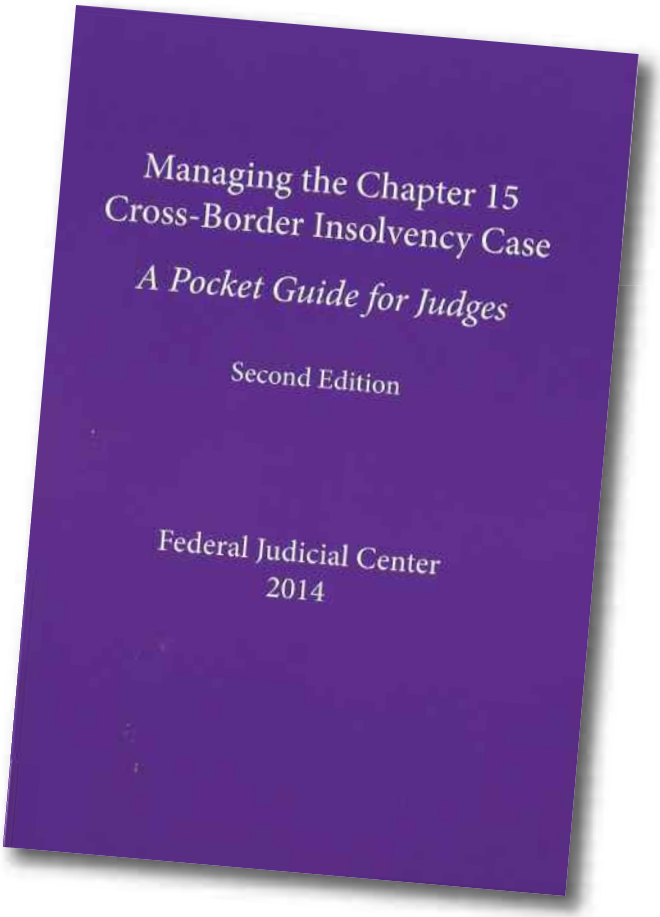
"We are absolutely delighted about our merger, which is a logical response to the latest trends in the market. The rules of play have changed since the insolvency market began to be liberalised and ESUG, the German Act for Further Facilitation of the Restructuring of Companies, was introduced. Our new structure enables us to meet the changing requirements and the needs of businesses and our clients", said lawyer Ottmar Hermann, name partner of hww hermann wienberg wilhelm. The hww hermann wienberg wilhelm umbrella covers three mutually independent service providers: lawyers hww hermann wienberg wilhelm Rechtsanwälte, business consultants hww hermann wienberg wilhelm Unternehmensberater and insolvency administrators hww hermann wienberg wilhelm Insolvenzverwalter. What is special about this three-pillar model is that it will enable the new Group to cover the entire range of services for the professional management of corporate crises in the interests of businesses and clients.

Pioneering the three-pillar model

"We want to be pioneers in what is a fast changing market in Germany. The future belongs to the supplier that can offer its clients tailor-made solutions and high-quality services from one source where necessary", said lawyer Rüdiger Wienberg, likewise a name partner of hww hermann wienberg wilhelm. The Group can now offer customised solutions for every problem: lawyers to advise companies and their creditors, business consultants for commercial restructuring and respected and experienced administrators who save as many jobs and safeguard as many companies as possible through sustained insolvency administration that is focused on the going concern.

Book Review:

Managing the Chapter 15 Cross-Border Insolvency Case – A Pocket Guide for Judges, 2nd Edition



Honourable Louise De Carl Adler, 2014, 51pp
Published by the United States Federal Judicial Centre (http://tinyurl.com/kvhq2w6)

Chapter 15 of the Bankruptcy Code provides a mechanism for a foreign debtor or representative in non-U.S. insolvency proceedings to protect such debtor's U.S. assets from U.S. creditors' collection actions or to stay any litigation commenced in the U.S. The ultimate goal in a chapter 15 proceeding is to preserve the value of the assets of the foreign debtor for the benefit of all its creditors globally.

Chapter 15 prevents piecemeal (and potentially contrary) adjudication relating to the same insolvent estate. It also prevents inequitable distributions to creditors of the same estate located in different countries, which may otherwise receive different distributions based on local law. Finally, it encourages better cooperation between courts in different countries, with an eye toward a globally efficient administration of all the foreign debtor's assets.

The Honourable Louise Adler has been a federal judge in the United States Bankruptcy Court for the Southern District of California since 1984. She has written the Guide for fellow judges who do not have her extensive experience in dealing with chapter 15 cases. The Guide would be also very helpful to any U.S. attorneys filing a chapter 15 petition to understand how to best present their case to the courts and to any foreign lawyers considering whether the filing of a chapter 15 case would assist their efforts in their non-U.S. insolvency proceedings.

The Guide is divided into five major sections. Part I of the Guide assists in understanding the process of recognition, including how to deal with requests for interim relief while the recognition process is under way. Part II of the Guide addresses the problems and considerations of operating a business in chapter 15. Parts III and IV address court-to-court communication including cross-border agreements or protocols, and claims issues. Part V discusses the bankruptcy court jurisdiction in chapter 15 cases.

The Guide is very well written and has considerable depth. It summarises in a concise but thorough fashion all the significant issues bankruptcy courts have faced since the enactment of chapter 15 in 2005. The first edition of the Guide was published in 2011 and this second edition has been updated and expanded to include cases decided up to 31 December 2013. Since chapter 15 is a relatively new statute, case law has been evolving very rapidly and a number of significant cases were decided in 2014. We look forward to the future third edition of the Guide.

Reviewed by Nava Hazan and Helen Kavanagh.

Nava Hazan is a partner in the Squire Patton Boggs Restructuring & Insolvency Practice Group. Nava is located in the New York office and her practice involves representation of foreign debtors, liquidators and administrators in cross-border proceedings and chapter 15 cases.

Helen Kavanagh is a Senior Associate in the Squire Patton Boggs Restructuring & Insolvency Practice Group. Helen is the Professional Support Lawyer for the UK practice.

Technical Update
Winter 2014/15

The Co-Technical Officers of INSOL Europe report on the new technical content available and other updates on the INSOL Europe website

MYRIAM MAILLY
INSOL Europe Co-Technical Officer

EMMANUELLE INACIO
INSOL Europe Co-Technical Officer

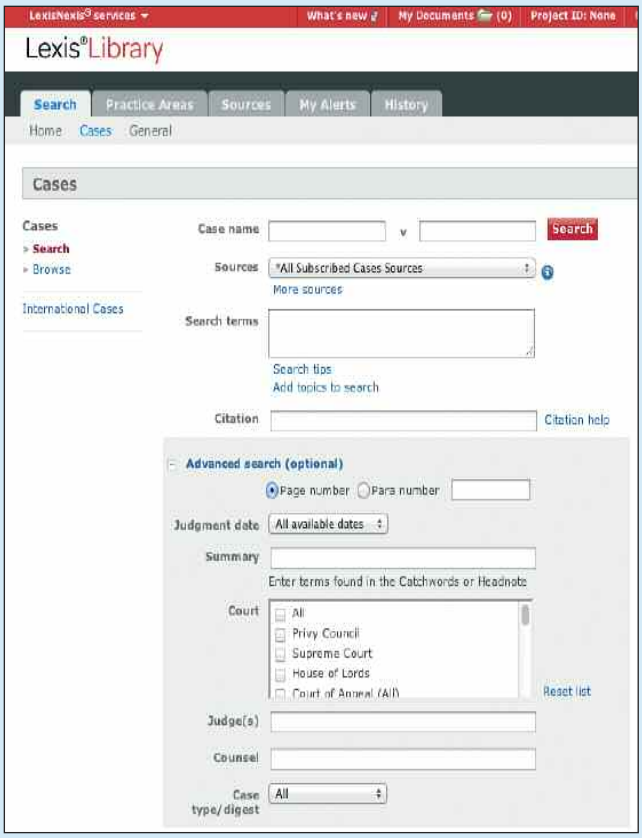
"LEXISNEXIS IS NOW HOSTING THE NEW LOOK CASE REGISTER FOR INSOL EUROPE"

A CLOSER LOOK AT...

INSOL Europe's EIR Case Register

This unique case abstract service provides summaries of over 450 judgments from the Court to Justice of the European Union and first instance and appeal courts of the EU Member States that consider a significant point relating to the EC Regulation on Insolvency Proceedings (n°1346/2000).

The Case Register committee, chaired by Chris Laughton, is supported by a dedicated team of national contributors. All abstracts are published in English and are academically moderated by Professor Reinhard Bork and Dr Kristen van Zwieten



Re-launch of the case register in Istanbul

We are pleased to announce that the re-launch of the INSOL Europe case register took place during the INSOL Europe Istanbul Congress (9-12 October 2014). LexisNexis is now hosting the new look case register for INSOL Europe at: www.lexisnexis.com/uk/legal/auth/checkbrowser.do?t=1417606371976&bhcp=1

Free access for INSOL Europe members

It is free to access for INSOL Europe members who were provided with a new user ID and password. If you have any problems accessing the new site, please call Raphael Victorino on the LexisNexis customer services helpline +44 (0) 845 3701234 (Opt 2 Ext 62025) or email raphael.victorino@lexisnexis.co.uk

Any questions?

We hope that you will enjoy using this new platform and would appreciate any feedback to technical@insol-europe.org

Make a comment!

New technical content on the INSOL Europe website

We invite all Members of INSOL Europe to provide contributions to cover all countries around Europe and beyond or to update the information published. Please see the links in the column on the right or contact Emma and Myriam on: **technical@insol-europe.org**

National Insolvency Statistics

Since our last column, we published updated national insolvency statistics for **Germany**. We thank Michael Thierhoff (Thierhoff Müller & Partner) for reporting.

Current national insolvency statistics from Croatia, England & Wales, Finland, France, Germany, Ireland, Italy, Latvia, Lithuania, Luxembourg, Portugal, Scotland & Northern Ireland, Spain, Sweden and Switzerland are published on the INSOL Europe website.

If you are interested in contributing for any uncovered Member States (or beyond), please contact us.

Glossaries

If you are interested in contributing for **Malta** and **Slovenia** (or beyond), please contact us.

How to become an Insolvency Practitioner across Europe?

At present, 18 countries are covered (Austria, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Latvia, Lithuania, Luxembourg, Poland, Portugal, Romania, Slovakia, Slovenia, Russia and United Kingdom) and reports from 4 countries should be available soon (Serbia, Sweden, Romania (update) and Cyprus).

If you are interested in contributing for any uncovered Member States (or beyond), please do not hesitate to contact us.

EIR Case Register Website - Update

As at 22th May, 390 abstracts are now uploaded on INSOL Europe's European Insolvency

Regulation Case Register website.

93 new abstracts from the CJUE, England & Wales, France, Germany, Luxembourg, Scotland and The Netherlands will be available very soon.

Academic Forum: Newsletters

For your information, the INSOL Europe Academic Forum Third Quarter 2014 (July-September) Newsletter and the INSOL Europe Academic Forum Fourth Quarter 2014 (October-December) Newsletter are now available at: www.insol-europe.org/academic-forum/newsletters/

Academic Forum: Book Announcement

Information in relation to the book entitled "Ruin and Redemption – The Struggle for a Canadian Bankruptcy Law, 1867-1919" by Thomas GW TELFER is available at: www.insol-europe.org/academic-forum/news/

INSOL Europe Annual Conferences (7-12 October 2014): Materials available

We are pleased to announce that the final programme as well as the presentation slides of both conferences are available at www.insol-europe.org/academic-forum/2014-insol-europe-academic-forum-events (Academic forum) and www.insol-europe.org/events/2014-events/ (Annual Congress)

Images from the main congress (http://tinyurl.com/njeyqw7) and a video clip (https://vimeo.com/111744685) are also available for your further information and reminder of your time in Istanbul.

EIR Case Register Website - Update

As of 2 December 2014, 447 abstracts are uploaded on the new Case Register platform.

The last abstracts published are the two last CJUE judgments delivered on 4 September 2014, namely *Nickel & Goeldner Spedition GmbH v 'Kintra' UAB (C-157/13)* and *Burgo Group SpA v Illochroma SA (C-327/13)*.

35 new abstracts from England & Wales, France, Hungary, Luxembourg, Scotland and The Netherlands will be available very soon.

Keep in touch!

We would like to invite you to join the INSOL Europe Group on LinkedIn at: www.linkedin.com/ and follow us on Twitter at @INSOLEurope

If you have any enquiries regarding insolvency matters, do not hesitate to submit your project or questions to us at: technical@insol-europe.org. ■

Links

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National Case Law
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EIR Reform – Process
www.insol-europe.org/technical-content/eir-reform-process

EIR Case Register
www.insolvencycases.eu

A city at the cross roads hosts an industry at the cross roads

John Willcock, Editor of Global Turnaround reports on the INSOL Europe Annual Congress, 9-12 October 2014

JOHN WILLCOCK
Editor, Global Turnaround

The European Commission's (EC) wish to create a pan-European 'rescue culture' has been closely aided by INSOL Europe. No wonder the technical programme for INSOL Europe's October conference was titled 'A new European approach to insolvency?'

The meeting was presided over by Catherine Ottaway, this year's President of INSOL Europe, and she had no hesitation in summing it up: "*We held the conference in Istanbul, the bridge between Europe and Asia. As an organisation, that is what we aim to be: a bridge between different parts of the insolvency and restructuring community.*"

Technical programme

The technical programme was designed by conference co-chairs Ian Grier from SGH Martineau in London and Michael Veder of RESOR in Amsterdam.

The Congress focussed mainly on new approaches across Europe towards cross-border insolvency, how local and European laws have developed to deal with the crisis and the European Commission's plans for 'approximation' (ie harmonisation) of the member states' insolvency laws.

Among a multitude of topics, three stood out: the transition from a bank-led insolvency market to a restructuring market led by 'alternative capital providers'; the growth in popularity of pre-packaged insolvency proceedings and the hostility they face amongst some groups of creditors; and the spread of pre-insolvency mechanisms like the English Scheme of Arrangement, especially in France, Spain and now the Netherlands.

> "THE EC's WISH TO CREATE A PAN-EUROPEAN 'RESCUE CULTURE' HAS BEEN CLOSELY AIDED BY INSOL EUROPE"

A smorgasbord of meetings

The annual INSOL Europe meeting is never just about insolvency practitioners, of course; the Istanbul Congress offered the usual smorgasbord of meetings for different interests.

If you were an academic, you got your own forum a day before the main conference kicked off, co-ordinated by Professor Christoph Paulus (*see full report on page 20*). If you were a member of the judiciary there was a meeting on Thursday. Lenders got their meeting on the same day.

There were panels devoted to small practices, and on Friday an anti-fraud forum and a meeting of the turnaround wing.

The Congress also gave different regions a focus, with European countries having their own get-together. The meeting also had its first mobile 'app', a surprisingly useful tool that helped delegates to keep track of the myriad panel sessions and meetings, as well as network with fellow attendees. Perhaps Istanbul will be remembered as the year that INSOL Europe arrived in the world of social media!

A shrinking world

It was significant, as Catherine Ottaway said, that INSOL Europe chose to debate such matters in a forum that is outside the borders of the European Union. To start the technical programme, she introduced the keynote speaker, Dr Bahadir Kaleagasi, the international coordinator of the Turkish Industry & Business Association (TUSIAD).

Kaleagasi took as his theme the G20, the planet, EU and Turkey. He spoke of the challenges to the international community, including biological viruses like Ebola and computer viruses that plague the IT world.

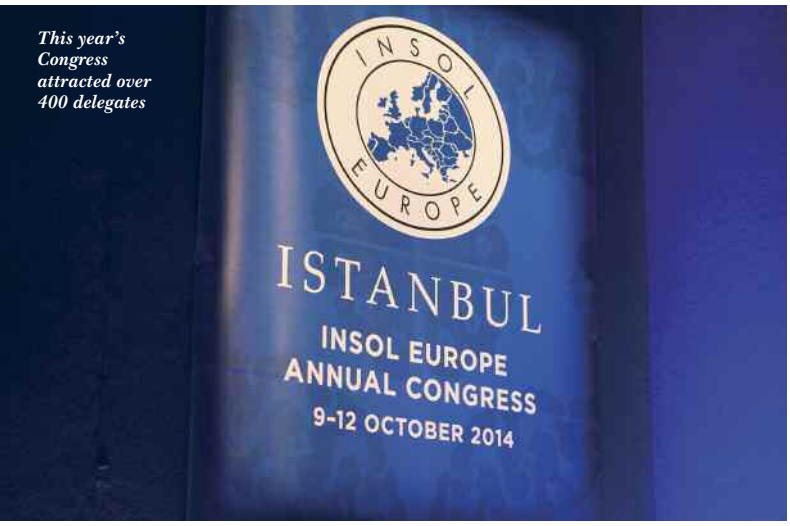
He spoke of Turkey's lack of natural resources, its lack of nuclear weapons, but also its riches in human capital. He said the biggest drag on economic growth was stagnation in Turkey's biggest trading partner, the European Community. The relationship with the US and Europe was still the most important in trade terms and recognition of legal standards, while that with China was growing rapidly in importance.

EC harmonisation proposals watered down

Professor Stefania Bariatti reported to the conference about the academic sessions the previous day, and discussed one of the key points: The European Commission's (EC) decision to abandon its proposals for harmonisation of insolvency law as being too ambitious.

Instead, the Professor noted that many countries have recently launched their own reforms, including pre-insolvency schemes. In March the EC encouraged this trend by publishing its own guidelines for Member States concerning pre-insolvency proceedings, and more proposals are imminent, said the Professor.

Welcome drinks reception



This year's Congress attracted over 400 delegates

The keynote speaker launches the day with a passionate delivery

Grand finale at the Gala Dinner

Registration desk was busy throughout the day

Many questions were taken by the panels

ONE OF THE MOST STRIKING PANELS WAS THE FIRST, WHICH DISCUSSED PRE-PACKAGED INSOLVENCY PROCEEDINGS

These proposals would fall under four main areas:

1. Laws should not clash in cross-border cases
2. Creditors should be able to ask for the debtor's restructuring without going to court – which should make saving businesses cheaper
3. Measures to facilitate acceptance of the restructuring plan, covering majorities and court confirmation
4. Measures to over-come the stigma of business failure

Pre-packs – hero or villain?

One of the most striking panels was the first, which discussed pre-packaged insolvency proceedings.

Pre-packs are vital tools in all the jurisdictions represented on the conference panel – yet its popularity with users is equalled by its unpopularity with unsecured creditors, particularly landlords.

The latter accuse pre-packs of being little better than 'phoenix' schemes, allowing 'connected parties' to dump creditors without offering the business or the deal to the market, and elevating the subject of valuation to an even more abstract and tendentious level than it usually is in most corporate deals.

If a court is not involved in a pre-pack, as in the UK, then no-one gets to sign off on valuations. Even in the US, some observers fear the bankruptcy court acts as little more than a 'rubber stamp'

London-based Mark Fennessy of Proskauer Rose chaired the INSOL Europe panel session on prepacks: 'Developments and hard lessons learnt.'

Mike Jervis of PricewaterhouseCoopers pointed out that one of the main challenges UK-based insolvency practitioners face is personal liability.

Pre-packs are vital in providing business continuity, said Jervis, and help with obtaining funding. Despite this, they have come into a lot of criticism, culminating in a Government sponsored report from Theresa Graham published earlier this year.

The Graham report suggested some form of oversight of pre-packs by 'experts', although no concrete proposals have been forthcoming so far.

Some pre-packs have been abused, Jervis said, particularly those involving 'connected parties.' Jervis acknowledged: "*I don't think the UK insolvency profession has covered itself in glory in that respect.*"

Jervis defined a bad pre-pack as one that subsequently goes into insolvency within a short period of time.

Nico Tollenaar of Resor in the Netherlands has been at the forefront of introducing a pre-pack into Dutch law, using a package of pre-existing law that has now been recognized by the Judiciary.

'Wet Continuiteit Ondernemingen I' (WCO I) was introduced last year, whilst a 'lean and mean' version of the UK Scheme of Arrangement has just been proposed, titled WCO II.

Tollenaar made a passionate defence of pre-packs, whilst acknowledging that "*there is a lot of suspicion and criticism of pre-packs in the Netherlands*".

"*In the UK there has been criticism of pre-packs for thirty years – so I think there will always be criticism. Such criticism from the media is a necessary evil – there is no other way.*"

Tollenaar explained that the media was critical of the secrecy involved in pre-packs, and that they have no judicial oversight or exposure to the wider market.

The obvious conclusion is that this is some form of fraud, he said. Nothing could be further from the truth.

"*The insolvency industry – the court, the practitioners, the lawyers – everything we are doing is aimed at limiting damage – outsiders will never understand what is going on.*"

This was despite the fact that pre-packs enjoyed such an obvious advantage over other mechanisms, in that they prevent business from disintegrating before a rescue has gone through. Tollenaar added that critics also fear it's just a way of dumping employees, which is very difficult outside bankruptcy.

They remain however a vital part of the practitioners' tool kit. Everyone agreed this debate will run and run.

Bond restructurings set for boom

Many 'zombie' companies in Europe, that people expected to collapse following the global financial crisis, have been able to refinance using the *hi yield* markets. Such bond issuance booms are always followed by default busts, and there is a wide expectation of a wave of *hi yield* restructurings involving European corporates.

These bonds use New York law, in contrast to traditional bank lending, that often use English law documentation. A fascinating panel on the restructuring of bonds at the INSOL Europe conference pondered whether this would result in more restructurings being carried out in New York rather than London.

The panel highlighted the challenge the insolvency practitioner faces in dealing with ever more complicated capital structures.

These in turn generate an ever-increasing number of stakeholders in restructurings. How to communicate with and organize these large and ever-changing groups is a big issue.

The panel was fortunate in having Mike Wilcox from Blackstone, one of the world's biggest private equity firms with US$270 billion in assets under management. The firm has been involved in representing Greek banks in debt discussion, as well as working on the restructuring of Northern Rock in the UK and ATU.

Wilcox observed: "*Bond market appears to be permanently open at the moment.*"

He said that some deals were using leverage of four and a half times; there was so much liquidity, and spreads have never been so low. The people taking advantage of all this high leverage seemed to be taking the attitude 'crisis, what crisis?' he said. "*That will impact recoveries eventually.*"

He pointed to Spain, which had just issued a 50-year bond at 4 per cent a few months ago.

"*When this cycle turns, investors will have received much less compensation for risk than in previous cycles.*"

Holly Neavill of Cadwalader in London said that the increasing complexity of capital structures had brought with it increasing inter-creditor tensions, especially banks vs bonds.

Making capital structures more complex also made them more fragile, Neavill observed. This often led bondholders to wonder how to accelerate their bonds, and even if they were able to, would this bring the whole edifice crashing down?

Bonds that use New York law bond documents "*bring the shutters down when you file for Chapter 11,*" she noted. This produces problems when attempting to carry out restructurings in Germany or France. She said: "*We worry about this more outside the UK, where UK administration is not available.*"

Dr Christian Barënz of Görg in Germany agreed that investors often don't read inter-creditor agreements, the original *hi yield* documentation is often done in quite a rush, and very often inter-creditor agreements weren't available to read during restructurings.

Alternative capital providers (ACP) fill vacuum left by banks

One of the panels on the last day, and one of the most significant, discussed changing funding dynamics; the move from the traditional banks to alternative capital providers.

Who better to lead such a discussion than Laura Barlow, head of restructuring at RBS, the bank that has shrunk its balance sheet by over UK£200 billion since the British taxpayer was forced to rescue it by taking an 81 per cent stake.

Barlow pondered whether relationship banking is dead or merely tarnished? She said she was concerned at the number of covenant lite deals, and that memories are short. "*RBS is hugely focused on improving transparency and focus on client relationships. We, restructuring bankers, have no problems having robust discussions with clients.*"

"*Clients have told me they value knowing where they stand,*" Barlow added.

David Ross of Sankaty in London backed the idea that alternative capital providers are filling the gap left by banks. "*But one thing alternative capital providers lack is the loan origination networks that banks have,*" Ross said. "*So as a fund you need a collaborative approach, and try and leverage the origination network that banks have.*"

Ross said Sankaty was in discussion with three banks in the UK with a view to teaming up the fund's capital with their loan origination networks. This joint venturing approach could be adopted by other 'bad banks' and shell banks across Europe, he added.

Wolf Waschkuhn of One Square Advisers observed that the banks' reluctance to swap debt for equity and then hold onto that equity put them at a disadvantage to the alternative capital providers.

"*The banks are cut off from [the upside] by not agreeing debt for equity swaps, and because they can't take equity they can't earn a premium – if there is a premium.*"

Generally Waschkuhn concluded that "*the increasing complexity of capital structures means reaching a consensus has become much more difficult.*"

How members deal with this change, and how INSOL Europe deals with it, remains a fascinating challenge, which will no doubt be discussed again when the organisation meets up in Berlin next October for its 2015 Annual Congress.

Catherine Ottaway closed the Congress, handing over the Presidency to Robert van Galen of NautaDutilh, who will preside over the Berlin Congress.

Who knows, perhaps then the Germans will finally be able to celebrate their own pre-insolvency scheme. ■

MANY 'ZOMBIE' COMPANIES IN EUROPE, THAT PEOPLE EXPECTED TO COLLAPSE FOLLOWING THE GLOBAL FINANCIAL CRISIS, HAVE BEEN ABLE TO REFINANCE USING THE 'HI YIELD' MARKETS

Share your views!

Designing insolvency systems in Istanbul

Anthon Verweij reports on the INSOL Europe Academic Forum Conference, Istanbul, 8-9 October 2014

ANTHON VERWEIJ
Leiden Law School
(The Netherlands)

What needs to be taken into account with regard to designing insolvency systems as review and reform of systems on both national and supranational level is taking place within Europe?

This was the central theme of the INSOL Europe Academic Forum conference successfully held in the beautiful city of Istanbul. Around eighty insolvency academics and practitioners from twenty different jurisdictions presented and discussed papers at the conference held on 8 and 9 October 2014, including, for the first time, a delegation of 12 scholars and practitioners from the Lebanon.

Day 1

During the first panel session Professor Serra (University of Minho) examined the autonomy of insolvency law and several related pedagogical issues. Professor Jessica Schmidt (University of Bayreuth) delved into the concept of a unified insolvency procedure and whether or not the principle of "One company, one insolvency, one procedure" still has value with respect to groups of companies. Professor Anneli Loubser (University of South Africa) reflected on the nature, as well as the objectives, of Corporate Rescue and provided an insight into the South-African experience with corporate rescue procedures. Lastly, Gabriel Moss (South Square) discussed the underlying principles of insolvency law.

At the following panel session, Jenny Gant (Nottingham Law School) presented a comparative study regarding the impact of the financial crisis on the rights of workers and the implications for corporate rescue regimes. Professor Leonie Stander (North-West University) delved into the topic of environmental liability. Furthermore, Professor Kathleen van der Linde (University of Johannesburg) provided insight into fraudulent investment schemes and whether special insolvency rules should be designed and implemented to deal with such schemes.

Milestones

The first conference day events concluded with a reception and the Academic Dinner, also marking two significant milestones: the 10th anniversary of the Academic Forum and the 5th anniversary of the Young Academics' Network. During the conference dinner Judge Stephen Baister, in his speech, allowed the participants of the conference to take a look behind the scenes with regard to his work as a High Court Chief Bankruptcy Registrar.

Day 2

The following day of the conference started with a roundtable discussion on International Insolvency Reform Strategies. The work of the Debt Resolution and Business Exit Group of the World Bank was discussed extensively including the initiatives that have been undertaken in countries like Tunisia and Lebanon. Following contributions by three experts of the World Bank (Muttamchandani, Dancausa and Martinez) commentary and responses were given by Professor Ignacio Tirado (Universidad Autónoma of Madrid), Professor

Share your views!

David Burdette (Nottingham Law School) and Dr. Kristin Van Zwieten (University of Oxford).

During the following session, an opportunity was given to members of the Young Academics' Network for the exposition of research ideas. At this panel session five PhD-researchers presented their research. Wendy Akpareva (Nottingham Law School) reflected upon designing insolvency laws and systems. Natalie Mrockova (University of Oxford) provided insight into the Chinese insolvency law reform process and which lessons needed to be taken into account. Petr Sprinz (University of Palacky) discussed the fresh-start policy for natural persons and the implementation of such policies in the Czech Republic and Slovakia. David Ehmke (Humboldt University Berlin) presented his comparative PhD-study on private and public ordering schemes in relation to publicly offered debt under English, American and German law. Lastly, Anthon Verweij and Tim Verdoes (Leiden Law School) delved into the reinvigoration of Corporate Rescue as well as its underlying principles.

In the final afternoon session Professor Gerard Mäsch (University of Münster) discussed how European cross-border judgments texts are interwoven. Furthermore, Dr. Bolanie Adebola (University College London), gave a critical analysis of the concept and purpose of Corporate Rescue and which problems policy-makers should take into consideration.

Edwin Coe Lecture

The conference then ended with the Seventh Edwin Coe Lecture on the topic of "Insolvency Specialists and Government Enquiries: A Unique Opportunity to Contribute to the Public Good", a paper examining the role of academics in the many Governmental and Parliamentary enquiries on insolvency law, using Australian examples. It was presented by the well-known and respected Australian academic, Professor Rosalind Mason (Queensland University of Technology).

Active forum

All in all, due to the active involvement of presenters and participants, combined with the support of Edwin Coe as sponsor of the Academic Forum, the conference can be deemed a success. Designing insolvency systems proved to be a fruitful conference theme. Contributions and commentaries by presenters and participants during the conference will undoubtedly fuel the ongoing debate regarding the Corporate Rescue paradigm. The interest shown in the conference by speakers and delegates resulted in a very fitting event to mark the tenth anniversary of the Academic Forum. ■

"DESIGNING INSOLVENCY SYSTEMS PROVED TO BE A FRUITFUL CONFERENCE THEME"

The phenomenon of corporate debt restructuring in India: How far can it go to prevent insolvency?

The winner of the Richard Turton Award 2014, Anant Khandelwal, writes on the current trends in the insolvency landscape in India

ANANT KHANDELWAL
SBI Capital Markets Limited (India)

We are delighted to announce that the winner of the Richard Turton award for 2014 is Anant Khandelwal from India.

Anant works for SBI Capital Markets Limited and is part of the debt restructuring and advisory team in the investment bank. He has been involved in some of the country's largest and landmark debt restructuring deals.

Anant was invited to the Annual Congress in Istanbul to receive his award.

A summary of his paper is presented here. The full version complete with all references can be found on line: at www.insol-europe.org/featured-articles/richard-turton-award-2014/

Introduction

The International Monetary Fund recently observed that Indian corporate entities are among the highest leveraged in the Asia Pacific region. Recent Reserve Bank of India (RBI) figures show that non-performing loans (NPLs) of the total loan portfolio of the Indian lenders have almost doubled from 2.2% in March 2009 to 4.5% in March 2014. The rising incidence of NPLs has been continuously on the rise due to the economic slowdown after the global meltdown in 2008. Although India outperformed expectations riding through the global economic slowdown relatively unaffected, its exposure to the crisis was unavoidable. Ultimately, with economic growth slowing down, delay in implementation of projects and rate of interest going up sharply, corporations have been under tremendous financial stress and have been finding it difficult to repay loans.

This paints a grim situation where the corporations are facing tough times and may even face liquidation. In order to pre-empt the liquidation of the company, which has a far reaching adverse impact both financially and socially, the borrowers seek to renegotiate the terms of the loan with their lenders. In fact, the lenders too might seek a reschedulement in order to minimise the losses and reduce non-performing loans. This action leads to what is popularly called 'debt recast' or 'corporate debt restructuring'. To prevent bankruptcies, in 2001, the RBI came up with Corporate Debt Restructuring (CDR), a mechanism that companies unable to pay off debts can use to stay solvent, restructure and finally revive.

Indian Banks sought to restructure over $40 billion in corporate loans in the last two fiscal years from April 2012 to March 2014. This debt, restructured through the CDR forum, was greater than the cumulative amount of debt restructured under the forum since its inception in 2001.

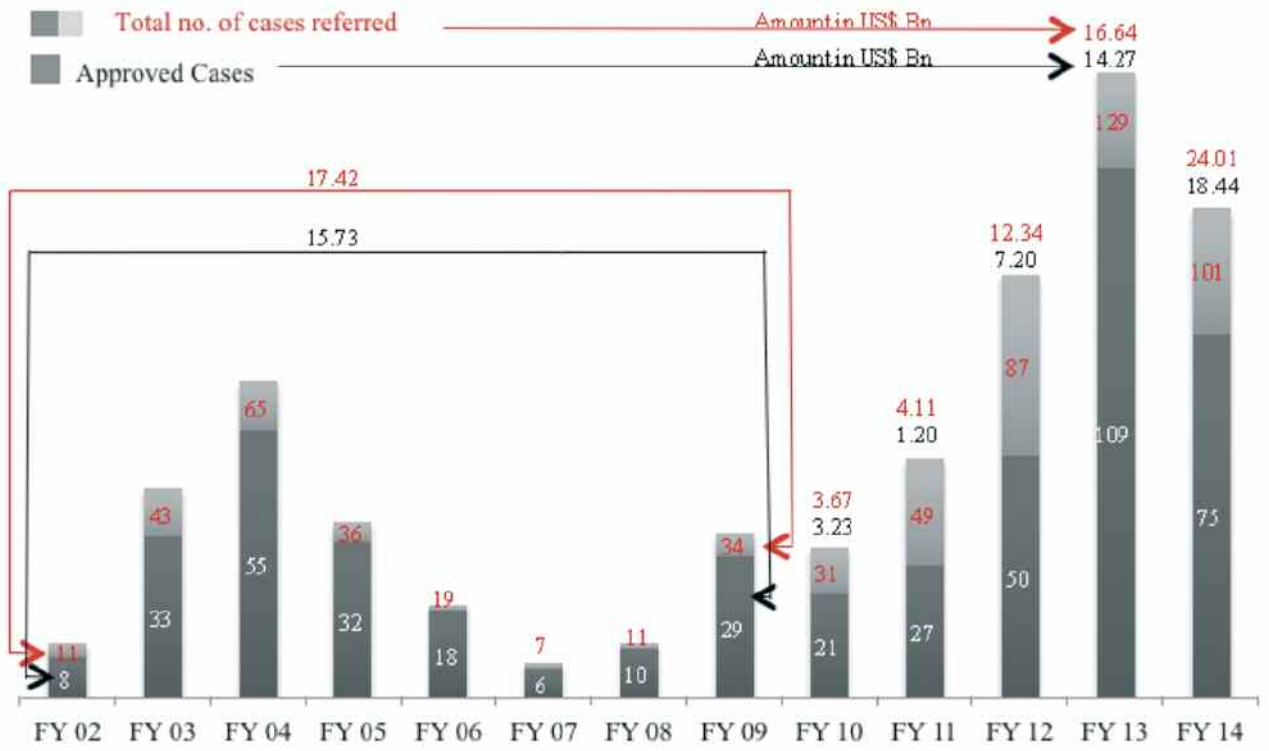
Restructuring & insolvency regime in India

When corporations in India are confronted with financial distress they have to consider a number of options in order to achieve restructuring or liquidity. There is no single comprehensive and integrated policy on corporate insolvency and restructuring in India comparable to the Chapter 11 or Chapter 7 bankruptcy code in the US. There are **five** broad ways for them to attempt to achieve the desired results. These include (1) winding up under the 2013 Company Act (which recently replaced the 1956 Company Act), (2) arrangements or compromises under the Companies Act 2013, (3) restructuring under the Sick Industrial Company Act (SICA) and (4) Reconstruction of assets under the Securitisation, Reconstruction of Financial Assets and Enforcement of Security Interest (SRFAESI) Act. Lastly, (5) debt restructuring as per the RBI guidelines on CDR provides an important forum to address these concerns.

The objective of the framework known as CDR is to ensure a timely and transparent mechanism for restructuring the corporate debts of viable entities facing problems, outside the purview of SICA and other Company Acts and other legal proceedings, for the benefit of all concerned. In particular, the framework aims at preserving economically viable corporations that are affected by certain internal and external factors and minimise the losses to the creditors and other stakeholders through a coordinated restructuring programme.

How far it can go to prevent insolvency?

As per market estimates about 70-80% of the loan restructuring cases referred to the CDR cells are able to meet their obligations. And, almost 40% of these cases



Source: CDR Cell & Outlook India

are successfully revived. However, recent failures of CDR packages in the last two quarters, amounting to over $2.5 bn, and the subsequent sale to the asset reconstruction companies for ultimate liquidation, has put a big question mark on the ability of just debt restructuring in saving the companies. Nevertheless, statistics are just an indication that provides enough hope of a possible turnaround from insolvency for the companies under the process of implementation of debt restructuring packages. However, experts warn that not all can be turned around.

Success & failure of the CDR mechanism

Debt Restructuring has become the buzzword recently in Corporate India because of the significant increase in the number and volume of cases being restructured by the banks under the CDR mechanism in the recent years as presented in the diagram above.

The table shows that the number of cases referred and approved for debt restructuring via the CDR mechanism has been continuously on the rise after the 2008 global crisis. The total number of 622 cases which have been referred to a CDR cell since its inception until March 2014 aggregated to a total debt of over $75 bn out which debt referred in just the last three financial years amount to $53 bn. Clearly, this presents a serious cause of concern. More cases being referred means widespread corporate distress and sends warning signs to both the financial sector and the economy as a whole.

Banks have reported that 10-15% of the restructured loans turn bad, which is an increase from corresponding figures about two to three years back. Bankers have also increasingly voiced that borrowers have been misusing the facility and passing on their burden to the lenders. The rising number of loan recasts across the sector has resulted in a spike in NPLs in the banking sector. Out of the total banking credit outstanding as on 30th September 2013, of $1060 bn, non-performing and restructured loans amounted to almost 10% i.e. $100 bn.

However, with the Indian economy on the path to recovery and a slew of reform measures under implementation by the RBI under a new Governor and the simultaneous revival of the equity markets, there has been a drop in debt restructuring by more than half in the first quarter of the current fiscal year vis-a-vis the same a year ago.

A window of opportunity

Over the past one and a half decade debt restructuring in India has seen its fair share of success and failures. While the successful turnaround of pharma giant Wockhardt and oil & gas major Essar Oil have been feathers in the cap of the CDR mechanism, the recent failures of shipbuilder Bharti Shipyard and hotelier Leela Ventures have cast a dark shadow on its success story.

One can decide whether the process of debt restructuring can save a company from being insolvent by looking into the

DEBT RESTRUCTURING HAS BECOME THE BUZZWORD RECENTLY IN CORPORATE INDIA

IT IS NEXT TO IMPOSSIBLE TO COME UP WITH A POLICY WHICH CAN PREDICT WAYS OF PREVENTING THE UNPREDICTABLE

Anant receiving his award from INSOL Europe Honorary Chairman Marc Udink at the Annual Congress in Istanbul

inherent weaknesses and drawbacks of the process and the best possible ways to tide over the said drawbacks.

The failure of cases being restructured has been due to various reasons.

Despite the existence of inter-creditor agreement (ICA) between various lenders, restructuring remains unenforceable as the CDR mechanism is non-statutory in nature. Even when the requisite majority of creditors have agreed to implement a scheme, dissenting creditors sometimes have commenced legal proceedings against borrowers despite the fact that they are against the spirit of ICA.

Once a borrower is under stress, there is a perception that the CDR process is easily accessible. This is because there have been instances when the debt relief package has been approved without properly establishing the viability of the borrower. Hence, a thorough assessment of the viability study by accredited industry experts should be a must for validation.

Moreover, recent hikes in loss provisioning requirements from 2.75% to 5% for restructured loans and which will increase to 15% from April 2015 onwards have drawn criticism from some banks, which say that restructured loans have almost been brought on par with bad loans. These policies could discourage lenders from turning to restructuring at all. So, if the lenders are unwilling to restructure and the loan turns into an NPL, the RBI guidelines forbid the banks to give any additional monetary support to the borrower. Further, under the distress situation, finding an alternate source of funding is a big challenge in Indian markets which are, at present, devoid of major stressed asset funds.

The current CDR guidelines require equity infusions and guarantees from the promoter, but often they are not backed by their adequate net worth. Moreover, the mechanism does not have any legal enforceability to press the promoters to bring in their commitments or take legal action, in case of failure. Thus, the debt restructuring mechanism should be granted a proper legal statute so that it becomes binding in nature.

Conclusion

The recent failures of debt restructuring in certain cases does not mean the mechanism has lost its purpose. What is required is a revamp of the debt restructuring mechanism in light of present macro and micro conditions and the lessons learned over the past years.

To conclude, one can safely state that financial markets worldwide will definitely be prone to business cycles as well as sudden economic aberrations and it is next to impossible to come up with a policy which can predict ways of preventing the unpredictable.

The mechanisms like CDR could appear as a saviour for both the investors and the entrepreneurs. Even though laced with few short comings, the CDR mechanism in India can go a long way in instilling both the creditors and the investors with faith in the market even in the times of economic gloom. If implemented in its true spirit, it gives the entity facing financial pressure a chance to recover and get back in the business besides bringing it back to life from insolvency. ■

Share your views!

RICHARD TURTON AWARD

Sponsored by:

INSOL INTERNATIONAL

Richard Turton had a unique role in the formation and management of INSOL Europe, INSOL International, the English Insolvency Practitioners Association and R3, the Association of Business Recovery Professionals in the UK. In recognition of his achievements these four organisations jointly created an award in memory of Richard. The Richard Turton Award provides an educational opportunity for a qualifying participant to attend the annual INSOL Europe Conference.

In recognition of those aspects in which Richard had a special interest, the award is open to applicants who fulfil all of the following:

- Work in and are a national of a developing or emerging nation;
- Work in or be actively studying insolvency law & practice;
- Be under 35 years of age at the date of the application;
- Have sufficient command of spoken English to benefit from the conference technical programme;
- Agree to the conditions below.

Applicants for the award are invited to write to the address below enclosing their C.V. and stating why they should be chosen in less than 200 words by the 1st July 2015. In addition the panel requests that the applicants include the title of their suggested paper as specified below. The applications will be adjudicated by a panel representing the four associations. The decision will be made by the 3rd August 2015 to allow the successful applicant to co-ordinate their attendance with INSOL Europe.

The successful applicant will

- Be invited to attend the INSOL Europe Conference, which is being held in Berlin, Germany from 1 - 4 October 2015, all expenses paid.
- Write a paper of 3,000 words on a subject of insolvency and turnaround to be agreed with the panel. This paper will be published in summary in one or more of the Member Associations' journals and in full on their websites.
- Be recognised at the conference and receive a framed certificate of the Richard Turton Award.

Interested? Let us know why you should be given the opportunity to attend the IE Conference as the recipient of the Richard Turton Award plus an overview of your paper in no more than 200 words by the 1st July to:

Richard Turton Award
c/o INSOL International
6-7 Queen Street
London
EC4N 1SP
E-mail: claireb@insol.ision.co.uk

Too old? Do a young colleague a favour and pass details of this opportunity on.

Applicants will receive notice by the 3rd August 2015 of the panel's decision.

Defining the role of the CRO

In the Summer edition of Eurofenix (issue #56) Bob Rajan and colleagues explained why a Chief Restructuring Officer (CRO) is so important. Here, Stephen Taylor expands on the subject with some further definitions of the role in question

STEPHEN TAYLOR
Founder Director of Isonomy (UK)

As has been noted, the term "Chief Restructuring Officer" originated in the United States where indeed the concept of Chief Officer first appeared.

It seems to me these days that one is simply a nobody without "Chief" something or "Officer" in one's title. The "C suite" so beloved of salespeople is becoming more and more crowded. As Bob and his team remind us it is not necessary for a "CRO" even to be an officer of the company and thus the term has become simply a generic for a specialist in a particular aspect of restructuring.

But what is that aspect? There are after all, plenty of other experts involved in even quite modest restructurings – lawyers, accountants, investment bankers and public relations gurus to name but a few. Anyone involved in this space must be keenly aware that the costs of employing all these people can be very large indeed and it is not without irony that it is the cost of advisors that eventually breaks the back of some companies. To add another person – still more, another firm – requires justification.

A CRO can be asked to fill many roles simply because there is no definition of "restructuring". Some parties favour a hands-on operational agent, able to transform a company's profit & loss account while keeping a tight rein on cash. I prefer to call such a person a "Chief Transformation Officer" where it is needed, but many stakeholders are right to say that it is the job of a CEO

and his executive team to lead this work. Many CEOs would agree too and hence the deep suspicion that many have at the suggestion of employing a CRO: "but that is my job….".

It's not good enough – and bad politics – to counter this by saying that existing management are not trusted, unreliable or simply bad. This might be the case, but not as often as many in the restructuring profession would like to think.

At this stage of the economic cycle, seven years since the financial crisis that marked the turn from boom to bust, most companies have addressed the fundamentals of cost cutting. They would not be around today if they had not done so. Many directors and stakeholders are now more and more focussed on avoiding cutting too far, and on investing to ensure they stay ahead of the competition. This means making more of existing resources rather than taking them out. The need for a cost-cutting CRO is not so pressing.

In my experience the two big issues of the moment are strategic direction and balance sheet weakness, with a third element – the left field incident, such as a regulatory issue or business accident – often creating the trigger for something to happen. Interestingly, the stakeholders in these enterprises often have a very clear view of the way they want the business to deal with these matters – they just don't agree among themselves what that direction should be or how to get there. Hence the plethora of advisors to help them.

These experts have an important role to play. By definition they bring great

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expertise in their field to the table – be that industrial, legal, financial markets etc. But, as an old military saying goes, one should "*have the experts on tap not on top*". It is important that the stakeholders, including the board of directors as custodians of the company, remain as the principals.

So where does the CRO fit into this mix?

I like to characterise a board of executive or managing directors as being like lions. Lions are fearsome creatures respected by all as they look out over the wide open savannah. Unfortunately some lions find themselves passing through a jungle where the paths are narrow, the light is dim and the sights and sounds are very different to their normal habitat. Among other things there are other animals in the jungle who do not fear lions and often have no particular interest in helping them get out of the jungle. For a creature of the open spaces these places can be very scary and bring on stress and unpredictable and inadvisable behaviour.

When we hear creditors say they don't trust management, what they really mean is they don't trust management lions to behave in a way that jungle animals should behave. Even the legislators put in place rules for director behaviour that require them to act like jungle animals and threaten to bring various personal sanctions against them if they don't. Paradoxically these legislators are the very same politicians who extoll the virtues of entrepreneurship – lion behaviour – when things are going well in the open plain.

Leaving aside the very different role of Chief Transformation Officer, the role of the "Chief Restructuring Officer" is to act as a guide for lions as they cross this strange land. It is not the job of the CRO to usurp the role of the CEO or CFO, still less to ignore the board entirely as some kind of apparently benevolent dictator. Rather it is to work with them, explaining the territory and distinguishing that which looks scary from that which is truly dangerous. To do this the CRO has to know the jungle and its animals. He or she must fully understand the motives and incentives of all the parties, have their respect and find a way to accommodate them as best as possible. He must know too how to get the best use out of other experts, including when to bring them in, what questions and roles to ask of them.

Here I part company with Bob Rajan and his article. While of course there are circumstances where more resources are needed, the overlap of work between the company and its advisors and between different sets of advisors is a major contributor to the costs of the process. If an outside firm does the hard yards instead of the company staff, the latter never learn. If the advisors are falling over themselves, inefficiencies can kill the business.

This is why there is a growing trend towards using experienced individuals in this role rather than firms. With no internal pressure to sell in more professional time – often of quite junior staff – each advisor gets a clear role and experts do not find themselves squeezed out or unheard. Neither do the existing management or their often extremely talented, if frustrated, lieutenants. Lions can be lions but well behaved lions! Put more simply, entrepreneurs can be directed to focuss on what they were previously recognised as good at – creating value through their selling or production skills.

None of this should be seen as totally exonerating the board of directors from all the problems of the business. There is one important point to note. The CRO owes his or her duty to the company. It is not to the board of directors of the company or to any one individual who sits on it. While I believe that many senior managers, if properly directed and guided, can make a good contribution to rescuing a business, there are times when one or more of them simply have to leave. The company is not the same as the board, but instead is the embodiment of its stakeholders in proportions laid down by local law – that is one of the iron laws of the jungle. To bring in very expensive resource from the CROs' own firm, with very only limited experience or expertise in actually acting in a CEO or CFO role, is not the solution in these circumstances. Better to reach out through formal and informal channels to find the right individuals wherever they might be.

To summarise, "CRO" is a generic term encompassing a wide variety of possible roles to be performed by a hands-on, sleeves-rolled-up mid-term operational agent that I would call a "Chief operations /transformation/turnaround Officer," to be distinguished from another type of operational agent, chosen for a much shorter, transaction-focussed assignment to align parties and get the deal done. One might call the latter a "Chief Navigation Officer". It should be axiomatic that the person filling the role must be an expert in that specifically required area of need.

A key skill of the other advisors around the table is to understand the role that is needed and finding the right person to fill that role. Different people will be required according to the need. Finally companies should hire a CRO according to what that specific individual can bring to the table.

In many situations there already exists plenty of expert advice available externally and inside the company, even if sometimes the internal management needs firm guidance. The ability, therefore, to bring along some colleagues is of minor importance compared with the experience and skill of the individual concerned. ■

"COMPANIES SHOULD HIRE A CRO ACCORDING TO WHAT THAT SPECIFIC INDIVIDUAL CAN BRING TO THE TABLE"

A special unit to avert entrepreneurs' relocation to a better world

Marc Binnié reports on the new psychological support unit for distressed business owners: 'Aide Psychologique des Entrepreneurs en Souffrance Psychologique Aigüe' (APESA)

MARC BINNIÉ
Associated clerk at the Commercial Court of Saintes

Suffering: a familiar yet hot issue

We all know how much energy, imagination, dedication, audacity – if not outright adventurism – it takes to start up a new business. We also understand what this entails for business owners in terms of risk-taking, dangers, and tension, often brought to a peak in bankruptcy procedures.

Olivier Torres, Economy Professor in the University of Montpellier, and head of the Entrepreneurs' Mental Health Observatory AMAROK (www.observatoire-amarok.net), points out that "*the business owner's health capital is the SME's chief intangible asset.*"[1]

In firms – most of them small – facing such procedures, the ensuing difficulties have a direct impact on business owners' psychological health. During court hearings, judges, liquidators and court clerks are increasingly witness to scenes of mental breakdown, involving fits of crying, stress, despair, and even clearly articulated suicidal ideas.

For despondent entrepreneurs, such procedures first symbolise the brutal possible end of their career, guilt, failure, and dishonor, even if they subsequently realise that they often mark the first step of a personal reconstruction.

While legal concepts and procedures, together with business owners' efforts to "*put on a good face*" and behave as society expects them to, are often enough to smoothly address the most complex and tense cases, the weight of psychological and moral suffering is sometimes too heavy to handle for un-trained court personnel.

Bankruptcy procedures have prompted so many desperate phone calls in the first contacts with court clerks; so many examples of a state of shock after the collapse of a "*life's dream*"; so many outbursts of tears by middle-aged men; so many mentions of the darkest thoughts during hearings; so many hopeless cases of solitude in spite of the rational, attentive, and kind-hearted arguments of professionals! How many years have we been helplessly witnessing the tragic sequence of events: bankruptcy, depression, and divorce?

The high number of proceedings (62,200 in 2013 alone) and the changes in the sociology of business owners were not matched by greater acceptance of bankruptcy procedures which, in addition to being the *locus* of well-known social tensions, also give way to often overlooked psychological and moral tragedies.

The psychological support unit's recognition of suffering entrepreneurs as a potentially suicidal and vulnerable group is in itself a protective factor. In contrast, ignoring this suffering can represent an aggravating factor. The day the same recognition is extended to independent workers will also mark a great step forward.

Recognizing suffering as a gesture of humility

Legal experts and bankruptcy procedure lawyers are not heartless, and some of them, tactfully alluding to the "*business owner's solitude*"[2] and their "*psychologically affected*"[3] state, do demonstrate their awareness that using the generic term 'debtor' poorly accounts for a complex situation that only someone with a lack of psychological training would still feel entitled to describe as straightforward.

The publication by the National Clerks' Association of a widely distributed brochure[4] entitled "*Entrepreneurs, do not deal with your problems alone!*" (which can be downloaded on its website www.cngtc.fr) attests to the growing awareness within the profession of the need to inform economic actors about the procedures in order to roll back "*fatalism and discouragement.*"

Lawmakers, too, send out protective signals every now and then. The so-called Business Rescue Act and the upcoming Investigation Procedure for Personal Recovery[5] have both a legal and psychological impact.

However, given the lack of prior psychological assistance, the onus is on the legal process – since "*the judge only rules on real cases involving flesh-and-blood men*"[6] and because "*the courts are confronted with raw human nature*"[7]– to give this suffering a voice, before channeling it toward organized structures.

When within the framework of bankruptcy procedures we talk about judicial time, we are not only referring to the time of the hearing, but more broadly to the time of judicial receptiveness, which covers the entire process, from the talks with the judge for the prevention of corporate difficulties and with clerks, to meetings with liquidators and receivers.

What is a hearing primarily about, if not listening? What helpful listening "*truly aims for is not so much to understand the other person as to give them the opportunity to better hear and understand what they are saying and experiencing*."[8]

Bankruptcy proceedings are conflict-prone[9] and sometimes have psychological effects, but they also represent a breeding ground where various branches of the law can meet. Provided that they are not viewed as a cure-all solution, the daily practice of bankruptcy procedure is intended to open up to other fields of knowledge, and to become a bridge so that its practitioners become more alert when faced with distresses subjects.

This fascinating overture will naturally involve broadening the scope of the training of both clerks[10] and lawyers[11]. This is the least of the humanistic values of CSR (Corporate Social Responsibility) we are asking business leaders to adopt.

An experimental psychological support unit

It has appeared when dealing with corporate difficulties that one cannot provide the business owners only with legal answers when despair and suicidal ideas are near at hand in the worst cases. It explains why the Commercial Court of the city of Saintes set up a psychological and suicide prevention support unit especially dedicated to business owners.

Without acting as medical practitioners, the head of the Prosecution Department of Courts of First Instance, the judges, liquidators, clerks and clerks' assistants are now able to guide and advise desperate business owners to willingly consult trained psychologists. Basically, the idea is to restore dignity and self-respect to those men and women.

The suicide prevention society "*The Time Passengers*", whose chairman is Jean-Claude Douillard,[12] collaborates to the unit by providing proper and regular treatment and attention to suffering debtors.

All bankruptcy practitioners have got appropriate training to detect suicidal ideas and identify the germs of suicidal risk.

They are now able, if necessary, to discuss the personal psychological business owner's situation. It is now possible for each member of the 'team' noticing psychological distress at a hearing or during a conversation,

> **THE UNIT'S RECOGNITION OF SUFFERING ENTREPRENEURS AS A POTENTIALLY SUICIDAL AND VULNERABLE GROUP IS IN ITSELF A PROTECTIVE FACTOR**

PERFECT AND TOTAL CONFIDENTIALITY PREVAIL, NO INFORMATION OF ANY KIND IS GIVEN TO THE DIFFERENT ACTORS OF THE BANKRUPTCY PROCEEDINGS

to immediately fill in an alerting file and send it to the unit's coordinator.

The latter will at once contact the suffering entrepreneurs and propose them after about half an hour talk, free psychological care in five sessions performed by the nearest trained practitioner.

The framework of the programme is fairly simple:

- Signs of an acute psychological suffering are displayed by either the business owner when having a conversation with the clerk, its assistant or the liquidator, or when interviewed by a judge during a hearing.
- Assessment of aggravating or protecting factors.
- Proposition of psychological care.
- An alerting file is filled in at once if the interested party has consented to it, and sent to the unit coordinator.
- The psychological evaluation interview will be immediately performed by the coordinator.
- The coordinator chooses the nearest and most appropriate psychologist.
- The latter will then contact the candidate.
- Information about the psychological care is given to the 'alert trigger'.

It only requires:

- Appropriate training to conduct a psychological suffering assessment interview provided to all practitioners dealing with bankruptcy procedure.
- Constitution of a trained psychologists network ready to take action in emergency

Perfect and total confidentiality prevail, no information of any kind is given to the different actors of the bankruptcy proceedings (district attorney, judge, liquidator, clerk or assistants of the latter).

They will only receive information about the setting up of the psychological care. The device is also meant to protect those who are at the front of sufferings.

A transversal conception of justice

Considering individuals in their entirety and their complexity on legal and economical proceedings is to all accounts a fairly new idea that enhances the social efficiency of justice. Nevertheless, this conception is close to the guidelines of the recently tabled report of "*The Institute of Superior Studies on Justice*" according to which:

"*Trial can pretend to some social efficiency only through concatenation of (….) different realities. Trial gets its strength from Law but also from the intersection of all kinds of realities in 'a total social fact'. Social efficiency of justice comes from its centralising and structuring capacity to combine all kinds of dimensions, social, legal, rhetorical, political and subjective ones.*"[13]

The party concerned, thanks to the lightness of the device, becomes aware that his/her sufferings of neither legal nor economical kind are taken into account. It is not a question of acting no longer as a district attorney, as a judge, as a liquidator or as a clerk, it only means a new action, a new way of enhancing our mission.

As a practitioner once said in a few words: "*being able to understand how suicidal behaviour operates, being able to identify anxiety disorders, which afflict victims with excessive and unrealistic feelings that interfere with their lives, learning to ask valuable and proportionate questions without fearing of hurting the other person are the main points I will remind from the different interventions. Analysing risk and trying to be protective is also a means for us to assess and manage our feelings and hand over the reins to the professionals of the unit when necessary.*"[14]

Hearing time or conversation time remain specific, genuine, but the possibility of a psychological care, without having to thoroughly change our practice, allows when needed, to follow the person who, consciously or not, bears the burden and suffers from the contradictory tensions of business difficulties.

Within this framework, The Commercial Court does not depart from its primary mission of dealing with the "*difficulties of commercial and craft businesses*" and providing the most appropriate legal and economical answers, and has the opportunity of answering with pragmatism and imagination according to its tradition, to the crucial question: "**What is a good judgment in times of crisis?**"

An alerting protocol based upon inter-professional collaboration

The process began in December 2012 with an experimental phase. A number of health professionals – psychologists, psychiatric nurses, doctors and psychiatrists – started by attending hearings dedicated to cases of bankruptcy at the Commercial Court of the city of Saintes.

The persons summoned to court had previously consented to their presence. They were to be contacted again in January 2013, and most of them agreed to be more extensively interviewed.

Once over the initial feelings of surprise, because of not being used to be treated in a sensitive manner throughout the justice process, they willingly accepted to talk about their psychological condition; their cooperation confirmed the accuracy of our strategy.

This is how the alerting response protocol and the psychological care for distressed business owners were set up in the Commercial Court of the city of Saintes. We have also created several interdisciplinary collaboration tracks.

- Training time on legal proceedings in Commercial Courts for members of the steering committee – health professionals, highly trained nurses, psychologists, sophrologists, family therapists, educators, etc.;
- Awareness time dedicated to

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identify suicidal risk signs for insolvency practitioners;

The Commercial Court registry letters all mention the existence of the psychological support unit. Information screens shortly display messages to invite business owners to question themselves about their psychological state.

Since it was set up in September 2013, the service has benefitted 96 business owners: 38 women, 40 men and 9 pairs.. It proves that SME entrepreneurs are not reluctant to benefit from psychological support when feeling the need of it and confirms the wisdom of our approach. Initially focused on the business owner him/herself, it has been extended to the near family members, most of the time the spouse, who sometimes may encounter deeper sufferings. Psychological care was even once granted to someone mourning a suicide victim.

Language being often the best way to reduce tensions, we are at present considering with a child psychiatrist the possibility of elaborating language items to be used by the business owner with his children.

It can happen to be rather difficult to build a theory of common sense, but according to E. Durkheim "*once evil is known, once we know what evil is made of and what it depends upon, once we know the main characteristics of the appropriate remedy to cure evil, it is not essential to set up in advance specific measures; but it is essential to attack the task decisively.*" ■

If you would like further information about the support described in this article, please contact the author at: *mbinnie@tcsaintes.com*

Footnotes:

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SINCE IT WAS SET UP IN SEPTEMBER 2013, THE SERVICE HAS BENEFITTED 96 BUSINESS OWNERS: 38 WOMEN, 40 MEN AND 9 PAIRS

Out-of-court debt restructuring: Implementation of INSOL Principles in Austria

How Austria deals with the lack of a legal framework for out-of-court restructurings

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Like some other jurisdictions Austrian law does not provide a concrete legal framework for an out-of-court debt restructuring.

However, the law does not prohibit the management of a company for extra-judicial restructuring; on the contrary, it grants 60 days for extra-judicial restructuring efforts if there is a reason for insolvency (inability to pay, over-indebtedness without a positive prognosis).

Obligation to file for insolvency

On the one hand, 60 days is a relatively short period of time; on the other hand, these 60 days can only be fully exhausted if the restructuring attempt appears promising and feasible. The 60-day period can also be used for the preparation of judicial restructuring proceedings, with or without debtor in possession.

The problem is that few entrepreneurs are willing to admit that a reason to file for insolvency proceedings exists. Most insolvency applications are made after the end of the 60-day time period.

Preventive restructuring proceedings

In 1997, the Austrian legislator tried to prompt companies experiencing financial difficulties to act as soon as possible by creating the Company Reorganisation Act (*Unternehmensreorganisationsgesetz*, URG). A reorganisation proceedings is a judicial proceedings with a court-appointed reorganisation auditor, which can, however, only be installed under the condition that no grounds for insolvency already exist. The proceedings are not public and therefore not published in the public internet insolvency gazette as all other insolvency proceedings are.

Disadvantages of the proceedings are the lack of a stay of enforcement actions and the non-involvement of creditors. The reorganisation proceedings pursuant to the URG (therefore) proved to be a flop. The applications filed in the euphoric period shortly after the law entered into force in 1998 were dismissed as the applicants were already insolvent. Supposedly, proceedings pursuant to the URG were opened only once in all of Austria since the law entered into force. More details are not known because, as already mentioned, the proceedings are not public.

Notwithstanding its failure in practice, the URG is still in force. One positive result of the URG was the legal definition of certain key figures, which were viewed as suitable to identify looming financial difficulties. This is the equity capital ratio figure, which should not fall below 8%, and the notional debt repayment period which should not exceed 15 years.

If these figures are not met, the members of the management board of companies which must be audited are liable for up to €100,000 per person in case of subsequent insolvency proceedings.

Importance of out-of-court restructuring

Regardless of the lack of a legal framework, out-of-court debt restructurings are very popular in practice. There is still a certain stigma attached to judicial insolvency proceedings despite the latest amendment of the Insolvency Law in 2010, in which it was once again attempted to help companies to overcome their fear of the Insolvency Court.

According to the most recent study of the University of Linz, the success rate of out-of-court debt restructurings is around 50%, whereby it is lowest in the case of small businesses with an

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average annual turnover of under €10 million.

Guidelines for restructuring

Due to the lack of a legal framework for out-of-court debt restructurings, three Austrian banks – Raiffeisen Bank International, Erste Group and UniCredit Bank Austria – together with the law firm *Schönherr Rechtsanwälte*, translated the INSOL Principles[1] (*Statement of Principles for a Global Approach to Multi-creditor Workouts, published in 2000*) into German and added explanations and comments with regard to Austrian conditions and specifics.

The eight INSOL Principles were supplemented each with an annex for trade credit insurers and leasing companies. A special section for trade credit insurers was added as the business model of trade credit insurers differs from that of banks. Trade credit insurers have no direct legal relationship with the debtor. If trade credit insurers refuse the further assumption of the risk, suppliers will no longer take the debtor's orders. It is therefore necessary to promptly include trade credit insurers in the process of the out-of-court debt restructuring. The risk position of leasing companies, as owners of the financed leasing objects, is different than that of banks. Leasing companies should be included in a timely manner, and should not take any measures which could lead to additional liquidity burdens during the stay.

The *Guidelines for Restructuring in Austria* are purely voluntary, but have been recognised by most banks since they were first presented in April 2013. They deal with the first phase of an out-of-court debt restructuring in which the possibility for reorganisation of a debtor has to be examined.

It only makes sense to apply the guidelines in cases where at least three banks are involved and liabilities exceed the total amount of €30 million. An initiative of the European Bank for Reconstruction and Development has the aim of making the Austrian form of the INSOL Principles as the standard for restructuring proceedings in the entire CEE-region.

Previous experience shows that only 10% of the cases in which the Austrian form of the INSOL Principles were applied lead to a subsequent insolvency. One must however keep in mind that the test period has only been going on for one and a half years.

As welcome as the initiative of the three Austrian banks with regard to the INSOL Principles (which have already been used in many other jurisdictions) is, problems arise when the debtor is already insolvent. Normally companies only apply to the workout-departments of banks when the 60-day period for the application of insolvency proceedings has already begun.

Especially for large companies the 60-day period is too short for the preparation of a restructuring plan. The duration for the first standstill period is set at one till three months in the explanatory notes to Principle 1.

If there is no positive prognosis for the company's continued existence in the case of over-indebtedness, a bank or another involved creditor group risks avoidance in a subsequent insolvency even if no new credit was granted.

An avoidance risk exists if the potential insolvency estate is diminished (quota impairment) between the point in time where insolvency should have been filed for and the point in time where the proceedings where actually opened.

The danger of liability for this so-called quota impairment has lessened since the 2010 insolvency law amendment as it must be shown that the reorganisation concept was clearly unsuitable.

However, the questions of whether a positive prognosis for the company's continued existence was given and the question of whether the reorganisation concept was suitable, are usually judged subsequently in court proceedings through an expert report. Court appointed experts generally have more information available in hindsight as well as more time than the debtor and his creditors at the time of the crisis.

Reorganisation financing, which is referred to as "super senior" in the explanatory notes to Principle 8, can only be obtained by a court-appointed administrator if it was granted within the framework of reorganization proceedings pursuant to the Company Reorganization Act. Such proceedings do not, however, as mentioned above, ever take place in practice. In subsequent insolvency proceedings, reorganisation financing is not only in danger of not being granted, but is also on the same level as all other insolvency claims.

In the explanatory notes to Principle 3 it is stressed that the agreement for a stay does not release the debtor from his responsibility to file for insolvency, if it is given. The debtor alone has the responsibility to file for insolvency in a timely manner. Evidently, this note is meant to highlight that the banks involved shall not be viewed as de facto management and thus be jointly responsible for a delay in filing for insolvency.

Future developments

As a result of the Recommendation of the Commission dated 12.03.2014 on a new approach to business failure and insolvency, there have been efforts in the Austrian Ministry of Justice to reform the Company Reorganisation Act in such a manner that the restructuring proceedings correspond to the recommendations of the Commission. In the course of this reform a legal framework should be built which supports out-of-court debt restructurings with appropriate involvement of the courts. ■

Footnotes:

1 The INSOL Principles are international standards for a global approach to Multi-creditor Workouts. They are called "*Statement of Principles for a Global Approach to Multi-creditor Workouts*" and were published in 2000.

FEW ENTREPRENEURS ARE WILLING TO ADMIT THAT A REASON TO FILE FOR INSOLVENCY PROCEEDINGS EXISTS

Avoidance actions: The Court of Luxembourg extends the scope of EIR

Jean-Luc Vallens reports on the ECJ judgment of 16 January 2014, C 328/12 (Schmidt)

JEAN-LUC VALLENS
Judge, French Court of Appeal

The German Supreme Court has filed a question with ECJ (European Court of Justice) for a preliminary ruling about issues of jurisdiction of Members States and limits of the scope of EIR.

A German liquidator had filed an avoidance action toward a third party located in Switzerland with a German Court. Do German courts have jurisdiction regarding such an action?

The Court of Luxembourg has answered "Yes" for grounds linked with predictability and effectiveness: the third party is deemed to expect application of the German insolvency Code and it could be necessary to gather all issues under a sole judge. It seems however in opposition with the natural scope of EIR (European Insolvency Regulation).

> "DOES THE EIR APPLY TO AN AVOIDANCE ACTION BROUGHT BY A GERMAN LIQUIDATOR AGAINST A THIRD PARTY LOCATED IN SWITZERLAND?"

About the judgment

The European Court of Justice (ECJ) has delivered a judgment giving a challenged interpretation of the EIR.

A question for a preliminary ruling was referred to the ECJ about the scope of EIR: does the EIR apply to an avoidance action brought by a German liquidator against a third party located in Switzerland? In particular, BGH (the Bundesgerichtshof) asked the ECJ whether such a lawsuit was, in application of the EIR, under the jurisdiction of German courts. The ECJ answered positively. This ruling seems to be in opposition with the EIR itself and it creates doubts regarding the real scope of the Regulation.

The grounds underlined in the judgment are related to foreseeability and universality, and are based on a general and comprehensive approach of jurisdiction in favour to courts of the opening State, by reference to other previous cases. Nevertheless, each of these reasons seems very weak.

Foreseeability means that the Swiss third party which got a beneficial or preferential payment before insolvency could expect the German courts to have jurisdiction considering that main insolvency proceedings were opened in Germany (opening State under the EIR's definition). This is not true: no third party located outside the EU would expect the application of the EIR.

If the ECJ has adopted a similar rule in a previous case (ECJ, 12 February 2009, C-339/07, Seagon), it is important to note that it concerned a third party located within the EU.

Universality of insolvency proceedings, a principle mentioned in the Recitals of the EIR, only means that proceedings opened in any Member State should produce legal effects in any other Member State where assets are located. It does not grant jurisdiction to courts neither upon a part nor on all the assets located out of the EU borders.

The previous case invoked by the ECJ concerned the Regulation (EC) 44/2001 of 22 December

2000, for recognition and enforcement of civil and commercial judgments (ECJ, 1st March 2005, C-281/02, Owusu). But such an approach cannot easily be applied: the Recitals of the EIR promote the proper functioning of the internal market, as well as the efficiency of insolvency proceedings. The Recitals also express the general idea of proportionality in matters of rules and cooperation: i.e. nothing more than a better efficiency of insolvency proceedings among EU Member States.

Moreover, there are links between jurisdiction and recognition rules, Member States have to recognise foreign proceedings and judgments closely linked to insolvency by virtue of the application of mutual trust and direct effect of the EU principles. It cannot be imposed to the other States.

As far as the principle of efficiency is concerned, one can have some doubts about it: an order issued by the German court on the basis of this rule will have to be recognised and enforced in Switzerland, against the third party, by a Swiss court. Swiss judges will probably have to apply rules provided for by the Swiss International Private Law and its requirements for the recognition of foreign orders: namely local proceedings should be first opened, with specific rights for local creditors.

The reasons to approve the court's decision

Laurence-Caroline Henry, Professor at University of Nice has the opposite view.

LAURENCE-CAROLINE HENRY
Professor, University of Nice

"In my opinion, the judgment of the court must be approved because the regulation's words and objectives are respected.

There are three reasons to approve the judgment. The first one is the proper interpretation of the scope of the regulation on insolvency proceedings (EIR). The second one is the unjustified discrimination between similar situations. The third reason is the mandatory nature of the European regulation.

First, the scope of the EIR must be interpreted widely in order to improve the efficiency of the text. The EIR concerns necessarily cross-border insolvencies, but cross-border doesn't necessarily mean internal European insolvencies, it could mean international insolvencies involving a Member State and a third country. Nothing in the EIR forbids such interpretation because the text keeps silence on that point. In matters of international jurisdiction, the sole criterion laid down (EIR, art 3-1) is the centre of main interests (COMI). This one has to be located within the territory of one Member State. Actually, the only relevant criterion for determining the scope of the EIR is the localisation of the debtor' COMI in the European Union (EU). In that case, the insolvency proceedings are closely linked to the EU and the aims pursued by the regulation have to be respected (effectiveness and efficiency of insolvency proceedings).

Second, the fact that a creditor is settled or is not settled within the territory of one Member State is not a relevant criterion. Here, the question referred to the court for preliminary ruling concerns an action to set a transaction aside by virtue of insolvency. The court has already judged in the Seagon case that such an action derives directly from the proceedings and is closely connected with it. The fact that the involved creditor is settled in or out of the EU doesn't matter at all. In both cases, the court where the COMI of the debtor is located has jurisdiction. The interests at stake are the same; the liquidator has to protect the assets of the debtor for the other creditors to be paid. Same situations must involve same solutions.

Finally, the mandatory nature of the European regulation justifies the judgment. National courts have to apply the regulation as soon as the COMI is located within the territory of a Member State. Because of the words of the regulation, its application is necessarily universal in order to insure the efficiency of the text. The same rule of jurisdiction has to be enforced for all Member States even if the defender is settled in a third country, in order to insure the harmonisation of the rules governing jurisdiction. The difference between jurisdiction and recognition and enforcement must be done as usual in international private law. So the question to know if the Member State judgment will be recognised and enforced by a third country depends of the international private law of this non-European State. Even more, thanks to this consideration the defender is protected even if the EIR is applied. On the one hand, the foreign creditor knows where the debtor's COMI is located, so the application of the EIR is foreseeable. On the other hand, the European judgment must be recognised before being enforceable in the non-European State.

The judgment is an extensive interpretation of the scope of the EIR, but such an interpretation is the only way to insure the full application of this regulation. Of course the main consequence is the restriction of the scope of the international private law of the Member State and the effects of this wide approach have to be evaluated: it's a new and difficult question!" ■

"THE SCOPE OF THE EIR MUST BE INTERPRETED WIDELY IN ORDER TO IMPROVE THE EFFICIENCY OF THE TEXT"

The Pier of Scheveningen

Rik Buitenhuis looks back on the bankruptcy and sale of a Dutch landmark

RIK BUITENHUIS
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> A NEW CHAPTER IN THE EVOLVING STORY AROUND ONE OF THE NETHERLANDS' MOST FAMOUS BUILDINGS BEGINS

On 30 October the 'Pier of Scheveningen' was sold to DE PIER B.V., a consortium made of the building company Kondor Wessels and the easyHotel franchise holder for the Benelux Danzep.

The sale took place almost two years after the former owner of the iconic Dutch sea-side landmark was declared bankrupt. The buyer aims to re-open the 'Pier of Scheveningen' for the public early 2015. With the sale of the Pier a new chapter in the evolving story around one of The Netherlands' most famous landmarks begins. Time to look back on the past chapter: from bankruptcy to sale, careful to find the right buyer, while keeping in mind the creditors' interest and the expectations of the public.

Former owners of the Pier, the limited liability companies '*De Scheveningsche Pier Vastgoed B.V.*' and '*De Scheveningsche Pier Exploitatie B.V.*', were declared bankrupt by the District Courts of The Hague and Amsterdam in January 2013. Marc Udink (*Udink & De Jong Advocaten*) was appointed by the Courts as receiver in bankruptcy. The two bankrupt companies respectively owned and operated the landmark 'Pier of Scheveningen'. An enormous concrete structure covering about 25,000 m^2 and stretching 380 metres into the sea (recently voted one of ten most beautiful piers in the world due to its scale and unusual concrete structure).

History

When declared bankrupt in 2013 the Pier already had a (financially) troubled history. The ancient Pier, a hundred metres to the south from the current one, was destroyed in a fire during WWII. After being rebuilt in the 1950s (at the current location), it had changed hands a few times before the Van der Valk family (shareholders and directors of the two bankrupt companies), well known in The Netherlands for their hotels and restaurants, bought the Pier in 1991 (in disrepair) supposedly for one Dutch guilder.

In the late 1990's the Van der Valk family made considerable investments and doubled the square metres by adding a second floor onto the Pier. Unfortunately, it turned out that the Van der Valk family was not able to make a return on the investment and eventually filed for bankruptcy of the companies '*De Scheveningsche Pier Vastgoed B.V.*' and '*De Scheveningsche Pier Exploitatie B.V.*' in December 2012.

Bankruptcy of an iconic 'public building'

The bankruptcy of the Pier was covered extensively by the Dutch national media and resulted in much speculation about the future of the landmark, both in the media and within the understandably worried Hague and Scheveningen communities. Although privately owed, the Pier has always been a public space loved by many. Besides the media attention and concern about the future of the Pier, many parties interested in buying it contacted the receiver, the municipality and/or the media. These where local, national and international parties, joint ventures and also crowd funding projects and (other) citizens' initiatives.

A cancelled auction and further negotiations

Soon after bankruptcy it was decided the Pier would be auctioned off publicly. With an auction Udink tried to force a quick sale of the Pier, as a quick sale would best serve the interest of all stakeholders. The process would be transparent to the public, the municipality and the many interested parties. Most important with an auction, the largest possible sum could be generated for the joined creditors within the shortest possible period of time. While the auction generated a lot of interest, the market proved not ready for it yet. None of the interested parties made a reasonable initial bid beforehand and as a result the auction had to be cancelled.

The cancellation of the auction signalled a second phase in the sale process. After the cancellation the receiver could, in relative calm, talk with several of the more serious interested parties. Among those parties were both Kondor Wessels and Danzep. Kondor Wessels and Danzep first learned of each other's interest in re-developing the Pier due to the publicity the auction generated and later on decided to join forces. After the cancellation of the auction, the municipality also became an active third party in the negotiations, whereas earlier the municipality had acted only as an opinion maker, venting ideas about the future of the Pier with limited regards to the interest of the joined creditors and other

stakeholders, and showing little comprehension of the characteristics of the bankruptcy proceedings. Later on the approach of some politicians within the municipality changed back to that of opinion maker and put the deal in jeopardy when it was almost reaching a concluding stage.

Third party interests

At the moment of bankruptcy the Van der Valk family operated three businesses on the Pier. A casino, a restaurant and a theme park, operated in part in the limited liability company '*De Scheveningsche Pier Exploitatie B.V.*'. Besides the Van der Valk businesses operated on the Pier a considerable amount of square metres was let to commercial third parties. That part of operating the Pier was handled by the limited liability company '*De Scheveningsche Pier Vastgoed B.V.*'. The lessees operated a wide variety of businesses on the Pier from a bungy jump centre to a pancake restaurant, to souvenir shops.

The receiver closed the Van der Valk businesses soon after bankruptcy. Due to the bankruptcy the revenues of the Van der Valk businesses (further) declined and it was clear operating them would not be cost-effective and not in the interest of the joined creditors. With regards to the contracts with lessees a decision had to be made. While the contracts did generate funds in the short term, the effects of the lease contracts on the sale value of the Pier were debatable and depended heavily on the development plans of the future buyer. Given the history of the Pier and the condition of the building, the future buyer most likely would prefer to re-develop the Pier. To accommodate the future buyer the receiver therefore decided to give notice of termination to the lessees. Some of the lessees accepted the termination, others did not. The receiver brought legal action against the lessees that did not.

During the legal proceeding the bankrupt estate had the fulfill the contracts. While the bankrupt estate did so, it could not provide the lessees with normal cleaning, security and maintenance services. Also the receiver did not have the funds to comply with City and/or fire department regulations. This eventually led to the municipality closing the Pier for the public end of 2013 due to safety concerns (the Pier no longer complied with fire department regulations). That meant, besides the public being denied access to 'their' Pier, also that the lessees, at that moment still operating their businesses on the Pier, had to close their businesses.

The closing of the Pier and the termination of the contracts with the lessees was the direct and insurmountable consequence of the (private ownership/public space) nature of the Pier and the characteristics of bankruptcy proceedings in which the interest of the jointed creditors are paramount.

Sale and the interest of the joint creditors while managing expectations of the public

On 30 November the Pier was sold to DE PIER B.V. With the sale of the Pier speculation with regards to the future of the iconic Pier (or lack thereof) have ended. The future of the Pier will be further defined by the buyer (and the municipality). The buyer aims to re-open the 'Pier of Scheveningen' for the public early 2015. With the re-opening of the Pier the The Hague and Scheveningen communities will regain their beloved landmark once again.

During the last two years Udink had to manage the expectations of the public while acting in the interest of the joined creditors. Fortunately, in the end, the receiver found a buyer. And, more important in bankruptcy, the interest of the joint creditors have been served well with the sale. The buyer will, in time, pay a total sum of €3 million for the Pier, which covers all preferential and ordinary creditors. A great result overall. ■

Further information on the re-opening of the Pier can be found on pierscheveningen.com

> **BESIDES THE PUBLIC BEING DENIED ACCESS TO 'THEIR' PIER, THE LESSEES HAD TO CLOSE THEIR BUSINESSES**

Share your views!

A hunt for justice erodes the attorney-client privilege

David Conaway explains the Garner exception to the rules of attorney-client privilege

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In a highly regulated environment, it is challenging for US corporations to maintain 100% compliance with each and every law touching them.

When issues arise, US corporations rely on the ability to have full and frank discussions with their legal counsel to assess risk and take corrective action to minimize loss. The possibility to have such private discussions is based on the attorney-client privilege, which prohibits legal counsel from divulging privileged communications to any third party.

Although the attorney-client privilege is quite strong, one of the world's largest public companies learned it is not absolute. The Delaware Supreme Court, in *Wal-Mart Stores, Inc. vs. Indiana Electrical Workers Pension Trust Fund IBEW*, ruled that in-house counsel's legal advice to management was not protected by the attorney-client privilege.

Background facts

In 2012, the *New York Times* reported about a scheme of alleged illegal bribery payments from Wal-Mart's Mexican subsidiary, Wal-Mart de Mexico, S.A. de C.V. ("WalMex") to Mexican government officials, allegedly at the direction of WalMex' then CEO. The New York Times indicated that Wal-Mart management knew about the allegations as far back as 2005 and attempted to "whitewash" any evidence of illegality.

Wal-Mart conducted an internal investigation, led by WalMex' general counsel, who concluded that there was no evidence of wrongdoing. In response, a Wal-Mart shareholder, owning less than half a percent of Wal-Mart's stock, initiated an investigation, in furtherance of asserting claims against Wal-Mart's officers and directors for breaches of fiduciary duties owed to shareholders. As part of the investigation, the shareholder sought production of documents and communications between in-house counsel and management under Title 8, Section 220 of the Delaware Code, which allows shareholders to review books and records for a "proper purpose." Wal-Mart refused production, based on the attorney-client privilege. The shareholder, in turn, requested the Delaware court to compel turnover.

Delaware court ruling

In ruling the attorney-client privilege did not protect the documents and communications in this case, the *Wal-Mart* case relied on an exception to the attorney-client privilege, first

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recognised over forty years ago in the Fifth Circuit US Court of Appeals case of *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970). The so-called *Garner* exception arises in shareholder suits alleging officer or director actions that are adverse to the shareholders' interests. In such cases, shareholders can obtain privileged information to establish facts to support claims for the breach of fiduciary duties by officers or directors. To prevail, shareholders must demonstrate "good cause" based on several factors, including:

- the number of shareholders and the percentage of stock they represent;
- the "*bona fides*" of the shareholders;
- the nature and viability of the shareholders' claims;
- the necessity of having the information and its availability from other sources;
- whether the alleged actions are potentially criminal or illegal;
- whether the communication is related to past or to prospective actions;
- whether the communication relates to the alleged wrongdoing or the litigation itself;
- whether the communication is identified or is a fishing expedition; and
- the risk of public disclosure of trade secrets or other confidential information.

The Delaware Supreme Court found that the pension fund showed "good cause" to apply the *Garner* exception because essential information was not available from non-privileged or public sources. The Court attempted to balance the competing interests of preventing corporations from hiding corporate wrongdoing and preserving open and honest communication between in-house counsel and their corporate clients. While the Delaware court recognised that the attorney-client privilege is essential in allowing clients to freely discuss possible legal issues with counsel without fear of legal discovery, the Court believed that corporations could abuse the privilege and purposefully conceal evidence of wrongdoing. The court noted, however, that any exception to the attorney-client privilege should be "*narrow, exacting, and intended to be very difficult to satisfy.*" If a corporation is committing wrongful acts, the harmed shareholders should be able to evaluate the acts of the corporation.

Although US state courts have been split on the *Garner* exception, its adoption by the influential Delaware court will no doubt reinforce the Garner exception in future shareholder litigation.

Worth mentioning

In connection with the alleged Mexican bribery payments, the US Department of Justice and the Securities and Exchange Commission (SEC) have ongoing investigations of Wal-Mart's activities that began in November 2011.

There is also a shareholders' securities fraud class action case against Wal-Mart in the Arkansas federal court. Thus far, the SEC has refused to turn over to Plaintiff materials developed in the SEC's investigation.

Takeaways

1. The Wal-Mart case dealt with in-house counsel. As a result of the holding, similar challenges to attorney-client privilege are likely to arise with respect to external counsel, which could lead to this same outcome. Consequently, shareholders in Section 220 and derivative suits in Delaware may now be entitled to production of both in-house and outside counsels' work-product and communications relating to alleged breaches of fiduciary duty, including documents produced during the course of an internal investigation.

2. In the post-financial collapse era, scrutiny of corporate activity is certainly elevated. It is likely that courts faced with any corporate action involving criminal or illegal corporate activity will more readily apply the *Garner* exception and waive the attorney-client privilege. Perhaps "lesser" breaches of fiduciary duty might withstand the *Garner* exception.

3. Arguably the risk of illegal activity is greater in foreign jurisdictions where "rogue" managers or officers are operating in a less disciplined environment. US corporations would be well advised to focus on a vigorous corporate policy and training including with respect to the US Foreign Corrupt Practices Act (and other countries' versions of the same).

4. It may also be advisable for US corporations to consider in appropriate cases confidentiality agreements and arbitration clauses with shareholders that could limit disclosure of privileged information, as an effort to protect legitimate confidential commercial information, and head off additional investigations by various US government agencies.

5. The Wal-Mart case also illustrates the difficult position of corporate counsel, when confronted with the ethical obligation to not divulge communications while being a target of investigators or prosecutors seeking the information. To protect counsel and their employers, companies should consider strategies on evaluating and investigating allegations of illegal activity, including (1) memorialising (or not) results of investigations, (2) limiting the number of parties involved in the process, (3) protecting information such as attorney-client privileged or attorney work product, and (4) involving third parties to conduct investigations. ■

ALTHOUGH THE ATTORNEY-CLIENT PRIVILEGE IS QUITE STRONG, ONE OF THE WORLD'S LARGEST PUBLIC COMPANIES LEARNED IT IS NOT ABSOLUTE

Tax treatments in France

Hervé Ballone explains the tax treatment of the debt waiver granted by a mother company to its subsidiary having financial difficulties in France

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A company might, in certain circumstances, voluntarily waive its debt owed to a client, hence the term "debt waiver". This particular act is regularly used when the company is in difficulty and is unable to face repayment of its debts with the flows generated by its economic assets.

This type of operation occurs *ipso facto* tax implications, which depend on the nature and circumstances of the waived debt. Indeed, the waiver may have:

- a commercial nature: the waiver permits to continue business opportunities or to preserve sources of supply,
- a financial nature: the waiver is justified within a group, between a parent company and one of its subsidiaries.

Where the debt waiver has both a commercial and a financial nature, it must be determined if the commerciality is predominant. If so, the waiver is commercial, if not, it is financial.

Provided that the waiver comes from a normal management, a commercial debt waiver is taxable at the level of the beneficiary and deductible at the level of the mother company.

Regarding the financial debt waiver, the tax treatment is different at the level of the mother company from the one at the level of the subsidiary.

Tax treatment of the financial debt waiver at the level of the mother company

According to the Law dated 16/08/2012, the company which grants a debt waiver can no longer deduct it. However, the Law allows a partial deductibility of the debt waiver granted to a subsidiary under a "*procédure de sauvegarde*" (safeguarde proceedings), "*redressement judiciaire*"(judicial restructuring) or liquidation proceeding, and during a conciliation procedure (Law dated 29/12/2012) or approved under the provisions of Article L 611-8 of the Commercial Code.

The administration extends this measure to debt waivers granted within the framework of insolvency proceedings mentioned in Schedule A of the EU Regulation 1346/2000 dated 25 May 2000.

The debt waiver remains deductible up to the negative net worth of the subsidiary and its positive equity in proportion to the holdings of the other shareholders. The net position is equal to the amount of equity (art. 434-1 of the Plan Comptable Général) after deduction of settlement expenses.

Thus, three scenarios are possible when the beneficiary of the said debt waiver is subject to one of the above proceedings.

1. There is a net position before and after the waiver: the waiver is fully deductible

For example: *Company A* owns 100% of the shares in *Company B*, which is under safeguard proceedings: *Company A* grants a €50,000 debt waiver to *Company B*.

Net equity before the waiver: –€100,000; Net equity after the waiver –€50,000

2. The negative net position becomes positive after the debt waiver: the waiver is deductible up to the amount of the negative equity before the waiver, plus the amount of the positive equity in proportion to the fraction of capital belonging to other shareholders

If the waiver is granted by a sole shareholder:

For example: *Company A* holds 80% of the shares in *Company B*, which is under restructuring. *Company A* grants a €180,000 debt waiver to *Company B*.

Net equity before the waiver: –€150,000; Net equity after the waiver: €30,000.

Thus, the amount of the deductible debt waiver is €156,000: 150,000 + (30,000 x 20%).

If the waiver is granted by two shareholders:

For example: *Company A* and *Company B* hold respectively 30% and 20% of the shares of the company *Company C*, which is under restructuring – the shareholders respectively grant a debt waiver of €300,000 and €200,000.

Net equity before the waiver: –€400,000; Net equity after the waiver: €100,000.

Thus, the amount of the deductible debt waiver is €450,000:

€270,000 (400,000 x 300,000/500,000 = 240,000 +(300,000 - 240,000) x 50% = 30,000); €180,000 (400,000 x 200,000/500,000 = 160,000 + (200,000 - 160,000) x 50% = 20,000)

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3. The net position is positive before and after the debt waiver: the waiver is deductible up to the shares held by the other shareholders

If the waiver is granted by a sole shareholder:

For example: *Company A* holds 80% of the shares in *Company B*, which is under safeguard proceedings: *Company A* grants a €80,000 debt waiver to *Company B*.

Net equity before the waiver: €50,000; Net equity after the waiver: €130,000.

Thus, the amount of the deductible debt waiver is €16,000 (80,000 x 20%)

If the waiver is granted by two shareholders:

For example: *Company A* and *Company B* hold respectively 30% and 20% of the shares of the company *Company C*, which is under restructuring. The shareholders respectively grant a debt waiver of €100,000 and €50,000.

Net equity before the waiver: €80,000; Net equity after the waiver: €230,000.

Thus, the amount of the deductible debt waiver is €750,000:

€50,000 (100,000 x 50%) + €25,000 (50,000 x 50%).

Tax treatment of the financial debt waiver at the level of the subsidiary

In principle, the debt waiver is taxable at the level of the subsidiary. As an exception (art 216A of the French Tax Code), where the beneficiary of the debt waiver is subject to corporation tax, the fraction of the non-deductible waiver for the mother company who has granted it, it is not taxable at the level of the subsidiary, provided that the following conditions are met:

- the subsidiary commits to increase its capital in favour of the mother company for an amount equivalent to the debt waiver granted by the end of the second year following the year of the waiver (eg. by 31/12/2013, if the waiver is granted during the year ended at 31/12/2011)
- the waiver is granted by a mother company in the meaning of the article 145 of the French tax Code.

In case of breach of the above commitment, the debtor company must reintegrate the amount of the waiver granted to the taxable income of the year in which it has been granted. ■

A COMMERCIAL DEBT WAIVER IS TAXABLE AT THE LEVEL OF THE BENEFICIARY AND DEDUCTIBLE AT THE LEVEL OF THE MOTHER COMPANY

Country Reports
Winter 2014/15

Updates from Latvia, Spain, France and Romania

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Latvia: Major reforms

After two years of fierce debate a major package of amendments is going to enter into force on 1 March 2015 in Latvia. The most controversial are those relating to personal bankruptcy.

Firstly, after the sale of the debtor's dwelling that served as collateral, the remainder of the debtor's obligations towards the secured creditor will be discharged automatically, without applying a discharge procedure. Secondly, the amendments have shortened the terms of the discharge procedure, with the vast majority of personal bankruptcy proceedings now expected to last for approximately one and a half years.

A lot of amendments address corporate insolvency and restructuring, as well. For example, for the first time ever a specific time period has been set for the debtor to file for insolvency if the debtor has not honoured obligations due – more than two months. In addition, the debtor will not be able to argue that it plans to submit a restructuring application in order to avoid filing for insolvency.

Members of the debtor's management board will now be expressly liable for losses caused to the debtor, if the debtor's books are not handed over to an IP or if they are in a condition that does not give a clear image of the debtor's transactions and assets over the last three years prior to the debtor's insolvency. The law also gives guidance to courts as regards the amount of the aforementioned losses, i.e., such losses will be measured in the amount of:

1) the unsettled claims of creditors in the course of the debtor's insolvency proceedings and
2) reduction in assets as of the moment when the debtor should have filed for insolvency.

In case of the debtor's restructuring ending into liquidation (insolvency), a new administrator for insolvency will be appointed according to a roster. This will aid combating abuse of restructuring proceedings and using them as a mere prelude for insolvency with a chosen IP.

The administrator will now be entitled to provide a reasoned opinion to the court that any of the creditor's claims is *prima facie* unfounded. In addition, the administrator will be obliged to turn to the police in case of reasonable doubt about the obligations included in a restructuring plan or suspicion of document forgery. Further, claims towards third persons secured by rights *in rem* in respect of debtor's assets will be regarded as secured claims in the debtor's insolvency proceedings.

The amendments also aim to remedy one of the pitfalls of insolvency proceedings in Latvia, vesting in IPs the rights to challenge creditor's claims substantiated by court rulings in so-called simplified civil proceedings: undisputed compulsory execution of obligations and compulsory execution of obligations in accordance with warning procedures. Until recently, these simplified civil proceedings allowed persons cooperating with the debtor to relatively easily obtain legally almost invincible fraudulent creditors' claims.

Time will tell true practical implications of the amendments and whether we are yet to experience even more changes in the near future. What can be said for sure is that restructuring and insolvency remains a hot topic in Latvia.

> "FOR THE FIRST TIME EVER A SPECIFIC TIME PERIOD HAS BEEN SET FOR THE DEBTOR TO FILE FOR INSOLVENCY IF THE DEBTOR HAS NOT HONOURED OBLIGATIONS DUE"

Latvia: A fundamental reform of the status of the insolvency administrator

The year 2015 will bring a fundamental reform of the insolvency administrator's status in Latvia, as subsequently administrators will be considered as public officials.

The sudden radical change has been broadly discussed between professionals and in the mass media, nevertheless, initiators of the new amendment to the Insolvency Law and representatives of the Latvian Parliament have not been able to name at least one public (state) function that is assigned to insolvency administrators.

Supporters of the reform assert that it has been enacted for the purpose of ensuring more effective control over the activities carried out by administrators within insolvency proceedings. However, it has not been clarified how the new status of the administrators would help to achieve this abstract aim. Thus, for the time being, the new public official's status of insolvency administrators has provoked more questions and problems rather than providing explanatory answers to former issues.

First of all, the concept of a public official is closely linked to restrictions regarding the combining of several positions. Since half of all insolvency administrators in Latvia consists of sworn attorneys, probably they will have to face an inevitable choice – it is not known yet whether it will be possible to practice in both professions at the same time. Besides, until now there are no transitional provisions adopted.

Furthermore, the new provisions make us think about the status and duties of administrators from other EU Member States in case they act in the Republic of Latvia according to EU Council regulation (EC) No 1346/2000 of 29 May 2000 Article 18. Thus the status of public official would also be applied to a foreign liquidator, although it would contradict national regulations of other states.

The fact that Latvia has chosen such a radical step that restricts the freedom to choose an occupation as an insolvency administrator for sworn attorneys and is not in compliance with the regulations of other EU Member States brings a rhetorical question: shall this new Latvian approach be considered as ingenious or rather a thoughtless error soon to be fixed?

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> SHALL THIS NEW LATVIAN APPROACH BE CONSIDERED AS INGENIOUS OR RATHER A THOUGHTLESS ERROR SOON TO BE FIXED?

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France: French insolvency law recognises insolvency of groups of companies

The Ordinance of 12 March 2014 and its Decree of 30 June 2014 have enacted a set of provisions aiming at the coordination of insolvency proceedings applicable to groups of companies facing financial difficulties (C. com, Articles L. 662-8 and R. 662-18 & seq.).

The Ordinance creates a new function through the coordinator for groups which are defined according to the companies law, depending on the ownership of a majority of shares and control (C. com, Article L. 233-3)

The coordinator will be appointed upon application of any of the administrators or liquidators in charge of insolvency proceedings.

The Decree provides a criterium for choosing the coordinator, among administrators and liquidators, on the basis of the maximum number of employees or turnover.

The administrator's main task will consist of assessing plans with a view to proposing a global solution; assisting the liquidators of various proceedings with checking claims between companies of the group and evaluating proposals issued from debtors and/or creditors.

Moreover, they would be in the position to adopt protocols in matters of coordination; the judges and public prosecutor will be duly informed of it.

The fees to be paid to the coordinator will be defined by a judge from the Court of Appeal, and shared among different proceedings, with a possible challenge before the President of the Cour of Appeal.

Administrators and liquidators will have the duty to use properly these new tools for groups.

Courts will have to combine these new provisions with the future text amending the EU Regulation on insolvency proceedings which contains a specific chapter dealing with such coordination measures.

However, the new French law does not address some of these issues, as for example opposite interests and judicial cooperation between courts.

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Spain: Further reforms concerning in-court restructurings

Pursuant to the amendment to the Insolvency Act enacted in March 2014, relevant measures were created as to favour out-of-court restructurings which remained not possible for agreements within the insolvency proceedings.

The Royal Decree-Law 11/2014 of 5 September on urgent insolvency measures (the "RDL") has solved this.

Indeed, the March amendment was a historical and substantial change in the Spanish *in rem* rights system, since for the first time in case of out-of-court refinancing agreements approved by a Judge, the secured claim is determined as per the value of the collateral, without bringing a foreclosure claim. The RDL implements this system in case of insolvency.

For such purposes, each creditor's secured claim value i.e. the privilege, which cannot be less than zero or exceed the amount of the secured claim, is now calculated by the receiver as follows (the remaining part of the claim would rank as ordinary), such a calculation being subject to challenge before the judge:

90% of the fair value of the collateral
–
claims with prior ranking security over the collateral
=
Secured claim value

Special and general privileged claims are sub-classified as: (i) labour; (ii) public; (iii) financial (irrespective of being subject to financial supervision); and (iv) others.

Purchasers of claims after the declaration of insolvency, regardless of being subject to financial supervision, are also granted voting rights (unless they are "specially-related persons" to the debtor, whose scope has been increased, affecting indirect shareholders).

All creditors holding an interest in the syndicated loan will be deemed as having adhered to the proposal if at least 75% (or a lower majority under the syndicated loan agreement) of the syndicated liabilities vote in favour.

Debt-for-assets deals are possible provided that the underlying assets (i) are not considered necessary for carrying out the debtor's business; and (ii) their fair market value does not exceed the extinguished claim or, if so, the excess is applied toward

the insolvency estate.

A transitional regulation for in-court agreements approved under the former regime and breached within a two-year period following the entry into force of the RDL exists, as to apply the regime of the RDL subject to certain majorities.

The RDL has also included relevant changes such as removing certain obstacles for the sale of the business within the insolvency proceedings.

The buyer is automatically subrogated into the debtor's position in any agreements, licences or administrative authorisations without the counterparties' consent being required, provided that: (i) they relate to the debtor's business or professional activity; and (ii) the buyer does not expressly refuse the subrogation.

The RDL also exempts buyers from assuming the debtor's debts prior to the sale, unless the buyer expressly assumes subrogation or any regulation provides otherwise (such as debts owed to the Social Security).

A process for selling business units is designed, which is not clearly mandatory for the receiver. The judge may, even before the auction, opt to sell them through a specialised person if considered to be in the best interest of the insolvency estate – the fees incurred being deducted from the receiver's remuneration. The judge also has broad discretion to approve, among the offers received within a threshold of up to 10% of the price, the offer that best guarantees the continuity of the going concern or, where relevant, employment and debt settlement issues.

The regulation applicable to the consequences of the transfer of assets linked to specially privileged claims when relating to the business unit sold is modified too, determining whether or not the security survives. In addition, their sale may be carried out for a price lower than the secured claim value if approved by the specially privileged creditors entitled to separate enforcement or representing at least 75% of those liabilities.

The judge is authorised to retain up to 10% of the insolvency estate as security against future appeals based on discrepancies with creditors regarding liquidation.

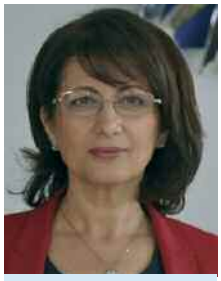
Debt-for-assets deals as part of the liquidation plan are also permitted if: (i) no public creditors are affected; and (ii) the enforcement framework for assets related to special privileged claims is satisfied.

The above mentioned measures should encourage the survival of the distressed business. In-court creditors' agreements are now more flexible and prevent privileged creditors who do not hold a real secured value from blocking the restructuring (although public creditors still cannot be forced to certain deals). The sale of businesses as going concerns will also be easier in practice thanks to the automatic subrogation in contracts, but the fact that buyers must assume debts due to the Social Security might drive to a reduction in the price.

THE SALE OF BUSINESSES AS GOING CONCERNS WILL ALSO BE EASIER IN PRACTICE THANKS TO THE AUTOMATIC SUBROGATION IN CONTRACTS

In-court restructuring majorities regime:

Measure	Approval: % of ordinary creditors	% of privileged creditors belonging to the class to be crammed down
Full payment with a grace period ≤ three years	Simple majority	60%
Prompt payment with debt discharges ≤ 20%	Simple majority	60%
Debt discharge (≤50%)	50%	60%
Debt discharge (≤100%)	65%	75%
Payment deferral (≤ 5 years)	50%	60%
Payment deferral (5-10 years)	65%	75%
Conversion into profit participating loans (≤ 5 years) (not applicable to public creditors)	50%	60%
Conversion into profit participating loans (5-10 years) (not applicable to public creditors)	65%	75%
Debt-for-assets and debt-for-equity (not applicable to public creditors)	65%	75%



SPERANTA MUNTEANU
KPMG Restructuring SPRL,
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Romania: Insolvencies in 2014

In June 2014, the Romanian Parliament adopted a new law regarding the preventive and insolvency proceedings, namely law 85/2014. This new regulation aims to enable a collective procedure through which the liabilities of a debtor may be covered, while, at the same time, offering the debtor a chance for restructuring its business.

The new insolvency law follows the best practice guidelines set at an international level by the UNCITRAL Legislative Guide on Insolvency Law, the Principles and Guidelines for Effective Insolvency and Creditor Rights System established by the World Bank and the "Report on the observance of standards and Codes" ("ROSC").

Based on information provided by the Romanian National Trade Register Office and the Romanian Bulletin of Insolvencies, it is estimated that, by the end of 2014, a total number of 27,000–30,000 companies will have entered insolvency during this year alone.

It is expected that the new regulation will have a positive impact on the companies undergoing preventive or insolvency proceedings and on their creditors.

General overview

From the gathered data, it appears that, on a sectorial level, the industries most affected by insolvency in 2014 were the construction sector, textile manufacturing, mining, the metallurgical industry and hospitality and food serving industries. However, certain important players on the market coming from other industries are also in insolvency.

The immediate impression is that most of the companies undergoing insolvency proceedings intend to head towards court-supervised restructuring. It should be noted that the results of such undertakings may vary greatly, depending on the industry and on the company's real ability of recovery.

Also, taking into consideration the fact that the new legislation does not vary greatly from the old one with respect to the restructuring procedure, the overall confirmation rate of such a procedure is expected to be situated between 3-5% of all the registered cases, due, mainly, to the tardy filing for insolvency by debtors/creditors. In 2013, out of approx. 27,000 new insolvency cases, only 1,200 had a reorganisation plan confirmed by a syndic judge (information gathered from the publications in the Romanian Bulletin of Insolvencies).

It should be noted that all of the companies discussed below have expressed intention for restructuring their business within court-supervised reorganisation proceedings.

Distribution on a sectorial level

In the construction sector, out of a number of approximately 35,800 construction companies, more than 5,000 are currently undergoing insolvency proceedings, with some of them being registered as important players on the market (i.e. turnover of over €10M). The construction sector is situated at the top of the industries affected by the opening of new insolvency proceedings.

One of the most important companies, VEGA 93 Iasi, acting in the construction industry, which entered insolvency in November 2014, had registered, in 2013, a total turnover of over €58M.

Another interesting example is that of a pharmaceutical products distribution company, ADM Farm, which in 2013 had registered a total turnover of approx. RON 695M (€154.6M), and in December 2014 entered insolvency at its own request.

In the freight sector, CFR IRLU, one of the most important companies dealing with locomotive maintenance and equipment repair has filed for insolvency in the third trimester of 2014.

In 2013, the company had registered a total turnover of approx. RON 86M (€19M), and was performing maintenance works, repair and modernisation of railway locomotives for railway operators present both on the Romanian market and abroad, whilst having units and capabilities for these services distributed on a territorial level in a significant number of stations and repair shops.

Another example of a large company entering insolvency in 2014 is that of the news and media agency, Mediafax Group SA, a top performing company in its activity area, which had registered in 2013 a total turnover of approx. RON 77M (€17.2M). The company's major financial difficulties are due to fiscal issues.

Conclusion

While the changes in the insolvency regulations are welcome, it remains to be seen whether the overall impact will be a positive one and if, in fact, those companies that really have a chance to recover will indeed do so. ■

"IT IS EXPECTED THAT THE NEW REGULATION WILL HAVE A POSITIVE IMPACT ON THE COMPANIES UNDERGOING PREVENTIVE OR INSOLVENCY PROCEEDINGS AND ON THEIR CREDITORS"

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15 MAY 2015

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