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The journal of INSOL Europe
Summer 2018

Breaking the chains

Annual Congress Preview

Crypto-currencies

Blockchain & Regulation

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- Second chance in Cyprus
- GDPR: Moment of truth?
- M&A transactions in Poland
- R3-INSOL Europe Conference

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Welcome from the Editors


FRANK HEEMANN


CATARINA SERRA

I have waited until the last minute to write this editorial. The world appears to change every day in the most unbelievable ways and, more than this, it changes so quickly that it is hard to keep up-to-date: what is true today might not be so tomorrow.

In Italy, until recently, everyone would bet that there would be general elections. Yet, a spectacular turnaround happened: the Italian President swore in the government presented by the (unlikely) coalition between an anti-establishment movement and a right-wing party. Both parties have backed calls for Italy leaving the eurozone and the EU. The head of one of the parties is against illegal immigration and the Minister for European Affairs is – believe or not – Eurosceptic. Can this "odd-couple-based government" last? Will Italy indeed vote to leave the eurozone and, eventually, move forward to the Italiexit? *Vediamo*.

As if that were not enough, surprising events also occurred in Spain. A new (socialist) government took control, after a no-confidence vote was passed in the parliament. The Prime Minister (and the motion's author) is a politician who, not long ago, was ousted by his own party's colleagues over losses in the general elections and was believed, for a while, to be politically dead. The party which supports the new government is clearly in minority, hence the compliance with the general 2018 budget presented by the outgoing (conservative) government will depend on the approval of a mish-mash of leftist and nationalist (Basque and Catalan) parties.

The political instability or, should I say, turmoil, in both countries has already had a negative outcome in the performance of stock markets. The yield differential between German bonds and Italian bonds has widened, indicating that investors view the latter as a riskier bet. This may be considered overreacting but, to some extent, it is understandable. Italy is the eurozone's third-largest economy and has the second highest public debt after Greece. Whatever happens in Italy is likely to have a direct impact on the economies of the so called "peripheral countries".

To top it off, there are signs of what some have already called a global trade war. President Trump kicked it off with the announcement that the US would impose tariffs on steel and aluminium imports from Canada, Mexico, and the EU. The EU may respond with the adoption of tit-for-tat measures on US products. The G7 summit, held in Quebec, in June, failed to restore the international order. We are certainly walking on thin ice.

It is only fair to assume that the insolvency world will be affected. In which ways and to which extent it is still to be determined.

Interestingly, regarding situations where there is a "likelihood of insolvency", there are signs of a comeback to the fostering of purely consensual instruments, in which there is no longer room for the judicial authority and the restructuring agreement remains binding only upon the parties. The Draft Directive has opened the road, providing that "creditors who are not involved in the adoption of a restructuring plan shall not be affected by the plan".

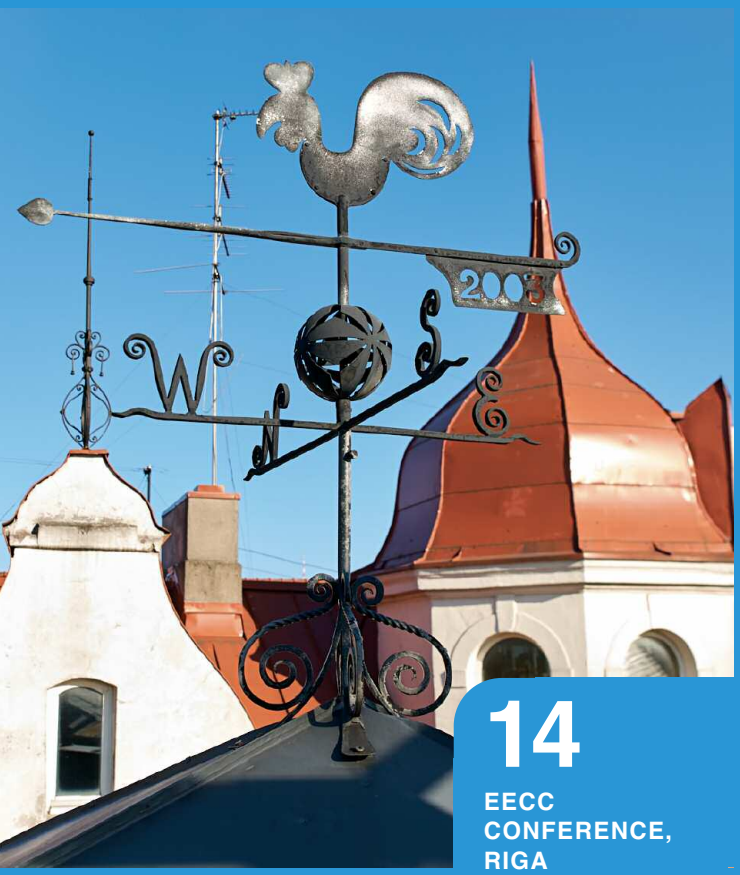
Illustrative examples of such a shift can be found in Italy and in Portugal. The imminent reform of the Italian Insolvency Act is expected to introduce a brand-new instrument, very similar to the English schemes of arrangements, but without the binding effect of the restructuring agreement upon dissenting creditors. In Portugal, the most recent tool available for corporate restructuring works completely out-of-court and enables the company to reach an agreement with *inter partes* effects. The inevitable questions are, of course, whether these instruments will succeed and whether they are here indeed to stay.

You may find country reports discussing these topics in the current issue of Eurofenix, as well as many other interesting articles and pieces on the most recent developments of international insolvency law and practice.

Lastly, I would like to remind you all the INSOL Europe Annual Congress, to be held in Athens, next October. When we meet there, the international scenario will most probably be different – hopefully better, with all the forces converging to a "breaking [of] the chains", in harmony with the theme of our Congress.

See you all in Athens!

Catarina



14
EECC CONFERENCE, RIGA

26
CRYPTO-CURRENCIES IN BANKRUPTCY

eurofenix
Edition 72 Summer 2018

CONTENTS

3 **Welcome from the Editors**
Catarina Serra introduces us to the new edition

6 **President's Column**
Radu Lotrean brings us updates on our events and collaborations around Europe

8 **News and Events**
Conference reports, news and updates from our organisation across Europe

12 **Technical Insight**
Emmanuelle Inacio takes a closer look at the 4-letter acronym that has been on everybody's lips lately…

14 **EECC Conference, Riga**
Paul Omar and Veronika Sajadova report on this year's EECC Conference in Latvia

18 **Retreat or progress in cross-border restructuring?**
Chris Laughton reports from the 15th joint conference between R3 and INSOL Europe

20 **Breaking the chains in Athens**
Emmanuelle Inacio previews the forthcoming Annual Congress in the city of the gods

22 **In the Groves of Symposia**
Paul Omar and Jenny Gant on what we can expect from the Academics

23 **A second chance for consumers in Cyprus**
Alexandra Kastrinou reports on the new virtual reorganisation and other tools for IPs

26 **Crypto-currencies in bankruptcy**
Ivan Simanovsky writes on the specifics of the new Belarusian regulation

CONTENTS

28 **"Alert and Assisted Arrangement" Procedures in Italy**
Eugenio Vaccari on how the organic reform of the Italian insolvency law draws heavily from international best practices

30 **Legal framework for distressed M&A transactions in Poland**
New opportunities for investment in Polish distressed businesses

32 **Recognition and enforcement of insolvency-related judgments**
Florian Bruder reports from UNCITRAL Working Group V's latest session in New York

36 **US Column: The Chapter 15 Case of Hanjin Shipping**
Ilana Volkov presents a case study in the universalist approach to cross-border insolvency administration

36 **Country Reports**
Updates from Portugal, Czech Republic, US and Italy

42 **Technical Update**
Myriam Mailly writes on how the potential changes expected in national insolvency legislations will play when the time comes for the Directive to apply

44 **Book Reviews**
Paul Omar presents the latest selection of new publications reviewed by our members

46 **Dates for your diary**
INSOL Europe contacts and dates for your diary

30
DISTRESSED M&AS IN POLAND

32
UNCITRAL 53RD SESSION NEW YORK

European projects and collaborations

RADU LOTREAN
INSOL Europe President

Radu Lotrean brings us updates on our organistion's forthcoming events and collaborations around Europe

> LAST YEAR OUR ORGANISATION WENT THROUGH A 360° HOLISTIC SELF-ASSESSMENT PROCESS, DESIGNED TO HELP INSOL EUROPE TO RECOGNISE ITS OWN POTENTIAL

I would like to update you regarding some of INSOL Europe's projects; our collaboration with AIJA, with DAV, the INSOL Europe local country directors and the 2018 Annual Congress, which will take place in Athens, Greece from 4-7 October.

Young members in Mallorca

After a very successful meeting during our Riga EECC Conference, we have signed a collaboration agreement with AIJA in order to organise a future co-labelled international Conference in Mallorca, Spain. The event is due to take place from 13 to 15 June 2019 at the Blau Porto Petro Hotel and will cover the Recast European Insolvency Regulation and other hot topics of the moment. I would like to address special thanks to our Young Members Group co-chairs, Anne Bach and George-Louis Harang as well as Héctor Sbert (Lawants, Spain), AIJA President of the Insolvency Law Commission and Kristīne Zvejniece (Rödl & Partner, Latvia), AIJA Co-Chair Law Course Committee, for pushing this forward.

Discussions in Brussels

Another co-labelled event has taken place recently; the 7th European Insolvency & Restructuring Congress, organised by the Section on Insolvency Law and Restructuring of the German Bar Association (DAV) and INSOL Europe in cooperation with ReTurn, in Brussels, on 28 & 29 June 2018. The event was definitely a successful one, not only in terms of attendance (more than 100 participants) but also in terms of speakers (high-ranking officials both from the European Parliament and the European Commission), and of themes. The best proof of this was the controversial discussions that followed the presentations and workshops centred on the EC Proposal Directive on Preventive Restructuring Frameworks, on digitalisation and legal tech in restructuring and insolvency, on restructuring of bonds under Austrian and German Law, creditor protection in Austria and the Austrian view on preventive restructuring frameworks, cooperation and group insolvencies, a comparison regarding the results for secured creditors in and out of court and others.

Strategic thinking in Sibiu

As you very well know, last year our organisation went through a 360° holistic self-assessment process, designed to help INSOL Europe to recognise its own potential and decide for itself how to best address the challenges this organisation faces. The key words, or perhaps more appropriate, the focus for last year's efforts by the Strategic Task Force 2025 working group, the Executive and INSOL Europe's community was 'organisational capacity building'. This process has not only provided INSOL Europe with the tools and perspective necessary to regularly reflect on its performance, to improve and to adapt its plans and activities according to their purpose, context and resources, but more importantly, it provided an excuse and a tool for re-examining INSOL Europe's foundation – its purpose, context and resources. This part of the process was concluded by the INSOL Europe Council meeting at Sibiu, that adopted several important resolutions.

National and regional relevance

One of the most important changes adopted, to be implemented this year, will be the local country INSOL Europe directors. We consider that a local approach is an important step in the development of INSOL Europe, firstly because we need the local representative voice in INSOL Europe, and often the best place to maximise opportunities for participation is at the local level; and secondly, we need a strong local base of members to change policies at national and international level. INSOL Europe needs to be represented in every European country, to increase its relevance and impact. In this respect, after approval by the INSOL Europe council, a new working group has been created with the objective of promoting INSOL Europe at national level, sharing know-how, promoting our programmes and the High-Level Course on Insolvency. In return this will help to increase membership and spread our message locally, spread the national message at a European and international level

Share your views!

and therefore increase INSOL Europe's relevance and impact.

This working group will be co-chaired by three regional co-chairs whose responsibilities will be to actively coordinate the actions and requests of the INSOL Europe national directors within the scope of their regions with the activities of INSOL Europe through a direct contact with the Executive. They would also actively control INSOL Europe's national directors and provide a link to the Executive.

INSOL Europe's national directors do not constitute an independent chapter, they are the local contacts of INSOL Europe for local organisations, with a general mission of creating, improving and maintaining good relationships. They are required to report to the regional co-chairs, to proactively encourage subscription by new local members, to proactively encourage article writing by local members for Eurofenix, promote INSOL Europe's activities and the High-Level Course on Insolvency. In terms of tools for achieving this, INSOL Europe's national directors may organise friendly local meetings to advertise INSOL Europe and its work and participation to our annual conference, they may organise half-day local conferences including the presence of foreign members, Academic Forum members or Judicial Wing members and they may use INSOL Europe materials.

Council elections

Also, please note that this is the time of year when we consider retirements from and election to our Council. This year three reserved seats (for France, Germany and Spain) and a non-reserved seat on the Council have become available, so please don't forget to make a nomination and vote.

Athens

Last but not least, our 2018 Annual Congress in Athens, from 4 to 7 October, is coming up. I am exceedingly happy and excited with this project and the stage it has reached. The organisational team is very efficient and the technical programme is full of surprises and manages to combine local and international interests seamlessly. We have a detailed introduction to the Greek insolvency law and the overall situation, panels on the EC Proposal Directive on Preventive Restructuring Frameworks, the Recast EIR, legal tech (how is modern technology affecting the work of advisers, IOHs, insolvency courts), digital assets, how to crack down on offshore companies, the future of mobility, the methods used to track down assets hidden by fraudsters and so on.

Brexit

There is also a welcome discussion on the Brexit situation. As we have seen from the Draft Agreement on the withdrawal of the UK from the EU, in the specific case of cross-border insolvencies, the draft establishes that the Community Regulation on insolvency proceedings, Regulation (EU) 848/2015 (Recast European Insolvency Regulation) will continue to be applicable to all insolvency proceedings which are commenced in the Member States (including the UK) before the end of the transition period (31 December 2020).

However, from that date onwards the authorities of the UK will cease to apply the Recast European Insolvency Regulation and will resort to its internal legislation when declaring themselves to have jurisdiction to commence insolvency proceedings, identifying the national law which will apply to those proceedings, and deciding under what conditions they recognise insolvency proceedings conducted in an EU Member State, and so on.

What is the impact of this? Well, probably an increase of costs, of time and, of course, greater uncertainty since the recognition of a British judgment may or may not be ordered by the national court.

What next?

Please join me – Athens will be the perfect place for brainstorming, creating new connections, networking and meeting other like-minded professionals. After the Congress, what could be better than having a great conversation with a new friend, and exploring the city in a 24° weather?

All of these projects require a considerable amount of work and I want to thank and acknowledge the organisational team's efforts. And having shared a few of these ideas about our INSOL Europe community, we would really appreciate any feedback on these matters. Moreover, any involvement is more than welcome. ■

> **INSOL EUROPE NEEDS TO BE REPRESENTED IN EVERY EUROPEAN COUNTRY, TO INCREASE ITS RELEVANCE AND IMPACT**

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 issues, please contact Paul Newson, Publication Manager: paulnewson@insol-europe.org

INSOL Europe Council Elections

This is the time of year when we consider retirements from and elections to our Council.

Countries with 30 or more members are entitled to a reserved seat on Council and in October this year, vacancies will arise for the following:

France: As Marc Senechal will have completed his 2nd and final 3-year term of office.

Germany: As Frank Tschentscher will have completed his first 3-year term of office but may stand again for election against other candidates.

Spain: As Vicente Estrada will have completed his first 3-year term of office but may stand again for election against other candidates.

Therefore members from France, Germany and Spain will shortly receive a separate email requesting nominations for candidates from their own country.

In the meantime, one non-reserved seat vacancy on Council (which may be occupied by any country) will also become available following the appointment of Piya Mukherjee (Denmark) as Vice President in October last year.

Closing date for nominations: 21 July 2018

Information about how to nominate a candidate has been emailed to members. Contact Caroline Taylor, INSOL Europe's Director of Administration at carolinetaylor@insol-europe.org if you have not received your copy of the nomination form.

Prominent insolvency academic to head UNIDROIT

Professor Ignacio Tirado, Titular Professor of Corporate and Insolvency Law at the Universidad Autonomá de Madrid, was appointed the new Secretary-General of UNIDROIT at a meeting of the body in May 2018. Professor Tirado will be taking up his position at the Villa Aldobrandini, headquarters of the body in Rome, over the summer.

Professor Tirado is well-known in INSOL Europe circles as the leading organiser of the High-Level Insolvency Course project, which its first cohort completed in Romania in January 2018. Professor Tirado has a number of other accolades to his distinction, including being a Senior Legal Consultant at the World Bank, former Legal Consultant at the IMF, one of the founding Academic Board members of the European Banking Institute as well as Visiting Professor in a number of universities and institutions.

UNIDROIT was first set up in 1926 as an auxiliary body of the League of

Nations and re-founded in 1940 as an international body under a special statute to which states can accede. Currently, it has 63 Member States drawn from all over the world, which support its core purpose, that is, to study modernisation, harmonisation and coordination needs in private law, with a special emphasis on commercial law. The work of UNIDROIT leads to the formulation of uniform law instruments ready for of adoption into any domestic law, as well as principles and rules by which acceding states can achieve the objectives of transposing international best practice into their domestic frameworks.

INSOL Europe takes this opportunity to congratulate Professor Tirado on his new position and will be happy to benefit from his expertise in restructuring and insolvency work.

Insolvency and the City

The Cross-Border Corporate Insolvency and Commercial Law (CI&CL) Research Group of the City University of London hosted its second conference in London on 27 April 2018, *reports Eugenio Vaccari, CI&CL Research Group Founder*.

Following the success of last year's inaugural event, this year's conference strives again to become an established international forum for the discussion of recent developments and issues in the field of corporate insolvency law and practice. Participants from more than 17 countries, representing six continents, attended the latest event, which was generously supported by INSOL Europe, Thomson Reuters and the City University of London.

The forum was jointly chaired by Professor Jason Chuah (Head of Academic Law, City University of London) and Eugenio Vaccari (CI&CL Research Group Founder), who, in their opening address, highlighted the relevance of corporate insolvency law and practice in the current economic and political climate. During the morning session, papers on cross-border issues, corporate practice and the impact of artificial intelligence on insolvency practice were presented, such as the one by Professor Gerard McCormack (Leeds) on recent innovations in Singapore, Hamish Anderson (Norton Rose Fulbright LLP) on the impact of the withdrawal of Britain from the EU and Associate Professor Sarah Paterson (LSE) on the risks caused by the use of covenant-lite loans in buyout transactions.

Two afternoon sessions were held in parallel, building on the expertise of academics and practitioners alike, the idea being to offer delegates the opportunity to follow presentations of interest to their area of practice and expertise. In these sessions, presentations by Marco Mastropasqua (Garbarino Vergani), Clive Day (Legal Director, Gateley Plc), Professor Laura Coordes (Arizona State University), Dr. Jennifer Gant (NTU) and Dr. Christian Chamorro-Courtland (Sydney) focused on the impact of insolvency regulatory reforms on the profession, covering topics as diverse as the impact of insolvency on the maritime and aviation industry, the financial sector, municipalities, salaried workers, consumers.

Overall, the conference presented a challenging and stimulating environment for PhD candidates and early career researchers, enabling them to discuss their research with more experienced attendees from practice and academia. With the generous support of the participating bodies, the CI&CL Research Group was pleased with the outcome of the day's proceedings. Planning for next year has already begun with information on future events, past conferences, as well as general group activity regularly made available on the CI&CL website at: www.ciclresearch.com.

LinkedIn

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 Financial Institutions 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.

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!

Make a comment!

Mārtiņš Bunkus

The morning of 30 May 2018 brought sad news about the tragic death of a member of INSOL Europe from Latvia, Mārtiņš Bunkus.

Mārtiņš was an attorney-at-law and a certified insolvency administrator.

He began working as a lawyer and even managed to open his own law firm whilst still studying at the Law Faculty of the University of Latvia. Later, in 2008, he passed the Bar exam and obtained an insolvency administrator's certificate. This marked the start of his career in the insolvency and restructuring field which spanned almost ten years.

Throughout this decade, Mārtiņš and his law firm's employees administered the insolvency proceedings of several dozens of companies and individuals. In addition, Mārtiņš was advising debtors, creditors and other stakeholders on insolvency and restructuring matters. He took an active part in the work of the professional organisation of Latvian insolvency administrators and also held different positions within it.

Mārtiņš also participated in the work of the Latvian Bar Association. In particular, he was the deputy head of the Bar Association's Commission on Tax and Financial Matters.

Friends and colleagues remember him as a talented professional and an avid traveller.

With thanks to Edvīns Draba for writing this piece.

Insolvency proceedings opened for Flamant Group in view of the continuation of its activities

By a judgement of 4 April 2018, the Dutch-speaking commercial court of Brussels opened insolvency proceedings for three main companies of the well-known Belgian Flamant Group: Flamant SA, Flamant Group SA and Flamant Retail Belgium SPRL, ***writes Bart De Moor of Strelia.***

Flamant is a lifestyle and interior design brand, founded more than 35 years ago, which offers a wide range of styles and products. In Europe, Flamant has become a reference brand for exclusive, charming and timeless interiors. The company experienced a rapid growth which led to a turnover of 44 million euro in 2008. His Majesty Filip, King of the Belgians, awarded the company with a royal warrant. The company has the following sales channels: 7 own stores in Belgium and France, more than 200 client-resellers in more than 40 countries and an online store.

In 2009 the Flamant Group and its branches encountered financial difficulties due to the global economic and financial crisis, which resulted in a drop in turnover. On 4 April 2018 the court ordered a judicial reorganisation by transfer under judicial authority and appointed Bart De Moor as insolvency practitioner, in view of a transfer of the undertakings and continuation of the activities.

The proceedings included a stay until 13 June 2018. Bids were awaited for the entire undertakings or parts of it and large publicity was made towards potential interested purchasers. Bids could be made for the whole undertakings of the companies involved, including subsidiaries, or for certain activities or a combination thereof.

Upon the proposition of the insolvency practitioner appointed, the Brussels court of commerce will decide on the authorisation of the transfer to one or more purchasers in view of the continuation of the activities without interruption. The decision will be made having in view the continuation of the employment and the creditors' rights and interests as main criteria. Upon closing of the insolvency proceedings and a successful transfer of a major part of the viable activities the initial legal entities in reorganisation will presumably be liquidated.

We want you!

Call for expression of interests for the INSOL Europe 2019 Copenhagen Congress

by the Co-chairs of the INSOL Europe's 2019 Copenhagen Congress,
Michala Roepstorff (Plesner, Denmark) & Florian Bruder (DLA Piper, Germany)

The Technical Committee for the INSOL Europe 2019 Congress which will be held in Copenhagen from 26 to 29 September 2019 invites all INSOL Europe members to express their interest to participate as speakers at our flagship event.

All expressions of interest should be sent to the Secretary to the INSOL Europe Conference Technical Committees, Emmanuelle Inacio, at **emmanuelleinacio@insol-europe.org**, and should indicate (a) the speaker's nationality, affiliation and qualifications, (b) the topic on which the speaker would be interested in speaking, and (c) a short statement as to what unique or compelling perspective the speaker would like to bring to the congress. The Technical Committee seeks in particular proposals from speakers who have not been speakers at the last two Annual Congresses.

Expressions of interest should be sent as early as possible, no later than **15 September 2018**. All expressions of interest will be considered by the Technical Committee, although due to the large number the Committee expects to receive, the Committee likely will not be able to accommodate all, or even most, requests.

INSOL EUROPE

Denmark Copenhagen

GDPR: The moment of truth?

Emmanuelle Inacio takes a closer look at the 4-letter acronym that has been on everybody's lips lately...

EMMANUELLE INACIO
INSOL Europe Technical Officer

> **IN THE DIGITAL AGE, THE GENERAL DATA PROTECTION REGULATION (GDPR) WAS DESIGNED TO HARMONISE DATA PRIVACY LAWS ACROSS EUROPE**

The Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) applies since 25 May 2018[1].

In the digital age, the General Data Protection Regulation (GDPR) was designed to harmonise data privacy laws across Europe, to protect and empower all EU citizens' data privacy and to reshape the way organisations across the European Union (EU) approach data privacy.

The key article of the GDPR, is "consent".

Consent remains one of six lawful bases to process personal data, as listed in Article 6 of the GDPR. When initiating activities that involve processing of personal data, a controller must always take time to consider whether consent is the appropriate lawful ground for the envisaged processing or whether another ground should be chosen instead. Controllers that ask for a data subject's consent to use these data shall in principle not be able to rely on the other lawful bases in Article 6.

If obtained in full compliance with the GDPR, consent is a tool that gives data subjects control over whether or not personal data concerning them will be processed. If not, the data subject's control becomes illusory and consent will be an invalid basis for processing, rendering the processing activity unlawful.

Definition of Consent

Article 4 (11) of the GDPR defines restrictively "*consent*" of the data subject as "*any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her*".

As a general rule, the GDPR prescribes that if the data subject has no real choice, feels compelled to consent or will endure negative consequences if they do not consent, then consent will not be valid.

To assess whether consent is freely given, Article 7(4) of GDPR plays an important role. Article 7 (4) of GDPR indicates that, *inter alia*, the situation of "*bundling*" consent with acceptance of terms or conditions, or "*tying*" the provision of a contract or a service to a request for consent to process personal data that are not necessary for the performance of that contract or service, is considered highly undesirable. If consent is given in this situation, it is presumed to be not freely given (Recital 43).

The GDPR is clear that consent requires a statement from the data subject or a clear affirmative act which means that it must always be given through an active motion or declaration. It must be obvious that the data subject has consented to the particular processing. A "*clear affirmative act*" means that the data subject must have taken a deliberate action to consent to the particular processing. Recital 32 sets out additional guidance on this. Consent can be collected through a written or (a recorded) oral statement, including by electronic means. "*This could include ticking a box when visiting an internet website, choosing technical settings for information society services or another statement or conduct which clearly indicates in this context the data subject's acceptance of the proposed processing of his or her personal data*". Silence, pre-ticked boxes or inactivity on the part of the data subject, as well as merely proceeding with a service, cannot be regarded as an active indication of choice.

Evidence of consent

In Article 7(1), the GDPR clearly outlines the explicit obligation of the controller to demonstrate a data subject's consent. The burden of proof will be on the controller, according to Article 7(1). But the GDPR does not prescribe exactly how this must be done. Therefore, if the controller is not able to demonstrate that the data subject has consented to processing of his or her personal data, this will render the consent invalid. Similarly, if the evidence of consent is considered insufficient, the consent will not be considered valid, rendering the processing activity unlawful, even if it meets all of the other conditions of validity.

Article 29 of the Directive 95/46/EC established a "Working Party on the Protection of Individuals with regard to the

> CONTROLLERS ARE FREE TO DEVELOP METHODS TO COMPLY WITH THIS PROVISION IN A WAY THAT IS FITTING IN THEIR DAILY OPERATIONS

processing of Personal Data", generally known as the "Article 29 Working Party"[2]. As of 25 May 2018, the Article 29 Working Party ceased to exist and has been replaced by the European Data Protection Board (EDPB)[3], which is composed of representatives from the national data protection authority of each EU Member State, the European Data Protection Supervisor and the European Commission (without voting right).

In the same way as the Article 29 Working Party, the EDPB monitors the correct application of the new data protection rules, advise the European Commission on any relevant issue, and give advice and guidance on a variety of topics related to data protection. The novelty of the GDPR is that the EDPB will also issue binding decisions in the case of certain disputes between national data protection authorities, thus fostering the consistent application of data protection rules throughout the EU.

In November 2017, the Article 29 Working Party published "Guidelines on consent under Regulation 2016/679"[4]. These Guidelines provide a thorough analysis of the notion of consent in the GDPR.

Regarding the question of the evidence of consent, according to the Guidelines on consent, controllers are free to develop methods to comply with this provision in a way that is fitting in their daily operations. At the same time, the duty to demonstrate that valid consent has been obtained by a controller, should not in itself lead to excessive amounts of additional data processing. This means that controllers should have enough data to show a link to the processing, but they shouldn't be collecting any more information than necessary.

For instance, the controller may keep a record of consent statements received, so he can show how consent was obtained, when consent was obtained, and the information provided to the data subject at the time shall be demonstrable. The controller shall also be able to show that the data subject was informed, and the controller's workflow met all relevant criteria for a valid consent. For example, in an online context, a controller could retain information on the session in which consent was expressed, together with documentation of the consent workflow at the time of the session, and a copy of the information that was presented to the data subject at that time. It would not be sufficient to merely refer to a correct configuration of the respective website.

Neither the GDPR nor the Guidelines on consent of the Article 29 Working Party published considered the role Blockchain could play in the evidence of consent. Indeed, if the data could be tracked by using Blockchain, which is an incorruptible digital register, this would give evidence of consent. Globally, Blockchain could indeed be a consistent step toward data protection. ■

Footnotes

1 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32016R0679
2 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, no longer in force, repealed by the GDPR: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31995L0046
3 https://edpb.europa.eu/
4 Article 29 Data Protection Working Party, Guidelines on transparency under Regulation 2016/679, WP260, November2017: https://iapp.org/media/pdf/resource_center/wp29_consent-12-12-17.pdf

Share your views!

A Baltic revolution in restructuring and insolvency: Riga

Paul Omar and Veronika Sajadova report on this year's EECC Conference in Latvia

PAUL OMAR
INSOL Europe
Technical Research Officer

VERONIKA SAJADOVA
INSOL Europe
Technical Committee Co-chair

Share your views!

Latvia's capital city, Riga, adorned with the beautiful architecture of the Art Nouveau period, played host for the first time to an EECC conference, the 14th in the series.

The one-day event, on Friday 1 June, was preceded by a welcome dinner on the eve of the conference, at the Gutenberg Restaurant. The restaurant terrace, in the heart of the Old City, offered an exceptional view over the landmarks of the city centre, rightly recognised by their inclusion on the UNESCO World Heritage Sites Register. Also welcoming the many attendees and guests was the warm weather, hitting a high of 26 C° in the week of the conference, quite exceptional for June in the Baltics.

Topping off the evening was a special presentation by Radu Lotrean (President of INSOL Europe; EECC Co-Chair) to Florica Sincu, who stepped down after 26 years of faithful service as French Office Co-ordinator and Secretary to the Eastern European Countries' Committee. Florica's presence will be missed by many at INSOL Europe events but she continues to be part of the team, working on Eurofenix.

Words of welcome and a moment's reflection

The conference was officially opened on Friday morning by Radu Lotrean. Before embarking on his speech, Radu led the conference in a minute's silence in memory of INSOL Europe member and local practitioner, Martins Bunkus, who died tragically earlier in the week. In addressing the conference, Radu noted the increasingly important role played by the EECC event in increasing our awareness of not only European developments, but also reform initiatives at local and regional levels. To this end, he highlighted the recent establishment of the high-level course in insolvency, first held in Romania in 2017-2018, which put together academics, judges and various experts who delivered information on international best practice and also offered the participants the possibility of sharing local know-how with their peer group. Participation within INSOL Europe by members from emerging and developing jurisdictions also featured with Radu talking of a new initiative to permit these countries with fewer than 30 members to be represented on Council. To these thoughts, Evert Verwey (EECC Co-Chair) added his own words of welcome before ceding way to the morning's guest of note.

Florica Sincu received an award for 26 years service

The keynote speech, which preceded the substantive agenda of the day, was given by the Latvian Minister of Justice, Dzintars Rasnačs. Following a warm welcome to the assembly, the Minister placed emphasis on the happy coincidence in timing that the EECC event was occurring in Riga just as the cycle of local reforms, which had taken place over a 3-year period, had come to an end (the previous day, in fact). These reforms, which have already been positively evaluated by the European Commission and International

Latvian Minister of Justice, Dzintars Rasnačs, spoke about the recent cycle of local reforms in his keynote address

Delegates marked their respect with a moment of silence for Martins Bunkus

Monetary Fund, are not the end of the story, as further initiatives will be likely to materialise in the future, as the reforms begin to bed down in practice. Nonetheless, the Minister was confident that the current wave of reforms has left Latvian practitioners with better and improved legal frameworks for carrying out their activities. In appreciating INSOL Europe's timely decision to hold the EECC event in Latvia, the Minister felt it was an honour for the country and looked forward to increasing cooperation between local practitioners and the wider international community.

The Technical Sessions: Friday morning

The technical sessions proper began with the cutting-edge topic of the moment: the Proposal for a Directive on restructuring, insolvency and second chance ("Draft Directive"). The panel, moderated by Mathias Storme (KU Leuven, Belgium), opened with a presentation by Paulus Markovas (Cobalt Law Firm, Lithuania) comparing the provisions of the Draft Directive to the Lithuanian Law on Business Restructuring. Delegates then had an exceptional opportunity to obtain an insider's view from Salla Saastamoinen (DG-Just, European Commission), who was able to provide an insight into the areas of the Draft Directive agreed upon by the Member States, including, inter alia, the qualification and training of insolvency practitioners, the appropriate discharge period, exceptions to discharge as well as the digitalisation of procedures.

A further coincidence in the timing of the conference was also remarked upon here, in that the prospective meeting of the Council (Justice and Home Affairs) on 4-5 June, which is anticipated will agree parts of the Draft Directive dealing with a second chance for entrepreneurs, effective measures and data collection. It is expected that the remainder of the Draft Directive, including the thornier question of the preventive restructuring framework, will be postponed till the Austrian presidency takes up the baton this summer. The final presentation in this session focused on a new initiative arising out of the INSOL Europe 2011 Report on Harmonisation, with Alberto Nuñez-Lagos (Uria Menendez, Spain) outlining the contents of a proposed Model Law focusing on some of the common content of the Draft Directive.

The second panel of the morning focused on theoretical and practical aspects of the Recast European Insolvency Regulation ("Recast EIR"), especially now that it has reached the first anniversary of its implementation. Moderated by Evert Verwey, the panel discussed an instructive case-study, charting the course of the Air Berlin proceedings in Germany, which triggered proceedings in both Austria and Germany in respect of its subsidiary, Niki Air. The ensuing competition between courts was the subject of some debate between panellists Björn Laukemann (Max-Planck Institute, Luxembourg), Robert van Galen (NautaDutilh, the Netherlands) and Judge Miodrag Dordevic (Supreme Court of Slovenia) on how the anticipation of the changes in the framework of the Recast EIR has met the challenges in practice. In particular, Judge Dordevic said that the text offers useful tools for cooperation and communication, though the tension between the need to expedite proceedings and

> **IN APPRECIATING INSOL EUROPE'S TIMELY DECISION TO HOLD THE EECC EVENT IN LATVIA, THE MINISTER FELT IT WAS AN HONOUR FOR THE COUNTRY**

"As a legal practitioner from Riga, I was particularly delighted not only to have attended my first INSOL Europe conference in my own hometown but also for the fact that the topic was being discussed to a large extent against the backdrop of the recent thorough shake-up of the Latvian regulation.

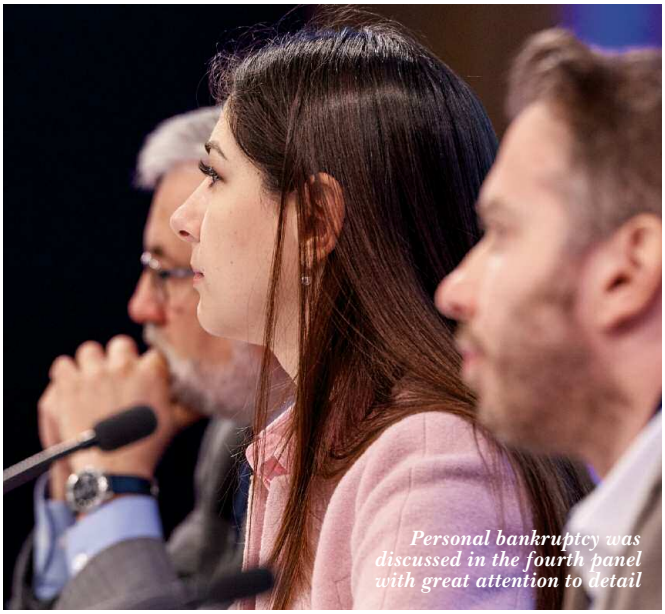
This allowed even the Latvian Justice minister in his opening remarks to venture the possibility of it now being "*the best insolvency law in Europe*". Over the course of the conference, this upbeat notion was put to the test of the harsh reality and critical viewpoints, which culminated in an Austrian delegate referring to the Latvian regulation for selecting the administrator as "probably the least appropriate".

This exchange of dissenting opinions and a forum where no truths of the insolvency law are held self-evident is of utmost practical and academic importance. Borrowing a thought or two from the neighbour can often lead to solutions of the most complicated legal impasses. I left the conference feeling enriched."

First time attendee Indulis Balmaks (Rödl and Partner, Riga)

The conference was attended by 100 delegates from across Europe

An instructive case-study charted the course of Air Berlin



Personal bankruptcy was discussed in the fourth panel with great attention to detail

THE PANEL SET OUT A STRONG CASE FOR ADOPTING THE LATVIAN APPROACH TO LEGISLATION

that of protecting national substantive and procedural rules can put the judges in an unenviable position.

The final panel of the morning dealt with transaction avoidance provisions, an indispensable tool for insolvency practice, with Hans Renman (Hamilton Advokatbyrå, Sweden) and Rolef de Weijs (Houthoff, the Netherlands; Riga Graduate School of Law) setting out a comparison between the legislation in Germany, Latvia, Sweden and the United Kingdom. With the assistance of an impromptu group of experts: Veronika Sajadova (Latvia), Anne Bach (Germany) and Paul Omar (United Kingdom), the panel set out a strong case for adopting the Latvian approach to legislation as a template for possible harmonisation.

The Technical Sessions: Friday afternoon

Following a commodious lunch, delegates reassembled for the first of three further panels, this time on personal bankruptcy. Moderated by Veronika Sajadova, the panellists, including Jan-Ocko Heuer (Humboldt University, Germany) and Paweł Kuglarz (Kuglarz and Partners, Poland), addressed personal bankruptcy and discharge issues from a European-wide comparative perspective, as well as the critical criterion of good faith set at the heart of the discharge principle. With the assistance of very detailed and useful slides mapping out the various waves of consumer law reform across Europe, the panel suggested that, though consensus had yet to be achieved, the principle of discharges being available only to honest and deserving debtors, as in Polish and other laws, might become the norm for any future harmonisation initiative. Returning to the corporate arena, the panel that followed,

Questions from the audience were ably answered by the panels

"When you participate in the annual EECC Conference from year to year, you may get used to the other participants and even become friends with some of them.

But this time, the conference surprised me with a big number of new delegates mainly coming from abroad. Although it is hard to guess the reason of the attraction, I assume that it was due to the special, carefully-designed programme and the eminent speakers: judges, academics, politicians, insolvency practitioners, attorneys and other professionals.

Indeed, it was my great pleasure and honour to help host the conference in Riga on behalf of the Association of the Latvian Commercial Banks and the Latvian Foreign Investors' Council.

I would like to thank all panellists for their effort and significant input in making the conference in Riga such an achievement and a delight."

Veronika Sajadova, Swedbank Latvia and INSOL Europe Technical Committee Co-chair

Opportunities abounded for networking with fellow delegates

Many of the panels focussed on hot topics and local issues

moderated by Ernst Giese (Giese and Partner, Czech Republic) and consisting of Peeter Viirsalu (TGS Baltic, Estonia) and Edvins Draba (Sorainen, Latvia) gave a regional and practical flavour to proceedings through a case study centred on the restructuring of the automotive supplier "Sedis", operating in both countries.

The last panel of the day turned to the subject of the underlying insolvency framework supporting the law. With moderation provided by Laila Medin (Deputy State Secretary on Sectoral Policy, Ministry of Justice, Latvia), the panellists focused on recent topical issues.

Under this broad umbrella, Helmuts Jauja (FICIL, Latvia) discussed the recent changes to the practice qualifications framework in Latvia, while Niculina Somlea (CITR, Romania) looked at how criminal law affected the conduct of insolvency proceedings in Romania. The final element of the panel was provided by Paul Omar (Technical Research Coordinator, INSOL Europe), who gave an overview of challenges facing the insolvency law reform environment in emerging and developing countries.

Closing remarks

Closing remarks were delivered by Evert Verwey (EECC Co-Chair), who confirmed the utility of the day in helping participants share expertise and experience and looked forward to the next occasion in 2019.

To round off a long day of interesting and thought-provoking presentations, there then followed a traditional networking and drinks hour for all participants.

Finally, the Young Members' Group usual networking meeting took place in the Skyline Bar of the hotel, affording these delegates convivial company and spectacular views over the city. ■

More photos from the event can be viewed on our website: www.insol-europe.org/gallery/2018-riga-latvia

Retreat or progress in cross-border restructuring?

Chris Laughton reports from the 15th joint conference between R3 and INSOL Europe which took place on 7 June 2018 in London

CHRIS LAUGHTON
Partner, Mercer & Hole, London;
Treasurer, INSOL Europe;
Editor, R3 RECOVERY

Over 60 senior delegates from nearly 20 jurisdictions met in the heart of the City, in sight of the Tower of London, to explore the theme "retreat or progress in cross-border restructuring".

Glen Flannery and Nico Tollenaar, who have for many years chaired this most successful of co-labelled cross-border restructuring events, brought together an impressive team of speakers from around the world. UK, other European, offshore and North and South American perspectives were delivered by lawyers and insolvency practitioners, as well as by experts from the banking, legislative and journalistic communities.

A strength of the conference was its familiar format, beginning with Richard Fisher and Henry Phillips of South Square discussing the year's common law cross-border cases. Richard considered the wane of universalism in the context of the rule in Gibbs (a nineteenth century English Court of Appeal case, which decided that a debt governed by English law cannot be discharged or compromised by foreign insolvency proceedings). He also explained that Article 21 of the UNCITRAL Model Law could not be used in *Re International Bank of Azerbaijan* to gain a permanent stay and overcome the rule in Gibbs procedurally. Henry identified from *Carlyle Capital Corporation Limited* (a Guernsey case), that a director who gives some, albeit inadequate or incompetent, consideration to actions he honestly believes are in the interests of the company will not be guilty of a breach of loyalty.

> "A STRENGTH OF THE CONFERENCE WAS ITS FAMILIAR FORMAT"

Market developments

Maintaining tradition, John Willcock, Editor of Global Turnaround, interviewed a panel on market developments and as media sponsor also provided a special report for the conference[1]. After reminding delegates that Brexit is a massive uncertainty generator he invited John O'Driscoll of Walkers to speak of the attractiveness of a Cayman provisional liquidation as a restructuring tool. It can be used to give a breathing space, leaving management in place in a light touch case (as in the *Ocean Rig* case), and fits well with Chapter 11 or an English Scheme, but it might benefit from rebranding to lose "liquidation" from the title!

Ilona Wolffram-van Doorn from the Dutch Ministry of Justice and Security spoke fascinatingly on the implementation of a statutory basis for pre-packs in the Netherlands and on legislation being drafted for a Dutch Scheme of Arrangement. The current idea favours two types of scheme: one subject to the European Insolvency Regulation and COMI etc., and the other being outside the EIR, applicable if there is "sufficient connection" to the Netherlands jurisdiction and governed by private international law rules.

Werner Meyer of Simmons & Simmons then told the Air Berlin-Air Niki story. Air Niki filed for insolvency in Germany and was successful at first instance but overturned in the court of appeal. Meanwhile the German administrator had agreed to sell the business and assets to IAG, subject to the insolvency status being resolved. A creditor then filed to open main proceedings in Austria and the Austrian administrator sold the business and assets to Lauda Motion. It is unfortunate that there was not more cooperation between the German and Austrian courts and administrators as a good deal of value was destroyed by the jurisdictional argument. John's conclusion on the conference theme of retreat or progress might best be interpreted as two steps forward from Cayman and the Netherlands but one step back from Germany and Austria!

Cayman complexities

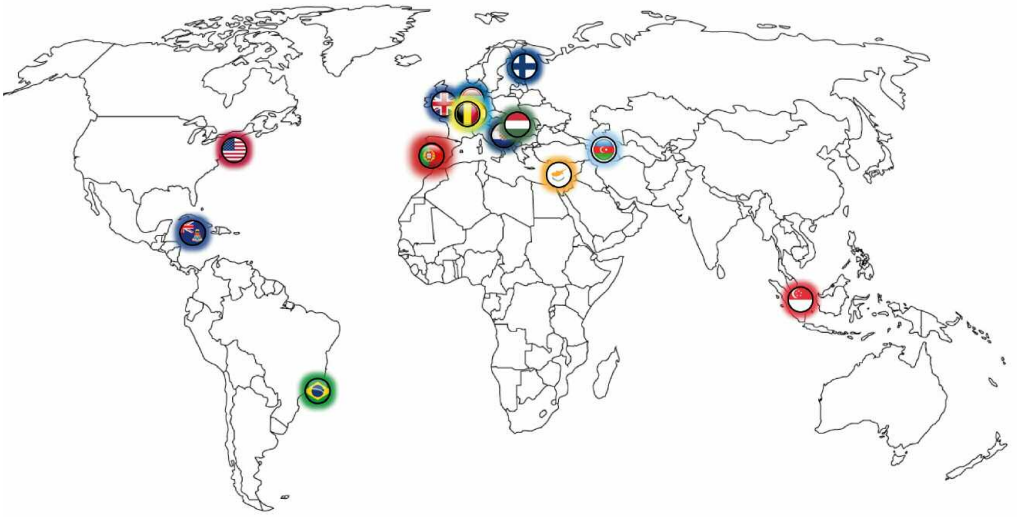
Chris Duffy of Alix Partners and Nick Herrod of Maples & Calder took delegates back to Cayman for a more detailed look at the *Ocean Rig* case heralded by John O'Driscoll. Key features included a pre-appointment COMI-shift from the Marshall Islands, which had no restructuring regime; light touch provisional liquidations; a litigation trust to hold and

potentially pursue claims; and four linked schemes of arrangement. Much more detail was discussed then I have room to relate, but this was a complex and well-planned restructuring, which demonstrates the cost and tax advantages that Cayman can offer over the US and the UK. To emphasise progress in cross-border restructuring, Barry Cahir spoke from the floor briefly and unashamedly to point out that the Irish scheme of arrangement's 55-year heritage has been augmented since 2011 by Examinership, which is akin to Chapter 11!

Piya Mukherjee of Horten spoke as INSOL Europe's Vice President about the association, encouraging those delegates who were not already members to join us. Later, Stuart Frith of Stephenson Harwood, who is the new President of the host body, R3, explained the wishes of UK professionals and the UK government to see the continuing application of the EIR and the Recast Brussels (judgment) Regulation to the UK after Brexit, with mutual recognition and reciprocal civil justice cooperation. Notwithstanding legal difficulties like, for example, the Netherlands not recognising foreign insolvency proceedings except from the EU (as Nico Tollenaar pointed out), cooperation is clearly fundamental to effective cross-border restructuring and insolvency. The uncertainty that John Willcock highlighted is anathema.

The discussion format of the EU Developments presentation by Stephen Taylor of Isonomy and Johan Jol of ABN AMRO not only reflected their chance meeting and first conversation in New York but also facilitated a flow of ideas. They covered non-performing loans (the restructuring and hedge trader caravan is heading for Italy), bank risk vs client care (bankers have to look after clients personally), morality vs legal structure (whether it's legal or illegal, is it right?), legislators driving behavioural change using the court of public opinion, and the dearth of good non-executive directors due to the worry of cross-infection (involvement with a restructuring seen as unsuccessful could lead to a reputation that might damage a good company).

Around the world in one day…



Cross-border case study

Finally, the latter part of the afternoon was given up to a case study of Oi Telecom, Latin America's largest ever restructuring. Playing roles with which they were largely familiar in reality were Laura Femino of White & Case as US Counsel, Marcel Groenewegen of CMS as Netherlands Trustee, Sergio Savi of Barbosa Müssnich Aragão as Brazilian adviser and Lucas Kortmann of RESOR (who had been a Netherlands adviser) chaired the session. This 70 million customer business with a 347,000 km fibre network in Brazil gave rise to a politically high-profile and truly cross-border restructuring involving different languages and cultures. Another feature of the case was the bruising nature of the litigation.

Structurally, the Brazilian group had used Dutch and other nationality SPVs to attract funds tax-efficiently. The Brazilian Recuperação Judicial ("RJ") proceedings (akin to Chapter 11), which involved substantive consolidation, were not recognised in the Netherlands. Similarly, the trustee of the Netherlands SPV, which had valuable inter-company claims, was not recognised in Brazil. Suits, injunctions and counter-suits ensued with litigation extending to Cayman (in relation to a Cayman fund) and the US (were main proceedings in Brazil or the Netherlands and hence who controlled the US Chapter 15 proceedings?). A split board and a failed plan led to a court-imposed CEO in Brazil and a 2-day creditors' meeting in late 2017. By June 2018 matters had moved forward and another creditors' meeting was held and the plan approved just days before the conference!

The case study illustrated clearly the problems that arise when insolvency proceedings are not recognised in another jurisdiction. It also showed again the importance of cooperation between courts and practitioners. ■

Footnotes

1 Available at: www.globalturnaround.com/documents/R3-INSOL-EuropeInternationalRestructuringConference.pdf

> **COOPERATION IS CLEARLY FUNDAMENTAL TO EFFECTIVE CROSS-BORDER RESTRUCTURING AND INSOLVENCY**

Breaking the chains: Looking ahead to Athens

Emmanuelle Inacio invites you to our Annual Congress in the city of the gods and introduces the forthcoming technical sessions

EMMANUELLE INACIO
INSOL Europe Technical Officer

What could be more divine than inviting you to Athens, the so-called city of Gods, for our forthcoming Annual Congress?

Athens, historic city and capital of Greece is a city indeed blessed by the gods, with ruins and archaeological sites dating back thousands of years, a crystal-blue coastline, magical sunsets and mountainous landscape. Above all, many of the classical civilization's intellectual and artistic ideas originated in Athens and the city is generally considered to be the birthplace of Western civilization, where democracy was born and reign.

Seven years after being on the verge of a financial collapse, Athens is now seeing better times.

Greece has experienced economic growth for five straight quarters and the first quarter of 2018 was higher than the last three months of 2017 which was revised upwards according to the Elstat statistics service. But what is not under the spotlight is how the Greek people are still paying for the effects of the crisis. It is the first time, since 2011, that the economic accounts of Greece are so encouraging that the country is looking with some optimism to the month of August 2018 when the last phase of the bailout program will be over definitely.

An analogy can be drawn between Athens and Prometheus, a god tortured by gods… In Greek mythology, Prometheus, who was punished by Zeus for stealing the power of fire from gods and giving it to mortals is chained to a rock and condemned to have his liver gnawed on by an eagle every day forever. Prometheus is the allegory of a powerless but defiant victim of an unjust and powerful god who rules by arbitrary laws and demands blind obedience. Only his reason and wisdom lead him to breaking his chains.

> **OUR DELEGATES WILL HAVE THE DIFFICULT TASK OF CHOOSING TWO BREAK-OUT-SESSIONS FROM FOUR VERY INTERESTING PRACTICAL AND SECTORIAL TOPICS**

Congress theme

The main theme for our forthcoming Athens Congress could not be more evident than "**Breaking the Chains**" as the thread connecting the sessions of the technical programme prepared by the co-chairs of our Annual Congress Technical Committee, George B. Bazinas (Bazinas Law Firm, Greece) and Frank Tschentscher (Schultze & Braun, Germany).

Professor Evangelos Venizelos who is *inter alia* the former Deputy Prime Minister and former Minister of Foreign Affairs of Greece, has honoured us by accepting our invitation to open our Congress with a keynote speech.

The first panel session chaired by George Bazinas (Bazinas Law Firm, Greece) will conduct the analysis of the constant amendment of the Greek insolvency framework imposed by Greece's international creditors, who are searching in vain for the "Holy Grail".

Current affairs for our profession will then be presented. On the one hand, an update of the status of negotiations between the European Union and the United Kingdom on Brexit will be provided by Andrew Shore (Insolvency Service, UK). On the other hand, an update on the European Commission's Directive proposal on preventive restructuring frameworks of 22 November 2016 will be presented by a panel under the guidance of Prof. Reinhard Dammann (Clifford Chance/Sciences Po Law School, France). Indeed, the Directive focusing on harmonising the principles of restructuring proceedings and second chance frameworks should be adopted this autumn.

Breakout sessions

Our delegates will then have the difficult task of choosing two break-out-sessions from four very interesting practical and sectorial topics:

- Stathis Potamitis (Potamitisvekris, Greece) as the chair of the first break-out-session will raise the question as to whether non-performing loans are a solution or a mistake;
- The ways of cracking down on offshore companies will be set out by the leader of the second break-out-session, Eitan Erez (Eitan S. Erez & Co, Israel) who is the co-chair of the INSOL Europe Anti-Fraud Forum;
- Riaz Janjuah (White & Case, Germany) will moderate the third break-out-session devoted to the future of mobility as a challenge or an opportunity for the automotive industry;
- The fourth break-out-session led by Konstantinos Issaias (Kyriakides Georgopoulos Law Firm, Greece) will appraise the different ways of dealing with distressed assets sales according to the existing insolvency tools.

Judges panel

As most of the Recast European Insolvency Regulation's provisions are in force since 26 June 2017, the new rules on cooperation and communication between courts in EU cross-border cases will be covered by a judges' panel led by Prof. Heinz Vallender (University of Cologne, Germany) who is the chair of the Judicial Wing. The first practical applications of the Recast EIR after one year down the road will also be presented by a panel under the guidance of Giorgio Corno (Studio Corno Avvocati, Italy).

The Sherlock Holmes' session will close the first day of the Congress. It will be chaired by David Ingram, who is the co-chair of the Anti-Fraud Forum, and will evaluate how new information technologies can help in recovering assets in practice. This panel will deal with the new sophisticated devices and security apparatuses used by detectives in order to track and extract information, and to beat surveillance.

Economic analysis

The second day of the Congress will move the debate to the economic analysis of the law. The panel session guided by Bart De Moor (Strelia Law Firm/University of Leuven, Belgium) will evaluate whether insolvency regulations and legislations work and are efficient.

Our panels will then focus on one of the most burning issues of our time: legal tech. Frank Heemann (bnt attorneys-at-law, Lithuania) will have the task of assessing how is modern technology affecting the work of advisers, insolvency practitioners and insolvency courts.

If technology replacing the human element is considered unlikely, the insolvency world must break these chains. Huge advantages arise from the ability of new technologies to sort and analyse the massive amounts of data common in restructuring and insolvency situations.

The impact of digitalisation on the insolvency and restructuring practice will also be approached as we are in a new era of secured and anonymous transactions operating on blockchain. Indeed, the insolvency practice will unquestionably be challenged with the question of protecting and recovering digital assets.

The panel session chaired by Piya Mukherjee (Horten Law Firm, Denmark) will explore the blockchain and insolvency landscape.

Breaking the chains

Last but not least, this year our Annual Congress will break the chains of tradition as well, as this year one of our members, Frank Tschentscher (Schultze & Braun, Germany), will act as Congress Facilitator in order to ensure the fluid development of our programme.

Surely, you agree with us that INSOL Europe's Annual Congress in 2018 is an event not to be missed! ■

The INSOL Europe Annual Congress will take place in Athens from 4-7 October 2018. For more information visit: www.insol-europe.org/events

> **IF TECHNOLOGY REPLACING THE HUMAN ELEMENT IS CONSIDERED UNLIKELY, THE INSOLVENCY WORLD MUST BREAK THESE CHAINS**

In the Groves of Symposia: The Academic Forum moves to Greece!

Paul Omar and Jenny Gant on what we can expect from the Academics

PAUL OMAR
INSOL Europe
Technical Research Officer

JENNIFER GANT
Chair, YANIL

The Academic Forum of INSOL Europe will be hosting its Annual Conference in Athens from 3-4 October 2018. For more information visit the Academic Forum Event Page at: www.insol-europe.org/academic-forum-events.

The City of Pallas Athena welcomes the Academic Forum this autumn.

From the summit of the Acropolis, which is seeing restoration of the temples to their ancient glories, the protector of Athens extends her divine blessings and (naturally) her wisdom to the sessions of the Academic Forum. In keeping with this year's theme: "**Party Autonomy and Third-Party Protection in Insolvency Law**", a selection of papers has now been assembled into an exciting exploration of the links between the dominant theme of insolvency law and the minor, though equally important, topics of contract law, property law and corporate law.

Proceedings will begin with welcome greetings from the Chair, Michael Veder (Radboud Nijmegen), before the first session, presided over by Rolef de Weijs (Amsterdam), starts the debate in relation to the issue of *ipso facto* clauses in contract law. Presentations will be forthcoming from Natalie Mrockova (Oxford) on the permissibility of contractual opt-outs from court-driven insolvency, David Brown (Adelaide) on law reform experience in the Antipodes and Eugenio Vaccari (City University London) on the relationship between essential supply contracts and *ipso facto* clauses.

The second session will turn to the position and role of secured creditors. Guided by Jessica Schmidt (Bayreuth) in the chair, papers will tackle the third-party effectiveness of retention of title agreements: Melissa Vanmeenen and Inge Van de Plas (Antwerp), extrajudicial collateral enforcement of NPLs: Ben Schuijling, Vincent van Hoof and Tom Hutten (Radboud Nijmegen) and the impact of the second chance approach on secured creditors' rights: Judge Flavius-Iancu Motu (Specialised Court of Cluj). The day will then end with the Edwin Coe Lecture, given by an international speaker of note, before proceedings are adjourned for conviviality over drinks and dinner.

Younger academics

The second day will kick off with the session dedicated to the Younger Academics Network of Insolvency Law. With Jennifer Gant (Nottingham Trent) at the helm, speakers will address good bankruptcy governance (Frederik De Leo) (Leuven), potential abuse of corporate rescue procedures (Sofia Ellina) (Lancaster) and the future of financial restructurings in light of the COMI debate (Olha Stakheyeva-Bogovyk) (Kyiv). Later in the morning, the debate will move to the broader theme of corporate restructuring. Under the guidance of Anthon Verweij (Academic Forum Secretary), the presentations will focus on schemes of arrangement in Singapore (Wai Yee Wan) (SMU), (Gerard McCormack) (Leeds), (Casey Watters) (Nottingham Ningbo), comparative corporate restructuring strategies (Annika Wolf) (Emden/Leer) and the limits to the absolute priority rule (Tereza Vodičková) (Lawyer, Czech Republic). With a final session devoted to transaction avoidance, chaired by Florian Bruder (DLA Piper Munich), showcasing a paper from Reinhard Bork (Oxford), the conference will conclude with a farewell message from Michael Veder.

From the breadth of papers promised, the event looks set to deliver on its aim, which is to understand the way insolvency interacts with other legal themes and to challenge existing approaches, while stimulating debate and asking searching questions about the nature of the subject.

Hopefully, participants who join us in Greece will agree that the Athenian groves of academe will have proved a suitable place to debate old and new truths about insolvency. ■

A second chance for consumers in Cyprus: Reorganisations go virtual

In the last few decades the promotion of a corporate rescue culture has been a key objective for many EU jurisdictions, but particularly since the 2008 financial crisis, corporate rescue has been at the top of the agenda.

Although the significance of corporate rescue is not to be underestimated, it can be argued that consumer bankruptcy carries no less significance. The adverse impact of consumer bankruptcy has been intensely experienced at very large scales in countries like Greece and Cyprus. However, as opposed to the sporadic attempts that were made in the shadow of the financial crisis in Greece, Cyprus appears to have approached both corporate and consumer reorganisation in a more methodical manner and has noticeably placed greater emphasis on laying the foundations of a strong second-chance culture.

This article describes the steps taken in Cyprus to improve the position of consumer debtors and offers a brief overview of the recently introduced legislative framework, which is now entering into use following the introduction of an Interactive Reorganisation Tool and an accompanying 'Guide' in January 2018.

The new interactive reorganisation tool and guide

As stated above, the most recent addition to the second chance toolkit is an Interactive Reorganisation Tool (IRT), whose introduction was announced in January 2018.[1] It is designed to work together with a Reorganisation Guide (the Guide) relating to the facilitation of debt settlement arrangements with creditors, which has been recently launched by the Cypriot Insolvency Service.[2] The aim of both the IRT and the Guide is to inform debtors, who might in the future struggle with the repayment of their bank loans and other debts, of the various procedures available, as well as their rights and obligations. In addition, a key objective of the IRT and the Guide is to inform debtors of the advantages of early intervention.

The IRT is accessible both to debtors and to insolvency practitioners via the Insolvency Service's website[3] and aims to assist them in predicting the total value of the debt and to facilitate the repayment debts, by taking into account the debtor's monthly income and expenses, as well as any property that could possibly be used to discharge the debt. The IRT offers a range of personalised reorganisation scenarios available to the debtor and also provides a calculation of the time the debtor will need so as to repay their debt. Crucially, the IRT, by taking into account the particular circumstances of a debtor, also predicts whether the debtor might become unable to pay the debt, either in full or in part. It is argued that the IRT will prove to be particularly useful to insolvency practitioners, as by using it, they will be able to draft the most appropriate and viable reorganisation plans, hence maximising the possibility of creditor approval.

The Guide provides consumer debtors with information about the various options that banks may encourage them to adopt as part of settling their debts in accordance with the Directive of the Central Bank of Cyprus in relation to Arrears Management.[4] The Directive has been adopted by the Association of Cyprus Banks, which must also adhere to the Code of Conduct Regarding the Handling of Borrowers in Financial Difficulties, designed to support consumer efforts to achieve a fair, viable, consensual and voluntary restructuring where possible. In addition, the Guide offers summary descriptions of the various reorganisation and debt-settlement procedures that are available to consumers, such as the reorganisation plans.

The legislative framework

The rules that apply to indebted consumers are part of a recently updated Insolvency Framework, which provides for special procedures regarding the settlement and discharge from debt: the 2015 Law on Insolvency of Natural Persons (for the Development and Implementation of Personal Repayment and Discharge Plans), and the 2015 Bankruptcy Law (supplemented by the Insolvency Regulations, Ch.6).

The Law on the Development and Implementation of Personal Repayment and Discharge Plans provides for two key instruments:

a) the Personal Repayment Plans (PRP) by means of which an individual may restructure his debts and repay his creditors; and

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> IT IS ARGUED THAT THE IRT WILL PROVE TO BE PARTICULARLY USEFUL TO INSOLVENCY PRACTITIONERS

CONSUMERS ARE ENCOURAGED TO STAKE STEPS TO AVOID BANKRUPTCY AND ARE OFFERED A SECOND CHANCE WITH NEITHER STIGMA, NOR A PUNISHMENT

b) the Debt Discharge Mechanism, by means of which debtors with insufficient income and personal property may be discharged from debts not exceeding €25.000.

The 2015 Law on Insolvency of Natural Persons places much emphasis on the personal repayment plans, and arguably this provides for a shift in the socio-legal culture in Cyprus, as indebted consumers are encouraged to stake steps to avoid bankruptcy and are offered a second chance with neither stigma, nor a punishment element being attached to the available reorganisation procedures.

The personal repayment plan (PRP)

It is possible for consumers, provided that certain conditions are satisfied, to restructure their debts by means of a repayment plan. The repayment plan can either be consensual, or compulsory. A debtor who wishes to reach a compromise with his creditors through a Consensual PRP, prior to submitting a repayment plan for creditor approval, must appoint an insolvency practitioner who acts as Insolvency Advisor. The Insolvency Advisor examines the debtor's financial circumstances, advises the debtor as to the most appropriate course of action and drafts a plan.

Consensual PRP

When the debtor opts for a Consensual PRP,[5] the Insolvency Advisor drafts an appropriate plan and submits it to the Insolvency Service, which, in turn, must examine whether the conditions outlined in the Law have been complied with[6]. If the Insolvency Service approves the plan, it makes an application to the court for a Protection Order (moratorium),[7] which effectively protects the debtor against any action[8] from his creditors for a period of 95 days.[9] When the court issues a Protection Order, this order decides which debts are subject to it, and mentions the name of each creditor to whom the debts are due.

The Insolvency Advisor, within 10 days from the date the Protection Order has been issued, must provide all affected creditors with a written notice of his appointment and also submit a statement detailing the state of the debtor's financial situation.[10] In addition, he invites the creditors to confirm that their claim has been correctly listed by the Protection Order (i.e. prove their debt),[11] and to submit comments on the proposed plan and the manner in which the debtor's debt could be restructured.[12]

The creditors must, within 35 days from the date they receive the written notice, confirm in writing whether their claims have been correctly listed in the Order. The Insolvency Advisor subsequently examines the creditors' confirmation statements and within 5 days, from the moment he received these confirmations, he/she either accepts or rejects the creditors' submissions. In the event of a disagreement between the Insolvency Advisor and any creditor in relation with the confirmation of their claim, the court, upon an application by the Advisor or the relevant creditor, shall decide whether or not to uphold the Insolvency Advisor's decision.[13] The court's judgment is final and binding.[14]

Once the process of confirming the creditors' claims has been concluded, the Insolvency Advisor invites creditors to submit further comments on the proposed repayment plan. He/she then submits his proposal(s) concerning the PRP to the creditors and calls a creditors' meeting in order for the proposals to be approved.[15]

The proposed PRP must contain a series of compulsory terms. For instance, the plan must

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clearly include:

a) the secured and unsecured claims;
b) the circumstances for an extension of the maximum duration (60 months) of the PRP to another maximum 12 months, if necessary;
c) the condition, at the creditors 'demand, that once the PRP ceases to have effect, (i.e. lapse of time) the debtor shall not be discharged from secured debts covered by the Plan and must continue making payments in accordance with the terms and conditions of the original loan-agreement, unless otherwise agreed and stated in the PRP; and
d) another condition: the terms of the PRP must place the creditors in a more favourable position than the one they would be if the debtor's property was liquidated, unless the creditors' consented to a different outcome.

In addition, the plan must not demand:

a) the sale of any tools/equipment, necessary for the debtor to continue his profession/trade, unless the debtor consents to such a sale;
b) any payments, which would preclude the debtor from having a sufficient income so as to meet his and his family's reasonable living costs, unless otherwise agreed by the debtor.

Finally, the plan must include a provision about the remuneration of the Insolvency Advisor and mention any costs that may be incurred, as well as the manner in which they will be paid.[16] Once the repayment plan has been approved by the creditors at a creditors' meeting, it is also sanctioned by the court.[17]

Non consensual/imposed PRP

In the event that the proposed PRP fails to receive the necessary creditor support, provided that certain criteria are satisfied,[18] the Insolvency Advisor may request the court to issue an Order, imposing the plan to the dissenting creditors.[19] The Insolvency Advisor may at the same time apply to the court for an extension of the Protection Order, in order to prevent the enforcement of any claims during the period of time during which the court considers the application for the imposition of the non-consensual repayment plan.[20]

The court may only impose the repayment plan on the creditors, only if it is satisfied that a more favourable (or the same) outcome will be achieved for creditors through the Plan rather than through bankruptcy proceedings.[21] The moment the court imposes the proposed repayment Plan, it becomes binding on all creditors. Concerning the debtor, if he successfully fulfils the terms of the Plan he is relieved from any remaining unsecured debts, but he must continue making payments to the secured creditors, as stated in the original loan agreement (unless otherwise agreed).

Summary

To sum up, the IRT is 'consumer-friendly', as it is very easy to use. Provided that consumers resort to it at an early stage, the IRT offers a clear and structured approach that the consumers should take towards reorganising some of their key debts, such as credit card debt or overdraft indebtedness. The combination of the IRT and the comprehensive Guide encourages consumers to take early action, as clear and precise instructions are provided in relation to the steps to take in order to avoid a cessation of payments at a later date. They are also instructed how to reorganise their debts, so as to ensure that they are in a position to repay them.

Finally, it can be argued that the recently introduced IRT and Guide are complementary to an already sophisticated legislative framework, which effectively promotes a second-chance culture in the consumer indebtedness sphere. This is an issue which has come to preoccupy the European Commission, which is at present exploring ways of stimulating and improving Member State action in this area.

In this context, Cyprus is certainly a model worth considering, particularly for Member States without a strong history of legislative action in this field. ■

Footnotes

1 Available at: <http://www.mcit.gov.cy/mcit/insolvency.nsf/All/3C7D63F988E612C7C2258219002E26ED?OpenDocument>
2 The IRT and the Guide were prepared by the Insolvency Service with the support and advice of the Central Bank of Cyprus.
3 Available at: <http://www.mcit.gov.cy/mcit/insolvency.nsf/page04_gr/page04_gr?OpenDocument>
4 Directive on Arrears Management, 2015, Central Bank of Cyprus.
5 Article 33, Law on Insolvency of Natural Persons 2015.
6 Pursuant to Article 36, the Insolvency Adviser may include secured creditors claims into the plan, provided that he obtains their consent.
7 Articles 37-39.
8 Article 40.
90 For instance, Article 35 provides that in order for a debtor to use a PRP the following conditions must be satisfied: 1) the debtor is: a) a resident of the Republic; and b) unable to pay his debts as they fall due; 2) no other application for a protection Order is pending; 3) there is a reasonable prospect that the prospective PRP will facilitate the 'recovery' of the debtor within a period of no more than 5 years; 4) 25% of the debts have not been incurred within six months from the date the application for a Protection Order was made.
10 Article 42(1)(a).
11 Article 43(1).
12 Article 42(1)(b).
13 Such an application must be made no later than 15 days starting with the date the Insolvency Adviser notified the creditors of his decision to reject their confirmation statement (See Article 43(9).
14 Article 43(10).
15 Article 51(1). In addition, Article 51(2)(a) states that the Insolvency Advisor must give written notice of the creditors' meeting at least 14 days before it is to be convened. It is necessary that the creditors' meeting is convened during the period that the Protection Order has effect, otherwise the PRP procedure is deemed to be terminated (Article 51(3)).
16 Article 46.
17 Article 55(1).
18 The main criteria are: a) the total value of secured and unsecured creditors' claims does not exceed €350.000; b) at least one of the secured creditors has security over the debtor's main household, the market value of which does not exceed €300.000; c) the total value of the debtor's personal property (excluding his main household) does not exceed €250.000; d) the debtor has become unable to pay his debts due to circumstances beyond his control and as a result he suffered a reduction of his income by at least 25%.
19 Article 72. Ch. III of the Law on the Development and Implementation of Personal Repayment & Discharge Plans, 2015.
20 Article 75.
21 Article 73.

THE RECENTLY INTRODUCED IRT AND GUIDE ARE COMPLEMENTARY TO AN ALREADY SOPHISTICATED LEGISLATIVE FRAMEWORK

Crypto-currencies in bankruptcy: Specifics of Belarusian regulation

Ivan Simanovsky forsees that Belarus is about to become a major crypto-hub

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The much talked-of Decree No.8 "On the Development of Digital Economy" has been in effect since March 28 of this year (further referred to as the "Decree").

Among other things, it is aimed at the creation of conditions for implementing the Blockchain technology in the Belarusian economy and it secures the terms of Blockchain itself in the legal environment of Belarus (smart contract, token, owner and offering of tokens), and it introduces the definitions of crypto-currency, its operator and the operator of its exchange, the e-wallet, mining etc.

Let us try to evaluate what this Decree can bring to the sector of crisis management and bankruptcy.

In Russia, the legal precedents have already started to form: one can remember the recent first case at the Moscow Arbitration Court when crypto-currency assets were included in the bankruptcy assets of a bankrupt company. This case is interesting because so far, the status of crypto-currency has not been legally determined in Russia.

In Belarus, following to the Decree, the definition of the term and that of the status of crypto-currency already exist. With the entry of the Decree into force, the Belarusian legal entities can now officially mine.

In the nearest future the question of what is the place of crypto-currencies in bankruptcy procedures will be in focus. And since there is a new law on bankruptcy that has been prepared and is about to be adopted in Belarus, it would be great if it took into consideration the legislative innovations of 2018 and if it focused on the business of the future in general.

The Decree clearly defines that for the accounting purposes tokens are acknowledged as assets. That is why in Belarus, as opposed to Russia, the question of whether crypto-currency should be included into the bankruptcy

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assets no longer exists. Some questions and problems may occur later, once there is a necessity to evaluate and realise such assets for the payment of debts to the creditors, but also concerning the competency of the financial departments of bankrupt companies which accounted for such assets and the readiness of the crisis managers and courts to work with new realities. We believe that in the future the bankruptcy question will be just as interesting on the crypto-currency exchange markets.

With the Decree crypto-currency was introduced into the legal turnover in Belarus as "bitcoin, another token, used in international turnover as universal means of exchange". For the purposes of accounting the tokens that emerged (have been mined) in the process of mining or were acquired by a different way, are acknowledged as assets.

In bankruptcy procedures creditors have the right to expect payment of the debt by means of disposal of any assets belonging to the debtor. That is why today we can confidently say that Belarusian companies that will issue or acquire tokens in the market and then will find themselves in bankruptcy will be able to sell these digital assets in order to settle with the creditors. These assets will be included in the bankruptcy mass as intangible assets. As tokens have not been acknowledged as a legal means of payment, it will be impossible to pay the creditors directly by tokens. It is unlikely that it will be possible to transfer tokens to creditors under the Accord and Satisfaction Agreement because in order to do that, tokens would have to preliminarily and repeatedly be put out for futile public auctions.

The only way to sell tokens is to involve an operator of crypto-currency exchange among the residents of the High Tech Park (HTP). In this way, it is assumed that the crisis manager should not have any problems in discovering these assets. The Decree establishes that transactions with tokens shall be shown in the accounting records of the company. However, even when there is no due record keeping or when the accounting data is concealed, it will be still possible to discover the evidence that this bankrupt company had tokens by addressing a corresponding request to the operators of crypto-currency exchange. That is why one can expect that the economic courts will be sending requests to HTP to find out whether the legal entities in relation to which the economic insolvency (bankruptcy) procedures have been initiated, have / have had (do not have / have not had) tokens the HTP residents might be aware of.

It is obvious that the provisions of the Decree require serious explanations to the public and the economic entities and that they require improvements brought to the applicable regulatory framework.

How will the crypto-currency market be regulated?

Let us consider a number of important aspects.

a) Belarusian rouble remains the only legal means of payment on the territory of Belarus.
b) Tokens circulation will be limited on the territory of Belarus. The Decree does not stipulate the possibility to exchange tokens for anything other than Belarusian roubles, foreign currency, electronic money, and other tokens. As such, it is prohibited to use the foreign currency in settlements between the residents of Belarus in crypto-currency operations, except for transactions with crypto-currency platform operators.
c) The Decree secures the measures to improve legal safety of participants in transactions with tokens. State authorities, in accordance with their competence, will have the task to control the activity of crypto-currency platform operators and crypto-currency exchange operators.
d) Legal entities will be able to pay for acquired or assigned tokens under operations made via HTP residents; individuals will be able to pay by transfer of money to bank accounts or e-wallets of tokens owners, crypto-currency platform operators, crypto-currency exchange operators and foreign trading platforms.
e) Transactions with tokens are of high risk because there is no specific and clear pricing policy procedure and no guarantees of protection of rights and legal interests of token holders. In particular there are no guarantees concerning discharge of liabilities towards these holders (including the purchase of tokens at foreign trading platforms).

In order to mitigate the risks of involvement of banks into carrying out suspicious transactions of the clients, and in order to protect the interests of individuals carrying out regular transactions with tokens, the National Bank has prepared draft Provisions designating:

- crypto platform operators, crypto currency exchange operators as having a high risk customer profile when working with the bank, and
- financial transactions with tokens, systematically conducted by bank customers – to high risk operations.

At this stage everything is still evolving. And only time will show how well all participants, starting with the debtor or creditor and ending with the judicial system (as the ultimate authority in the issue of bankruptcy), will manage to make sense of all the subtle aspects of the dealings with crypto-currency and to work with these new realities. ■

ONLY TIME WILL SHOW HOW WELL ALL PARTICIPANTS WILL MANAGE TO MAKE SENSE OF ALL THE SUBTLE ASPECTS OF THE DEALINGS WITH CRYPTO-CURRENCY

"Alert and Assisted Arrangement" Procedures: UK Schemes in Italian "Salsa"?

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On 11 October 2017, the Italian Senate approved the final version of a law aimed at systemically reforming Italian insolvency law, which fundamentally dates from 1942. Law no. 155/2017 (the Law) was published in the Official Gazette on 30 October 2017 and entered into force on 14 November 2017.[1] The reform was based on the preparatory work of the "Rordorf Commission", a group of experts appointed by the Ministry of Justice in January 2015.[2]

Both the Commission and the Government were inspired by the desire to comply with the international best practices set out by UNCITRAL, the World Bank and the EU, though curiously no mention is made of the 2016 Proposal for an EU Directive on Insolvency, Restructuring and Second Chance. The 2017 Law does not *materially* change the current legislation. It gives the government the authority (and a period of twelve months) to amend the law by means of one or more decrees. Their enactment will determine a change in the applicable law. In the current state of political uncertainty due to the increasingly probable general elections, it is not possible to speculate whether these decrees will be enacted in the near future.

> ONE OF THE MOST INNOVATIVE ASPECTS OF THE LAW IS THE INTRODUCTION OF THE "ALERT AND ASSISTED ARRANGEMENT" (AAA) PROCEDURES

Innovative procedure

One of the most innovative aspects of the Law is the introduction of the "Alert and Assisted Arrangement" (AAA) procedures (Article 4), by means of which the Italian legislature aims to implement the suggestions included in the EU Recommendation on a new approach to business failure and insolvency.[3] Under the Law, AAA procedures will be activated whenever the operational or financial situation of the company is compromised to the extent that any reasonable managing or governing body would raise a red flag over the future existence and profitability of the business.

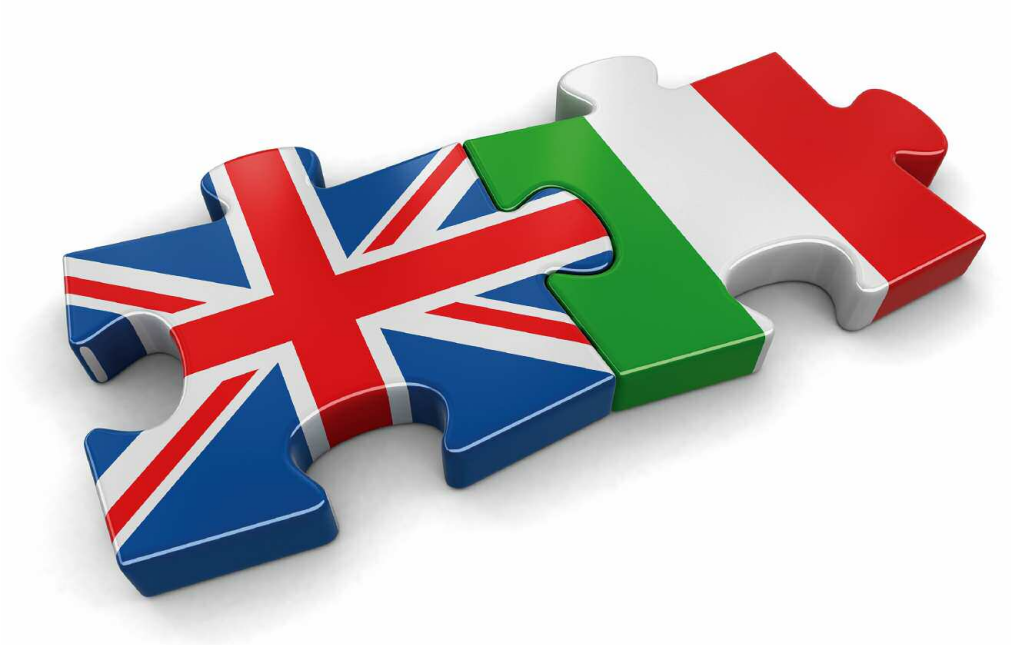
In more prosaic words, AAA procedures are available to solvent companies (with the sole exception of state-owned, large and public ones) in a situation of "crisis", as defined by Article 2(b) of the Law. Provided it is possible to determine with sufficient precision the moment when the company enters into a state of crisis, the management will have 6 months from that moment, to commence any of the procedures mentioned in Article 4(h), including, but not limited to, AAA procedures. Should the management fail to act promptly, the supervisory and corporate governance bodies, as well as some qualified creditors (such as revenue and social security agencies) have the obligation to file for an AAA procedure.

The AAA procedure is entirely non-judicial. It is designed to be confidential and promote an agreement between the debtor and its creditors. It can be used as an alternative or a parallel to the more traditional mechanisms for reorganising a company's capital. As such, it bears a significant resemblance to the UK schemes of arrangement (schemes), as regulated by Part 26 of the Companies Act 2006. The schemes are indeed a valuable and flexible tool for reorganising a company. In essence, they are a compromise or an arrangement between the debtors and their creditors and members (or any class of them). Once the schemes have been approved by the required majorities[4] and sanctioned by the court, they bind any dissenting minority.

Independent authority

Unlike the UK schemes, however, where negotiations are conducted by the solvent debtors (or the professionals they may hire), in AAA procedures negotiations are supervised by an independent authority consisting of three independent experts, one of whom is appointed by the president of the competent "insolvency" court. This aspect of the procedure seems less convincing if it is considered that one of the major criticisms of the schemes is the perception they are "*complex, cumbersome and expensive*".[5] By contrast, however, in the Italian AAA procedures, creditors do not have to be divided into classes or vote on the final proposal.

The AAA procedures, moreover, do not result in an agreement binding upon dissenting creditors. Their failure does not determine the automatic commencement of a formal insolvency procedure, even if the independent authority is obliged to inform the local public prosecutor if it determines that the company has moved from "crisis" to insolvency. During the



> THE ORGANIC REFORM OF THE ITALIAN INSOLVENCY LAW DRAWS HEAVILY FROM INTERNATIONAL BEST PRACTICES

procedures, the debtor may petition the court for any protective measures necessary for achieving a positive outcome. These measures, including the possibility of an automatic stay, can last throughout the negotiations (i.e. for up to 6 months). However, unlike in the UK schemes, the court has no authority to sanction an AAA procedure, hence an absence of finality.

The lack of binding effect of the procedure, as well as the constant interaction with judicial authorities, represent peculiar characteristics of the Italian procedures as compared to the UK schemes. These peculiarities are further underlined by the fact that the documents produced within the AAA procedures can be used as evidence in subsequent formal liquidation or restructuring procedures. This could be a great risk for the management when considering whether to attempt a procedure that might produce the basis for claims in the event of a failure, thus limiting any incentive for doing so.

While the Rordorf Commission and the legislature were guided by the urgency to provide Italian entrepreneurs with efficient turnaround remedies, it was decided to significantly diverge from the models from which they drew inspiration. As such, the view could be taken that the success and frequency of the AAA procedures will largely depend on the behaviour of the "qualified" creditors under a legal obligation to commence procedures whenever they acknowledge the debtor to be in a "crisis". This is because, in the vast majority of SMEs, the management is not supported by corporate governance bodies, while periodic audits by their accountants are unlikely to provide timely warnings of the emergence of corporate distress.

Arguably, the management could be encouraged to timely file for an AAA procedure by reason of the system of rewards and penalties associated with early and late filings. Anecdotal evidence and common sense, however, suggest that the management tends to remain in a "state of denial" about the company's crisis until far too late. It is also questionable whether the average managers will have sufficient knowledge of the provisions included within the Law, which could inform their conduct. This might frustrate the policy objectives pursued by the legislators in crafting the Law.

Conclusion

In summary, the Government is proud to announce that the organic reform of the Italian insolvency law draws heavily from international best practices (including the UK experience). However, there is fear that the AAA procedure, looking more like a UK scheme disguised by a veneer of Italian salsa, might represent a typical example of a dressing spoiling the salad and thus fail to achieve the desired result. ■

Footnotes:

1 Year 158, No. 254.
2 Commissione per Elaborare Proposte di Interventi di Riforma, Ricognizione e Riordino della Disciplina delle Procedure Concorsuali, 'Relazione allo Schema di Legge Delega per la Riforma delle Procedure Concorsuali' (29 December 2015).
3 Commission Recommendation 2014/135/EU of 12 March 2014 on a new approach to business failure and insolvency [2014] OJ L74/65.
4 Section 899(1), Companies Act 2006.
5 *Report of the Joint DTI/Treasury Review of Company Rescue and Business Reconstruction Mechanisms* (2000) at para. 43.

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Legal framework for distressed M&A transactions in Poland

Andrzej Wierciński, Jakub Jędrzejak and Klaudia Frątczak-Kospin write on the new opportunities for investment in Polish distressed businesses

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With the enactment of the new Polish Restructuring Law and a substantial reform to the Bankruptcy Law as of 1 January 2016, the legal framework for distressed M&A transactions in Poland has been significantly changed and new legal tools became available to implement it.

Firstly, the introduction of procedures in the form of 'pre-pack' has played an important role, allowing debtors to maximise their assets' value (or what is left of it), accelerate the distressed business sale process, and ensure the continuity of operations. Polish pre-pack is increasingly viewed as a prime opportunity for a speedy and effective sale of distressed enterprises, however, it is not an ideal solution, with a number of issues still needing to be fine-tuned. And neither is it a magical and always suitable solution, since there are attractive alternatives to 'pre-packs' with regard to the acquisition of distressed enterprises in Poland.

Acquiring businesses within bankruptcy proceedings

The acquisition of an enterprise subject to Polish bankruptcy proceedings has, in theory, been an appealing opportunity for potential investors, even prior to the 2016 amendments of the Polish insolvency laws. The primary reason for this was, and still is, that such buyers are freed from the liability for the bankrupt's debts, for which the acquirer, in the case of an ordinary enterprise transfer, would be liable. Moreover, assets sold within liquidation proceedings are sold free from pretty much all encumbrances established thereover.

Polish law provides that the trustee of the bankruptcy estate should undertake all reasonable steps to complete the liquidation of the estate within six months from the opening of the bankruptcy proceedings. In practice, this time-limit has rarely been met, with most proceedings (including direct asset sales) taking many more months, or, in certain cases, even years.

The estate is usually liquidated through a public auction or tender, although going outside this standard procedure is permitted, allowing the entire, or a part of the estate to be sold to a single bidder (which requires the consent of the creditors' committee). The fact that all these processes are, and frequently have been, protracted, usually results in the bidder losing interest, with the enterprise itself deteriorating all the while, and with business partners ceasing co-operation and key employees jumping-ship due to the stigma of co-operating with a business labelled as 'bankrupt'. Therefore, the greatest issue with the ordinary process was, and continues to be, the amount of time that must pass from the opening of the bankruptcy for the transaction to be finalised.

'Pre-packed' solution for a pre-existing problem?

The "pre-pack" was intended to be a remedy for the above. Since, on the one hand, the new Polish "pre-pack" has been broadly discussed by other authors, and on the other omitting it from the discussion on distressed M&A transactions would render such discussion futile, we will only touch upon it in passing, focusing on the practical aspects of its application.

Under the amended Polish bankruptcy law, an application for the approval of the terms of sale of an enterprise (or an organised part thereof, or a substantial part of the debtor's assets), submitted together with a bankruptcy petition, may be approved by the court. Such a sale, cannot in principle, include assets encumbered with registered pledges (provided that the pledgee has a right under the respective pledge agreement to seize the ownership of the encumbered assets or to request their sale within a special accelerated procedure, which is almost always the case), unless, consented to by the pledgee or, which view has been criticised by some, the court.

The court must approve the pre-pack application if the purchase price offered by the potential investor is higher than the estimated proceeds to be generated within the ordinary bankruptcy proceedings (less liquidation costs). According to a *Court Watch Polska Foundation's* report, the time from filing to decision for the pre-pack applications accepted in 2016, was between 4 and 307 days, averaging 121. However, complete statistics for the last year in this regard are not yet available.

Notably, the pre-pack process allows for an accelerated disposal of an otherwise sound business that has got into distress, though, even accelerated, such a distressed

transaction may in practice still require a good deal of time to be closed. This may be difficult to accept by potential investors. Especially in a situation where, in order to take immediate possession and management of the business subject to pre-pack, the proposed buyer decides to deposit the full price as proposed under the 'pre-pack' upon submitting the pre-pack application, in which case, the proposed buyer can manage the enterprise in the interim, but risks that its financial resources will sit on the deposit account during the entire process and that at the end of the day the transaction will not be completed (e.g. if the creditors successfully challenge the court's approval of the terms of pre-pack).

Nevertheless, the 'pre-pack' solution is increasingly popular, and recent cases show that even larger enterprises are being considered for sale in this way. For instance, the recent approval of the pre-pack sale terms of Alma, a major retailer, permitted the company to raise PLN 94 million and satisfy its core investors.

Acquisition of distressed assets – alternatives to pre-pack

Given the aforementioned flaws of the Polish pre-pack, it is worth mentioning that in addition to pre-pack procedures, the new Polish Restructuring Law also provides for an interesting legal framework for distressed M&A.

Liquidation arrangement

Although generally intended to restore the debtor's ability to function and compete in the market, restructuring proceedings allow for the so-called "liquidation arrangement", where the creditors' claims are to be satisfied through the liquidation of the entire (or arguably, a part of) enterprise of the debtor. Such a sale would permit a third party to acquire the enterprise, but, contrary to acquisitions within bankruptcy proceedings, such a sale would not release the acquirer from the liability for the enterprise's liabilities incurred prior to the sale (though such liability is generally limited by the terms of the arrangement with creditors and it is also limited in time and capped at the value of the enterprise) nor would it result in the release of encumbrances established over the enterprise/assets sold.

It should be noted that it is possible for the debtor company to be leased at the stage of the arrangement proceedings. Such a lease requires the consent of the creditors' council (or, if the creditors' council is not established within the given proceedings, then of the judge-commissioner). This may serve as an interim instrument of vesting the buyer with control over the business, pending agreement on a structure for, and implementation of, its ultimate sale (and subject to anti-trust approval, where relevant).

Debt-for-equity swap

The arrangement between the debtor company and its creditors may also provide for a debt-for-equity swap provision. If additionally protected by way of a back-to-back agreement with a third party consisting of investors interested in buying the shares acquired as a result of the swap, this provision permits potential investors to acquire the enterprise through a share deal.

Providing additional funding

Providing funding to a debtor company within restructuring proceedings is now also subject to certain additional protection measures which may further encourage and facilitate such funding before the transaction's closing. Namely, since the enactment of the new Restructuring Law, the Bankruptcy Law provides that if the restructuring fails and the debtor subsequently goes into bankruptcy, the claims for the return of the funding provided in the course of restructuring proceedings or for the implementation of the arrangement shall enjoy priority of satisfaction before unsecured creditors (subject to meeting certain additional conditions).

Although we note a growing interest in applying the above-mentioned mechanisms for the implementation of distressed M&A transactions regarding debtors at the edge of, or subject to restructuring proceedings, we would argue that the Polish Restructuring Law does not yet include a comprehensive set of instruments which would be designed specifically for, and would enable smooth processing of distressed M&A (at least not in a way that the Bankruptcy Law purports to do with "pre-pack").

Consequently, although implementation of the new Polish Restructuring Law was definitely a step in the right direction, from a distressed M&A perspective there is still some room for improvement. ■

> THE PRE-PACK PROCESS ALLOWS FOR AN ACCELERATED DISPOSAL OF AN OTHERWISE SOUND BUSINESS THAT HAS GOT INTO DISTRESS

Recognition and enforcement of insolvency-related judgments

Florian Bruder reports on the draft model law on recognition and enforcement of insolvency-related judgments completed by UNCITRAL Working Group V (Insolvency Law) in its 53rd session

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> **INSOL EUROPE WAS HONOURED TO HAVE BEEN INVITED TO SEND A DELEGATION TO THE WORKING GROUP V MEETING**

Overview: The new UNCITRAL Model Law

UNCITRAL's Working Group V (Insolvency Law), at its 53rd session in New York, has just completed work on the model law on recognition and enforcement of insolvency-related judgments ('**Judgments ML**'). The Judgments ML, together with a draft guide to enactment, will be submitted to the UNCITRAL Commission for finalisation and adoption within the year.

If adopted, Member States will be invited to incorporate the Judgments ML into their national laws in order to harmonise cross-border enforcement and recognition of insolvency-related judgments. The Judgments ML is designed to complement the existing 1997 UNCITRAL Model Law on Cross-Border Insolvency ('**MLCBI**'). Legislation based on the MLCBI has been adopted by many jurisdictions, including a handful of EU Member States: the United Kingdom, Poland, Slovenia and Greece. The Judgments ML may be incorporated by States on a stand-alone basis even if they have not enacted the MLCBI.

At the same meeting, Working Group V continued its consideration of:

(i) draft legislative provisions for a stand-alone model law on facilitating the cross-border insolvency of multinational enterprise groups;
(ii) core provisions relating to micro, small and medium-sized companies; and
(iii) a proposal by the United States for the development of model legislative provisions on civil asset tracing and recovery.

INSOL Europe was honoured to have been invited to send a delegation to the Working Group meeting. Our delegate, Florian Bruder of DLA Piper, reports on the recent outcomes.

Scope of new Model Law and differences to MLCBI

As a complement to the 1997 MLCBI which covered the recognition of foreign main and secondary insolvency proceedings, the Judgments ML

which provides for the additional recognition of judgments related to main or secondary proceedings. An insolvency-related judgment encompasses a decision by a court or administrative authority that "*arises as a consequence of or is materially associated with an insolvency proceeding, whether or not that insolvency proceeding has closed and was issued on or after the commencement of that insolvency proceeding*".

In earlier sessions Working Group V contemplated that only judgments issued after the commencement of insolvency proceedings should fall within the scope of the Judgments ML. However, this gave rise to a concern that some important preliminary measures might be excluded. The extent to which the Judgments ML should apply to judgments relating to circumstances stemming from the period before the commencement of the proceedings remains controversial and has been left for enacting Member States to determine.

For European states, Art. 32 of the EU Regulation on Insolvency Proceedings ('**EIR**') may serve as guidance. The EIR applies to judgments deriving directly from the insolvency proceedings and are closely linked with them. This appears potentially narrower in scope than the Judgments Model Law. According to the Court of Justice of the European Union, judgments only fall under this part of the Regulation if they could not have been carried out without the pending insolvency proceedings, e.g. claw back claims.

To clarify and distinguish the scope of the new Judgments ML and the MLCBI, Working Group V decided that decisions which fall within the MLCBI should be excluded from the Judgments ML. However, where a judgment opening insolvency proceedings (which therefore falls under the MLCBI) includes or combines other types of judgment, those latter judgment(s) may be subject to recognition and enforcement under the Judgments ML.

Mechanics: Recognition and enforcement in different scenarios

The Judgments ML follows a straightforward recognition and enforcement procedure irrespective of the type of judgment or the state of origin.

Pursuant to Art. 4 the enacting state specifies the courts or authorities that carry out the recognition and enforcement of foreign judgments. For example, a party could seek recognition of a German judgment by a competent court in the U.S. pursuant Art. 10 ff. Together with the application for recognition and enforcement the party would have to present the court with a certified copy of the judgment in question as well as any documents necessary to prove its legal validity and enforceability in the state of origin. In each case certified translations may be requested.

Recognition of a judgment can also be sought as part of a defence to a claim or incidental to another question already before the court. For example, the party to the German judgment referred to above may be sued in the U.S. It may present the German judgment as a defence and apply for recognition of that judgment under the Judgments ML – provided the U.S. has by then enacted it.

Following the application procedure, the competent court decides whether all criteria are met:

(i) the judgment must be effective and enforceable in its state of origin;
(ii) the person seeking recognition must be an insolvency representative entitled to act in relation to the judgment;
(iii) all necessary documents must have been submitted; and
(iv) the court must be competent to hear recognition applications.

The parties involved have the right to be heard by the court during the process. Recognition may solely be refused on the grounds mentioned in Art. 7 (public policy), 9 (legal effects in state of origin) and 13 (further grounds to refuse), i.e. if

(i) the judgment is still being reviewed in the state of origin or is contrary to its public policy;
(ii) a party of the proceedings was not notified in some way;
(iii) the judgment was obtained by fraud or is inconsistent with another judgment issued in this state or another state;

WORKING GROUP V DECIDED THAT DECISIONS WHICH FALL WITHIN THE MLCBI SHOULD BE EXCLUDED FROM THE JUDGMENTS ML

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> JUDGMENTS ML IN ART. 14 LEAVES IT TO THE ENACTING STATES TO DECIDE WHAT 'RECOGNITION' OF A FOREIGN JUDGMENT ACTUALLY MEANS

(iv) recognition would interfere with administration of the insolvency proceedings;
(v) the judgment has a material effect on all creditors, e.g. plan of reorganisation or the interests of creditors or the debtor have not been protected in the proceeding; or
(vi) the court of origin had no jurisdiction to make the judgment.

The Guide to Enactment explains that the grounds to refuse recognition should be applied restrictively. In particular, the public policy exemption is designed to block recognition only in cases of conflicts with matters of fundamental importance for a state. Nevertheless, the Judgments ML's exemptions (see in particular Art. 13 Judgements ML) are broader than those in the EIR where the exemptions are limited to public policy infringements (Art. 33 EIR).

The competent court will decide whether or not to recognise the judgment in question. To ensure rights of either party will not be compromised in the meantime the court may grant appropriate, provisional relief under Art. 11 such as staying the disposition of assets until the court has reached its decision.

Comparison of the Judgments ML with the EIR

While there are numerous aspects that could be compared regarding the EIR mechanisms on recognition and enforcement with those of the Judgments ML, this article concentrates on a few general differences.

Starting with the legal nature of the Judgments ML: UN Member States must decide whether to adopt this new model law. Following adoption, its legal status would be the same as any other national recognition and enforcement provision. Conversely, the EIR prevails over national law, including, if enacted by European Member States, the Judgments ML. The Judgments ML would therefore only have effect to the extent that its subject matter is not already covered by the EIR.

Another key difference lies in the procedure for recognition. While a party seeking recognition under the Judgments Model law must apply to a foreign court, presenting documentation and facing potential defence allegations from the opposing party, recognition among EU Member States subject to the EIR is automatic. In other words, by way of example, an Italian judgment would be recognised and enforceable by law in Germany without the need for an application to a German court. For the enforcement of insolvency related judgements, the EIR refers to the Judgements Regulation (Regulation (EU) No. 1215/12012) only allowing for an application to object to the enforcement, however, on a more limited basis.

Finally, the Judgments ML in Art. 14 leaves it to the enacting states to decide what 'recognition' of a foreign judgment actually means, in other words, what the consequences of recognition should be. Under the EIR, recognition by an EU Member State results in the application of the law of the state in which the judgment was issued. This is not necessarily the case with the Judgments Model Law. Even if an enacting state recognises the foreign judgment it does not need to apply the foreign law to determine the legal consequences. Art. 14 provides the choice whether the enacting state wants to give a recognised judgment (i) the same effect it has in the state of origin or (ii) the effect it would have had if it had been issued in the recognising state. E.g. a U.S. court could – provided such a provision pursuant to option (ii) existed under U.S. law – decide to adapt the legal content of the decision to national law, potentially giving the original judgment a slightly different meaning.

Conclusion

With the new Judgments ML UNCITRAL presents an interesting tool towards international standardisation of recognition and enforcement procedures of insolvency related judgments. As it was designed to complement the 1997 MLCBI, we expect it to be enacted in particular by states that have already incorporated the MLCBI into their national laws. On a stand-alone basis, states will have to consider that provisions of the Model Law might not match existing provisions under national law. EU countries in particular will need to consider the interaction of the Judgments ML with the EIR, since both legal frameworks follow different approaches on a variety of subjects. It will be interesting to see how the Judgments Model Law will be accepted by states around the globe and whether it will succeed in further harmonising cross-border recognition of judgments in the insolvency arena.

Material can be found at: www.uncitral.org/uncitral/en/commission/working_groups/5Insolvency.html ■

The Chapter 15 Case of Hanjin Shipping

Ilana Volkov presents a case study in the universalist approach to cross-border insolvency administration

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CHAPTER 15 REFLECTS A STRONG CONGRESSIONAL PREFERENCE FOR A UNIVERSALIST RATHER THAN A TERRITORIAL APPROACH TO TRANSNATIONAL INSOLVENCY ADMINISTRATION

Chapter 15 of the US Bankruptcy Code, which is based on UNCITRAL's Model Law on Cross-Border Insolvency, was enacted in 2005 to provide an "effective mechanism" for dealing with cross-border insolvency cases.[1]

Some of Chapter 15's express objectives are "*greater legal certainty for trade and investment*" and the "*fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested entities, including the debtor*."[2]

Under Chapter 15, a foreign representative may file a petition in the US to obtain "*recognition*" of the debtor's foreign insolvency proceedings.[3] If the insolvency proceedings are recognised as "*foreign main proceedings*," the debtor receives important substantial relief described hereafter.[4] Among other things, the foreign debtor is entitled to an immediate application of the automatic stay concerning his/her property located within the territorial jurisdiction of the US. The stay prohibits all entities (except for certain limited exemptions) from: commencing or continuing pre-petition judicial, administrative or other actions or proceedings against the debtor; recovering a pre-petition claim against the debtor; enforcing a pre-petition judgment against the debtor or the property of the estate; obtaining possession of property of the estate or exercising control over property of the estate; and creating, perfecting or enforcing any lien against property of the estate that secures a pre-petition claim.[5] Similar injunctive relief is also available on a provisional basis, that is, from the date of the filing of the Chapter 15 petition to the date of recognition, "*where the relief is urgently needed to protect the assets of the debtor or the interests of the creditors*."[6]

Generally, there are two schools of thought regarding multinational insolvency proceedings:

1) universalism, where a bankruptcy progresses as a unified global procedure administered by one court, with the assistance of courts in other nations; and
2 territorialism, where a debtor is forced to file an insolvency action in every country where his/her property may be found.[7]

It is well accepted that Chapter 15 reflects a strong Congressional preference for a "universalist" rather than a "territorial" approach to transnational insolvency administration, an approach that recognises today's interconnected global economy. For example, Section 1508 of the Bankruptcy Code states: "*In interpreting this chapter, the court shall consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions.*"[8] This approach is further evidenced by Section 1507(b), which provides that upon granting recognition of the foreign main bankruptcy proceedings, a court may provide additional assistance, "*consistent with the principles of comity.*"[9]

Furthermore, Chapter 15 requires the US Bankruptcy Court to "*cooperate to the maximum extent possible with a foreign court or a foreign representative….*"[10]

What does all this mean, exactly? The Model Law's underlying philosophy was explained in an often cited decision, In *re ABC Learning Centres, Ltd.*, 728 F.3d 301 (3d Cir. 2013). There, the Court of Appeals for the Third Circuit stated:

> *"The Model Law reflects a universalism approach to transnational insolvency. It treats the multinational bankruptcy as a single process in the foreign main proceedings, with other courts assisting in that single proceeding. In contrast, under a territorialism approach a debtor must initiate insolvency actions in each country where his/her property is found. This approach is the so-called "grab" rule where each country seizes assets and distributes them according to each country's insolvency proceedings."*[11]

The Court further observed:

> "*Chapter 15 creates ancillary proceedings in the United States to provide support to the foreign insolvency administrator.* ***The goal is to direct creditors and assets to the foreign main proceedings for orderly and fair distribution of assets, avoiding the seizure of assets by creditors operating outside the jurisdiction of the foreign main proceedings.***"[12]

The US Bankruptcy Court for the District of New Jersey (the "Bankruptcy Court") which presided over the Chapter 15 case of *In re Hanjin Shipping Co., Ltd.* ("Hanjin") fully embraced this universalist approach on several key occasions throughout the case. This article will discuss the Bankruptcy Court's ruling and rationale for granting the foreign representative's motion for provisional relief.

Hanjin's business and the insolvency proceedings

On August 31, 2016, Hanjin commenced insolvency proceedings in South Korea: its foreign representative filed a Chapter 15 petition in the US on September 2, 2016. At the time of the filing, Hanjin was the largest shipping company in South Korea and the seventh largest shipping company in the world, transporting over 100 million tons of cargo per year and reportedly carrying almost eight percent of the U.S. market's trans-Pacific trade volume. Hanjin's business as a global carrier involved an enormous amount of commercial relationships, including with suppliers of "*necessaries*," such as fuel.

Critically, at the time the Korean insolvency proceedings were initiated, Hanjin had more than a dozen US bound vessels carrying billions of dollars of cargo, four of which were anchored or drifting outside US territory for fear of being arrested by unpaid providers of the so-called "*necessaries*." Most of the cargo was ordered in anticipation of the holiday season. Hanjin needed emergent relief from the Bankruptcy Court:

i) to ensure the cargo could be delivered to its owners and to avoid enormous economic damage to them, and
ii) to get paid for its work and generate revenue for continued operations.

The provisional order and the maritime lienholders' objections

To obtain this essential provisional relief, Hanjin's foreign representative had to demonstrate, among other things, that creditors and other interested entities were "*sufficiently protected*."[13] The primary objectors to the request for provisional relief were the unpaid providers of "*necessaries*," who asserted statutory maritime liens on account of their pre-petition claims and wanted the ability to arrest Hanjin's inbound vessels in order to enforce those liens. The maritime lien-holders argued their interests were not "*sufficiently protected*" if they could not enforce their maritime liens through ship arrests. Alternatively, they contended that if the Bankruptcy Court were to impose the automatic stay on the maritime lien-holders, it should require, at a minimum, that Hanjin post security or file a bond in accordance with 11 U.S.C. § 1522(c).

The Bankruptcy Court overruled the maritime lien-holders' objections and entered a provisional order on September 9, 2016, thus permitting Hanjin ships to enter and leave US ports without fear of arrest. After discussing Chapter 15's universalist approach and the *ABC Learning* case at length, the Bankruptcy Court found that allowing Hanjin's vessels to enter US ports under protection of the automatic stay was necessary to "*protect the interests of [Hanjin's] global rehabilitation and creditors as a whole*." Indeed, according to the Bankruptcy Court, allowing the maritime lienholders to enforce their individual lien rights in the US would accede to a "*territorial view*" of international insolvency proceedings "*in contradiction to Chapter 15's clear directive*." Furthermore, the Bankruptcy Court rejected the lienholders' request for security, finding that Hanjin did not have the financial wherewithal to provide any letters of credit or bonds and, in any event, their claims could and should be administered in Hanjin's main insolvency proceedings in Korea. The Bankruptcy Court ultimately concluded that Hanjin's foreign main proceedings "*will be better off*," as a whole, if the vessels were able to deliver the cargo promptly.

The maritime lienholders were unhappy with the Bankruptcy Court's decision and filed a motion for reconsideration. The Bankruptcy Court denied that motion; the denial was affirmed on appeal by the District Court. The maritime lien-holders' further appeal to the Circuit Court was dismissed as moot.

Conclusion

It was critical for the Bankruptcy Court to grant the foreign representative emergent relief in order to avoid disruption of international commerce and irreparable harm not only to the beneficial cargo owners who were anxiously awaiting the receipt of their cargo, but also to Hanjin and its creditors. To accomplish that result, the Bankruptcy Court had to acknowledge its role in the overall insolvency proceedings as an adjunct court, in other words, a court whose role was to support and assist the court administering the Korean insolvency proceedings and not to indulge the parochial interests of individual creditors.

By directing adjudication and payment of the claims of all unpaid creditors to the foreign main proceedings in Korea, the Bankruptcy Court stayed true to the purpose and intent of Chapter 15. ■

> **THE BANKRUPTCY COURT HAD TO ACKNOWLEDGE ITS ROLE IN THE OVERALL INSOLVENCY PROCEEDINGS AS AN ADJUNCT COURT**

Footnotes:

1 See 11 U.S.C. § 1501(a).
2 *Id.*
3 The term "foreign representative" is defined in Section 101(24) of the US Bankruptcy Code to mean "a person or body, including a person or body appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding."
4 See 11 U.S.C. § 1520.
5 *Id.* at § 362(a).
6 *Id.* at § 1519.
7 Jay Lawrence Westbrook, *Chapter 15 at Last*, 79 Am. Bankr. L.J. 713, 715 (2005).
8 11 U.S.C. § 1508.
9 *Id.* at § 1507(b).
10 *Id.* at § 1525.
11 *Id.* at 307 (internal citations omitted).
12 *Id.* at 306-307 (internal citations omitted) (emphasis supplied).
13 See 11 U.S.C. § 1522(a).

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Country Reports

Summer 2018

Updates from Portugal, Czech Republic, US and Italy

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> THE AMENDMENTS MAY WELL BE NUMEROUS AND FLASHY, BUT DO THEY EMBODY A REAL SHIFT OF THE PORTUGUESE INSOLVENCY LAW?

Portugal:
Recent amendments to the Portuguese Insolvency Law: The forces that determine the success of restructuring tools

Before spring even blossomed, the review of the Portuguese Insolvency Law was completed with the issuance of Law Nº 7/2018 and Law Nº 8/2018 of 2 March 2018. The review began in 2017 with the Insolvency Act (hereafter IA) being amended by Law Decree Nº 79/2017, of 30 June. The amendments may well be numerous and flashy, but do they embody a real shift of the Portuguese Insolvency Law? Let us have a look.

Law Decree Nº 79/2017 amended the insolvency proceedings and, more importantly, the popular pre-insolvency hybrid proceedings known as "special revitalisation proceedings"[1]. Standing out among the latter amendments is the inclusion, once and for all, of non-traders (natural persons and entities other than companies) in the range of beneficiaries of pre-insolvency instruments[2].

The debate around the scope of the special revitalisation proceedings had burst four or five years before. Some argued that the proceedings were extended to non-traders/non-entrepreneurs, others sustained that they were limited to cases in which business or entrepreneurial interests were at stake. The legislator responded with the creation of the "special proceedings aimed at a payment agreement"[3], which apply only to non-traders/non-entrepreneurs, which, give or take, are identical to the special insolvency proceedings. This managed to put an end to the squabbling, but simultaneously showed that, in the legislator's perspective, business or entrepreneurial interests have never set a threshold.

Law Nº 7/2018 and Law Nº 8/2018 of 2nd March brought about other novelties.

The first piece of legislation put forward a special regime for debt-for-equity swap[4] turning it into a restructuring measure on its own, available outside the insolvency proceedings (and the framework of a restructuring plan) and regardless of the company's situation (insolvency or pre-insolvency). According to the new regime, shareholders may be crammed down by creditors through the judicial confirmation of the debt-for-equity swap, in which case the intervention of an insolvency practitioner is required[5].

If insolvency proceedings commence while the debt-for-equity swap is still ongoing, the latter is immediately terminated, to allow the insolvency proceedings to pursue. The rule is difficult to justify, considering that one of the restructuring measures provided for in the IA (hence, available when the company enters insolvency proceedings) is, precisely, the debt-for-equity swap.

But the most interesting novelty is the pre-insolvency instrument created by Law Nº 8/2018 – the regime of out-of-court corporate restructuring[6]. It unfolds into two sub-regimes: the first is designed to help companies to reach a restructuring agreement with its creditors (negotiation regime)[7] and the second is designed to help the company carry out a previously negotiated restructuring agreement (agreement regime)[8].

As a matter of fact, not much differentiates the restructuring agreement in question from the ordinary restructuring agreement the company may be able to reach out of court, mainly because its effects remain *inter partes* (i.e., it is only binding upon the parties). What is more, the requirements to enter the regime are quite demanding, especially the need to show a non-insolvency situation ascertained by a certified public accountant. Will the benefits be worth the trouble?

There are indeed a few advantages, triggered, as the case may be (negotiation regime or agreement regime), by the deposit of the negotiation protocol or the deposit of the

restructuring agreement in the Commercial Registry. By virtue of the deposit of the negotiation protocol and whilst the negotiation is ongoing, the term to file for insolvency is suspended and the company's suppliers are prevented from withholding performance or terminating essential contracts[9].

Once the company reaches a restructuring agreement and deposits it, there are tax advantages concerning certain transactions, individual enforcement actions brought by creditors who are parties in the agreement are bound to cease, and new financing is not to be declared void, voidable or unenforceable in the context of subsequent insolvency proceedings.

Still, there may be doubts as to the future use of the regime. The benefits seem insufficient to persuade the company to follow this regime rather than the traditional path of out-of-court negotiation. More importantly, the scheme entails serious restrictions to the creditors' rights and no significant compensation / motivation. One thing is for sure: the participation of a minimum percentage of creditors is required for the benefits to be enjoyed.

As always, the success of the tool will depend not so much on its adequacy to perform the restructuring, but rather on the creditors' perception of the tool's adequacy to pursue their economic interests. Probably the Portuguese legislator should have been more aware of this. ■

Footnotes:

1 In Portuguese: Processo Especial de Revitalização (PER). The proceedings were introduced in 2012. They instantly carved out an important place for themselves in the framework of instruments of Insolvency Law and have never ceased to gain ground.
2 There were, indeed, a couple of amendments to the special revitalisation proceedings. Such amendments, however, do not undermine nor diminish the validity of the statement above.
3 In Portuguese: Processo Especial para Acordo de Pagamento (PEAP).
4 All claims are convertible except shareholders' loans.
5 Other core features of the new regime are: the shareholders have pre-emption rights (if they want to, the shareholders may make contributions to be applied in the repayment of the creditors) and the debt-for-equity swap may be preceded by a capital reduction to zero, provided the shareholders are out of the money (meaning that, upon a valuation of the enterprise, they would not receive any payment or other consideration if the normal ranking of liquidation priorities were applied).
6 In Portuguese: Regime Extrajudicial de Recuperação de Empresas (RERE).
7 In the first case, companies may enjoy the assistance of a corporate restructuring mediator [in Portuguese: mediador da recuperação de empresas]. The new career was created by Law Nº 6/2018, of 22nd February.
8 The old instrument of the kind – the system for corporate out-of-court restructuring [in Portuguese: Sistema Extrajudicial de Recuperação de Empresas (SIREVE)] – was repealed on the same occasion. For all that matters, it never received much attention.
9 These are contracts which are necessary for the continuation of the day-to-day operation of the business.

> **ONE THING IS FOR SURE: THE PARTICIPATION OF A MINIMUM PERCENTAGE OF CREDITORS IS REQUIRED FOR THE BENEFITS TO BE ENJOYED**

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Czech Republic:
The 2017 Amendment to the Insolvency Act and its possible effects on statistics

As has been pointed out in previous issues of Eurofenix, an extensive amendment to the Insolvency Act took effect on 1 July 2017 (2017 Amendment).

The 2017 Amendment brought several substantial changes to a number of aspects pertaining to insolvency proceedings, including most notably the security of future or contingent claims (e.g. bank guarantees), the assessment of a company's insolvency and its discharge from debts. Looking at the statistics concerning insolvency proceedings in 2017 and comparing them with the data from 2016* one might make a couple of remarks regarding the 2017 Amendment.

Number of insolvency petitions

From 2013 to 2016, the number of insolvency petitions gradually diminished at a rate of about 8% annually on a year-to-year basis. Whereas in 2013 37,613 insolvency petitions were filed, in 2016 only 29,493 were submitted. In 2017, however, the fall was steeper as only 23,135 petitions were registered with insolvency courts.

Types of insolvency proceedings

Under the Czech Insolvency Act, three basic methods for resolving a debtor's insolvency exist: liquidation (*konkurs*), reorganisation and discharge of debts (*oddlužení*). As in 2016, the discharge from debts accounted for almost 90% of all insolvency proceedings in 2017.

Creditors' insolvency petitions

The data reveals that the decrease in the number of petitions concerns both creditors' as well as debtors' insolvency petitions. As regards creditors' insolvency petitions, readers might be reminded that the 2017 Amendment *inter alia* did touch upon the position of creditors by making the preconditions for submitting insolvency petitions stricter, particularly with respect to ascertaining the creditors' claims.

Debtors' insolvency petitions

As mentioned above, most of the insolvency proceedings are of the type of discharge from debts, whereas only a minority of them are initiated on the basis of the creditor's insolvency petition. Therefore, the fall in the number of debtors' insolvency petitions is presumably attributable to changes related to the discharge from debts proceedings as the most "popular" type of insolvency proceedings.

The 2017 Amendment stipulates that debtors themselves are in principle no longer eligible to file a motion for discharge from debts, they must be assisted by legal professionals (mainly attorneys or authorised entities). Moreover, the fees for the preparation of motions for discharge from debts are subject to regulation. This legislative move is targeted against dubious legal entities which in many instances would charge disgracefully large fees. Nevertheless, anecdotal experience suggests that nowadays only a limited number of legal professionals are willing to assist debtors, because the authorised entities are overloaded with too many debtors' cases to treat.

Against this background, it is not surprising that the statistics show a sharp fall in the number of proceedings dealing with the discharge from debts. In 2016, insolvency courts dealt with 26,596 motions for discharge from debts, with confirmations in 22,084 proceedings. In 2017, the influx of new proceedings for the discharge from debts sharply decreased to 21,007 cases, and only 18,428 confirmations were issued.

The ratio between discharge from debts in the form of a sale of a debtor's assets and that of a repayment plan stayed more or less the same. Less than 3% of all cases were solved in the former way, whereas more than 97% were in the latter. ■

**As concerns the data, the author refers to statistics provided by the Ministry of Justice of the Czech Republic, based on the request submitted pursuant to the Freedom of Information Act.*

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US Chapter 15:
Delaware court sends U.S. creditor packing… to Italy

In the Chapter 15 proceedings of Energy Coal S.p.A., the Delaware Bankruptcy Court required a U.S. creditor to recover its claim in Italy.

Because there is no uniform global insolvency law, and every country has its own insolvency law, The United Nations Commission on International Trade Law (UNCITRAL) developed the UNCITRAL Model Law on Cross-Border Insolvency (1997) to facilitate cooperation and uniform outcome in cross-border insolvencies. 43 countries have adopted the model law, and the U.S. version is Chapter 15, which is similar to the "foreign main" proceedings in Italy. Founded on principles of comity, the U.S. courts assist the foreign insolvency court in cross-border insolvencies. A key benefit of Chapter 15 to foreign debtors is the use of the "automatic stay" which enjoins creditor action against U.S. assets. Another important benefit is the foreign debtor's ability to obtain discovery and assert claims against U.S. companies.

MacEachern Energy LLC ("U.S. Vendor") was a vendor owed at the level of 2.2 million euros by Energy Coal S.p.A. ("Energy Coal"), an Italian company doing business in the U.S. U.S. Vendor also owed money to Energy Coal, creating a right of set off of mutual debts. In April, 2015, Energy Coal filed for insolvency protection in Italy, under the Italian Insolvency Law, the Concordato Preventivo. In October, 2015, Energy Coal also filed for Chapter 15 proceedings in the U.S. in order to obtain the U.S. "automatic stay", aiming to forbid

U.S. creditors to pursue its U.S. assets.

In the Italian proceedings, Energy Coal submitted a restructuring plan for approval by the court in September, 2016. The Italian plan provided that unsecured creditors would receive 7% or less as a dividend. In the Chapter 15 case, Energy Coal moved to have its Italian plan enforced in the U.S., by order of the Delaware Bankruptcy Court. Specifically, the claims of U.S. creditors were subject to the Italian plan, and creditors were enjoined from seeking judgments in the U.S.

U.S. Vendor objected to the Italian plan, particularly against the injunction preventing it from recovering 100% from Energy Coal in the U.S. and the effective elimination of its set off rights. Energy Coal could recover 100% of its claims from U.S. Vendor, while U.S. Vendor would have received 7% or less on its claims. In support of its objection, U.S. Vendor cited its contract with Energy Coal, which provided for the Florida law and venue to be applied to any contract disputes.

In light of U.S. Vendor's objection, Energy Coal agreed that U.S. Vendor could reduce its claims to a judgment in Florida courts. However, Energy Coal's position remained that any judgment would be subject to the Italian plan and could only be paid pursuant to the Italian proceedings, meaning that U.S. Vendor must litigate in Italy.

The Delaware Bankruptcy Court ruled that comity and the need for cooperation and assistance in cross-border insolvencies outweighed the parties' contractual choice of law and choice of forum provisions. U.S. Vendor was thus left to litigate in Italy regarding the enforcement of its judgment and distribution on its claim. A piece of good news for U.S. Vendor is that the Delaware Court acknowledged the loss of U.S. Vendor's set off rights and hinted that if Energy Coal sought recovery of claims owed by U.S. Vendor, the Court would allow U.S. Vendor to assert set off of its entire claim as a defense. ■

> **THE U.S. COURTS ASSIST THE FOREIGN INSOLVENCY COURT IN CROSS-BORDER INSOLVENCIES**

Italy:
NPL and insolvency proceedings

Recently, the attention of the financial–economic world has focused on non-performance loans, (hereafter NPL).

The term "NPL" stands for bank loans emerging from mortgages, loans and funding, difficult to recover due to a worsening of the economic and financial situation of the debtor, no longer able to perform all or part of his/her contractual obligations.

Within the macro-category of the NPL, the Bank of Italy, in application of the EU Regulation 227/2015, has foreseen a new and precise classification of the NPL, in particular:

- Non-performing loans that are the debt exposures of subjects in an insolvency situation or situations alike. In this case, it is not necessary that the status of "non-solvency" be judicially established;
- Probable defaults or exposures - other than those classified as non-performing - for which the Bank, without recourse to actions such as the enforcement of guarantees, evaluates unlikely that the debtor regularly performs his/her obligations;
- Expired past due and/or overdrawn exposures or exhibitions that have expired or exceed the credit limits for more than 90 days and are above a materiality threshold.

The issue related to NPLs suffered by the Italian banks is largely the result of the recession that hit the Italian economy in recent years and especially the long time needed for the judicial recovery of the credit.

In the context of non-performance loans, procedures aimed at recovering the repayment of those loans play a fundamental role . On the one hand, there are the procedures regulated by the Civil Code - which have to be excluded from this brief analysis – and on the other, the insolvency procedures.

With regard to the latter, unfortunately, their duration is too long; in fact, the information provided by the Bank of Italy shows that recovery takes place within approximately the first five years.

The element of slowness of recovery characterises not only the "liquidation" procedures such as bankruptcy and the composition with creditors which have a liquidation purpose, but also the restructuring procedures provided in the Italian law.

In fact, in most cases, these proceedings are still ongoing four years after they commenced.

Furthermore, it is useful to consider the restructuring procedures that are transformed into liquidation procedures.

With regard to individual recovery procedures, the composition with creditors deserves a particular attention. In fact, despite several amendments to insolvency law aimed at pointing out the restructuring purpose[2], these proceedings are still being used nowadays for liquidation purposes. It is important to highlight, however, that according to the analysis conducted by the Bank of Italy, the number of recoveries obtained through the composition with creditors is higher than those obtained through other procedures.

In this context, in order to avoid that the presence of non-performance loans in the balance sheet, adversely affecting the granting of credit, the recent reforms related to the bankruptcy law will hopefully reduce the time needed for the recovery and increase the positive outcome of insolvency proceedings.

At the European level, however, one should be aware of the directives of the EBA (European Banking Authority) aimed at reducing non-performing loans by exhorting the operational and governance bases for effective recovery, which shall be implemented by January 2019. ■

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Spotlight on the INSOL Europe "EU Relations Working Group"

Myriam Mailly writes about the information available on the INSOL Europe website about the EU 'Directive proposal', and in particular how the potential changes expected in national insolvency legislations will play when the time comes for the Directive to apply.

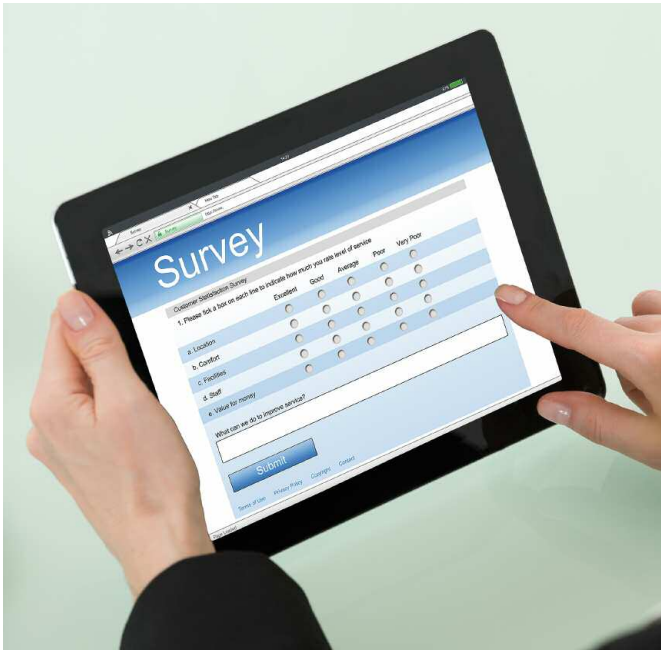
MYRIAM MAILLY
INSOL Europe Co-Technical Officer

Published on 22 November 2016, the initial version of the Directive proposal contains a number of provisions in three distinct main parts, namely preventive restructuring frameworks (Title II), second chance for entrepreneurs (Title III) and measures to raise the efficiency of restructuring, insolvency and second chance (Title IV).

The other titles are horizontal in scope, for example, Title I contains a provision on the availability of early warning tools for debtors, be they legal or natural persons engaged in a trade, business or professional activity (entrepreneurs).

At this stage, it seems fair to say that the contents of the Directive Proposal relating to Title II is now well known: there are provisions which aim to put in place common core elements for preventive restructuring frameworks to give debtors in financial difficulty, be they legal or natural persons, effective access to procedures facilitating early negotiation of restructuring plans, their adoption by creditors and the possible confirmation by a judicial or administrative authority. Some debates have started very early on that part of the Directive proposal, and in particular to assess whether it would be possible or desirable for some Member States to put in place a system of classes of creditors, where absent from their current legislation. Some look into how to protect the legitimate interest of the creditors by ensuring that the debtor benefits from an automatic general stay of enforcement proceedings in view of making progress in the negotiations on a restructuring plan. Others concern the extent of the right of shareholders to be protected in relation with the cross-class cram-down mechanism, etc.... It is true that this part of the proposal can be highly controversial depending on the main features of the domestic insolvency legislations.

> "A SHORT QUESTIONNAIRE HAS BEEN SENT TO LOCAL EXPERTS UNDER THE AEGIS OF THE INSOL EUROPE "EU RELATIONS WORKING GROUP"



EU Relations Working Group

This is the reason why a short questionnaire has been sent to local experts under the aegis of the INSOL Europe "*EU Relations Working Group*" chaired by Robert Van Galen and assisted by Paul J. Omar (INSOL Europe Technical Research Coordinator) and myself. The aim of that questionnaire is to deliver a clear and concise information on several selected aspects of the Directive proposal so as to assess the elements which were already adopted or not yet in place in various domestic legislations.

Compliance update

I am pleased to inform INSOL Europe members that relevant information on the compliance (or not) of certain domestic insolvency legislations with the Directive proposal (as published in November 2016) is now available for the following countries: Bulgaria, Czech Republic, Cyprus, Denmark, England & Wales, Estonia, Finland, Greece, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Poland, Portugal, Romania, Slovakia, Slovenia and Spain at www.insol-europe.org/technical-content/eu-draft-directive.

Specific comments were also made by national reporters from Luxembourg, Bulgaria, Estonia and Slovakia.

On behalf of the INSOL Europe "EU Relations Working Group", we would like to thank the national reporters for their willingness to cooperate in this project within such a short period of time.

If you want to contribute as well, please do not hesitate to send any relevant information, articles etc... to me at mailly.myriam@orange.fr

And let's keep a watchful eye on the on-going negotiations concerning the EU Directive proposal! ■

For updates on new technical content recently published on the INSOL Europe website, visit: www.insol-europe.org/technical-content/introduction or contact Myriam Mailly by email: technical@insol-europe.org

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Got a new book to review or preview?

Let us know and we will consider it for a future edition. Contact Paul Newson for more details on: paulnewson@insol-europe.co.uk

Transaction Avoidance in Insolvencies

Rebecca Parry, James Ayliffe QC and Sharif Shivji (3rd edition) (2018, OUP, Oxford), 720pp, £195, ISBN 978-0-19-879340-3

The book *Transaction Avoidance in Insolvencies* is now seeing the publication of its 3rd edition. The text consists of no less than 26 chapters and covers 639 substantive pages and over 100 devoted to the tables and index. The heart of the work is to be found in the four chapters on the key provisions of transaction avoidance. In addition to the two chapters covering sections 238 and 239 of the Insolvency Act 1986, there are the two chapters on Transaction Defrauding Creditors covered by section 423 and the Avoidance of Late Floating charges covered by section 245. Overall, the book provides much more than 'just' a very thorough analysis of the rules on transaction avoidance. Because of its scope and depth, it provides an integrated approach to transaction avoidance as part of the overall English legal system. Besides, the text does not omit a discussion of other grounds for seeking redress, such as the chapter on Office Holder Claims addressing claims based on misfeasance, fraudulent trading and wrongful trading.

The book is also relevant for practitioners because of the way the EIR works. Under Articles 7 and 16 of the European Insolvency Regulation, a court-appointed administrator not only has to be able to make it over the hurdle of the transaction avoidance of his or her own law, but, where the law applicable to the contract (*lex causae*) is different from the law of the opening Member State (*lex forum concursus*), the court-appointed administrator will also have to be able to make it across the hurdle of the *lex causae*. In practice, the second hurdle is often English law, very likely because of the very limited application of section 239 on preferences. Furthermore, for other reasons than the possible application of English law on transaction avoidance to certain transactions, the book provides great insights for practitioners, English and foreign alike. There is an entire part in the book with four chapters on practical issues such as evidence gathering and limitation periods.

Transaction Avoidance in Insolvencies also provides a wealth of information and inspiration for legislators and academics. In assessing the functioning of English law and to what extent it provides freedom to parties, one should not only look at section 239 and its very limited scope. English law has developed not only thoughts, but also working legal instruments addressing ways in which creditors may be prejudiced which have gone all too often unnoticed in other jurisdictions. Clear examples of these are the English rules on late floating charges, the anti-deprivation rules and rules on preferring insider guarantees. In summary, there is not a practitioner nor a scholar in Europe in the field of insolvency law who would not greatly benefit from reading the book.

Rolef de Weijs,
University of Amsterdam,
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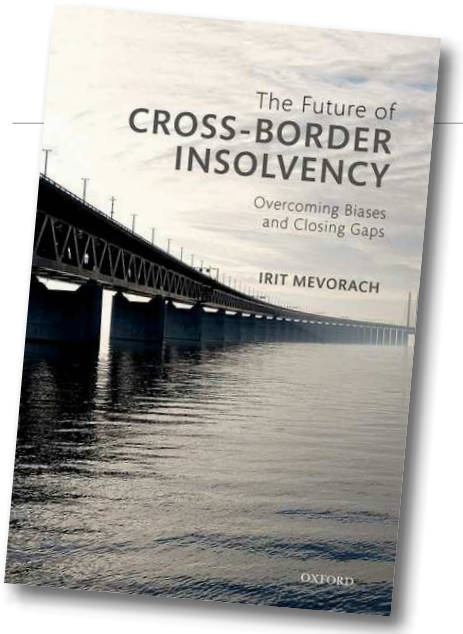


The Future of Cross Border Insolvency: Overcoming Biases and Closing Gaps

Irit Mevorach (2018, OUP, Oxford), xxiv and 290pp, £75, ISBN 978-0-19-878289-6

This is a text that analyses the phenomenon of cross-border insolvency from the standpoint of international law and behavioural and economic theory. Drawing on international texts, the jurisprudence, commentary and practice, this work seeks to understand the default to modified universalism as the benchmark for approaching transnational procedures and cooperation. Set against historical events, and particularly the Global Financial Crisis, the insolvencies of multinational institutions, particularly those of banks and other large players, have tested the limits of modified universalism as an effective tool for governing procedures with international features. This means that stakeholder choices, predicated on the bias towards modified universalism, have the potential to affect the location and conduct of insolvencies.

Addressing the nature of cross-border insolvency law and practice, the author makes the case for the treatment of modified universalism and other precepts derived from the law and practice of international insolvency as a form of customary international law, reducing, if not eliminating, the traditional divide between public and private international law. This, it is claimed, will assist in three things: the reconceptualisation of international insolvency as a source of substantive rules, rather than being seen solely as an adjunct to procedural law; the ability to shape the design and form of the instrument(s) by which cross-border insolvency is propagated; and, finally, the ability to understand how compliance with the new canons of international insolvency can be incentivised at domestic and international levels.

This is clearly a novel work that takes a fresh perspective of what transnational insolvency is as a system and set of rules. Adding to the evident depth of analysis, this text is well-written and the argument well-supported by an enviable range of resources drawn from a range of subjects and disciplines. It can be recommended to those seeking a fresh approach towards understanding this challenging area of law and practice.

Secured Credit in Europe: From Conflicts to Compatibility

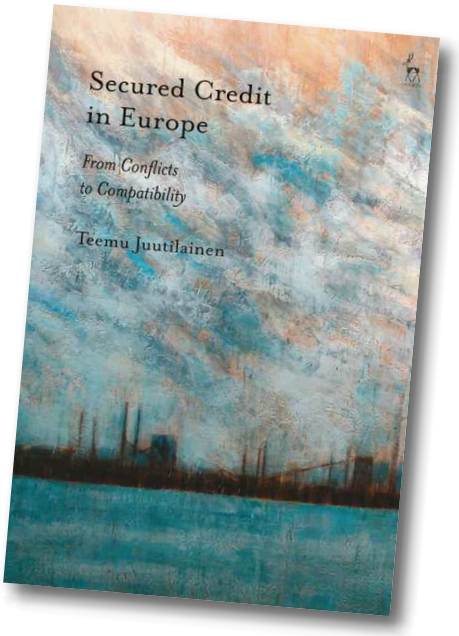
Teemu Juutilainen (2018, Hart, Oxford), xxv and 334pp, £85, ISBN 978-1-5099-1006-9

The use of security in structuring the financing of enterprises is a given today, though the types of collateral given up as security may change from time to time. This work, based on a doctoral project at the University of Helsinki, focuses on security rights affecting tangible movables and receivables, currently very common forms of collateral. Security rights are, however, not without their problems, chiefly in whether they are valid and/or enforceable across borders. In the absence of a uniform approach towards security rights, saving some international conventions (e.g. Cape Town 2001) and suggested model laws on secured transactions, the issue devolves down mostly to the national level, at which there are profound differences in approaches to structuring property, asset-security and insolvency laws.

The project, on which this work is based, rests on solid doctrinal foundations and takes a comparative law approach, examining the laws of some ten different jurisdictions, mostly in Western Europe and the USA, as well as recent associated literature. The text distils this information and considers avenues for action at both domestic and international level, in the latter case focusing on the potential for action within the European Union derived from its recent work in the common civil law project. Analysing previous work in this area, including international initiatives and how asset-security rights have been reflected in, for example, cross-border insolvency texts, the author comes up with two potential approaches, one rooted in substantive harmonisation, the other in structuring conflict of laws.

Both approaches evidence difficulties and the author discloses, through the analysis across three major chapters, his preference for an order of treatment of the choices available, including the possibility of a European Security Right. While the text is very much reflective of the way a doctoral level project is conceived and executed, it manages to push to the fore the choices and difficulties facing law reform in this area. There is a plethora of resources used here and references to the sources that have informed this study. In summary, the text would be useful to policy-makers and those involved in the process of law reform from academic, judicial, practitioner or stakeholder backgrounds.

Paul J. Omar, Technical Research Co-ordinator, INSOL Europe



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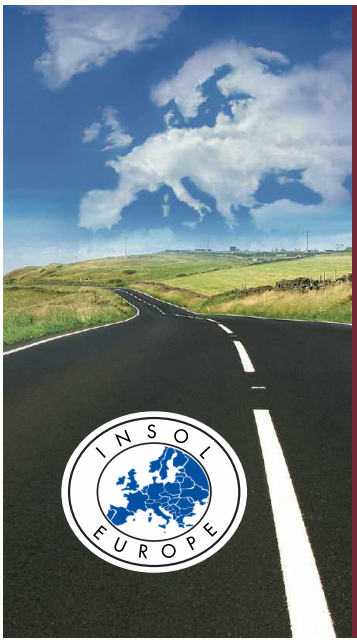

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