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The journal of INSOL Europe
Autumn 2018

INSOL EUROPE

Greece:

Corporate Rescue

Historic debt-deal

Also inside this edition:

- France is catching up
- Legal framework in Croatia
- Consumer insolvency in Poland
- Brexit and cross-border insolvencies
- Conferences, books *and more*...

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Welcome from the Editors

FRANK HEEMANN

CATARINA SERRA

Ten years after the collapse of Lehman Brothers comparisons are being drawn between the state of the world's financial and economic system in the autumn of 2008 and today. An armada of experts, real and would-like to be, analyses the progress made since the start of the financial crisis, the lessons learned, and the work still to be done. Some augurs even depict gloomy pictures of an imminent financial and economic crash. Personally, I am too little of an expert to join those daring to predict the future.

Looking back, however, I have certainly witnessed impressive and positive changes over the past ten years. The EU Member States improved their domestic laws to help tackling crises. The Insolvency Regulation came of age and since last year we are gaining experience with the Recast Regulation. New initiatives, like the Directive Proposal on preventive restructuring frameworks, send clear signals to the Member States to increase the efforts to avoid insolvencies and their negative effects on economy and society.

What I find most important from a practical point of view is the wealth of experience gained during the past ten years. At least in 'my' region, the Baltic States, and the wider Central and Eastern European region, the know-how and experience of IPs, judges, lawmakers, bank employees and similar key-players have progressed impressively, thanks also to the tireless work of organisations like INSOL Europe.

Chances are that you are reading these lines in Athens at our Annual Congress. 'Breaking the Chains' is the leitmotif. Are we really breaking the chains?

Has Greece, for instance, succeeded in ensuring a historic debt-relief? And has it introduced effective changes to its corporate rescue legal framework? Read more in the articles on the Greek debt deal (*p.20*) and on New rules for corporate rescue (*p.16*). In another context we may ask, whether (or when) modern technology is going to disrupt the way insolvencies and restructurings are handled. Joanna Goodman opens our eyes with her guest editorial on Artificial Intelligence in insolvency work (*p. 8*). And, of course, our evergreen subject… the UK breaking away from the chains of the EU…. Stay up-to-date with the article Brexit and cross-border insolvencies (*p. 28*).

For readers who are interested in recent and ongoing experiments, Catarina Serra's presentation of the "new kid in town", the Portuguese corporate restructuring mediator, will be of interest (*p. 36*), as will be the report on the Croatian Agrokor restructuring that was facilitated by a new legal framework (*p. 23*).

In addition to lots of chain-breakers you will find in this edition valuable information on recent and planned changes in the law (see the reports from Slovakia, Cyprus, Lithuania, and France), advice on executory contracts in Chapter 11 proceedings (*US Column, p. 32*), trends in consumer insolvencies in Poland and much more.

I am confident that you will enjoy this edition of eurofenix as much as I do, and that you will share my view that the articles link in nicely with the topics at our Annual Congress.

I am looking forward to meeting you in Athens.

Frank

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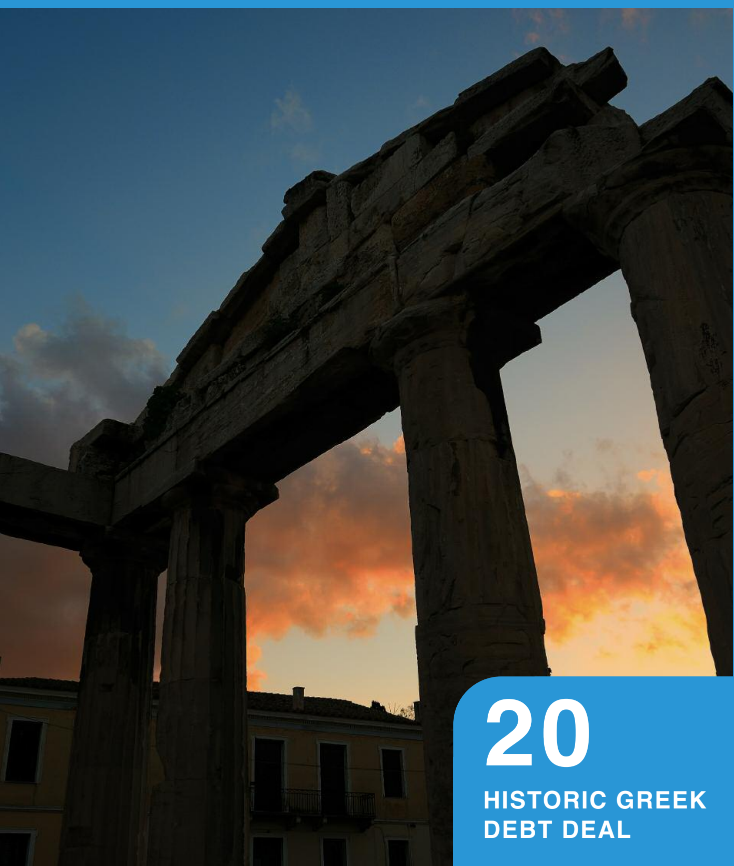
CORPORATE RESCUE IN GREECE



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HISTORIC GREEK DEBT DEAL

eurofenix

Edition 73 Autumn 2018

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Building the future

RADU LOTREAN
INSOL Europe President

Radu Lotrean writes his last editorial with a summary of the positive changes he has helped bring to our organisation

"

VISION WITHOUT ACTION IS A DREAM; ACTION WITHOUT VISION IS SIMPLY A WASTE OF TIME; ACTION WITH VISION IS MAKING A POSITIVE DIFFERENCE

"

It has been a very good year for our organisation. Being part of the management team was a special privilege for me.

As I write this last "President's Editorial" I wish to begin by welcoming our incoming President, Alastair Beveridge. I believe that our organisation is strong and well positioned to reach even greater heights in the future, building upon its past accomplishments. Most of us actively involved in INSOL Europe activities know Alastair as an enthusiastic and hard-working professional, dedicated to the growth of our organisation. As Alastair navigates the course ahead, I have no doubt that he will put down his mark on INSOL Europe in many positive ways.

Strategic planning

INSOL Europe is an organisation that is growing rapidly. Therefore, it constantly needs up-to-date strategies to guide development and to prepare for the challenges that lie ahead. The Strategic Task Force 2025 questionnaire elicited the aspects of the current membership, the motivation and aspirations of the members, as well as how INSOL Europe should be seen in, and interact with, the outside world and its members.

The questionnaire results have definitely been a great tool that we used during my term. The results revealed some interesting facts about our organisation, facts that have made us think and rethink our role, the organisation's growth, footprint and target groups. Based on the Strategic Task Force 2025's findings, INSOL Europe has been engaged in a strategic planning process which culminated, in April 2018, with an action plan approved by the Council. These are the key findings that forged this plan:

- In the last couple of years, we have seen a slight but steady decrease in membership within our organisation;
- INSOL Europe is not represented in half of the European countries; and
- There are countries that don't have a representative in our Council.

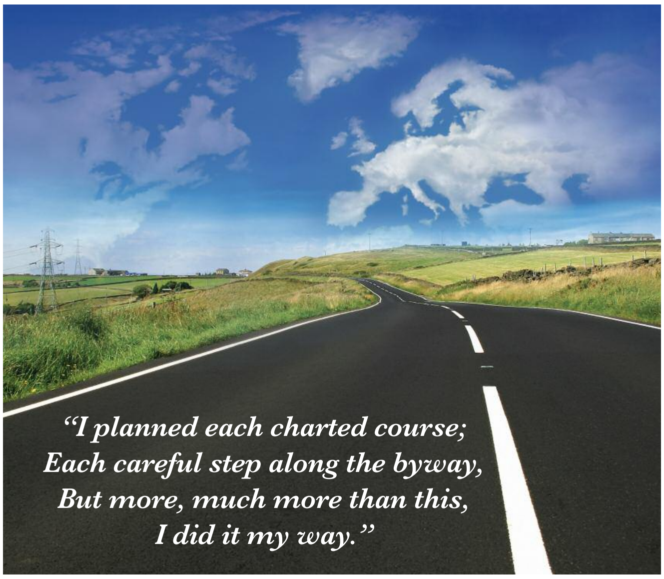
But we also have a huge potential for attracting members from big countries, under-represented today (membership ratio-wise), such as France, Italy, Spain, Germany, and also from countries that are not represented in the Council, such as Cyprus, Greece, Hungary, Belgium, Portugal, Luxembourg, Finland. In order to accomplish this, we have analysed the membership needs, our organisation's marketing tools, as well as the content we deliver to our current or potential members.

My plan was somewhat simple, with three important pillars, aiming to restructure the very core of our organisation:

(1) Footprint - the development of our network by shifting our attention and resources towards the local footprint;
(2) Representativeness of all European countries or regions; and
(3) Communication/collaboration.

Footprint

Regarding the local footprint, even without the findings of the Strategic Task Force (STF), from the very beginning of my mandate, it was clear to me that INSOL Europe needed to be present in all European countries



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in order to increase its relevance and impact and help with the development of local insolvency legislations and business environment.

In this regard The Executive has decided to create a new Committee – The **INSOL Europe Development Committee** – with the objective of creating local, national networks, which would act as transmission belts between the national and the European communities. This would eventually lead to create an awareness of INSOL Europe's existence and its capability to help the progress of each national legislation and of the stakeholders, by our sharing know-how and best practices and by promoting programmes through tools such as the High-Level Course on Insolvency. In return, this will help increase membership, spread INSOL Europe's message locally, as well as spreading the national messages at the European and international level!

Such a strategy will increase INSOL Europe's relevance and impact. In each country represented in INSOL Europe, the wing is composed, if possible, of one or two **Country Coordinators**. These coordinators will liaise with their country's local association(s), fostering the relationship between such associations and INSOL Europe and promoting and maintaining INSOL Europe's profile. Among others, their duty is to recruit new members, to chase subscriptions and invite the new local members to write articles for eurofenix, to organise friendly local meetings and conferences, to advertise the events organised by INSOL Europe, its work and to ensure participation in our Annual Congress, and, of course, to promote the High-Level Course on Insolvency. The Committee will be managed by three **Development Team Leaders** whose responsibilities will be to actively coordinate the project. The guidelines above were proposed by the Strategic Task Force Group, approved by the Executive and are subject to INSOL Europe Council's approval in Athens.

Representativeness

Since the beginning of my mandate I had a dream: INSOL Europe to be represented in all the European countries and most countries to have a representative in the INSOL Europe Council. (Just 14 countries are represented in the Council – we have members in 33 European countries but there are still 17 European countries with no membership).

In that light, I have made some proposals to change INSOL Europe's constitution, aimed to create two special seats reserved for countries which do not otherwise fill the conditions to be represented in the Council, in order to insure a better representation of our members belonging to smaller countries and to facilitate their voting process, subject to the approval of the General Meeting. Also the local footprint project will help create synergies between the nationals and European stakeholders.

Regarding membership, we have proposed adopting a tailor-made recruitment policy and subscription rate strategy that would take into consideration the age, the profession and the location (specially for the countries with a low INSOL Europe penetration rate) of the potential members. My proposal centres around providing a tailor-made accessible subscription rate for all our members, taking into account the cost of living in all European countries and also providing discounted rates for our young members or a number of members from the same firm. The Council will vote on the above proposal in Athens.

Communication and collaboration

Last but not least, we needed a website revamp and an improvement of our communication strategy in order to appeal to our potential members. An INSOL Europe communications sub-working group has been created and they are working to make our website more user-friendly.

This year we tightened our co-operation relationship with INSOL International, AIJA, FILA and DAV, through co-labelled events, and that proved to be very successful. (INSOL International / INSOL Europe Tel Aviv One Day Joint Seminar, R3 & INSOL Europe International Restructuring Conference, Joint 6th European Insolvency & Restructuring Congress, INSOL International - INSOL Europe - FILA Helsinki One Day Joint Seminar and for next year we organise the Annual Insolvency Conference with AIJA in Mallorca).

Our High-Level Course in Cyprus reached a record number of 100 delegates this year and proves to be an excellent national penetration tool.

This pretty much summarises it all. When I was installed as President of the organisation, I started by following in the footsteps of my predecessors, each of whom, in their special way, shaped our organisation. I hope now that the above mentioned strategic changes initiated during my term will leave their mark on the growth and prestige of our organisation.

As I look back at the past year, these initiatives took an extremely careful, detailed preparation because they challenged the very status quo of the organisation; nevertheless, each one was directed at providing better services and enhancing the value of INSOL Europe to you, our members. These were achieved through the relentless efforts and teamwork of the Executive, the Council, the Secretariat, as well as of many other dedicated members to whom I am very grateful.

While these initiatives are still ongoing and it will take a few years to come to completion, I end with Ramsay Clark's words: "*Turbulence is life force. It is opportunity. Let's love turbulence and use it for change.*" ■

> **"I HOPE NOW THAT THE STRATEGIC CHANGES INITIATED DURING MY TERM WILL LEAVE THEIR MARK ON THE GROWTH AND PRESTIGE OF OUR ORGANISATION"**

Artificial Intelligence in insolvency work: Transforming critical care

Joanna Goodman reports on the use of Artificial Intelligence and its role in the insolvency profession

JOANNA GOODMAN
Author and journalist, London

Insolvency and restructuring could be described as the corporate equivalent of critical care – bringing together multiple expert practitioners to provide life-support to some companies, and help them on the road to recovery, and palliative care to others.

And just as in medicine, advanced technology is transforming how critical care is delivered, identifying key challenges and smoking guns and predicting outcomes more accurately to improve a patient's chances, manage uncomfortable procedures and terminal cases with care and efficiency while, importantly, providing pain relief throughout.

Insolvency and restructuring work applies standard rules and processes to a specific set of circumstances, which are different for each company, and commonly involves managing large sets of company documents. This combination of rules and variables make it an ideal practice area for artificial intelligence (AI) to be applied to data capture and classification and process automation.

As Ed Macnamara, global restructuring & insolvency lead partner at PwC, explains, this goes beyond using machine learning to automatically apply accountancy rules and ensure creditor transparency. "*Data analytics and artificial intelligence tools hold the key to making processes more efficient, providing deeper insights and unlocking value more quickly. Where tasks are repeatable, and the approach can be defined, AI and other technologies play an important role in, for example, an insolvency practitioner's formal reporting requirements or detailed investigative work. At PwC we are using the latest technologies to work with the data and quickly get to the root of the issue, helping to drive efficiencies.*"

Litigation, and specifically e-discovery which involves managing large volumes of data, was an obvious starting point for legal AI, and technology assisted review (TAR) has particular application to insolvency investigations. TAR automates document review by using predictive coding to classify electronic documents. Early iterations of TAR required lawyers to review a sample set of documents and select the relevant ones. The software would then apply the same selection criteria to the entire collection, saving time and money by reducing the human element to the first and final stages of the review process. As technology became more sophisticated, AI engines reduced the human element further, by replacing sampling with comprehensive analysis of entire document sets for relevancies and anomalies. Although this technology is reducing headcount for routine tasks, experts are still required to provide the tailored advice and support that companies in difficulty require.

Cloud platforms for big data and e-discovery applications make litigation support and deal due diligence technology practical, accessible and cost-effective in the face of the exponential growth in data volume and the variety of media and platforms.

AI software such as Luminance (www.luminance.com) which identifies patterns in any multimedia dataset is ultimately scalable, as it has the ability to 'read' an infinite number of documents contemporaneously and in exactly the same way. It still requires a human to check the output: although algorithms do not make human errors, they may find false positives or misunderstand context. Bespoke e-discovery software such as Relativity (www.relativity.com) uses algorithms to identify patterns and concepts, and offer additional features including visualisation tools that support litigation strategies, e.g. whether to pursue a claim through the courts.

In a recent article for *Recovery*, Robin Ganguly, a senior associate at Bryan Cave Leighton Paisner LLP, highlights the application of TAR to investigations where insolvency practitioners need to establish whether there has been dissipation of assets. "*If predictive coding is employed to conduct a review of the company's books and records to search for leads, TAR has the ability to rank the documents by relevance so that humans can begin reviewing the most relevant documents, hopefully finding what they need before the time or money runs out.*" The level of review accuracy can be adjusted to an appropriate level either for a general investigation, or to pinpoint particular documents of types of document. Although not all TAR involves AI-powered data analytics, sophisticated products are required to investigate larger and more complex data sets across multiple platforms and media.

In another article for *Recovery*, Simon Edel and Olivia

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Lancaster highlight how technology helps restructuring professionals analyse financial information, helping to identify performance drivers and turn around failing companies. Other emerging technologies used in insolvency include real-time accounting tools, and the use of drones to profile large assets such as property and land, and online platforms for creditor information and asset sales.

Macnamara explains how PwC uses intelligent software to support banks in selling non-core or non-performing loan portfolios. "*We're using software to extract key information from banks' records, reading thousands of loan documents in a matter of minutes and identifying important credit information including borrower details, guarantors, collateral specifics and more. Not only is this faster, highly accurate and able to cover multiple languages, it's far more cost effective than historical means, adding speed and real value to the process.*"

AI for insolvency is not all about number crunching and automatically applying accountancy rules. ROSS Intelligence (www.rossintelligence.com), the first AI research tool to be employed in a law firm, was initially trained to understand and analyse insolvency legislation and regulation. ROSS is, in effect, a professional support lawyer with detailed insolvency expertise. Lawyers type in questions using natural language to find relevant, up-to-date case law and match this with core legal principles. Features include the ability to extract legal points, quotes and precedents to support an argument. ROSS has expanded to cover multiple practice areas, but it was first employed in law firm insolvency departments.

Intelligent document automation tools are used to produce the necessary documents to get a company into insolvency and contracts needed for buying, selling or restructuring a business. There is a large and growing choice of contract automation tools, such as Thomson Reuters ContractExpress (www.contractexpress.com). Kira Systems (www.kirasystems.com) applies machine learning to both contract analysis and creation.

These dynamic forms capture information and expedite processes, enabling insolvency teams to work leaner and scale their efforts. However, even intelligent automation does not replace the strategic thinking that goes into creating restructuring or administration sale documents or deciding whether to trade out. As one practitioner observed, AI can't do the thinking that fits behind complex schemes of arrangements or deal with the human dynamics that lie behind commercial decisions and outcomes.

Technology is used for prevention as well as cure, supporting investigations, research and analysis, by tracking companies that might fail, and providing information and insights to companies that have exposure to businesses that are at risk. Widely used tools such as Begbies Traynor's Red Flag Alert gather information from Companies House, the Land Registry and other public sources and apply algorithms to identify patterns of behaviour that might suggest that a company is in financial difficulty and enable action to be taken before it is too late.

Mark Fry, partner at Begbies Traynor explains how Red Flag Alert has developed into a real-time decision-support tool that enables insolvency practitioners to aid a business in distress before it reaches the point of no return. "*In early 2000 we created Red Flag Alert: a business financial database that tracks business performance and provides intelligent insight into the associated risks of insolvency. The product has undergone a number of revisions since then to create a fluid ruleset and bespoke algorithms that allow the group and its clients to make educated decisions based on large volumes of data over decades. We use a suite of technologies (some proprietary) to draw on tens of millions of data points and overlay sector, location and wider business sentiment conditions in order to create an expert system output that adapts with market conditions.*"

Looking ahead, but not too far, Begbies Traynor is investigating big data analytics and data science technologies. "*This will add an active and intelligent predictive component to the group's insolvency armoury, allowing early signs of trouble to be identified more quickly and accurately so that positive action can be taken,*" says Fry. He anticipates advances in modular machine learning automation tools increasing productivity, and deep learning to data analytics enabling outputs to transcend from information and insights to knowledge and wisdom.

PwC's Macnamara predicts that as the business world becomes more complex, due to globalisation and other factors, "*given the potential permutations and combinations, it just won't be possible to [handle insolvency and restructuring work] manually. While I don't believe technology will ever stop insolvencies from happening, it will evolve the role of the insolvency practitioner with proportionally more time being spent on the key strategic aspects of the case and less on the more procedural elements.*" He believes that AI is on its way to becoming "*an essential tool in understanding whether a business is viable or not and designing the optimal restructuring solution.*" ■

> "INTELLIGENT AUTOMATION DOES NOT REPLACE THE STRATEGIC THINKING THAT GOES INTO CREATING RESTRUCTURING OR ADMINISTRATION SALE DOCUMENTS"

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

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.

Make a comment!

Share your views!

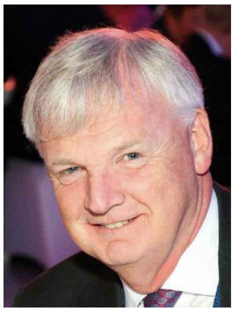
You will have noticed that we have added QR Codes to every main article to encourage readers to give us their views. The QR codes take you the LinkedIn group for *eurofenix* (see above).

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

Eminent appointments for long-standing members of INSOL Europe

Catarina Serra, joint chief editor of Eurofenix since 2017 and long standing member of the Academic Forum of INSOL Europe, has recently been appointed as judge of the Portuguese Supreme Court of Justice. In Portugal, the Supreme Court comprises mainly career judges and public prosecutors. There are, however, limited seats for jurists of recognised merits and Catarina has been appointed on that basis.

Catarina has been a Professor of the Faculty of Law of the University of Minho since 1991 and has dedicated a substantial part of her academic career to Insolvency Law. She has written several books and articles and has been the scientific coordinator of the Portuguese Insolvency Law Congress. To the greatest extent possible, she plans to continue her work in the area. During Fall / Winter of 2018, she will be teaching a subject on Insolvency in a master course of NOVA University of Lisbon.



Michael Quinn, a past President (2005-2006) and long standing Council member of INSOL Europe, has recently been appointed as a judge of the High Court of Ireland. Usually in Ireland judges are appointed after working as barristers and Michael joins a very small number of solicitors who have been appointed to the judiciary.

Michael is a former partner in William Fry Solicitors and was a founding member of the Irish Society of Insolvency Practitioners. Throughout his career he has advised numerous receivers, liquidators, examiners, investors, banks and company directors across various industries. Michael is extremely well regarded by all in his profession and throughout the insolvency industry in Ireland and Europe.

We congratulate both Michael and Catarina on their new appointments and wish them well in the next phase of their careers.

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Emeritus Professor Ian F. Fletcher QC (honoris causa) (1944-2018)

A tribute by Professor Bob Wessels

With great sadness, I report the passing away of a dear friend and colleague, Ian Fletcher, on 21 July 2018. He was 74. I will commemorate him on another occasion more fully, but I wish to express here that, in particular, the world of international insolvency law has lost a giant.

Ian Fletcher was Professor of Commercial Law at Queen Mary, University of London and, from 1994-2000, Director of the Centre for Commercial Law Studies. Later he became Professor of International Commercial Law at University College London. In 1971, he was called to the Bar by Lincoln's Inn, of which he was elected as a Bencher in 2003, and he was an Academic Member of 3/4 South Square Chambers, Gray's Inn.

He is the author of many articles and books, including the well-known The Law of Insolvency, whose fifth edition was published in 2017. Internationally, he belonged to the group of prominent and leading academics in the field of cross border insolvency and private international law. He is also the author of Insolvency in Private International Law, whose second edition appeared in 2005, a guiding book for many international academics and practitioners.

Ian always impressed me with non-political views, being pragmatic, embracing integrity and standing for independent thinking. It was a joy to know and to work with someone who was so honest both as a person and intellectually. It was a great tragedy for him, his wife Letitia and their sons Daniel and Julian, when he slowly lost his strength due to a malignant condition. I extend my deep sympathies to them.

Ian Fletcher truly left his mark on the insolvency world. I will miss him and always remember him.

Enhancing the effectiveness of the Insolvency Regulation

The Insolvency Regulation (Recast) is in force since 26 June 2017. It covers (i) the international jurisdiction of a court in a Member State to open insolvency proceedings, and the applicable law; (ii) the (automatic) recognition of these proceedings in other Member States; (iii) the competences of the insolvency practitioner to act in other Member States; (iv) the duties for insolvency practitioners and courts to cooperate, and to communicate with each other in cross-border insolvency matters; and (v) a specific system for the insolvency proceedings of members of a group of companies. The Regulation is binding in its entirety and is directly applicable in the Member States in accordance with the European Treaties.

A survey, undertaken between October 2017 and March 2018, describes the way in which a number of Member States (Finland, France, Germany, the Netherlands and Italy) have responded (or partly, or not) to the need for compatibility between the Insolvency Regulation and these States' domestic rules. From the survey it follows that legislators in Member States are rather reserved when drafting legislation to introduce the recast Insolvency Regulation.

Six topics have been chosen for assessment, mainly related to the provisions in the Insolvency Regulation (Recast) that are new or expanding certain legal norms and concepts in comparison to the former Insolvency Regulation from 2000.

They cover (i) international jurisdiction of the court, (ii) publication and registration in insolvency registers of other Member States, (iii) the relation between main and secondary insolvency proceedings, (iv) provisions related to cooperation and communication between insolvency practitioners, between courts and insolvency practitioners, (v) national provisions required in group coordination proceedings, and (vi) remedies in group coordination proceedings.

The outcome is strikingly diverse in character. Legislators in some Member States assess that the provisions under the Regulation are rather complete, leaving little to no room for supplemental national rules. Others, however, prefer to explain the decision-making processes and the role of the courts to hear and decide upon remedies found in the Regulation.

As a consequence, CERIL calls national legislators in EU Member States to review their assessment or to initiate assessment and to better coordinate efforts in order to (i) prevent unnecessary confusing differences, (ii) save time, costs and precious time of courts (procedural battles in a court) and businesses (delay and costs of litigation) to find these out, and (iii) encourage/strengthen effective and efficient national (procedural and substantive) rules to introduce the Insolvency Regulation (Recast).

The study was conducted by a Working Party of the Conference on European Restructuring and Insolvency Law, co-chaired by professors Stephan Madaus (Germany) and Bob Wessels (The Netherlands). Members of the Working Party were academics and practitioners: Giorgio Corno (Italy), Ian Fletcher (United Kingdom), Tuula Lina (Finland), Ignacio Tirado (Spain) and Paul Omar (United Kingdom), some of them well known in the INSOL Europe community. The survey itself can be found on *www.ceril.eu*.

Click here

Professor Bob Wessels

Technical Insight: The Niebler Report

EMMANUELLE INACIO
INSOL Europe Technical Officer

Emmanuelle Inacio takes a closer look at The Niebler Report on the European Commission's Proposal Directive on Preventive Restructuring

"THE NIEBLER REPORT PROPOSES A DEFINITION OF "LIKELIHOOD OF INSOLVENCY""

On 21 August 2018, the Committee on Legal Affairs of the European Parliament adopted Angelika Niebler's Report[1] on the European Commission's Directive Proposal on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU[2].

Indeed, the committee on Legal Affairs recommended that the European Parliament's position adopted at first reading under the ordinary legislative procedure (Article 294 TFUE) should amend the European Commission's Directive Proposal. The most important proposed amendments are the following:

Preventive restructuring frameworks

As a reminder, the Directive Proposal introduces an obligation for the Member States to ensure that, where there is a likelihood of insolvency, debtors shall have access to a preventive restructuring framework that enables them to restructure their debts or business and to benefit from a stay of individual enforcement actions if, and to the extent that, such a stay is necessary to support the negotiation of a restructuring plan[3]. The Niebler Report proposes a definition of "likelihood of insolvency" that "means a situation in which the debtor is not insolvent under national law but in which there is a real and serious threat to the debtor's future ability to pay its debts as they fall due"[4].

The Report adds that the Members States may provide for restructuring frameworks to be available at the request of creditors and workers' representatives, with the agreement of the debtor[5].

But the Report adds a restriction: the Member States have the possibility to provide that access to restructuring proceedings is limited to enterprises that have not been finally sentenced for serious breaches of accounting and bookkeeping obligations under national law.

The Directive Proposal requires that the Member States shall ensure that the debtors who are negotiating a restructuring plan with their creditors may benefit from a stay of individual enforcement actions if and to the extent that such a stay is necessary to support the negotiations of a restructuring plan[6]. The Report adds that the stay of individual enforcement actions may be possible where the obligation of the debtor to file for insolvency has not yet arisen and provided there is a likelihood of preventing the company from undergoing insolvency proceedings.

Regarding the question of the maximum duration of stay, like in the Directive Proposal, the Report requires the Member States to allow the debtor to apply for a general or limited stay of individual enforcement actions to support the negotiations of a restructuring plan limited to 4 months. But, the Report also proposes that the total duration of the stay of individual enforcement actions, including extensions and renewals, shall not exceed ten months (not 12 months as the Directive Proposal). The Reports adds a new provision: the total duration of the stay shall be limited to two months if the registered office of the company has been transferred to another Member State within a three-month-period prior to the filing of a request for the opening of restructuring proceedings[7] to avoid *forum shopping* and for consistency with the Regulation 2015/848.

Regarding restructuring plans, the Directive Proposal requires Member States to include a minimum mandatory information in restructuring plans submitted for confirmation by a judicial or administrative authority[8]. The Niebler Report proposes that the Member States shall require all restructuring plans to be confirmed by a judicial or administrative authority and include a minimum mandatory information.

According to the Report, the modalities of information and consultation of the workers' representatives in accordance with the EU's and the national law as well as information on the organisational aspects that bear consequences upon employment (such as dismissals, short-time work or similar) should *inter alia* be included in the restructuring plans. The Report adds that restructuring plans should not affect worker' rights, entitlements, claims, occupational

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pension funds or schemes[9] and that the Member States shall ensure that, where the plan includes measures leading to changes in the work organisation or in contractual relations, those shall be confirmed by workers in cases where the national law and practices require such confirmation[10].

Moreover, the Report adds that restructuring plans which involve the loss of more than 25% of the workforce should be confirmed by a judicial or administrative authority[11]. According to the Report, the Members States shall ensure that the workers' rights, such as the right to collective bargaining and industrial action, that their right to be informed and consulted should not be compromised by the restructuring process and that workers shall always be treated as a preferential and secured class of creditors[12].

The Proposal includes a cross-class cram-down mechanism to be used if the restructuring plan is not supported by the required majority in each class of affected parties, leading to a dissenting voting class. In the case of a cross-class cram-down, the restructuring plan must always be confirmed by a judicial or administrative authority. The cross-class cram-down mechanism is subject to a number of minimum harmonised requirements in order to ensure that the rights of the parties involved are appropriately protected. This means that the plan must be supported by at least one class of affected creditors, and dissenting voting classes must not be unfairly prejudiced under the proposed plan[13]. The Report proposes that the plan must be approved by the majority of classes of affected creditors and that the Member States have the option of increasing the minimum number of classes required to support the plan as long as the minimum number still represents the majority of classes[14].

Regarding the role of the practitioner in the field of restructuring, the Proposal states that the appointment by a judicial or administrative authority of a practitioner in the field of restructuring shall not be mandatory in every case but may be required where the debtor is granted a general stay of individual enforcement actions or where the restructuring plan needs to be confirmed by a judicial or administrative authority by means of a cross-class cram-down[15].

The Report requires that whether or not the supervision of a restructuring procedure by a practitioner in the field of restructuring is mandatory, it shall in all cases be subject to the national law in order to safeguard the rights of affected parties, which is reassuring for the insolvency practitioners. The Report adds that the Member States shall require the appointment of a practitioner in the field of restructuring at least where the debtor is granted a stay of enforcement actions, where the restructuring plan needs to be confirmed by a judicial or administrative authority by means of a cross-class cram-down, in accordance and where it is requested by the debtor or by a majority of creditors[16].

Practitioners in the field of restructuring, insolvency and second chance

Regarding the role of the practitioner in the field of restructuring, insolvency and second chance, the Report puts the emphasis on their training, as well as of the members of the judiciary and of the administrative authorities.

According to Report, the Commission shall facilitate the sharing of best practices between Member States with a view to improving the quality of training across the Union, including by means of networking and the exchange of experience and capacity building tools, and if necessary shall organise training for members of judiciary and administrative authorities dealing with restructuring, insolvency and second chance matters[17].

Moreover, the Report strengthens the need to frame the practice in the field of restructuring, insolvency and second chance and increase its transparency. Indeed, according to the Report, Member States shall ensure that practitioners in the field of restructuring, insolvency and second chance, as well as other effective oversighting mechanisms concerning the provisions of such services comply with statutory codes of conduct, which shall at least include provisions on training, qualification, licensing, registration, personal liability, insurance and good repute[18]. Member States shall establish effective sanctions for failure to comply with the practitioners' obligations and ensure that information about the authorities exercising supervision or control over practitioners in the field of restructuring is publicly available[19].

To be continued… ■

> **THE COMMISSION SHALL FACILITATE THE SHARING OF BEST PRACTICES BETWEEN MEMBER STATES WITH A VIEW TO IMPROVING THE QUALITY OF TRAINING ACROSS THE UNION**

Footnotes:

1 http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&mode=XML&reference=A8-2018-0269&language=EN#title5
2 https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52016PC0723
3 Article 4.
4 Amendment 44.
5 Amendment 57.
6 Article 6.
7 Amendment 59.
8 Article 8.
9 Amendment 65.
10 Amendment 66.
11 Amendment 67.
12 Amendment 70.
13 Article 11.
14 Amendment 68.
15 Article 5.
16 Amendment 58.
17 Amendment 91.
18 Amendment 92.
19 Amendment 93.

New rules for corporate rescue in Greece

Alex Kastrinou brings us a timely analysis of the effectiveness of the recent changes to corporate rescue in Greece

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"THE LAW OF 2007 CONSTITUTES THE FIRST SERIOUS EFFORT TO PROMOTE THE CONCEPT OF CORPORATE RESTRUCTURING"

Following the example set by many other European jurisdictions, Greece sought to reform its Insolvency Code in 2007, in order to introduce procedures that offered a genuine chance of survival to ailing companies.

The Law of 2007 has been subsequently tweaked a few times[1] in attempts by the legislator to strengthen the rescue culture nurtured by the 2007 reforms and to facilitate corporate rescue in a financially challenging environment, where the stigma of failure still has a strong presence.

The aim of this article is to offer a brief analysis of the corporate rescue provisions of Greece as they now stand and to assess their efficiency.

As opposed to other European Member States, Greece traditionally lacked a sophisticated corporate rescue regime. The Law of 2007 constitutes the first serious effort to promote the concept of corporate restructuring in this jurisdiction, which was previously geared towards the liquidation of traumatised companies. As with almost every other jurisdiction in current times, one of the key aims of the new Greek insolvency rules is to provide ailing but salvageable companies with a possibility of recovery, or crucially facilitate an orderly exit of insolvent entities from the market.[2] Never before have those two functions of insolvency law been more important for the Greek economy. Greece is slowly but steadily recovering from a financial crisis that brought the county's economy to its knees. The drastic steps taken by the legislator back in 2007 to foster a corporate rescue culture, as well as the subsequent multiple efforts (in the form of legislative reforms) to boost that rescue culture appear now to be bearing fruit.

Prior to the 2007 reforms, corporate rescue provisions did not have a codified form. Instead, various dispersed rejuvenation provisions existed, which dealt with the avoidance of corporate failure and distress. The Law of 2007, striving to mark a shift in policy, replaced all of the (primarily creditor-friendly) dispersed laws with a unified Insolvency Code, which contained some starkly debtor-friendly rescue procedures.

Law 3588/2007 was particularly aimed at offering the honest but ill-fated debtor a second chance, facilitating the rescue of viable distressed companies and preserving employment. Importantly, two clear-cut rescue procedures were introduced, namely the pre-insolvency procedure of rehabilitation (Article 99) and the reorganisation plan procedure (article 108).

The rehabilitation procedure

Article 99, introduced a new type of 'debtor in possession' procedure, which allows debtors to overcome their financial difficulties, whilst they remain in control of their company. The rehabilitation procedure, in its inception, highly resembled the French conciliation procedure and involved the appointment of a mediator, whose task would be to negotiate an agreement with the creditors, which would then be subject to ratification by the court.

A debtor, who is either experiencing imminent or foreseeable financial difficulties, or is in cessation of payments, can petition the court for the ratification of a rehabilitation agreement.[3] Originally, under the 2007 regime, in order for a collective negotiation process to commence, the debtor would have to apply to the court for the initiation of the rehabilitation procedure. Such a requirement, defeated any rescue prospects, as it effectively prevented the debtor from taking action at an earlier stage (i.e. before their application to the court), but also resulted in increasing the procedural costs, as well as the delays. It has been argued that this requirement also made the rehabilitation procedure prone to abuse, as unscrupulous debtors would aim to open proceedings solely to take advantage of court delays and a moratorium, which would become effective at the time a petition was submitted to the court to open proceedings, therefore, postponing the opening

of liquidation proceedings.[4]

The latest reforms[5] of the Greek Insolvency Code effectively address the issues of procedural costs and delays, because, pursuant to the amended Article 99, the debtor must commence negotiations as early as possible and without the need to apply to court for an order. The debtor is to achieve an out of court collective agreement with the creditors,[6] which may then be submitted to the court for ratification.

Additionally, amendments were introduced to Article 99 with regard to the moratorium that is attached to the rehabilitation procedure, aimed at reducing the risk of abuse by bad- intended debtors.[7] In particular, pursuant to Article 106a, in order for the debtor to benefit from a moratorium during the negotiation period, creditors representing 20% of the total value of claims must issue a written statement, confirming that they consent to participate in the negotiations with a view to reaching a reorganisation agreement. Accordingly, debtors lacking the support of creditors would arguably avoid submitting an application for the protection of a preliminary moratorium. Furthermore, pursuant to Article 106, the court receiving an application to ratify a rehabilitation agreement would grant an automatic moratorium of four months with the possibility of extension until the closure of the proceedings. Again, the legislator leaves little room for abuse by unscrupulous debtors, as in order for a debtor to reach that stage (i.e. applying for ratification of the agreement) it is presupposed that they would have acquired the requisite creditor approval.[8]

Seeking to enhance the efficiency of the rehabilitation procedure and to avoid applications from dubious debtors, an additional safeguard was introduced, namely that an application to have an agreement ratified must be accompanied by an expert's report. The expert, who typically is a financial institution or an auditing firm, is appointed by the debtor and his/her approving creditors.[9] The expert's report, *inter alia*, must contain information in relation to the financial situation of the debtor, a detailed list of the creditors' claims (particularly secured creditors), the market conditions and the prospects of success of the agreement.[10]

It could be argued that under the revised Article 99, where there is no longer a need to petition the court for approval of the opening of a negotiation period, the debtor is provided with a key opportunity to commence discrete restructuring negotiations with the creditors. The lack of publicity during the process of negotiations is arguably a significant development, as it safeguards the value of the business and protects it from the stigma, which is associated with failure.

"THE LACK OF PUBLICITY DURING THE PROCESS OF NEGOTIATIONS IS ARGUABLY A SIGNIFICANT DEVELOPMENT"

> **WHERE ATTEMPTS TO AVERT A FINANCIAL CRISIS AT THE PRE-INSOLVENCY STAGE HAVE PROVED FUTILE, AN ALTERNATIVE ROUTE TO CORPORATE RESCUE MAY BE AVAILABLE**

Once an agreement has been reached, the debtor may apply to the court in order to have the agreement ratified. Upon the judicial ratification, the agreement becomes binding upon all creditors, including dissenting creditors (cram down effect).[11]

Although, one of the key functions of the rehabilitation procedure is to encourage ailing debtors to take action and to restructure their affairs whilst in control of the company (i.e. debtor in possession), it is important to note that like in any other rescue procedure, the support of creditors plays a crucial role. As far as the functioning of the rehabilitation procedure is concerned, the legislator appears to be putting the debtor in the driver's seat. However, it should also be noted, that where the debtor has reached a state of cessation of payments, it is possible for its creditors[12] to draft a rehabilitation agreement without any debtor involvement and lodge an application to the court to have it ratified.[13] Arguably, the rationale behind this provision is to encourage viable debtors to take preventative action as early as possible. At the same time, it appears that a balance is achieved between the promotion of rescue through a 'debtor in possession' regime and the protection of the creditors' rights, by way of allowing them to take control of the debtor's rehabilitation, where the latter has failed to propose and implement any restructuring measures.

Article 99, as amended, aims to facilitate the conclusion and implementation of restructuring agreements and, importantly, provides for a moratorium, which safeguards the debtor against any creditor enforcement claims. It remains to be seen, whether there will be an actual shift towards a rescue culture, where the procedure will operate as a stand-alone 'debtor-in-possession' rescue procedure, or whether it will simply function as a device that enables creditors to have pre-pack agreements ratified by the courts.

The reorganisation plan

Where attempts to avert a financial crisis at the pre-insolvency stage have proved futile, an alternative route to corporate rescue may be available for an insolvent debtor, namely by way of a reorganisation plan, which forms part of the traditional liquidation procedure. In particular, the debtor may submit to the court a reorganisation plan within three months from the moment they entered a state of cessation of payments, together with their application to open liquidation proceedings.[14] Once the reorganisation plan is ratified by the court, it becomes binding upon all creditors, including dissenting creditors. Only where a reorganisation plan does not receive the requisite creditors' support[15] and subsequently, judicial ratification, liquidation proceedings will be initiated.[16] This formal reorganisation phase is designed to ensure that the debtor is given another chance, even at a later stage, and consequently avoid liquidation.

The information contained in the reorganisation plan is divided into three stages, namely an 'informative', a 'descriptive' and a 'development' stage. In particular, the debtor is required to submit a plan, which contains important information in relation to the financial situation of the company and describes the origins of the company's distress. In addition, the debtor is required to disclose any information which would be likely to affect the implementation of the reorganisation plan, its acceptance by the creditors or its ratification by the court.[17] Moreover, the plan must provide a report comparing how the creditors' claims would be satisfied as part of the suggested reorganisation plan and liquidation proceedings.[18] Furthermore, the debtor must provide a list of the measures adopted, or going to be adopted, in order to ensure the satisfaction of the proposed change to the creditors' claims, as well as a list of measures which would outline any changes in the operational aspects and the unproblematic continuation of the company.[19]

Furthermore, a crucial amendment was introduced in 2016 to the Reorganisation Plan procedure, namely, it is no longer necessary for the court to approve the content of a proposed plan prior to this being submitted to creditors for approval[20]. This effectively limits the involvement of the court in the process and accordingly eliminates the associated procedural delays and costs, making the procedure more attractive to ailing debtors and their creditors.

It could be argued that the introduction of the reorganisation plan procedure in 2007 and its subsequent amendments demonstrate the intention of the legislator to promote the idea of corporate rescue where informal rescue attempts have failed. Under the current legal framework, the debtor is encouraged to submit a reorganisation plan even at a later stage, therefore adding an extra defence against liquidation.

Conclusion

It is argued that, following the introduction of the Law of 2007 the insolvency laws of Greece witnessed a remarkable shift of ethos. The legislator's intention to promote the concept of corporate rescue and to encourage a second chance culture is clearly reflected in the current legal framework. One must nevertheless be reminded that a legal framework can only operate efficiently if it is supported by equally efficient institutional frameworks. A first step to strengthen the institutional framework in Greece was made in 2016, where for the first time a provision was made for the creation of a regulated insolvency profession. Arguably, next on the reform agenda should be the efficiency (or lack of it) of the judicial system, as though the reforms somewhat solved this problem by reducing the level of court involvement, courts remain notoriously slow and are not necessarily specialist bankruptcy courts.

Finally, at a time where Greece appears to be recovering slowly from the financial crisis, one must not forget that the restructuring of problematic companies has proven to be a rather difficult task in an economic environment where banks frequently struggle themselves to keep up with their own capital requirements.

One would hope that the much-needed reforms to the judicial system will soon be introduced in Greece. This, coupled with what appears to be (at least in theory) an effective legal framework and a recovering financial sector, should contribute to the establishment of a corporate rescue culture. The corporate rescue rules in Greece have come a long way in the last decade, the numerous reforms demonstrating that the legislator is actively striving to create a framework (both institutional and legal) which facilitates rescue. However the establishment of a reformed judiciary and the new laws still only in the books are insufficient in themselves and the system can only effectively develop through their application. Here, one cannot fail to remember Aristoteles's wise words that "*When we have to learn things before we can do them, we should learn them by doing them*". Therefore, the journey towards a sophisticated corporate rescue culture is likely to be a long one. ■

Footnotes:

1 Reforms to the Greek Insolvency Code have been introduced by Law 3588/2007, Law 4013/2011, Law 4446/2016 and Law 4549/2018.

2 See Paulus, C., Potamitis, S., Rokas, A., & Tirado, I., *Insolvency Law as a Main Pillar of Market Economy- A Critical Assessment of the Greek Insolvency Law*, 2015 (24) Int. Insolv. Rev. 1-27, at p.3.

3 Article 99(3) Where the debtors is are in a state of cessation of payments, at the time of applying to the court for ratification of the agreement, it is required that they also file for the opening of formal insolvency/liquidation proceedings. If the court ratifies the rehabilitation agreement, the debtor's application to open liquidation proceedings is rejected. Conversely, where the court rejects the debtor's application to ratify the agreement, the court proceeds to consider the application to have liquidation proceedings opened.

4 See Frastanlis, *Pushing Towards Efficiency: New Changes in Greek Restructuring and Insolvency Law*, (2018), Int. Corp. Resc. 14(4), 281-284 at p. 281. See also Paulus, C., Potamitis, S., Rokas, A., & Tirado, I., note 2 above, at p. 10

5 By way of Law 4446/2016, as restated in Law 4549/2018.

6 A rehabilitation agreement may be submitted to court for ratification, where it has been approved by creditors representing 60% of the total value of claims, including 40% of secured creditors. See Article 100(1).

7 See Frastanlis, S.,note 4 above at p. 281.

8 I.e. Creditors representing 60% of the total value of claims, including 40% of secured creditors must give their approval

9 Article 104(6).

10 Article 104 paras. (3)(4) &(5).

11 See Article 106b para. 3 (a), (b) & (c).

12 Creditors representing 60% of the total value of claims, including 40% of secured creditors.

13 Article 100(1).

14 Article 108 (2). This is subject to extension by maximum one month, where the court is satisfied that the delay does not prejudice the interests of the creditors and that there is a real prospect that the plan will be accepted by them.

15 The reorganisation plan has to be approved at a creditors' meeting by creditors representing at least 60% of the total claims and at least 40% of these must be secured. See Article 108.

16 Article 107.

17 Article 109a (a).

18 Article 109a (b).

19 Article 109 (b).

20 The Law of 2016 abolished what was previously Article 114 of the Insolvency Code.

> **"THE CORPORATE RESCUE RULES IN GREECE HAVE COME A LONG WAY IN THE LAST DECADE"**

RICHARD TURTON AWARD 2018

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

In recognition of those aspects in which Richard had a special interest, the award for 2018 was open to applicants who fulfilled all of the following:

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

Applicants for the award were invited to write a statement detailing why they should be chosen in less than 200 words. A panel representing the four associations adjudicated the applications. The panel members are as follows: Robert van Galen – INSOL Europe, Neil Cooper – INSOL International, Patricia Godfrey – R3 and Maurice Moses – IPA. The committee received outstanding applications for this year's award and it was a very close run decision. We are delighted that the award has attracted such enthusiasm and response from the younger members of the profession and know that Richard would also be extremely pleased that there had been such interest.

The committee is delighted to announce that the winner for this year's award is **Yutong Zhang** from China. Yutong is a visiting researcher of University of California, Los Angeles, School of Law, and prior to that he was a PhD candidate at China University of Political Science and Law. Currently Yutong is practicing insolvency and turnaround at JD Finance. He will be writing a paper on "*Blockchain: A Chance for Turnaround Procedure Modernization*", which will be published in summary in one or more of the Member Associations' journals and in full on their websites.

As part of the award, Yutong is invited to attend the INSOL Europe Congress on 6-7 October 2018 in Athens, Greece. We would like to congratulate Yutong on his excellent application and also thank all the candidates who applied for the award this year.

The details of the Turton Award and papers of the previous winners can be found at https://www.insol.org/turton-award.

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Greek debt deal: Breakthrough or ball and chain?

Yiannis G. Sakkas and Yiannis G. Bazinas report on the historic debt-relief deal for Greece and the historic moment for the Eurozone as a whole

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On 22 June 2018, the Eurogroup reached what was termed a "historic" deal on a debt relief for Greece, a momentous achievement and the final step for Greece's return to economic normality, after almost a decade of European and IMF bailouts.

The debt package was portrayed in the public domain as "*an historic moment for the Eurozone*", "*the end of the Greek crisis*" and even "*the biggest act of solidarity that the world has ever seen*". However, the same enthusiasm is not shared by all. Concerns still persist that the agreed measures are not sufficient to restore debt sustainability. Even worse, the deal is conditional upon a continuation of strict austerity measures, which may prove the final nail in the coffin for the national economy. To avoid this, the future of the Greek debt relief inevitably requires a debt write-down.

The Greek debt deal

The current Greek debt package constitutes the latest episode in the long saga of the Greek sovereign debt crisis, which has been at the epicentre of the political debate in the EU for the better part of the last decade. With Greek public debt amounting to a nominal value of €340 bn. and corresponding to 180% of the country's GDP, it was widely accepted that a restructuring was essential in order for Greece to access the capital markets at the conclusion of the third bailout programme in August 2018. Such restructuring would seek to ensure that Greece is able to service its debt in the long run, without reliance on official sector financing. In technical terms, this translates to keeping the country's Gross Financing Needs (GFNs)[1] below 15% in the medium term and below 20% in the long term, as agreed by the Eurogroup on the 25th of May 2016.[2]

In order to achieve these targets, the country's European creditors agreed to restructure around €130 billion of loans extended to Greece by the European Financial Stability Facility (EFSF) in 2011. This restructuring will take the form of a deferral of interest and amortisation by 10 years and an extension of maturities for an additional decade. The deal also involves the waiver of certain extra interest payments on a portion of the EFSF loans (the so-called "step-up interest rate margin"). Furthermore, Greece will receive every semester, and until 2022, the profits made by the ECB and National Central Banks (NCBs) on their holdings of Greek bonds,[3] amounting to around €4 billion. Such payments, together with the disbursement of the final tranche of the current financial assistance programme by the ESM, amounting to €15 billion, will provide the country with a sufficient "cash buffer", so that it can access the markets with less difficulty. The Eurogroup also agreed to reconsider, at the end of the EFSF grace period in 2032, whether additional debt measures are needed in order to ensure that the agreed GFN targets are met.

The above arrangement however comes with a price. More specifically, in order to ensure debt sustainability, the Greek government has pledged to meet strict fiscal targets for the next decades, undertaking to achieve a primary surplus of 3.5% of GDP until 2022 and of 2.2% on the average, until 2060. In fact, the Eurogroup statement contains an annex outlining specific commitments by Greece "*to ensure the continuity and completion of reforms adopted under the ESM program*".[4] To make sure that these targets are met, Greece will be subjected to the Enhanced Surveillance Procedure, as its economic, fiscal and financial situation will be monitored on a quarterly basis. Such quarterly reports will also serve as the basis for the disbursement of €4 billion from the ECB's holdings of Greek bonds. Thus, while officially concluding the Third Financial Assistance Program with the ESM, the country will remain on a short lease for decades.

> THE CRITICAL QUESTION IS WHETHER THE CURRENT DEBT ARRANGEMENT IS SUFFICIENT TO HELP GREECE RETURN TO THE MARKETS AT A SUSTAINABLE RATE

Are the measures sufficient to restore debt sustainability?

While any debt relief would be welcome, the critical question is whether the current debt arrangement is sufficient to help Greece return to the markets at a sustainable rate.[5] In fact, the necessary extent of such restructuring has been a point of contention between Greece's two biggest creditors, the IMF and the Eurozone, for the past two years. The source of the disagreement is the divergent evaluation of Greece's ability to maintain the fiscal targets agreed, particularly regarding the evolution of the primary surplus. On the one hand, the European institutions appear confident about Greece's future fiscal performance and thus foresee that debt sustainability may be achieved through a combination of fiscal discipline and medium- and long-term debt relief, mainly involving the agreed reduction of the interest rates and the lengthening of loan maturities on EFSF loans.[6] On the other hand, the IMF has long been advocating that achieving and sustaining such high primary fiscal surpluses is highly improbable and that additional debt relief measures are required to ensure the sustainability of Greek public debt in the long run.[7]

The adequacy of the agreed debt relief measures depends largely on Greece's ability to achieve and maintain these fiscal targets. During the past years, Greece has pursued primary surpluses mainly through a strategy of over-taxation of the private sector[8], casting considerable doubt on their sustainability. For example, the country has managed to achieve, and even exceed, the target of a primary budget surplus of 1.75% for 2017 with tax hikes, increases in social security contributions and by not honouring internal payment obligations (holding back money owed to State providers, as well as by delaying the return of sale taxes and the payment of pensions). There is no need for a complex economic model to realise that through these tactics Greece will not be able to satisfy the attached conditionality for much higher surpluses over the next 42 years. In reality, the tax paying capacity has been exhausted following almost a decade of draconian austerity. Tax and social security contributions arrears are building by the millions each month and are now in excess of €130 bn., a 50% increase compared to 2014. Collection measures, imposed on State debtors, involving thousands of confiscations per day, have failed to bring as much revenue as expected. Also, the Greek welfare system is at a critical point and the unemployment rate is at 20.5%, placing Greece at the top of the unemployment table within the European Union. Some economists even argue that the fiscal targets are in reality much higher than portrayed in the debt agreement. It is suggested that when the applicable interest rates are taken into account, the required primary surpluses will be effectively in the range of 5.3% of the GDP through 2022 and of 4% of the GDP for the 2023-2060[9] period.

Inevitably, Greece will not be able to achieve the agreed primary surpluses, especially when taking into account that the government will have to drain

> **“ THE AGREED RELIEF MEASURES ARE, WITHOUT DOUBT, COMMENDABLE STEPS TOWARDS THE SUSTAINABILITY OF THE GREEK DEBT ”**

funds from the private sector at a substantial cost. It is noted that on the day of the Eurogroup meeting the Greek 10-year bond yield stood at 4,00 %, the lowest since February, but still the highest in the Eurozone. At the same time, there are no solid signs that this will dramatically improve. If nothing else, Greek bonds are most likely going to be among the less resilient to market swings. In fact, the IMF's projections suggest that, in the medium run, as official debt is substituted by more expensive borrowing from private sources, the country's financing needs will exceed 20% of the GDP. This will create a potentially explosive situation;[10] it is feared that in the late 2020s the Greek debt dynamics will again be unsustainable[11].

The impact of the deal on economic growth

While the Eurogroup's approach, requiring a high primary surplus for a very long time and allowing relatively little debt relief, is internally consistent, it is not consistent with international experience.[12] Evidence suggests that very few countries (mainly oil- and other resource-rich countries) have historically achieved such high fiscal targets for such a prolonged period of time, as agreed for Greece.[13] Furthermore, in these instances, high primary surpluses were backed by a strong real growth, rather than a strategy of fiscal consolidation. Greece will have to keep on track with its fiscal targets and foster economic growth at the same time. However, the one objective seems to negate the other, since the path to the required fiscal targets is paved with tough austerity measures. Unfortunately, such measures have only served to prolong recession, with the Greek economy sinking by 28% from its pre-crisis level. In reality, adherence to these fiscal targets will deprive the country of the necessary fiscal space in order to implement a growth-oriented policy.

The need for a debt write-down

The agreed relief measures are, without doubt, commendable steps towards the sustainability of the Greek debt, at least in the medium term. However, as explained above, the debt package does not go far enough to ensure that Greece will be able to stand on its feet in the long run. Greece, inescapably, needs a limited face value debt relief without any delay. If such decision is deferred for the future, the cost of a debt restructuring will be much higher than the additional debt relief required to make the debt sustainable today, considering that the official sector would in effect be repaying around €100 billion in expensive new borrowing acquired from the markets in the meantime[14].

Nevertheless, any discussion for a write-down is still an anathema for Greece's European creditors. Admittedly, there are sound arguments to support this stance, centering on moral hazard, EU Treaty constrains, etc. However, the key obstacle in finding a solution to the Greek debt crisis is, and has always been, political, and not economic or legal. The real economic substance of the Greek debt resolution was settled long ago, when official creditors agreed to take on the majority of the country's debt and shoulder the risk of a future Greek haircut.[15] Thus, if a political decision is made to solve the Greek debt problem, there are plausible ways to do so without aggravating moral hazard and, at the same time, being in line with Article 125 of the Lisbon Treaty, which provides that Member States may not bail-out fellow EU countries. Namely, the face value debt relief will need to be structured in a way that strengthens budgetary discipline, linking measures to fiscal turnouts and clawing back relief when imposed targets are not respected[16]. A restructuring along these lines will not only provide a substantial opportunity to the national economy to grow but, more importantly, fit much better the description of a "*historic moment for the Eurozone*". ■

Footnotes:

1 Gross financing needs (GFNs) are defined as the overall new borrowing requirement plus debt maturing during the year. Essentially, they measure how much a country must borrow each year in order to service its debt, given its income and noninterest expenditures. See IMF Fiscal Monitor 2015, Glossary.
2 Available online at https://www.esm.europa.eu/press-releases/eurogroup-statement-greece-25-may-2016.
3 These profits refer to interest income on bonds held by the ECB as a result of the Securities Market Program (SMP), which was instituted in 2010 and discontinued in 2012 and by the Eurosystem Central Banks also hold sovereign bonds (among them also Greek ones) in the context of the Agreement on Net Financial Assets (ANFA). The Greek sovereign bonds held by those institutions were acquired before 2012 and thus were not subject to the 2012 Greek bond restructuring.
4 See Annex to Eurogroup statement on Greece of 22 June 2018 available online at http://www.consilium.europa.eu/en/press/press-releases/2018/06/22/eurogroup-statement-on-greece-22-june-2018/
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New legal framework in Croatia to rescue Agrokor

Simon Rowley and Greg Cross report on retailer Agrokor's finanical crisis and subsequent turnaround

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Agrokor is the largest privately-owned group in the Republic of Croatia and one of the Adriatic region's largest vertically integrated companies with distribution markets all across Europe. Agrokor's revenue of EUR 6.1bn is equivalent to 12% of Croatia's GDP.

It operates through several strategic business segments including retail and wholesale, food production and distribution and agriculture. It also owns many diverse businesses outside these core sectors.

Agrokor's financial crisis was caused by external factors and management decisions

During 2016, Agrokor started to suffer as a result of negative macroeconomic trends with increasingly aggressive low-cost retail competition gaining an increased market share, which reduced Agrokor's revenues and also impacted negatively on profits.

The governance structure whereby many major decisions were made solely by the CEO, Mr Ivica Todorić also contributed to the increased pressure on the group.

Key pressures created by the group's strategy included the historical M&A "buy and build" model and over-investment in production facilities, which were incapable of producing sufficient return on expenditure. Furthermore, archaic financing solutions that included bills of exchange, trade loans and cessions provided short term solutions to day to day issues but were inappropriate for the group's size and complexity. This contributed to a "house of cards" effect where a serious issue in one entity very quickly spread to affect the whole group.

These pressures presented the group with a very challenging liquidity situation and although Agrokor successfully raised EUR 100m of new financing in the first quarter of 2017, it was insufficient to make regular payments to its suppliers, which resulted in reduced or suspended deliveries of goods and services.

The legal framework was developed specifically for this situation

As the government became increasingly aware of the difficulties facing Agrokor, it was concerned that a failure of the business could lead to economic instability in Croatia, as many Croatian suppliers which relied heavily on Agrokor began to find themselves in a difficult financial

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> **THE GOVERNMENT REVIEWED ITS CURRENT BANKRUPTCY PROCEDURES AND DECIDED THAT THEY WOULD NOT BE SUITABLE FOR AGROKOR**

position as a result of Agrokor's liquidity squeeze. Accordingly, at the beginning of 2017, the government, led by Prime Minister Andrej Plenković, but directly managed by Martina Dalić, the Deputy Prime Minister (DPM), reviewed its current bankruptcy laws and decided that the current pre-bankruptcy and bankruptcy procedures would not be suitable for Agrokor's size, complexity and systemic importance and therefore began the development of a third, new reorganisation regime, the Law on the Procedure for Extraordinary Administration of Companies of Systemic Importance for Croatia (the EA Act), which came into force on 6 April 2017.

The EA Act was designed to provide protection from creditors for a period of up to 15 months, allowing the debtor to find a settlement plan (effectively a restructuring proposal), which must be agreed for by either a simple majority in number and value of each creditor class or by 66 2/3% of the total value of creditors.

The commencement of proceedings resulted in the appointment of a new management team for the group

By the end of March 2017, it became clear that Agrokor had insufficient liquidity to continue normal operations, as demands for payments amounting to over EUR 460 million had been filed against the group's companies.

Discussions with the government for a bailout were unsuccessful and ultimately Mr Todorić turned to the courts to seek the protection of the EA Act. On 10 April 2017, Agrokor entered the Extraordinary Administration and Ante Ramljak was appointed as Extraordinary Commissioner (EC).

Immediately following the appointment, Agrokor's senior management team was removed from the holding company board as required under the law. Mr Todorić subsequently left Croatia appearing in London some weeks later, where he still resides. The Croatian state prosecutor commenced an investigation into events leading up to the filing and issued an international arrest warrant following allegations of fraud in connection with his actions at Agrokor. Extradition proceedings are currently ongoing with an appeal being lodged by Mr Todorić, after the initial hearing in April 2018 determined that Mr Todorić should be returned to Croatia.

Liquidity was an immediate issue with additional capital urgently required

As there was almost no cash available in the group's key operating entities on 10 April 2017, the Extraordinary Administration immediately set about raising new finance, an action permitted under the EA Act.

Within a few days, the Extraordinary Administration was able to secure EUR 80m of funding from local lenders in order to address immediate liquidity challenges. This was designed to allow the businesses to continue operations and undertake some belated preparations for the critical summer tourist season, a period where historically 40% of annual EBITDA is generated. To assist with the systemic challenges facing the country, it was important to ensure this liquidity could quickly find its way to suppliers in order to secure continuity of business and thus, a portion of the funds raised were used to settle certain pre-petition liabilities. A significant portion of these payments were made specifically in respect of "border claims", invoices which were dated prior to the EA commencement, but fell due afterwards.

As it was clear that the initial EUR 80 million would be insufficient for Agrokor's medium term liquidity needs, a more extensive new money process was launched and by June 2017, the Temporary Creditors' Council approved a EUR1.06 billion super-senior facility comprising EUR 530 million of new money (including a refinancing of the initial EUR 80m) with the remaining EUR 530 million being the refinancing of pre-petition debt and its conversion to a super-senior ranking on a EUR 1 to EUR 1 basis. The refinancing was unsuccessfully challenged by certain creditors who argued that the EA Act did not allow such a move.

This additional liquidity provided Agrokor with sufficient cash to provide a stable platform from which it could start to rebuild trust with suppliers and resume normal operations.

It also expressly provided for a pool of up to EUR 150m, which could be used to pay pre-petition debts of critical suppliers in order to ensure that these businesses could continue operations and support Agrokor' s on-going business.

The financial position of Agrokor was different from what many stakeholders thought

Shortly after the commencement of the proceedings, advisors were engaged to provide an initial view of Agrokor's capital structure, identifying that the group had over EUR 6bn of debt, including EUR 505m in secured debt. Many stakeholders had previously understood that there was minimal, if any, secured debt.

Given these findings, the Extraordinary Commissioner determined that new auditors would be required and PwC was engaged to audit the 2016 financial statements. Once finalised, this resulted in write-downs of EUR 2.9 billion through various adjustments resulting from accounting irregularities and meant that post adjustments liabilities exceeded total assets by EUR 1.9 billion, providing a basis for the Extraordinary Commissioner to bring criminal charges against Mr Todorić for, among other things, falsifying financial reports.

After liquidity was stabilised, a restructuring proposal was developed to address the unsustainable capital structure

As operations eventually began to normalise, an interim governance structure was put in place whilst the restructuring plan was developed. During this time, Agrokor developed a granular bottom-up business plan for the ongoing operational development and sustainability of the operating business of the group. They indicated that the group was profitable and had the potential to further improve, but that the existing capital structure was not sustainable.

The business plan provided the EA with a robust forecast, from which the creditors' financial recoveries in the settlement plan could be foreseen. The objective of the settlement plan was to maximise returns for the creditors by ensuring that the group continued as a going concern, as opposed to a liquidation or the disposal of some or all of the operations.

The restructuring proposal was published in December 2017 setting out that the creditors would swap impaired debt for equity and other instruments in a deal that would allow them to take full ownership of the group with their shareholdings being based on the estimated returns on an entity by entity basis across the companies included in the EA.

As negotiations progressed, the public and the political pressure resulted in the replacement of both the Extraordinary Commissioner and the Deputy Prime Minister

Agrokor had made front page news since April 2017 and the former CEO had, through a blog he set up, been attacking both the process and the participants for many months. One of the challenges was in relation to the new law and whether it was constitutional; the Court ultimately confirmed it was, but this took time. Other challenges related to the writing of the law, email leaks related to the DPM, the cost of advisers and conflicts of interest. As a result of this pressure, the EC, Ante Ramljak, concluded that his continued involvement was a hindrance to reaching the settlement and resigned in February 2018.

Shortly thereafter, Fabris Peruško was appointed as the new EC of Agrokor, with Irena Weber as his deputy. The DPM, Martina Dalić, also resigned a couple of months later, amid tremendous pressures on the process and on the government.

Mr Peruško picked up from Mr Ramljak in leading the negotiations with the Temporary Creditors' Council and by 10 April 2018, the anniversary of the start of the proceedings, a commercial agreement was reached with creditors and a term sheet published. A three-month extension of the EA process was secured, enabling the finalisation of the documentation and presentation of a settlement plan to creditors. The key elements of the settlement plan remained consistent with the proposal published in December 2017. Some additional nuances included contingent payment rights for certain creditors, based on future business performance and a solution for the recourse rights, related to bills of exchange.

The plan also allows for the largest secured creditor, Sberbank, to swap its existing minority stake in the Slovenian subsidiary Mercator for an additional stake in the new group structure. This is particularly beneficial as Sberbank had commenced litigation against some of the group's entities in other jurisdictions, where the EA protection was not recognised. In response, Agrokor had challenged Sberbank's claims against the group. Ultimately, value was preserved for all creditors, as agreement on this crucial component of the settlement plan included both the withdrawal of litigation from Sberbank and the acceptance of Sberbank's claim by Agrokor.

Although the EA Act was clearly not initially included in Annex A of the EU Insolvency Regulations, the Croatian government successfully applied to have it added and this occurred on 14 June 2018. The proceedings were recognised in the UK in the course of litigation and a Chapter 15 application was also successfully made to the US Courts. Some of the other local jurisdictions, notably Slovenia, have not yet recognised the EA Act.

The plan has been approved by creditors and the focus is now on implementing the plan and returning to normal business activity

The final plan was filed at Court on 26 June 2018 and on 4 July 2018, Croatia's largest ever court hearing was convened in the Cibona Basketball Arena in Zagreb, where the plan was approved by an overall majority of 80.2%.

The court confirmed the settlement plan shortly after, on 6 July 2018, triggering a period of 73 days during which depositing challenges would be possible. After satisfactory resolution to the challenges, the plan will be irrevocably confirmed and the process of implementation can commence. The protection of the EA Act will remain in place until the implementation process has been completed.

With a distributable value of EUR 2.8 billion and outstanding claims of EUR 5.6 billion as at that date, the plan was approved, the overall average recovery being of around 50%. This is not a true benchmark of returns to individual creditors, as the complexity of the group's financing structure and the permitted pre-petition payments during the EA process mean that individual creditor recoveries will vary materially.

Overall, the process was a successful restructuring of one of the region's largest companies, maximising returns to creditors, preserving jobs for over 50,000 people and ensuring economic stability in Croatia. Whilst it is clear the law could be further refined, and a mandatory review is likely to highlight areas of improvement, it is an encouraging sign that both the public and the private sectors can move rapidly together to deliver such preventive action – and all in 15 months. Where else could this have been done so quickly?

> **OVERALL, THE PROCESS WAS A SUCCESSFUL RESTRUCTURING OF ONE OF THE REGION'S LARGEST COMPANIES, ENSURING ECONOMIC STABILITY IN CROATIA**

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France is catching up

Reinhard Dammann writes on the anticipated transposition of the Directive on preventive restructuring frameworks

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The Draft Bill "PACTE" (the "Draft Bill"), which will be under discussion in the French Parliament in September 2018, contains several reforms intended to allow the Government to transpose by anticipation the future Directive on preventive restructuring frameworks (the "Directive"), itself largely inspired by the French pre-insolvency proceedings.

At the same time, the Draft Bill allows the Government to reform some aspects of the legal regime applicable to securities during insolvency proceedings. The clear intention behind these reforms is to increase the attractiveness and economic efficiency of continental insolvency laws through an accelerated Franco-German harmonisation, called for by the French President, Emmanuel Macron.

Classes of creditors

The Draft Bill intends to introduce in the French law the mechanism of classes of creditors (Article 64-I-1°). The Directive, which is to be transposed on this point follows the German (§ 222, para. 2, InsO) and the American (Chapter 11, US Bankruptcy Code) models in proposing the formation of classes so as to reflect the rights and seniority of the affected claims and interests under the restructuring plan. It also allows for the formation of sub-classes of creditors if their rights are sufficiently similar to consider them to be a homogenous group with a commonality of interest.

While it is still uncertain what the exact class formation criteria will be under the French law, the reform will certainly give rise to a more efficient system. Indeed, the French law currently differentiates between creditors on the basis of their status (financial creditors, suppliers, bond holders). This results in creditors with diverging interests and rights being part of the same comity. Surely, the insolvency practitioner can modulate the creditors' voting rights based on their securities and inter-creditor agreements. However, the modulation criteria are not predictable enough to reassure the creditors in complex financial restructurings.

On this point, the intended reform should result, as in German law, in a more efficient grouping of creditors, solely based on the objective similarity of the qualities of their receivables. In our opinion, it should also provide for a clear hierarchy between different classes, in order to facilitate the transposition of the absolute priority rule inspired by the German law.

Cross-class cram-down

While the French law currently provides for a cram-down of dissenting creditors within comities of creditors, for comities approve restructuring plans with a 2/3 majority, the Draft Bill intends to also implement a mechanism of cross-class cram down (Article 64-I-2°). Indeed, the Directive provides that a restructuring plan which is not approved by all the classes of creditors can be confirmed by a judicial or administrative authority with the debtor's agreement if it has been approved by at least one class other than the equity holders and the classes which would not receive any payment in the case of the debtor's liquidation (Article 11). The intended reform will therefore align French Insolvency law with its German counterpart, which already allows for a cross-class cram-down insofar as the plan is approved by a majority of classes.

While the Draft Bill does not explicitly anticipate such a reform, its wording should allow for the transposition in the French insolvency law of a mechanism imposing reasonable restructuring plans to equity holders where their approval is necessary, for instance in cases of debt equity swaps. Indeed, following the German example, Article 12 of the Directive provides for the application of the cross-class cram-down mechanism to such equity holders. By comparison, the French law only allows for a forced dilution or equity sale in very restrictive circumstances, where the debtor's liquidation would have a severe negative impact on the national or regional economy.

'Best interest of creditors' test

The Draft Bill empowers the Government to adapt the French law so as to ensure that the interests of creditors are respected where a restructuring plan is imposed through cram-down mechanisms, allowing therefore for the transposition of the 'best interest of creditors' test, provided for by both the Directive (Article 10) and the German law. Thus,

> IN THE WAKE OF BREXIT, THE INTENDED REFORMS COULD GIVE CONTINENTAL LEGAL SYSTEMS AN EDGE OVER THEIR COMPETITORS

where the plan is approved by the judicial authority, it has to make sure that the dissenting creditors are better off if the plan is approved than in case of the debtor being liquidated.

The reform of securities law

The Draft Bill empowers the Government to simplify and improve the general legibility of the French securities law. The clear intention is to make the French law more attractive for international investors and to increase its over-all effectiveness, thus facilitating the financing of the French companies. In particular, a reflection is under way concerning the reform of the law governing securities in case of insolvency proceedings.

For the sake of creating a coherent overall system, the reform could extend the effective regime of the French *fiducie-sûreté* to traditional securities, in order to render the situation of creditors in case of liquidation predictable and thus allow for a meaningful implementation of the above-mentioned 'best interest of creditors' test. Indeed, such a test is only possible where the comparison between the two situations for each creditor is feasible. Unfortunately, this is not yet the case in France, where securities are treated differently in case of a disposal plan and the sale of isolated assets. Moreover, the outcome of liquidation proceedings depends on the situation of the privileged creditors (notably, the employees).

Simplified proceedings

The Directive encourages Member States to allow struggling small entrepreneurs and companies to quickly restart their activities. Consequently, the Draft Bill empowers the French Government to render the simplified liquidation proceedings mandatory for the small and medium-size companies, which have less than five employees and a 750,000-euros turnover. These proceedings are simple, cheap and fast, as they should be closed within 6 months (1 year in exceptional circumstances) from their opening. They shorten, therefore, the period during which the debtor is forbidden to engage in any economic activities.

Furthermore, the Draft Bill provides for an obligation for judges to systematically suggest opening simplified non-liquidation proceedings (*rétablissement professionnel*) in favour of qualifying professionals and entrepreneurs. Such proceedings, which already exist but should become more popular, result in a general discharge of debt and allow for a quick recovery of the debtor.

Conclusion

The anticipated implementation of the Directive and the resulting Franco-German harmonisation will allow the French insolvency law, with its decades-long experience of pre-insolvency proceedings, to become a model for other countries. In the wake of Brexit, the intended reforms could give continental legal systems an edge over their competitors across the Channel. ■

Brexit's impact on cross-border insolvencies

Charles Draper brings us an update on Brexit and the impact it will have on the UK and the EU

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On 29 March 2017, the Government of the United Kingdom activated Article 50 of the Treaty on European Union, formally commencing the UK's exit from the EU.

The European Union (Withdrawal) Act 2018 fixed the exit date for 11pm on 29 March 2019. With only just over 6 months remaining until the UK officially divorces from the European Union, we summarise the current position and impact of withdrawal on EU-UK cross-border insolvency proceedings.

The current position of EU-UK cross-border insolvency proceedings

With the exception of Denmark, cross-border insolvency proceedings between the UK and EU Member States are governed by the *EC Regulation No 1346/2000 on Insolvency Proceedings* and the *Regulation (EU) 2015/848 on Insolvency Proceedings (Recast)* (the "EU Regulations").

The EU Regulations assist with the harmonisation of cross-border insolvency proceedings by:

- Establishing "main" and "secondary" insolvency proceedings and providing for a co-ordinated interaction between the two;
- Automatically recognising insolvency proceedings in foreign jurisdictions;
- Applying the local law of the country where "main" proceedings have been opened in other Member States; and
- Requiring co-operation and communication between foreign office-holders and courts to facilitate the co-ordination of cross-border insolvencies.

These benefits streamline proceedings; greatly reducing the time and cost involved, preserving foreign assets and assisting with recovery of those assets. These functions ensure parity between local and foreign creditors and help achieve the maximum return to creditors.

Update on Brexit

On 19 March 2018, the EU and the UK jointly published a draft agreement on the withdrawal of the United Kingdom from the European Union (the "Draft Withdrawal Agreement"). The

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Draft Withdrawal Agreement details the progress of negotiations of the terms on which the UK will depart from the EU, but does not deal with the legal framework that will govern the future relationship post-Brexit.

The Draft Withdrawal Agreement provides for an implementation period - lasting until 31 December 2020 - during which certain EU laws will continue to be applicable in the UK, giving the UK and the EU time to formulate a new framework to regulate cross-border matters. A joint statement from the negotiators of the EU and the UK published on 19 June 2018 confirmed that the EU Regulations will remain effective during the implementation period. However, this depends on the remaining terms of the Draft Withdrawal Treaty being agreed before 29 March 2019. If not, the UK will lose the benefit of the EU Regulations as of 30 March 2019; a so-called "hard" Brexit.

Hard Brexit

The UK Foreign Secretary announced last month that the chances of a "no-deal" Brexit are "*growing by the day*", although more recently it appears that a deal may be closer than thought. However, if a hard Brexit occurs, any UK insolvency proceedings with a cross-border element that commences after 29 March 2019 (and vice-versa) will no longer benefit from mutual recognition and the assistance provided by the EU Regulations. Instead, office-holders may need to incur the additional time, costs, disbursements and uncertainty of:

- Applying to the foreign court for recognition of their appointment and assistance in enforcing judgments and orders;
- Seeking assistance locally to apply the law of the relevant jurisdiction; and
- Dealing with foreign office-holders where there are competing insolvencies.

Additional complications may arise as a result of tension between foreign insolvency regimes or due to a lack of co-operation between foreign office-holders. This may cause foreign assets to be lost, harder to recover, or simply not cost effective to recover for creditors. In any event, an increased cost to creditors in any EU/UK cross-border insolvency is likely to be the outcome.

Prior to the EU Regulations, a small minority of EU Member States (Poland, Greece, Romania and Slovenia and the UK) adopted the UNCITRAL Model Law and those will continue to apply in the event of a "hard" Brexit. The Model Law also promotes recognition and assistance in cross-border insolvencies, but only between those countries which have adopted it, and not to the same extent as the EU Regulations therefore its value and assistance is, to a degree, limited. One of the main advantages to the EU Regulations is that they determine which Member State's law applies to the insolvency proceedings by reference to a company's COMI ("centre of main interests"). The Model Law does not provide a comprehensive alternative.

In the event of a hard Brexit, the Model Law (if adopted by the remaining EU Member States) would, at least in the short term, offer a more effective and harmonised insolvency regime with the UK than none at all, but if not, the UK will have to rely on domestic legislation and the laws of the remaining Member States in order to obtain recognition.

Soft Brexit

In the event the Draft Withdrawal Agreement is agreed upon, the EU and the UK will have further time during the implementation period to negotiate a future framework and mechanism to govern cross-border proceedings. Failing any agreement, the position will be the same as mentioned above if hard Brexit occurs next year, but with the EU Regulations ceasing to have effect in the UK from 1 January 2021.

It is still difficult to predict what the outcome will be.

Whilst it would be beneficial to both the UK and the EU to reach an agreement reflecting the EU Regulations and maintaining the status quo, the impact on free movement between the two economies as part of the wider Brexit-deal will likely cause difficulties in achieving that.

Alternatively, the UK is free to negotiate bespoke agreements with individual EU Member States but this would result in a complex web of insolvency regimes specific to each Member State, without the weight and status of EU law behind them.

Impact on the UK

It is hoped that the reputation of the UK's insolvency regime as an efficient, flexible and effective framework will not be undermined by Brexit. However, the differences between the UK's and the remaining Member States's insolvency regimes, combined with the effect of a weaker pound and the restrictions on free movement of goods and people, may cause the UK to be less attractive to foreign investors and multi-national corporates than previously was the case.

With a recent survey of UK office-holders indicating that 76% expect a hard Brexit will lead to more corporate insolvencies, the UK may also see companies seeking to re-establish themselves outside of the UK. ■

> **THE REPUTATION OF THE UK INSOLVENCY REGIME AS AN EFFICIENT, FLEXIBLE AND EFFECTIVE FRAMEWORK IS UNLIKELY TO BE UNDERMINED BY BREXIT**

Wrongful trading in Europe

Mihai Lanţoş looks into Western, Central and Eastern European directors' liability systems whilst they also prepare for a new EU Directive on insolvency

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All modern European systems of law in force today provide for some sort of liability system for directors of companies, triggered by situations related to insolvency.

If in some cases the obligations of the directors or the liability cases are loosely defined (holding the directors liable if general duties are disregarded), other pieces of legislation provide detailed and specific situations for misconduct leading to personal liability.

The present article undertakes to briefly analyze three of Europe's jurisdictions in this regard, looking into the common-law system of the UK, the high performance statutory law system of Germany and Romanian – one of Europe's most insolvency active jurisdictions, thus covering Europe from west to east. At the same time, the new development in EU legislation will be taken into account.

In the EU, the issue of the directors' duties plays an important role when it comes to insolvency. Article 18 of the EC proposed Directive on restructuring frameworks underlines the most common and widespread obligations of the directors in most European jurisdictions. This article defines the conduct the directors must have, putting together the general duties and those normally seen only in insolvency situations.

The general duties would be:

- taking reasonable steps to avoid insolvency; and
- avoiding deliberate or gross negligent conduct which threatens the viability of the company.

> “IN THE EU, THE ISSUE OF THE DIRECTORS' DUTIES PLAYS AN IMPORTANT ROLE WHEN IT COMES TO INSOLVENCY”

The specific duties in case of insolvency are:

- the obligation to take immediate steps in order to minimise loss (damage) for the creditors, workers, shareholders and other stakeholders; and
- the obligation to have due regard to the interests of the creditors and other stakeholders.

Section 5 of the Explanatory Memorandum on the EC draft Directive establishes that Article 18 should present an incentive for the directors to pursue early restructuring when the company is still viable (i.e. pursue a *safeguarding approach as opposed to winding-up*).

Article 18 of the EC proposed Directive bears a striking resemblance to Article 214 of the UK Insolvency Act of 1986 which defines "wrongful trading" under UK law. Although Article 18 of the draft Directive is broader and somewhat imprecise, it is similar in nature and interpretation to the above mentioned UK Article 214. Both articles describe the consequences of the actions of the directors in case of imminent insolvency and seek to determine the directors to act so that insolvency is avoided and, should insolvency be reasonably unavoidable, to aim at limiting the damage to creditors (stakeholders) of the company.

This provides for a shift of focus in the directors' duties when insolvency is imminent. If up to this point the directors had duties of a fiduciary nature towards the company, when insolvency is imminent they will have to safeguard the interests of the creditors (and other stakeholders), even if this would infringe the shareholders' interests.

UK: Every step

Under UK law the most commonly used defense of directors is the "*every step*" notion provided in section 214 par. (3) of the Insolvency Act of 1986, which provides for relief for those directors who, realising insolvency is imminent, took "*every step*" reasonably leading to safeguarding the creditors' interests by either avoiding insolvency or by minimising the potential losses where insolvency could not be avoided.

Such conduct should be based on the directors' diligent conduct towards the company's situation, meaning that they have to keep updated about the company's financial and economic situation and act accordingly.

In the past, case-law[1] has sanctioned the conduct of negligent directors who relied on "*speculative hopes*" that the situation of the company would turn itself around, rather than act on the basis of "*rational expectations of what the future might hold*".

The most recent case-law[2] outlined a more accessible "*every step*" defence, stating that directors cannot be held liable if they take professional advice and apply that advice once the situation changes. Such an approach is based on the "*high hurdle for directors to surmount*" presented by every step which should be taken to avoid damages towards creditors. Nonetheless, wrongful trading under the UK law is based on the breach of the reasonably diligent conduct of directors in safeguarding the creditors' interests in case of imminent insolvency.

Germany

Germany, one of the high-performance insolvency jurisdictions in Europe, has adopted a somewhat different approach, but one which still derives from the same general principles of safeguarding creditors' interests. The two main laws that commercial companies are concerned with are the *Aktiengesetz (AktG)* and *Gesetz für Gesellschaften mit Beschränkter Haftung (GmbHG)*. These provide distinct rules for public limited companies and limited liability companies, but both define the directors' duties. Section 43 paragraph (1) of GmbHG prescribes the obligation for directors to act in good-faith and as diligent businessmen. Section 93 of AktG gives more detailed elements for the directors' duties, which are to act in accordance with the law, the articles of the association and the decisions of the shareholders, so that the interests of the company as a whole should always remain a beacon for any of the directors' actions.

The *Insolvenzordnung (InsO)*, the German insolvency law, provides for a limited number of situations in which the directors' liability can be triggered. First and the most direct, section 15a of the InsO sanctions directors for "*Insolvenzverschleppung*", i.e. not filing for insolvency within 3 weeks of the setting in of *Zahlungsunfähigkeit* (inability to pay outstanding debt) or *Überschuldung* (overindebtness). Such misconduct is also sanctionable under section 823 par. (2) of the "*Bürgerliches Gesetzbuch*" (the German Civil Code). This section provides that a person can be held liable in case it fails to uphold legislation put in place for the protection of others.

Chapter 9 of *InsO* outlines the situations in which a debtor (i.e. directors) can obtain relief from unsettled debt and an under-section provides reasons for which the court may deny relief to the debtor company and the directors. A quick walk through these provisions outlines a general duty of the directors to act in such a way that the creditor's interests are safeguarded before or during an insolvency procedure[3], thus providing conditions resembling Article 18 of the EC draft Directive and the UK wrongful trading provisions. Also relevant in regard to liability of directors are the *Insolvenzstraftaten* (criminal conduct related to insolvency) prescribed under sections 283 – 283d of the German *Strafgesetzbuch (StGB)*, the German Criminal Code. Under these regulations, directors can be sanctioned with personal liability and criminal punishment for actions which lead to damages incurred by the company or the insolvency procedure (such as failure to keep records or reckless conduct of business). The widespread *business judgement rule* can be seen when analysing these provisions as a whole. Courts of law in Germany have time and again concluded that directors may not be so clairvoyant as to know the outcome of a business venture beforehand, but they have an obligation to act with care and always keep informed in regard to the situation of the company, so that they make decisions based on proper information.

Romania

Romania, one of the most insolvency-active jurisdictions of Eastern Europe, has codified the directors' liability in its companies act (Law No. 31/1990), as well as in its Insolvency Act (Law No. 85/2014). Section 114[1] of the Companies Act introduces the *business judgment rule* which is to be used in all decision-making processes in a company and during their implementation. Section 169 of the Romanian Insolvency Act of 2014 is much more creditor-oriented. In case the actions of a director (detailed under section 169) lead to insolvency, official receivers or even creditors have the opportunity to submit claims in courts of law so that the directors will be personally liable for debt unrecoverable from the insolvent company. Directors can be held liable for actions such as failure to keep records in accordance with the law, personal use of companies' assets and/or credit, preferential payment of creditors, etc. This approach indicates what the Romanian legislator considered to be the *wrongful trading* of Romanian directors. Although conditions for triggering liability under section 169 are limited to specifics described thereunder, the 2014 addition of paragraph (2) in this section allows for liability actions to be taken in all instances where the actions of the directors or third parties have led to insolvency.

Conclusion

Every one of the three jurisdictions mentioned above uses rules and conditions for liability developed over the course of its own legal history. These approaches are somewhat different but they all follow a principle rule that provides for triggering liability of companies' directors in case of *wrongful trading*. The term, however, is defined differently under each jurisdiction. The EU draft directive extracts the essence of *wrongful trading* which can be recognised throughout all three jurisdictions, making trading within the EU more predictable. ■

"THE EU DRAFT DIRECTIVE EXTRACTS THE ESSENCE OF WRONGFUL TRADING WHICH CAN BE RECOGNISED THROUGHOUT ALL THREE JURISDICTIONS"

Footnotes:

1 *Ward v Perks, Re Hawks Hills Publishing Company Ltd (in liquidation) [2007]* and, more famously *Earp v Stevenson, Re Kudos Business Solutions Ltd (in liquidation) [2011]*
2 *Ralls Builders Limited (in liquidation) [2016]*
3 For example, section 290 par. (1) pt. 4 denies relief for directors who intentionally or gross-negligently postponed filing for insolvency, thus affecting the possibility of creditors' claims to be settled.

A rose by another name has its thorns[1]

David Conaway advises not to get stuck in Chapter 11 when a sales contract is deemed to be an executory contract

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In 2017, the U.S.'s largest trading partner was the European Union at $717 billion.[2] Also in 2017, EU countries represented approximately 43% of foreign direct investment in the U.S.

This trade is memorialised by a variety of contracts including sales contracts, joint venture agreements, technology and licensing agreements, financing agreements, agency and distribution agreements, and real and personal property leases. With the growth of cross-border insolvencies by companies with operations and assets in multiple countries, and acknowledging that the U.S.'s Chapter 11 is an often utilised as a strategic business tool, it is likely that such contracts will be impacted by Chapter 11.

Foreign companies doing business in the U.S. should understand the legal and economic impact of Chapter 11. This impact on sales and supply contracts allows proactive advance planning to avoid or minimise risk of loss. The following insights are based on advising numerous clients regarding multi-year and multi-million or billion dollar sales and supply agreements that have been subjected to the Chapter 11 process.

Companies sell goods or provide services to customers usually on two bases:

(1) purchase orders and invoices with references to terms and conditions, or
(2) a written sales or supply agreement.

A formal sales or supply agreement is normally indicative of a more material and longer term commitment by the parties.

> "SALES AND SUPPLY AGREEMENTS ARE TREATED AS "EXECUTORY CONTRACTS" UNDER THE BANKRUPTCY CODE"

Beyond the parties' performance obligations set forth in the contract, agreements are the culmination of significant negotiation of the terms and conditions of the contract, and a business decision to dedicate capacity and provide commitments on pricing, terms of payment and customer service, all of which are significant economic investments. In the event of a problem, the risk of loss is far greater than unpaid invoices.

Executory contracts

Sales and supply agreements are treated as "executory contracts" under the Bankruptcy Code, which is the statutory framework for Chapter 11 cases.

Debtors are provided the right to decide to assume, to assume and assign, or to reject executory contracts. This decision is required as part of the plan of reorganisation process, which normally occurs at the end of the Chapter 11 process. Pending a debtor's decision, the parties are generally obligated to continue performing.

In Chapter 11 cases where the "main event" is a Section 363 sale of all of the assets of the debtor to a third party, the outcome for material contracts is usually resolved as part of the sale process. The relevant pleadings and documents regarding the sale include a sale motion, the stalking horse asset purchase agreement (addressing assumed obligations and contracts), the proposed bidding procedures for a sale auction, and a proposed sale order, all of which are subject to objection by any stakeholder. As such, a Section 363 sale is both a "contested matter" (litigation) and a complex M&A transaction. Accordingly, suppliers must engage in the nuances of the Section 363 process to protect their contract rights.

If a debtor seeks to assume, or to assume and assign, the contract, he or she is obligated to:

(1) Cure pre-petition arrearages, meaning paying outstanding pre-petition accounts receivable balances, and
(2) Provide to the supplier "adequate assurances of future performance."

In the case of an assumption and assignment, the debtor as a practical matter delegates the adequate assurances obligation to the buyer.

If a contract is assumed, and arrearages are paid and adequate assurances are provided, the supplier should have successfully avoided the risk of economic loss.

If the debtor elects to reject a contract, any outstanding pre-petition balances will likely not be paid. Rejection is deemed a pre-petition breach of the contract, and the breach of contract damage claim (under Article 2 of the Uniform Commercial Code) is a pre-petition general unsecured claim. Such claims unfortunately rarely receive any meaningful value. Clearly, rejection of a material contract results in losses regarding the current obligations owed under the contract and regarding damages for breach of future performance.

In a recent matter we handled, the supplier invested in the development of plant capacity to support a customer's new product. The customer was unable to contribute to the investment. Instead, the contract provided for minimum purchases, and for a payment to the supplier calculated on the basis of purchasing shortfalls, meant to compensate for the customer's share of the investment. Generally, such investment losses are greater than the loss arising from non-payment of current invoices.

There are also a number of complexities of the assumption or rejection process that impact the supplier's risk.

1. Post-petition sales to an at-risk customer/debtor.

Generally, the parties must continue performing post-petition, and debtors (and lenders and/or buyers behind the scenes) certainly seek to enforce performance through the terms of the contract, which usually requires additional shipments of goods and credit extensions. Such obligations may well increase the supplier's risk due to the financial condition of the customer and the uncertainty of outcome in Chapter 11.

Suppliers should be aware of significant protections that mitigate this risk, under Article 2 of the U.C.C., particularly U.C.C. Sections 2-609 and 2-702 regarding anticipatory breach and cash before delivery shipments, which can relieve obligations to ship or to extend credit. Suppliers can anticipate that debtors will assert that the Bankruptcy Code trumps Article 2, but case law supports Article 2 as "applicable non-bankruptcy law" that governs the parties' rights and obligations.

Often the most important risk-assessment factor is the sufficiency and the terms and conditions of post-petition (DIP) financing. For example, DIP financing orders usually require modification (or objection) to carve-out any ownership or security interests of a supplier, as well as protect any intellectual property rights.

2. Critical vendor

Depending on the particular Chapter 11 case, essential vendors doing business on a purchase order and invoice basis can receive payment of some or all of their pre-petition claims in exchange for an agreement by that vendor to continue uninterrupted shipments and extensions of credit. Suppliers should be aware that performance obligations required by the Bankruptcy Code under a sales or supply agreement may limit this "remedy".

3. Anti-assignment clauses

Provisions in sales and supply agreements that require consent as a condition of an assignment are generally not enforceable in Chapter 11. However, courts have held that assignment provisions that are "material and economically significant" are enforceable. Suppliers are well-advised to include in the material contracts specific economic requirements of any assignee, rather than defer this analysis to a general "consent" provision.

4. Integration of related agreements

Often in the context of sales and supply agreements, there are related agreements such as security or other credit enhancement agreements or intellectual property agreements. Such agreements should be clear that they are integrated and interdependent contracts that must be assumed (or rejected) in toto. Otherwise, there is the risk that a debtor could attempt to assume a favourable supply agreement, but reject a security agreement that was essential to the supplier when entering into the sales contract.

5. Cure of pre-petition arrearages

In cases of related or integrated contracts, there may be pre-petition obligations owed under more than one contract. It is prudent for the obligations owed under integrated contracts to be "cross-defaulted" in order to achieve maximum benefit of the cure requirement.

A sales and supply agreement generally indicates a material economic commitment or investment by the parties. To avoid or manage the risk of economic loss, companies should understand the impact of Chapter 11 on such contracts and the preventative measures that can be implemented at the outset, thus avoiding the uncertainties of the Chapter 11 process. ■

Footnotes:

1 Likely the first fused "quote" of Shakespeare and the rock group Poison.

2 2017 U.S. Census Bureau.

"PROVISIONS IN SALES AND SUPPLY AGREEMENTS THAT REQUIRE CONSENT AS A CONDITION OF AN ASSIGNMENT ARE GENERALLY NOT ENFORCEABLE IN CHAPTER 11"

Tackling rising consumer insolvency in Poland

Pawel Kuglarz writes on consumer insolvency in Poland following his presentation at the recent EECC Conference in Riga

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For several years, consumer bankruptcy in Poland has been increasing. In our country, this instrument is still failing because it allows solving the debt problem for a small number of people.

In 2017, 5,535 people were delinquent, in 2016 only 4,436 people (out of 8694 applications filed for bankruptcy). In previous years, it was even worse (only 32 bankruptcies in 2014). Considering the number of applications submitted so far in 2018, a dramatic increase in the number of declared consumer bankruptcies can be expected next year.

In Canada, comparable to Poland in terms of population, annually ca. proceedings related to consumer insolvency more than 100.000, in the US - over 700,000, in France - about 200,000, in England and Wales - about 90,000, in Germany - about 100,000. The present state is still a drop in the ocean of needs, because 1.8 million Polish citizens have debts in the amount of 25,000,000,000 PLN

> "A DRAMATIC INCREASE IN THE NUMBER OF DECLARED CONSUMER BANKRUPTCIES CAN BE EXPECTED NEXT YEAR"

Personal scope

Consumer insolvency is dedicated to natural persons not engaged in economic activities. Former business activity does not exclude the debtor from filing for consumer bankruptcy. Consumer bankruptcy is also available to natural persons who used to be entrepreneurs, if less than one year has passed from the day of their cancelling their registration in a relevant register.

The debtor is insolvent if he does not perform his due obligations. There is a presumption that the debtor does not perform his due obligations if he is late more than three months. There is an additional prerequisite for legal persons – over-indebtedness: a state of excessive indebtedness can form the basis for a declaration of bankruptcy only when it lasts more than 24 months.

Negative grounds (exclusions)

There are some restrictions in accessing to consumer bankruptcy proceedings in Poland, based on the concept of a "deserving debtor". Most of them can be waived in case of compelling equity or humanitarian grounds.

First and foremost, the court rejects the debtor's or the creditor's petition for bankruptcy if the debtor has caused insolvency or significantly increased its extent intentionally, or as a result of gross negligence. The above restrictions can be waived by the court if the interest of justice or humanitarian grounds justify the opening of proceedings.

Costs of proceedings

The debtor is charged PLN 30 (8 Euro) when filling a petition. If the assets of an insolvent debtor are not sufficient to cover the costs of proceedings, the costs can be temporarily covered by the State Treasury. If the court cancels the bankrupt's debts without arranging the repayment plan for the creditors, the costs of the bankruptcy proceedings covered by the State Treasury will be waived.

Legal framework

The proceedings initiated as a result of a debtor's petition

Consumer bankruptcy involves a sale of the debtor's assets in ordinary bankruptcy proceedings and subsequent adoption and realisation of a payment plan over a period of up to three years (extendable by a further 18 months). Discharge is also possible without liquidation or without a repayment plan. The debtor loses his or her right to administer, use and dispose of the assets. There is a possibility of concluding an arrangement with creditors.

The proceedings initiated as a result of a creditor's petition

In principle, consumer bankruptcy involves only the liquidation of the assets of the bankrupt and the satisfaction of the creditors. Debt cancellation is only available if the debtor's insolvency is not intentional or due to gross negligence. There is still a possibility of concluding an arrangement with creditor.

Special regulations regarding the residential premises

The receiver may authorise the debtor to sell the movables included in the bankruptcy estate. If an apartment or a house where the debtor has lived is included in the bankruptcy estate, and the debtor and his dependents have no other housing available, the debtor is entitled to a housing allowance from the proceeds of the sale of his apartment or house, in an amount equivalent to the average rent of a residential apartment in the same or a neighbouring locality, for 12 to 24 months, to be specified by the judge-commissioner.

Problems

The last amendment of consumer bankruptcy replaced previous provisions criticised for their inefficiency on 31 December 2014. The new regulation liberalised access criteria and introduced State financing for debtors with insufficient assets to pay for the costs of the proceedings. But new problems appeared.

One of the biggest problems currently faced by Polish bankruptcy courts is the number of consumer bankruptcies that overwhelms their organisational capabilities, and this causes a significant delay in the treatment of company bankruptcy because:

- there are not enough insolvency courts;
- the insolvency courts are too charged with consumer bankruptcy cases;
- insolvency proceedings take very long; and
- there is no Central Insolvency Register.

From February 1, 2018, it was planned to launch an electronic Central Restructuring and Bankruptcy Register (Central Insolvency Register) which was to streamline the proceedings. There is simplified version of the registry - the National Register of Indebted Persons (hereinafter: KRZ), but KRZ cannot replace the Central Insolvency Register. Poland unfortunately did not establish such a register, although she was obliged to do so till 26 June 2018.

The Ministry of Justice has just presented a draft of a new law liberalising these proceedings.

The new liberalisation project

The proposal wakes hopes and doubts. The positive side is that the new project provides for a prepared liquidation (the so-called pre-pack) in consumer bankruptcy. The project assumes that the essential assets of the bankrupt consumer can be sold already at the start of the consumer bankruptcy proceedings, which will allow even

faster acceleration of this procedure. For the pre-pack the debtor or the creditor can equally apply. The applicant has to submit the valuation of the debtor's assets under the form of a report prepared by a person entered on the list of court experts, the draft of the sale contract, including the price proposal by the investor and the name of the buyer. After two years Poland already has a positive experience with the pre-pack procedure.

The second main change is very controversial.

There are no preconditions for the discharge of any debtor, even if the debtor caused insolvency or significantly increased its extent intentionally or as a result of gross negligence.

As we know, a debtor is considered insolvent if he does not perform his due financial obligations and there is a presumption that debtor does not perform his due financial obligations, if he is late by more than 3 months.

These solutions are similar to those successfully operated, e.g. in the United Kingdom, where the causes of insolvency are not even examined.

The debtor will be able to enter an arrangement with the creditor without declaring bankruptcy, outside the court, with the participation of a licensed restructuring advisor, who will ensure that the arrangement is executed in this way.

It is planned to introduce four to eight years' repayment plans, depending on the degree of fault in bringing about the insolvency. Improper pre-insolvency behavior will still allow the debtor to declare bankruptcy, but it will extend the repayment plan. The commitments that cannot be repaid because of illness, accidents or death will be included in the repayment plan for up to 3 years and the remaining part of the debt will be written off.

It is not clear, if the new consumer insolvency will extend the grounds of the declaring of the bankruptcy (debts in francs) and introduce the possibility of exempting a natural person from declaring bankruptcy if he or she has no property or income (e.g., is supported by family members). For such people, there is neither liquidation phase, nor repayment plan.

The liberalisation should help consumers, but the result can be the opposite. The banks and other financial institutions can demand additional securities, e.g. land mortgage, privileged in insolvency. The change that even grossly negligent, dishonest consumers can be discharged would not be fair to honest consumers. There is a saying in Polish: "the operation was successful, but the patient is dead".

> "AFTER TWO YEARS POLAND ALREADY HAS A POSITIVE EXPERIENCE WITH THE PRE-PACK PROCEDURE"

Share your views!

New kid in town: The corporate restructuring mediator

Catarina Serra introduces us to the new player in the Portuguese restructuring arena

CATARINA SERRA
Justice of the Portuguese Supreme Court

When the Eagles wrote the song "New kid in town" for their famous album "Hotel California" released in 1977, they were not obviously thinking of the professional Portuguese restructuring player just introduced, which goes by the name of "corporate restructuring mediator" (hereinafter: CRM).

Nevertheless, the metaphor may be helpful to understand the expectations created by the introduction of a new player on the field and the contradictions involved in the general rules applying to the CRM.

Where does the corporate restructuring mediator play?

Given the synchrony between the CRM and the new regime of out of court corporate restructuring[1] it was only natural to assume that he or she would be a core player in this regime and an *exclusive player* of this regime[2]. But such an assumption would be misleading: not only the appointment of a CRM in the regime of out of court corporate restructuring is optional but also his/her appointment can concern other settings (i.e. other restructuring arrangements or proceedings). It is possible to say that at most the CRM is a *natural* participant in out of court arrangements.

The law defines the CRM as the person who provides assistance to companies which find themselves either in economic distress or in actual insolvency and which plan to enter into negotiations with their creditors in order to reach an out of court restructuring agreement.

The only requirement for the appointment of a CRM is that the company should aim at restructuring: the economic and financial situation of the company (pre-insolvency or insolvency) seems to be completely irrelevant[3]. Despite the reference to the out of court nature of the restructuring, the legal instrument chosen to carry out the restructuring (out of court restructuring arrangements or formal restructuring proceedings) seems equally indecisive, since the only way an insolvent company may achieve restructuring is through formal (insolvency) proceedings[4]. This may lead to practical problems (of overlapping), considering that these proceedings revolve around a concurrent professional – the insolvency administrator/practitioner.

What are the duties of a corporate restructuring mediator?

The CRM has four core duties: to assess the company's economic and financial situation, to assess, together with the company's directors, the company's prospects of restructuring; to assist the company on the draft of a restructuring agreement and, finally, to help the company in the negotiations with its creditors.

In particular, in the new regime of out of court corporate restructuring, the CRM is expected to help the company to draw up a financial and economic assessment, which is meant to provide the elements necessary for the creditors to

> "THE ONLY REQUIREMENT FOR THE APPOINTMENT OF A CRM IS THAT THE COMPANY SHOULD AIM AT RESTRUCTURING"

contemplate the restructuring.

There is only one provision concerning his/her role in the pre-insolvency proceedings, according to which the CRM is assigned the task of providing assistance to the company in the negotiations.

Weighing all this, it is arguable that, despite his *nomen juris*, the CRM is not a genuine mediator but rather some kind of advisor or consultant, acting (more) on behalf of the company and lacking the typical features (independence, impartiality, neutrality) that characterise the mediator. As a matter of fact, this is not surprising considering a substantial part of his remuneration is borne by the company.

How and by whom is the corporate restructuring mediator appointed?

Although the initiative belongs to the company only, the entity with the power to appoint the CRM is the so-called Institute for the Support of Small and Medium Enterprises (hereinafter: ISSME).

The CRM must have his/her name registered on an official list and the rule is that the appointment respects the sequential order, i.e., follow the criterion "first in, first out". In exceptional cases, the ISSME may "bend" the rule and appoint a different CRM if it presumes that the CRM who follows on the list lacks the skills and the experience required.

In any case – and this is indeed the point to be stressed – the company does not have a saying on the appointment of the CRM.

Now, a crucial factor for the company when requesting the appointment of a CRM is the expectation that there will be, at its side and on its side, someone endowed with the expertise to carry out the restructuring but, most of all, someone who is reliable and trustworthy. If the company is not given any chance to choose or contribute to the choice of "its" CRM, it is very unlikely that it will be motivated to request this appointment.

How and by whom is the corporate restructuring mediator remunerated?

The CRM's remuneration consists of a basic remuneration plus a remuneration to be paid in case of a successful conclusion of the restructuring agreement – a kind of success fee.

The payment of the basic remuneration is split into 3 instalments: the first to be paid after the appointment of the CRM; the second to be paid after the drawing up of the "restructuring plan" and the third after the closure of the negotiations. It follows that only the first instalment is completely sure, the latter depending on the fulfilment of certain conditions.

The rules on remuneration are not the clearest and should, therefore, be carefully read. Read in such a way as to ensure that the reference to the "restructuring plan" stands for a reference to the "*draft* of the restructuring *agreement*". Otherwise the second instalment will be either paid after the third or – what is worse – not paid at all (since the final version of the restructuring agreement may only come out of and after the negotiations) and the second and the third instalment will never be paid when the CMR is appointed outside formal or hybrid proceedings (since there may not be a restructuring plan, strictly speaking, but only a restructuring agreement).

As previously mentioned, the payment of the CRM's remuneration, as well as the reimbursement of all the expenses incurred is usually borne by the company, with the ISSME ensuring only the payment of the first instalment of the basic remuneration.

5. Global assessment

As a conclusive remark, it is submitted considered that the CRM emerges as a useful professional, though – let it be clear – he/she is not a mediator and the law failed to provide the most appropriate setting to foster the request for his/her appointment by the company.

But it is still early to predict the outcome of a new player on the field; so, for now, we should rather sing:

"There's talk on the street;
it sounds so familiar.
Great expectations,
everybody's watching you.
(…)
There's talk on the street;
it's there to remind you
It doesn't really matter
which side you're on". ■

Footnotes:

1 The CRM was introduced by Law Nº 6/2018, of 22nd February, and the regime of out of court corporate restructuring was created by Law Nº 8/2018, of 2nd March.

2 This regime is absolutely out of court and unfolds into two sub-regimes: the first is designed to help the company to reach a restructuring agreement with its creditors (negotiation regime) and the second is designed to help the company carry out a previously negotiated restructuring agreement (agreement regime). On the topic, see Catarina Serra, "Recent amendments to the Portuguese Insolvency Law – The forces that determine the success of restructuring tools", in: *Eurofenix – The Journal of INSOL Europe*, 2018, 70, 38 ff.

3 Furthermore, it is not necessary for the company to enter into negotiations with the creditors or to intend to do it, for that matter.

4 When the company is insolvent, the term to file for insolvency is of 30 days, at the risk of severe consequences for the company's directors if they fail to fulfil this duty.

"

IT IS ARGUABLE THAT, DESPITE HIS *NOMEN JURIS*, THE CRM IS NOT A GENUINE MEDIATOR BUT RATHER SOME KIND OF ADVISOR OR CONSULTANT

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Country Reports

Autumn 2018

Updates from Slovakia, Cyprus and Lithuania

MARIA KYRIACOU
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“A DEBT RELIEF PROGRAMME KNOWN AS *ESTIA* WILL COME INTO FORCE AT THE BEGINNING OF 2019”

Cyprus: New laws to improve the legal framework on Non-performing loans

Several new laws were enacted in July 2018 to facilitate the reduction of non-performing debt in the Cyprus banking system. The main changes are summarised below.

- Law 83(I) 2018 amends the Companies Law in order to facilitate debt restructuring and promote corporate rescue. The moratorium during the tenure of an Examiner ceases if the company does not meet its obligations.
- Law 85(I) 2018 amends the Law of 2015 on Insolvency of Natural Persons (Personal Repayment Plans and Debt Relief Orders) in order to simplify procedures and facilitate the rehabilitation of the debtors who have not committed offences by speeding up their return to productive economic activity.
- Law 86(I) 2018 amends the Law of 2015 on Sale of Credit Facilities and Related Matters in order to remove all fees on the transfer of property or of a charge payable by the buyer. In addition, it clarifies the rules regarding the outcome of the sale of credit facilities, the transfer of rights and obligations, priorities, the continuation of lawsuits and the retention of documents.
- Law 87(I) 2018 amends the Law of 1965 on Transfer and Mortgage in order to enable a lender to split an existing mortgage into two or more mortgages for the same aggregate amount. The priority among the split mortgages is decided by the lender, but the order of priority in relation to other charges over the same assets is unchanged. The lender may sell any mortgage, irrespective of any notices issued before the new law took effect. No government fees are payable by the buyer.
- The Securitisation Law (Law 88(I)2018) establishes a framework for debt securitisation under the supervision of the Central Bank of Cyprus. The debtor's obligations and rights do not change with the securitisation of the loan and the securities are unaffected. The sale and transfer of the loan to the SPV is final and binding on the transferor and in the event of the subsequent insolvency of the transferor, there will be no recourse against the transferee.

The current exemptions from income tax, capital gains tax, SDC tax, stamp duty and transfer fees for transfers of immovable property from a borrower to the lender in the course of loan restructuring have been extended to borrowers who dispose of the property themselves in the open market. Both sets of exemptions will continue until the end of 2019.

The Insolvency Practitioners Regulations have also been amended in order to increase by 50 percent the fee payable to the insolvency practitioner for successful implementation of a personal restructuring plan.

To further facilitate the reduction of non-performing debt, a debt relief programme known as ESTIA will come into force at the beginning of 2019. Any loan secured on a principal private residence with a value of €350,000 or less will be written down to the market value of the property and extended up to 25 years at a below-market interest rate. The government estimates that the scheme, which will be administered by the Cyprus Land Development Corporation and funded by the government for the next 25 years, will benefit approximately 15,000 debtors, with total debts estimated at €3.4 billion. ■

Slovakia:
Shareholders and grey eminence – be aware

Piercing the corporate veil when the responsible company bodies disregarded legitimate creditors' interests and did not take reasonable steps to avoid insolvency or at least to take immediate steps to minimise the losses for creditors was impossible in Slovakia. The lack of legal measures to avoid and penalise such situations required an adequate reaction from the lawmakers. Happily, the responses are coming.

Extension of liability in case of bankruptcy

The recent amendment to the Slovak Commercial Code introduces a new liability of controlling entities – shareholders and/or other parent entities – for the insolvency of the controlled company if the shareholder contributes to the controlled company's insolvency and causes the creditor's claims not to be duly satisfied. There are two basic requirements for the establishment of the liability:

- Firstly, the controlling entity's actions must result into insolvency of the controlled company. In contrast to the liability of managing directors, standards for the behaviour of controlling entities are lower since they are *ex lege* not obliged to act with professional care.
- Secondly, the actions of the controlling entity must have significantly contributed to the insolvency of the controlled entity but they need not be the primary or the sole reason for the insolvency. However, there must be a causal relationship between the influence of the controlling entity's acts and the insolvency of the controlled entity.

The insolvency of the controlled entity is presumed if the insolvency proceedings could not be opened or were stopped due to the lack of assets. A welcome aspect of this new regulation is that it creates an additional legal basis for creditors to claim damages besides the general rules under the civil code. Moreover, the creditors will no more be dependent on the insolvency practitioner ("IP") who may bring actions only within pending insolvency proceedings.

To minimise the possibility of hiding from the liability for harmful conduct, the law also extended the liability for damages to persons who factually exercise the function of a statutory body without a formal appointment – so-called *de facto directors*. Those grey eminencies can be held liable in the same way as the statutory body. This means that those persons are not ultimately covered by the protective shield of a corporate entity anymore.

Shareholders and grey eminencies held liable for such damage may discharge themselves from liability only if they prove that they were acting informed and in good faith that their actions were in favour of the controlled company.

Stricter rules on liability for damages in case of bankruptcy

Laws on holding the statutory body accountable for insolvency are not new in Slovakia. However, the laws must be very precise or the application of these legal measures may turn ineffective.

In case of indebtedness of the company the managing director/liquidator/legal representative of the company is obliged to file for insolvency (Section 11 (2) of the Act 7/2005 Coll. on bankruptcy and restructuring ("Bankruptcy Act")).

To set up stricter rules concerning the statutory body (that is, the obligation to avoid insolvency and to act on time in case of insolvency), the legislator has introduced already several years ago a fixed contractual penalty established by virtue of law between the bankrupt company and its statutory body in the amount of €12,500. This contractual penalty cannot be waived, limited or excluded by any contract including articles of association or deeds of foundation. The person entitled to enforce the penalty is the IP. The IP may enforce the penalty individually against each of the persons who are required to file the bankruptcy petition, regardless whether acting individually or jointly.

After being previously removed from the Bankruptcy Act, its recent amendment re-established unlimited liability for damages caused by not filing the petition for insolvency on time. If the person who was required to file a bankruptcy petition on behalf of the debtor fails to file for insolvency timely, he/she will be liable to the creditors for the damage which arose as a consequence thereof, unless he/she proves to have acted with professional care. The liable person is given the opportunity to prove that even the timely filing of the bankruptcy petition would not lead to a better satisfaction of the creditor. Since it is a direct claim for damages to creditors, it will not be claimed by the IP but directly by the creditors. Unless proved otherwise, the damage suffered by the creditor is deemed to equal the value of the unsatisfied claim of the creditor.

Conclusion

The stricter rules on shareholders and persons acting on behalf of the company supported by the rules' precise application should help satisfying the creditors' claims. However, the creditors must also keep an eye on the actions of the IP and make sure that he/she is taking all the steps necessary to protect their interests. Besides that, the creditors can go after the liable persons on their own. ■

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"GREY EMINENCIES CAN BE HELD LIABLE IN THE SAME WAY AS THE STATUTORY BODY"

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THE DEFINITION OF INSOLVENCY IS PROBABLY THE MOST CONTROVERSIAL ISSUE OF THE DRAFT

Lithuania:
Draft Law on the Insolvency of Legal Entities

In order to consolidate bankruptcy and restructuring processes into a single statute, to combine the bankruptcy and restructuring professions into one, to resolve the issue of self-governance of this combined profession and to clarify the interpretation of the provisions of the bankruptcy and restructuring laws, the Draft Law on the Insolvency of Legal Entities (hereinafter – the Draft) was prepared in Lithuania in 2018.

In preparing the Draft, it was established that historically the law presented many deficiencies: the percentages paid to creditors were extremely low; the bankruptcy process took too long; the regulation of the profession of insolvency administrators was inadequate; and the administrative expenses and the administrator's remuneration lead to extended legal disputes as a result of which an insolvent legal entity suffered excessive litigation expenses and delays. The Draft therefore includes the following new ideas:

Enlargement of the concept of insolvency

The definition of insolvency is probably the most controversial issue of the Draft. Currently, insolvency is perceived as the state of an undertaking when overdue liabilities exceed half of the value of assets according to the balance sheet. The Draft provides a more modern definition of a company's insolvency as being its unability to fulfil overdue obligations and/or its having liabilities in excess of the value of its assets.

It is feared that if this definition of insolvency is included in the law, the risk of bankruptcy will arise for any undertaking temporarily unable to trade profitably, as even temporary negative results could be the basis for the initiation of insolvency proceedings. For this reason, some business organisations and lawyers propose to retain the old definition of insolvency fearing a significant rise in the number of Lithuanian enterprises becoming insolvent. In addition, in Lithuania it is believed that newly founded companies usually operate at a loss in the first few years, and the proposed change would result in companies having to initiate bankruptcy proceedings prematurely.

Agreement on assistance to overcome financial difficulties (hereinafter – "Agreement on Assistance")

The Draft introduces the new pre-insolvency Agreement on Assistance by creating the preconditions for solving financial difficulties without involving the court: as many actions as possible could be carried out during the restructuring stage and the court would only be implied where it is necessary and proportionally, in order to protect the rights of the creditors and the interests of the other parties affected by the restructuring plan.

Administration of enterprises without assets

To deal with legal entities which do not have sufficient assets to cover court and administrative expenses, such bankruptcies are usually administered by the bankruptcy administrators at their own expense. Creditors rarely agree to initiate such processes at their own expense and it is proposed that the court will open a bankruptcy case only if the petitioner pays a deposit specified by the court to cover the bankruptcy administration costs within a period not exceeding 14 days.

Change of rank of the creditors' claims

To encourage attempts at restructuring that require additional capital to be injected, it is proposed that the claims of creditors who provide financing for the restructuring of companies would rank equally with former employees and creditors. If the restructuring fails, such a proposal would affect the rights of the former employees since their potentially recoverable amounts from the company's assets would be significantly reduced. The claims of the other creditors, including tax authorities, would rank after, so that the State would lose the priority right of claim in bankruptcy proceedings.

Administrators as a sole profession

Another important novelty is the merger of the professions of bankruptcy and restructuring administrators into a sole profession, that of insolvency administrators. It is proposed to change the current insolvency administrator system by creating an effective self-governing body of insolvency administrators, i.e. the Chamber of Insolvency Administrators of Lithuania, whose functions would include the organisation and implementation of qualification examinations for insolvency administrators, the organisation and control of professional qualifications and the establishment of principles of professional ethics and of rules for their enforcement. The harmonisation of the state supervision of insolvency administrators and the delegation of certain functions to a professional organisation would lead to more effective implementation of each function. It is preferred that the profession itself should set professional ethics standards and take care of their enforcement, rather than the State.

The preparation of the Draft was prompted by the European Commission Recommendation 2014/135/EU of 12 March 2014 on a new approach to business failure and insolvency, the World Bank "Doing Business" report and the findings of the relevant public authorities of Lithuania.

It is planned that the Draft and the accompanying legal acts could be adopted by the Seimas (Parliament of Lithuania) in the autumn session of 2018. The Draft itself states that its entry into force is expected on 1 May 2019 (with the exception of relevant provisions, the entry into force of which is expected from 1 January 2022). ■

Update on the European Insolvency Regulation 2015/848

Myriam Mailly writes about the information available on the INSOL Europe website about the European Insolvency Regulation 2015/848 (hereafter ('EIR Recast'), and in particular on the *outcomes* of national insolvency proceedings applicable to EU cross-border insolvencies

First of all, a new consolidated version of the EIR Recast has been published on 26 July 2018 to reflect the changes introduced by the Regulation (EU) 2018/946 of 4 July 2018, replacing Annexes A and B to Regulation (EU) 2015/848 on insolvency proceedings (OJ L 171, 06.07.2018, p. 1-10).

The Regulation (EU) 2018/946 which entered into force on 26 July 2018 was adopted following the notifications from Belgium, Bulgaria, Croatia, Latvia and Portugal to the European Commission, related to recent changes to their domestic laws that introduce new types of insolvency proceedings or insolvency practitioners.

In a past column (*Eurofenix*, Summer edition 2017, pp. 44-45), useful links were listed to help the insolvency actors to find relevant information on the national laws applicable in cross-border insolvencies before applying the EIR Recast. The dedicated webpage, which is regularly updated, contains three main sections. The first section lists the official texts (and amended Annexes), while the second section contains the links related to the standard forms referred to in Article 88 of the EIR Recast and established by the implementing Regulation (EU) of 12 June 2017. A third section was also created, related to the information on domestic legislations/registers.

With regard to domestic legislations, Article 86 of the EIR Recast aims mainly at making a short description of national

insolvency legislations and procedures available to the public, and in particular to the matters listed in Article 7(2) of the EIR Recast ('the law of the State of the opening of proceedings').

However, even after one year of application, not all EU Member States (for example, Belgium, Latvia, Lithuania, The Netherlands and Slovakia) have contributed the information about their national insolvency proceedings within the scope of the EIR Recast. If some missing information could be easily explained by recent national insolvency reforms, sometimes it is however very difficult to identify what particular proceedings could be available regarding the specific situation of a debtor, as well as available solutions (financial restructuring, continuation of the business, sale as a going concern or piecemeal liquidation) without first studying in detail the national rules.

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 the questionnaire is to obtain clear and concise information on the outcomes of national insolvency proceedings applicable within the scope of the EIR Recast.

I am pleased to inform INSOL Europe members that relevant information is now available for the following countries: Bulgaria, Cyprus, Czech Republic, England & Wales, Estonia, Finland, France, Greece, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Poland, Portugal, Romania, Slovakia, Slovenia and Spain at: **www.insol-europe.org/technical-content/useful-links-to-be-aware-of-before-applying-the-recast-insolvency-regulation-2015848**

Click here

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

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

For updates on new technical content recently published on the INSOL Europe website, visit: www.insol-europe.org/technical-content/introduction

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MYRIAM MAILLY
INSOL Europe Co-Technical Officer

WE WOULD LIKE TO THANK THE NATIONAL REPORTERS FOR THEIR WILLINGNESS TO COOPERATE WITHIN A SHORT PERIOD OF TIME

Insolvency news and trends from Helsinki to Brussels

Myriam Mailly reports on two recent joint events where INSOL Europe was both an organiser and an active participant

> THE PRACTICAL DIFFICULTIES FOLLOWING THE AD HOC APPLICATION OF THE EIR TO CORPORATE GROUPS WERE UNDERLINED WITH CONCRETE EXAMPLES FROM GERMANY

INSOL International Helsinki 2018 Joint One-Day Seminar

The INSOL International Helsinki 2018 Joint One-Day Seminar took place at the Hilton Helsinki Strand Hotel on Wednesday 13th June and was jointly organised by INSOL International, INSOL Europe and the Finnish Insolvency Law Association (FILA) and enjoyed the presence of more than 100 delegates representing ten different jurisdictions: Denmark, Finland, France, Germany, Hungary, Romania, Sweden, the UK and the US.

The first session began with a summary of the main features of the EU Directive proposal on restructuring, insolvency and second chance (hereafter 'the Directive proposal'). The debate then focused on whether this text was supposed to ensure efficient and effective laws on business restructuring while securing at the same time a decent level of legal protection when conflicting interests are implied. The view was expressed that, while the harmonisation of national insolvency laws was certainly desirable, the method to reach it did matter, so as to convince national legislators to initiate insolvency reforms in their own jurisdiction. In that context, it was underlined that detailed rules may create challenges for the national legislators and even some incompatibilities or uncertainties in the national laws in relation to the European Insolvency Regulation 2015/848 (hereafter 'EIR Recast'). The audience was then informed that the Danish insolvency legislation already complied with some of the provisions of the Directive proposal, even if some differences remained.

The second session focused on the Finnish restructuring success story of the NANSO Group Oy. Thanks to an important operational restructuring, the Nanso Group continued its business (sale of women's clothes) and the audience could benefit from some key lessons experienced during the Nanso restructuring process. The audience also understood the importance of public communication of such successful restructurings, so as to make directors of any companies aware of the availability of restructuring mechanisms in Finland.

The seminar continued in the afternoon with the third session addressing recent developments on cross-border issues involving groups of companies in financial distress.

First, it was briefly reminded the issues that arose when the European Insolvency Regulation 1346/2000 (hereafter 'EIR') was applied *per se* to groups of companies. Then, the practical difficulties following the *ad hoc* application of the EIR to corporate groups were underlined with concrete examples from Germany. In addition, the panellists also discussed whether the mechanism put in place by the EIR Recast through the '*group coordination proceedings*' could lead (or not) to successful group restructurings in the EU. The final part of the panel focused on a more global perspective by referring to the current work of the UNCITRAL Working Group V, and in particular to the proposed '*planning proceedings*' which would aim at the development of a group insolvency solution for all or part of a group of companies and cross-border recognition and implementation of that solution in different States. The session ended with a description of the keys for a successful global financing restructuring plan, which was the result of coordinated restructuring proceedings in France and the US and more precisely between a French holding company under safeguard proceedings (preceded by an *ad hoc mandate*) and its 14 affiliated Chapter 11 USBC debtors.

The seminar ended with a focus on two topical issues in the Nordic region: environmental liabilities in bankruptcy proceedings and debt-equity swaps. On the first issue, it was reminded that this subject was particularly important in Finland, as there was a pending legislative initiative of the Ministry of Justice on the revision of the Bankruptcy Act. Proposals on the new legislation on debt-equity swaps were also presented, based on the fact that there was no regulation regarding debt-equity swaps in the composition regime of the Norwegian Bankruptcy Act. The session ended with a description of the debt-equity conversion in Denmark, in which the conversion of debt was considered as a legitimate way to establish new equity shares under the Danish Companies Act as it may contribute to the continuation of the company.

The 7th DAV European Insolvency & Restructuring Congress

The 7th European Insolvency & Restructuring Congress took place in Brussels on 28 & 29 June 2018. The Congress was organised by the Insolvency Law and Restructuring section of the German Bar Association (DAV) through its European Working Group, in cooperation with INSOL Europe and the ReTurn Association. 95 delegates representing 14 different jurisdictions (Austria, Belgium, Cyprus, Estonia, France, Germany, Greece, Italy, Poland, Singapore, Spain, the Netherlands, the UK and the US) were present.

The Congress started with the keynote speech of the Director-General of the DJ Justice (hereafter, 'DG Justice'), on the Consumers and Gender Equality. He put the emphasis on the EU adoption agenda of the European Commission's Directive proposal on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures, published on 22 November 2016 ('Directive proposal'). The Director-General stressed the importance for practitioners to be able to use these rules as soon as possible for the benefit of distressed companies and entrepreneurs. The audience was also informed that, though a "partial general approach" has already been achieved, it remained important to reach an agreement between the Council of the European Union and the European Parliament before the European Parliament elections in May 2019.

A lecture was then delivered on the need of a doctrinal foundation for the Preventive Framework, where emphasis is to be put on the doctrinal foundations existing between insolvency and restructuring proceedings and equally on their differences, in light of the 'contractual approach' (insolvent/solvent debtors, common/no pool and market/negotiated value).

Before lunch, a panel on the Directive proposal took place. Firstly, it was reminded there is a need to build a common culture of rehabilitation in Europe. The concerns of the European Parliament on matters such as voting rights, the role of employees, the meaning of '*unaffected*' creditors and the role of insolvency practitioners were in particular touched. Secondly, the Head of Unit A1 of the DG Justice focused on three issues still to be discussed within the Council of the EU, namely the degree of involvement of the Courts and IPs, the desirability (and difficulty) of introducing an adequate viability test and the requisite conditions for applying the cross-class cram-down mechanism. Thirdly, the EIP ('European Association of Insolvency Practitioners' organisations') representative put the emphasis on the importance of the daily work of French IPs and the numerous French attractive and effective legal tools aimed at rescuing the enterprises in financial distress as far in advance as possible.

After lunch, two workshops were available to delegates. The first workshop focused on challenges of digitisation and legal tech in restructuring and insolvency, while the second workshop examined the available options for secured creditors in- or out-of-court proceedings in several jurisdictions (Austria, France, Germany, Greece and the Netherlands).

The first day of the Congress ended with the festive evening where Prof. Dr. Bob Wessels delivered the keynote speech. Prof. Dr. Bob Wessels reminded the audience of the crucial role of insolvency practitioners in initiating best practices which can subsequently inspire their own legislation. It was important to remember that insolvency practitioners have powerful means to influence the future of national legislation, as well as European regulation.

The second day of the Congress began with an update on the CJEU and some landmark decisions in European insolvency law, in particular in the post-Brexit scenario. Creditor protection in Austria on preventive restructuring frameworks was then the topic developed in light of the Directive proposal. Criticisms were expressed on the uncertainties regarding concepts such as '*creditors' best interest test*' and '*absolute priority rule*', borrowed from the US and which might not fit with the idea of giving the owners of a distressed company a chance to be involved in the process of rescuing their business.

After the coffee break, the participants were updated on the cooperation in group insolvencies, beyond the scope of the EIR, and how to create an attractive insolvency hub, based on experiences from Germany, Singapore and the US. ■

In-depth reports from these events have been published on the INSOL Europe website and can be found at: www.insol-europe.org/news/from_insol

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EIR Reform – Process
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EIR Case Register
http://tinyurl.com/y7tf2zc4

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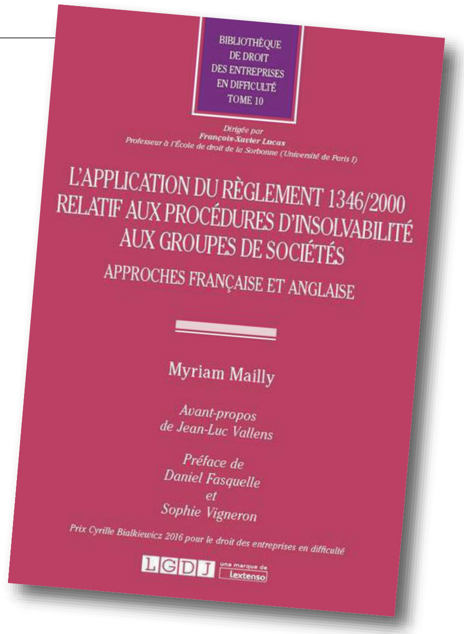


L'Application du Règlement 1346/2000 relatif aux Procédures d'Insolvabilité aux Groupes des Sociétés (The application of the European Insolvency Regulation to corporate groups: an Anglo-French perspective)

Myriam Mailly (2018, LGDJ, Paris), xv and 591pp, €62, ISBN 978-2-275-05768-2

This recently published French language work addresses the application of the EIR to the position of groups of companies, a very common structure for creating business networks and conducting cross-border trade. The research, which arose from the author's doctoral studies at the Universities of Kent and Lille, contains a comparative flavour, in that it examines the position from the standpoint of two very different legal systems: the English and the French. Charting the history of the initiative that produced the EIR, the book mentions some of the problems that have arisen from its single-minded focus on the activities of sole companies, which have only partly been resolved by the introduction of the Recast EIR. In examining the workings of the EIR, the work looks at domestic approaches to the problems of transnational coordination of insolvencies and how they have influenced the responses of the courts to the first cases they were confronted with invoking the application of the EIR.

For the author, the lacunae in the EIR, especially with respect to group structures, prompted the courts to craft solutions, first seen in the Daisytek case, that were gradually transposed to more and more complex situations. The response at European level has been more muted, though occasionally, cases such as Interedil and Illochroma, have created glosses in particular fact situations. Through these and other case studies, the book examines how the courts have pressed into service methods for rescuing groups lying both within and outside the scope of the EIR, in an effort to palliate some of its inconveniences. The work also contains a forward-looking element, addressing the Draft Directive of November 2016 and its likely contribution to the framework for cross-border reorganisations.

Overall, this is a work of methodical and detailed scholarship, which also received the Cyrille Bialkiewicz Prize in 2016 for publications in the field of insolvency. Though primarily addressed to Francophone readers, the book merits being brought before a wider audience for its strong comparative law features and treatment of universal problems.

Paul J. Omar
Technical Research Coordinator

Sovereign Defaults before Domestic Courts

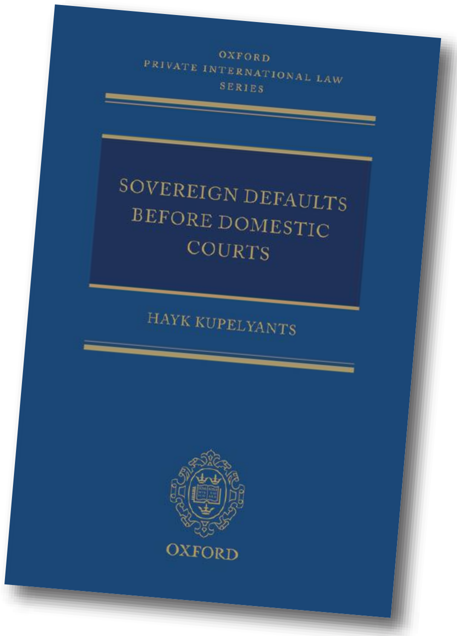
Hayk Kupelyants (2018, OUP, Oxford), 320pp, £75, ISBN 978-0-19-880723-0

The world of sovereign debt and sovereign defaults is often obscure. In the absence of a sovereign debt restructuring regime, sovereign debtors and (holdout) creditors play a cat-and-mouse game. The sovereign debtor may resort to extra-legal or legally questionable strategies, cease its payments, coerce the creditors with exit consent strategies or the threat not to repay its holdout creditors, or may try to retrospectively revise the terms of the agreement to his/her own advantage by a change in the national law. Creditors trade their claims to specialised debt investors who sue the debtor and try to enforce their claims or to pressurise the debtor, e.g., by blocking his/her access to the capital debt markets. In this recently published text, Dr. Hayk Kupelyants analyses how such disputes which arise in the context of sovereign defaults are likely to be decided in domestic courts.

Kupelyants' work starts with a theoretical legal and practical discussion of the (commercial) character of sovereign debt and debt restructurings and continues with a description and analysis of the most important bond terms typically included in sovereign bond contracts, before he turns to the question of litigation and enforcement. He deals with questions concerning jurisdiction, a possible stay to avoid pre-emptive legal action (during the restructuring negotiations), interim measures against the sovereign debtor, and the law governing the sovereign debt contracts. He also covers the disconcerting case of unilateral modifications of sovereign domestic-law bonds. Possible defences of the sovereign debtor against repayment and the challenges to sovereign debt restructurings, especially to strategic/coercive restructuring techniques, are also investigated. The book concludes with an analysis of enforcement techniques against the sovereign debtor.

While creditors might very well get a court to confirm that they hold a lawful claim to be repaid (in full) and while creditors will most likely see the principle of *pacta sunt servanda* upheld, especially in English and New York courts, the real challenge will be to find attachable assets of the sovereign debtors abroad, or to force the debtor by different possible enforcement strategies into a settlement.

With an extensive and thorough analysis of case law from primarily the US and the UK, Hayk Kupelyants' work provides the reader with a handy guide of how



sovereign defaults will be or are likely to be dealt with in domestic courts.

David Ehmke
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Book preview:
Le droit de l'insolvabilité internationale (International Insolvency Law)

Reinhard Dammann and Marc Sénéchal, June 2018, 974pp, ISBN 978-2-306-00090-8, €125

This text, published in June 2018, is written by two practitioners of high standing, who between them have acted in the major cross-border insolvencies in France in the past decade. As such, they are well placed to answer the essential questions posed by the text: how does the Recast European Insolvency Regulation function? What is the latest trend at the European Court of Justice in the interpretation of its provisions? What role is left for private international law rules in relation to international insolvencies involving third countries? And, what will happen after Brexit, as far as France is concerned? All of these questions receive answers distilled through analysis of the texts and the case law, guided by the authors' own practical experience.

A full review will be forthcoming in these pages in the next issue of Eurofenix.

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1–4 October	INSOL Europe Annual Congress *Sorrento, Italy*

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