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The journal of INSOL Europe
Spring 2019

Breaking new ground in Spain

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- Judicial Cookbook
- Bank Insolvencies in CEE
- Make-or-break time in Greece
- Abuse of *Lis Pendens* in Ireland
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Welcome from the Editors


FRANK HEEMANN


CATARINA SERRA

Writing these lines, I enjoy following the tragicomedy called Brexit, never boring with its twists and turns and its unpredictable end.

I decided, however, not to give it more attention for the purposes of this editorial, since its final outcome remains open while a clear shift towards an extension of article 50 of the Treaty of Lisbon can be observed. Being one of the editors of eurofenix I welcome this development, as it promises entertainment paired with legal complexity and will thus surely inspire future authors to contribute fascinating Brexit-related articles.

Different from our Brexit play, we see light at the end of the tunnel in other areas. The most relevant for our professions appears to be the imminent adoption of the Restructuring Directive by the European Parliament, presumably at the end of March. Professor Bork summarises the latest compromises for us (p.18), while Jean-Luc Vallens offers an interesting French perspective (p.22). After the Directive's adoption, the two-year implementation phase will commence and prompt Member States to get busy to adjust their domestic laws. At least in 'my' region – the Baltic States and CEE – this will be a challenge, since restructuring, rescuing of business and second chance are still rather new concepts here. It will, therefore, be necessary to not only improve legal frameworks, but also to continue explaining to stakeholders and societies the benefits restructuring, rescue of business and second chance can bring. In this context I also see an important role for INSOL Europe, inter alia by providing analysis like SWOT-tests of insolvency reforms (p.32), statistics (p.42), training courses, like the High Level Insolvency Course, as well as close on-the-ground cooperation with the help of country co-ordinators, INSOL Europe's new instrument emphasised also by Alistair Beveridge in his president's column (p.6).

While the Brexit front is failing to provide certainty, there is more clarity in other areas. At the beginning of March, the ECB published a policy decision not to increase its interest rates before 2020 and to keep other instruments in place for as long as necessary to maintain favourable liquidity conditions and an ample degree of monetary accommodation. Businesses will therefore continue to benefit from favourable interest rates when taking out loans for their investments, usually from their commercial banks. This edition analyses the crucial role of commercial banks from different angels, Ludovic Van Egroo addresses compliance in his article about GDPR and sensitive financial data (p.14), Yiannis G. Sakkas and G. Bazinas write about make-or-break for NPLs in Greece (p.30), while Richard Bodis provides an overview on bank insolvencies in CEE (p.28).

Definitely worth following is the prominent Spanish Abengoa insolvency which, like Brexit, promises captivating articles also in the future. José Carles Delgado and Carlos Cuesta Martin bring us the latest developments (p.24).

As usual, you will find valuable information and updates in our regular columns like the technical insight (p.12), the US-column (p.36), in country reports (p.40) and in book reviews (p.44 and in the president's column).

The conference season is starting and I am looking forward to meeting you soon, be it in May in Stockholm (INSOL International and INSOL Europe joint seminar), in June in Ljubljana (EECC Conference) or Mallorca (AIJA-INSOL Europe joint conference) or later in the year in other locations. Have a look at p.45 and www.insol-europe/events and sign up.

Cheers!

Frank

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ALASTAIR BEVERIDGE
INSOL Europe President

Alastair Beveridge updates us on recent events and future plans

> I WAS PRIVILEGED TO ATTEND A MEETING IN SWITZERLAND OF ABOUT 60 MEMBERS, INCLUDING SEVERAL JUDGES

2019 is now well and truly underway and, I am pleased to say, finds our organisation in rude health.

We are racing towards our next Council meeting which will take place in London in March and I am looking forward to welcoming my colleagues to my office for the meeting. It takes place one week before the Brexit deadline (29 March) and it is possible (although on current progress perhaps not likely) that we will have more clarity on this issue by then – the uncertainty is not helpful for anyone.

You will recall that one of the key outputs from the Strategic Review was the introduction of a Development Committee which was designed to help with both increasing membership but also for us to be able to be a bit more bespoke with our members in their own countries. The idea being that over time we would appoint INSOL Europe Country Co-ordinators for each country and that plans for each country, based on the specific needs of the country, would be developed. The Committee is in the process of choosing Country Co-ordinators and a further update on this will be provided in the next edition.

Not long after the Development Committee was approved Thomas Bauer, our Council representative for Switzerland, called me with a request. He told me that the Swiss Association for Insolvency Law (SchKG-Verienigung Association LP), which he was then the President of, were holding their annual meeting in Bern in February and he thought it would be a good opportunity for INSOL Europe to be presented to his Swiss constituents. I agreed to go and was privileged to attend a meeting of about 60 members, including several judges. The hospitality was excellent, and I was able to catch up with Daniel Staehelin (INSOL Europe President in 2012), who had founded the Swiss association some 20 years ago, as well as Sabina Schellenberg (who was on Council for the Young Members Group until October 2018). I also met new colleagues, some of whom I hope will join the INSOL Europe family.

The event had an innovative panel session in which one of the local lawyers asked three judges to give views on the issue of whether or not judges should assist in any way individual bankrupt debtors who were unable to afford legal counsel or understand the process they were going through. This resulted in a lively philosophical discussion with lots of interaction, a bit of humour, and good-natured debate – if I had spoken German and understood what was being said it would have been even better. Thanks again Thomas for the invitation, hospitality and the chocolate and biscuits (my kids loved them).

On a more serious note this is exactly what the organisation wants to do more of – support local initiatives, to make more people aware of what our organisation does and how it can help but also to ensure we are close to the key insolvency and restructuring issues and debates which go on in every country every day. My request to you all is to think about what might work in your country and let Radu Lotrean, Alberto Nunez-Lagos or Alice Van Der Schee (depending on which region you are in) know, so that we can find a way to help and support you locally.

High Level Insolvency Course (HLC)

Another of our key area of focus is education and you will be familiar with our HLC – this course (which consists of three modules) has been run in Romania and two of the three modules have now successfully been run in Cyprus – the date for the third and final module has now been set as 22 March 2019. This course works because it brings together local experience and international expertise to create a powerful set of messages and the input of excellent speakers makes this a really special event.

I am pleased to be able to report that after extensive discussions we have agreed that the next programme will be run in Athens, Greece – dates will be provided once finalised.

This programme can be run in any country and if possible we would like it to be used more – if you wish to find out more about the course or are interested in exploring whether or not it could be brought to your country please let me or Radu Lotrean know.

The future

My firm, AlixPartners, does an annual survey of experts in the field of restructuring. The most recent and 14th version was published earlier this month. We ask over 300 lawyers, bankers, advisers and others globally about

what they expect to see and why. I don't propose to reproduce it here but thought some of the key findings might be of interest.

Professionals in our field have a reputation for being focused on the timing of the next recession, and for good reason. In the past, restructuring and insolvency activity has been closely tied to the credit cycle. Today, that's seems to be far less true. The cycle still matters, but activity is increasingly driven by a steady drumbeat of disruption, even when overall macroeconomic factors are strong. New technology, rapid-fire shifts in consumer behavior, changing regulation, potential trade barriers, and tectonic changes like Brexit all threaten companies and entire sectors.

The three sectors where it was expected there would be the most challenges are:

- **Retail:** Driven by changes in consumer behavior, economic challenges and disruption.
- **Oil & Gas:** Although the vast majority of those surveyed had last year predicted oil being above $55 per barrel, it has fallen to around $50 per barrel and this creates continued challenges throughout the value chain.
- **Automotive:** Here it is a combination of consumer preferences, technology changes and China.

It appears therefore that disruption is here to stay and will challenge us all. If we have experience of specific industries or sectors we will be best placed to help and deliver value to our clients' challenges.

Although none of us can accurately predict what will happen this year or any other there are some things which are more certain and that is the venue of our Annual Congress. I am delighted to announce that we have agreed to hold our 2022 Annual Congress in the Croatian city of Dubrovnik.

Books again!

I have to confess that my reading in the last quarter has mainly been hard boiled crime fiction which I have loved for more years than I would like to admit but which is of less educational or intellectual interest – although I do know many, many ways to hide a dead body! The book that I have been reading for some time and have found fascinating is 'Why We Sleep by Dr Matthew Walker' – I was actually recommended this book by Neil Cooper but having dipped into it I was amazed and surprised.

It has made me work hard to ensure I get a good night's sleep as the benefits are enormous: given how hard we all work recharging batteries every day, this is not a 'nice to have', but is essential. So I will leave you with one final suggestion… go to bed a little earlier and sleep well. ■

> **I AM DELIGHTED TO ANNOUNCE THAT WE HAVE AGREED TO HOLD OUR 2022 ANNUAL CONGRESS IN THE CROATIAN CITY OF DUBROVNIK**

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

Who would be a director?

A highly successful second annual meeting of the joint INSOL International/INSOL Europe Financiers' Group took place in London on 20 November, chaired by John Willcock, Editor of Global Turnaround.

The stimulating discussion was hosted by the Commonwealth Bank of Australia, whose Mark Sutton, Senior Executive Manager, Group Credit Structuring, opened the proceedings. The panel was then introduced by Derek Sach, chair of the INSOL International Financiers' Group.

The theme was the package of measures floated by UK regulators in response to a number of controversial business collapses recently, including the retail group BHS and the outsourcing giant Carillion.

The suggested responses include strengthening corporate governance pre-insolvency, and potential new powers to investigate and pursue directors over companies that have been sold or dissolved.

This prompted two strands of discussion; given these changes, who would want to be a director? And more generally, who should play the role of ringmaster in the kind of complex restructurings now being seen with multinational companies boasting increasingly complicated capital structures?

The panel consisted of Patricia Godfrey, a partner in the banking and finance team at CMS; Andrew Shaw, a civil servant in the UK's Insolvency Service who currently heads its team preparing for Brexit; Ed Boyle, a restructuring and insolvency partner with KPMG; Julian Verden, Stemcor Group's managing director for Europe; and Richard Stables, EMEA head of restructuring at Lazard.

The debate was brought to a conclusion by Alastair Beveridge, INSOL Europe President and the joint group now looks forward to a similar event next year.

CERIL Update

On 12 December 2018, the Conference on European Restructuring and Insolvency Law (CERIL) published its CERIL REPORT 2018-2 on Cross-border Restructuring and Insolvency post-Brexit.

CERIL highlights the relationship between the EU and the UK after Brexit in the area of restructuring and insolvency law and seeks to formulate a position on the nature and content of a possible future instrument governing that relationship in its CERIL Statement 2018-2. CERIL argues for the development of a bilateral agreement between the EU and the UK in the field of insolvency and restructuring. Such bilateral agreement would mirror, with certain safeguards, the structure and content of the EIR Recast. It would cover international jurisdiction of courts, applicable law, a mutual system of recognition and enforcement and rules on cooperation and communication between UK and EU insolvency practitioners and courts.

The CERIL report highlights the relationship between the EU and the UK after Brexit and considers several solutions on how to fill the gap that will be left if, after Brexit, when the European Insolvency Regulation (Recast) will cease to apply. CERIL submits that a future agreement should be developed as a 'parallel instrument'. The Lugano Convention, which basically extends the framework of the Brussels I Regulation vis-à-vis EFTA States, or the bilateral agreement extending the Brussels I Regulation to Denmark may be used as a model. In this way conflicting interpretations by courts in the UK and the EU can be prevented.

The report was initiated and chaired by Prof. Francisco Garcimartín (University Autónoma of Madrid and Linklaters), and Prof. Michael Veder (Radboud University Nijmegen and RESOR) with the support of a CERIL working group investigating the possible consequences of Brexit on cross-border restructuring and insolvency in relation to the remaining EU. CERIL Report 2018-2 presents the result of this study.

Both the CERIL Statement 2018-2 and the full CERIL Report 2018-2 can be read at: www.ceril.eu/publications/ceril-report-2018-2-on-cross-border-restructuring-and-insolvency-post-brexit/

Insolvency Lunch in Prague

Ernst Giese reports on the first INSOL Europe Lunch in Prague, which took place on 12 November 2018 in the historic centre of Prague in the vicinity of the famous Castle.

Several insolvency law experts, liquidators and qualified attorneys from leading Czech law firms accepted the invitation to discuss the current status of the Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/ EU.

The president of INSOL Europe, Alastair Beveridge, gave the welcome address and introduced the association and its activities.

The keynote speaker was Nicolaes W. A. Tollenaar from the RESOR law firm, Amsterdam. Mr. Tollenaar presented a lively analysis on the Proposal in respect to "debtor-friendly" and "creditor-friendly" systems. His analysis was clearly that the first ones hinder whereas the latter ones facilitate business rescues.

Mr. Tollenaar offered many useful insights and an outline of what insolvency proceedings should look like ideally, while taking into account economic criteria. He criticised the EC initiative for failing to provide not only the debtor, but also creditors, the right to propose a restructuring plan. Exclusivity in favour of the debtor gives controlling shareholders the ability to offer creditors only marginally more than they might receive in a liquidation. If creditors do not have the right to put forward their own plan and develop an alternative, in practical terms they have no other option than to accept the plan put forward through the debtor by the controlling shareholder. This leads to a transfer of wealth from creditors to shareholders.

All attendees then shared their opinions, suggestions for consideration and exchanged their professional experience across borders. Tomáš Richter from Clifford Chance (Czech Republic) brought into discussion his practical knowledge, pointing out the fact that there is good and modern legislation focusing on insolvency in the Czech Republic, but the judicial application is very inconsistent in quality.

Alastair Beveridge and Ernst Giese at the Prague Lunch

Finally, the attendees suggested that regular meetings of the insolvency community in Prague will help to promote INSOL Europe in the Czech Republic.

Eastern European Countries' Committee Conference 2019
6-7 June, Ljubljana (Slovenia)

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

DATE FOR YOUR DIARY

22 May 2019

INSOL Europe & INSOL International Joint One-Day Seminar, Stockholm (Sweden)

Following the successful 2018 seminar in Helsinki, INSOL International is delighted to announce their first seminar to take place in the beautiful city of Stockholm, organised in association with INSOL Europe and with the support of restructuring professionals from across the Nordic region.

As the largest city and Capital of Sweden, Stockholm is comprised of 14 islands and more than 50 bridges across the Baltic Sea archipelago. Enjoy the cobblestone streets of the old Town, waterways and parks of the city area, or its wide range of shopping centres, museums and restaurants; Stockholm has something to offer whatever your tastes.

The programme includes sessions on the implementation of the EU Directive; restructuring in the region, focusing on the ongoing Componenta Group restructuring in Finland and Sweden; the impact of Brexit; and board directors' liabilities.

The seminar will culminate with cocktails and dinner at Villa Källhagen, with stunning views of the Djurgårdsbrunn canal and the Nordic Museum.

For more details visit www.insol.org/events/detail/118

Restructuring of Corporate Groups in Europe

Restructuring of corporate groups was discussed at two consecutive conferences of the European Law Institute (ELI), report Gert-Jan Boon, Ilya Kokorin and Jessie Pool.

On 5 December 2018, a joint conference of the ELI and the Business & Liability Research Network of Leiden University took place in Leiden (the Netherlands). During this conference, developments at both the national and European levels were discussed. The second conference, on 11 December 2018, was organised on the occasion of the UNCITRAL Working Group V meeting in Vienna (*see opposite page*). This conference focussed on matters of substantive consolidation.

In Leiden, prof. em. Bob Wessels (Leiden University) introduced the ELI Business Rescue Project. This project – led by himself and prof. Stephan Madaus (Halle-Wittenberg University, Germany) – resulted in 115 recommendations on a legal framework enabling further development of coherent and functional rules for business rescue in Europe*. Stephan Madaus introduced the recommendations, contained in Chapter 9 of the ELI Business Rescue Instrument on the issue of corporate groups. He highlighted that different approaches can be distinguished, from no or limited coordination up to substantive consolidation. Insolvent members of corporate groups in Europe are traditionally treated on an entity-by-entity basis. Domestic rules on corporate groups remain rare in the EU. This was also illustrated by prof. Joeri Vananroye (KU Leuven, Belgium), who elaborated on the possibilities for corporate group restructurings under Belgian law. Prof. Reinout Vriesendorp (Leiden University) highlighted that further research needs to consider the role of directors of insolvent corporate group members in the European context.

A joint presentation was given by Jessie Pool, Ilya Kokorin and Gert-Jan Boon (researchers at Leiden University), who discussed the existing legal mechanisms to facilitate efficient resolution of group distress. First, they considered the European Insolvency Regulation (EIR 2015) and concluded that, due to the voluntary nature of group coordination proceedings and an easy opt-out from them, such innovation may have limited effect. Different alternatives were considered, including the appointment of the same insolvency practitioner, establishing an enterprise COMI and using synthetic or "reversed" synthetic proceedings. But currently these options are either unavailable or face significant (practical) difficulties. Insolvency protocols were suggested as the most flexible tool. However, to make their adoption more prevalent, training for judges and insolvency practitioners is needed.

The conference in Vienna continued the debate and focused on the issue of substantive consolidation within corporate groups, adding perspectives from Europe, UNCITRAL and the USA. As Stephan Madaus stated, from the ELI Business Rescue Instrument it followed that only some EU Member States allow insolvency consolidation in case of intermingled assets or fraud. Florian Bruder (DLA Piper, Germany) showed the limitations under the EIR 2015, including a blanket prohibition of substantive consolidation in a cross-border context. He discussed alternative (out-of-court) approaches instead. In addition, prof. Irit Mevorach (Nottingham University, UK) argued that UNCITRAL in its Legislative Guide, Part Three (treatment of enterprise groups) struck a good balance between the principles of company and insolvency law by allowing for substantial consolidation, but only in the case of intermingled assets or fraud. According to prof. Edward Janger (Brooklyn Law School, USA), the US experience shows that substantive consolidation in practice is pursued mostly in the context of consensual (restructuring) plans.

The conferences revealed that approaches to restructuring of corporate groups are still very much in development. To date, there are no experiences yet with the group coordination proceedings under the EIR 2015. The application of other tools, such as insolvency protocols, has also remained limited. From the discussion it follows that in a cross-border setting, but also domestically, improving coordination by means of cooperation and communication may be the most feasible direction to pursue at the moment. To this end, judges and practitioners may rely on recommendations and best practices, for instance the ELI Business Rescue Instrument, but also those from other standard-setting organisations, which should support the restructuring of corporate groups.

** Bob Wessels & Stephan Madaus, Rescue of Business in Insolvency Law – an Instrument of the European Law Institute (September 6, 2017).*

UNCITRAL in Vienna: A winter rhapsody

On the banks of the blue Danube, frosted by the first snows of winter, the International Centre saw Working Group V convene for its 54th session. Florian Bruder, Counsel, DLA Piper, Munich and Paul Omar, Technical Research Coordinator, INSOL Europe report.

On the agenda: enterprise group insolvency and a simplified insolvency framework for MSMEs (micro, small and medium enterprises). Meeting Room D witnessed the 200 delegates, representing Member States, Observer States and representatives of the non-governmental organisations gather in the week of 10-14 December to deliberate on the final stages of the enterprise group texts and begin the next phase of the work on MSMEs. The meeting in Vienna was also scheduled to be the last presided over by Jenny Clift, who takes her retirement this year after 20 years of much appreciated service to the Working Group.

On enterprise groups, the deliberations focused on a line-by-line analysis of the draft Model Law addressing mechanisms for cross-border cooperation between courts and/or practitioners involved in the administration of insolvencies over members of such groups. While much of the text passed swiftly through the Working Group having achieved broad consensus on the content of the provisions, particular focus was paid to two issues: the conduct and recognition of the planning proceedings as well as the role of undertakings in the context of main proceedings. Both issues elicited some passion with interventions by delegates from Member States illustrating wide differences between perspectives on the scope and utility of the proposed provisions.

On the first issue, the dividing line between groups of delegates was whether the text could encompass the new group coordination proceedings instituted in Chapter V of the Recast European Insolvency Regulation, the function of the planning proceedings in the Model Law having been conceived in a slightly different way. The intention in the Model Law was that such proceedings derive from the main proceedings, while the Recast conception is that they are stand-alone proceedings without many of the powers that planning proceedings under the Model Law would enjoy. Parity between the two types of proceedings for the purpose of recognition was eventually

The delegation from INSOL Europe

achieved through a rewording with the Guide to Enactment, also presented for agreement by the delegates, to incorporate text explaining the rationale behind the rewording.

The issue of undertakings aroused some excitement, not so much for the substantive point of whether undertakings were in themselves desirable, but in the position of the text in a section titled "supplemental provisions". Though seemingly on the surface an issue of procedure and drafting, delegations were divided on whether this sent a signal to states considering enactment as to the status of these provisions within the overall Model Law initiative. Surprisingly, feelings were such that the issue was revisited in the context of whether the minutes of the meeting accurately reflected the tenor of the discussions.

By way of contrast, the debate over MSMEs was not as heated, with views from the floor in broad agreement. The discussion here was largely focused on suggesting ways of how recommendations in the UNCITRAL Legislative Guide on Insolvency Law could be more specifically targeted to the particular situation of MSMEs. Much of the debate centred on options open to businesses falling within the MSME definition, the eligibility criteria for proceedings, the mechanisms for commencing procedures, and the rights of access for particular stakeholders, especially creditors. The thorny issue of a homestead exemption was the subject of contributions illustrating the great contrast in approaches across the world. While differences in views were reflected in the contributions from delegates, the utility of such targeted recommendations was universally acknowledged.

The Working Group's next meeting is in New York on 28-31 May 2019. Items on the agenda for the 55th meeting are likely to include conflict of laws, asset-tracing and revisiting the MSME initiative.

DATE FOR YOUR DIARY

Association of Business Recovery Professionals R3 Rescue Recovery Renewal

11 July 2019

R3 & INSOL Europe International Restructuring Conference, London (UK)

Cross-border restructuring: at a crossroads in the wake of Brexit?

This conference is an analysis of the "cutting edge" of the international restructuring sphere. The incredibly fast-paced and dynamic qualities of the sector mean we must adapt and change with it.

The programme includes:

- Detailed cross-border case studies of two of the most important cross-border cases of recent years, Agrokor and Steinhoff.
- A panel session on the NPL landscape, the new tools to weather it and the new players entering the market.
- A panel session on the different approaches being taken in the UK and Europe in regard to pre-insolvency procedures and the potential for this to be a new battle ground.
- An international line-up of speakers to be announced!

Visit www.r3.org.uk/r3-and-insol-europe-conference for further information or to register your place.

A closer look at...

The fate of the practitioners in procedures concerning restructuring, faced with the future Directive on Preventive Restructuring Frameworks

EMMANUELLE INACIO
INSOL Europe Technical Officer

> THE NEED FOR NATIONAL REGULATORY FRAMEWORKS OF THE PRACTITIONERS IN SUCH PROCEDURES IS ACKNOWLEDGED BY THE FINAL COMPROMISE TEXT

After the Niebler's Report on the European Commission's Directive Proposal on preventive restructuring frameworks[1] was endorsed by the plenary meeting of the European Parliament on 12 September 2018 and the Council (Justice and Home Affairs) adopted its General Approach during its meeting on 11 October 2018, the co-legislators have successfully concluded their Trilogue[2].

The Committee of the Permanent Representatives of the Governments of the Member States to the European Union (COREPER) confirmed the final compromise text[3] of the Council of 17 December 2018[4] based on the feedback of the Member States and the discussions with the European Parliament which was approved by the Committee on Legal Affairs of the European Parliament on 23 January 2019[5]. Plenary sittings of the European Parliament are scheduled from 25 to 28 March 2019[6] and should the European Parliament adopt its position at first reading, the Council would approve it and the text of 17 December 2018 would be adopted, only the revision by the legal linguists of both institutions remaining to be done[7].

Regarding the fate of the practitioners in procedures concerning restructuring, insolvency and discharge of debt, the European Parliament has largely taken over the text of the General Approach and only little amendments had to be made.

Specialised insolvency practitioners have been identified by the European Commission's Proposal as instruments that can greatly help to reduce the length of procedures, lower costs and improve the quality of assistance or supervision.

Thus, regarding the role of the practitioner in the field of restructuring, insolvency and second chance, the final compromise text as the text of the General Approach puts the emphasis on the need for the Member States to ensure that practitioners who are appointed by judicial or administrative authorities are suitably trained, have the necessary experience and expertise for their responsibilities, that they are appointed in a clear, transparent and fair manner with due regard to the need to ensure efficient procedures and avoid any conflict of interests. Moreover, the final compromise text adds to the General Approach that 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 experiences and capacity building tools[8].

As a last point, the final compromise text, as the text of the General Approach, strengthens the need to frame the practice in the field of restructuring, insolvency and second chance and increases its transparency. Indeed, Member States shall put in place appropriate oversight and regulatory mechanisms to ensure that the work of practitioners is effectively supervised, with a view to ensuring that their services are provided in an effective and competent way, and, in relation to the parties involved, are provided impartially and independently. As regards the remuneration of practitioners, the final compromise text recommends that the remuneration shall be governed by rules which should be consistent with the objective of an efficient resolution of procedures, and appropriate tools shall be put in place to resolve any disputes over remuneration[9].

Appointment of IPs

If minimum standards for training, appointing, supervising and remunerating practitioners in procedures concerning restructuring, insolvency and discharge of debt are confirmed by the final compromise text, in order to bring the professionalism of practitioners in procedures concerning restructuring, insolvency and discharge of debt to comparable high-levels across the Union, however, the text paradoxically limits their appointment in restructuring procedures. While the need for national regulatory frameworks of the practitioners in such procedures is acknowledged by the final compromise text, the appointment of the practitioner in the field of restructuring is facultative, and this was contested during the negotiations and rendered it difficult to reach an agreement[10].

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 such proceedings shall not be mandatory in every

case. They may be required where the debtor is granted a general stay of individual enforcement actions and where the restructuring plan needs to be confirmed by a judicial or administrative authority by means of a cross-class cram-down. This would avoid unnecessary costs and would incentivise debtors to apply for preventive restructuring at an early stage of financial difficulties.

According to the final compromise text, the practitioner in the field of restructuring "means any person or body appointed by a judicial or administrative authority to carry out, in particular, one or more of the following tasks:

(a) to assist the debtor or the creditors in drafting or negotiating a restructuring plan;
(b) to supervise the activity of the debtor during the negotiations on a restructuring plan and report to a judicial or administrative authority;
(c) to take partial control over the assets or affairs of the debtor during negotiations"[11]

The Council noted that if the Member States agreed that the preventive restructuring procedure should be a debtor-in-possession procedure (meaning that the debtor should be left in at least partial control of the assets and the day-to-day operation of the business), some of them however considered that the presence of a practitioner in the field of restructuring can increase the efficiency of the procedure and can ensure that the interests of all parties are taken into account.

The General Approach thus lays down the general principle that the appointment of such a practitioner shall be decided on a case-by-case basis, depending on the circumstances of the case or on the debtor's specific needs, except in certain cases, where the national law may require such a mandatory appointment.

This point was particularly problematic during the negotiations as, contrary to the Council, the European Parliament would not deviate from a mandatory appointment of a practitioner at least in some cases. Finally, all parties have agreed to observe the general principle that the appointment of such a practitioner shall be decided on a case-by-case basis, except in certain circumstances, where Member States may require the mandatory appointment of such a practitioner in every case. Moreover, all parties have agreed to add a few cases in which a practitioner shall, at least, assist the debtor and creditors in negotiating and drafting the plan, such as where:

(a) the general stay of individual enforcement actions is granted by the judicial or administrative authority which decides that such a practitioner is necessary to safeguard the interest of the parties;
(b) the restructuring plan needs to be confirmed by a judicial or administrative authority by means of a cross-class cram-down, in accordance with Article 11; or,
(c) it is requested by the debtor or by a majority of creditors, provided that in this case the remuneration of the practitioner is borne by the creditors[11].

This slight shift in the final compromise text is more than welcome. Indeed, the appointment of a specialised and independent practitioner is crucial not only in the field of insolvency but also in the field of restructuring where there are also conflicting interests.

The Council's position seems to be inspired by the UK scheme of arrangement concluded between a company and one or more classes of its creditors. A scheme is not an insolvency procedure and can be a useful restructuring tool for both solvent and insolvent entities if the necessary majority of creditors vote in favour and the court approves it. In the UK scheme of arrangement, an insolvency practitioner is not required to encourage the negotiation of a restructuring agreement, although a scheme proposed by a company in administration/liquidation will be overseen by the administrator/liquidator. In France, the preventive and confidential procedures of ad hoc mandate and conciliation, which are very successful in practice to negotiate a restructuring agreement, are on the contrary based on the systematic appointment of an insolvency practitioner by the court.

The fact remains that, the directive cannot call for qualified practitioners in the field of restructuring, insolvency and second chance to ensure efficient procedures on the one hand, and, on the other, make their appointment facultative in restructuring procedures in order to lower costs. Indeed, only appointed qualified and independent practitioners can assist companies efficiently to prevent their difficulties as soon as possible, save jobs and avoid conflict of interests. ■

THE APPOINTMENT OF A SPECIALISED AND INDEPENDENT PRACTITIONER IS CRUCIAL NOT ONLY IN THE FIELD OF INSOLVENCY BUT ALSO IN THE FIELD OF RESTRUCTURING

Footnotes:

1 Inacio E., "*The Niebler Report on the European Commission's Proposal Directive on Preventive Restructuring Frameworks*" in Eurofenix, 2018 Autumn Edition n°73.
2 www.consilium.europa.eu/fr/press/press-releases/2018/10/11/directive-on-business-insolvency-council-agrees-its-position/
3 www.consilium.europa.eu/en/press/press-releases/2018/12/19/eu-agrees-new-rules-on-business-insolvency/
4 data.consilium.europa.eu/doc/document/ST-15556-2018-INIT/en/pdf
5 oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=&reference=2016/0359(COD)
6 www.europarl.europa.eu/plenary/en/infos-details.html?id=16721&type=Flash
7 Inacio E., "*The General Approach of the Council on the European Commission's Proposal Directive on Preventive Restructuring Frameworks*" in Eurofenix, 2018/2019 Winter Edition n°74.
8 Article 26.
9 Article 27.
10 See Bork R., "*Directive on Preventive Restructuring Frameworks: Political compromise in the trilogue talks and imminent adoption*", pp. 18-20.
11 Article 2(15).

Compliance:
GDPR and sensitive financial data

Ludovic Van Egroo studies how to apply GDPR to financial data in accordance with previous regulations

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> COMPANIES HAVE BEEN GIVEN TWO YEARS TO IDENTIFY THEIR PERSONAL DATA USES AND IMPLEMENT MEASURES TO ENSURE THEIR PROTECTION

Digital transformation impacts all business sectors and offers many opportunities for the use of data collection. The General Data Protection Regulation (GDPR) was thus implemented to provide a regulatory and legal framework for the protection of personal data against the different ways in which it may be used.

GDPR is particularly focused on a European citizen's personal data, qualified as sensitive when the latter concerns members of an association or a political, religious, philosophical, political or trade union organisation.

Companies that have not implemented the regulatory and organisational processes related to GDPR are liable to a fine up to €20 million or 4% of their global annual revenue. Organisations are required to provide evidence of their compliance with the risk of being convicted.

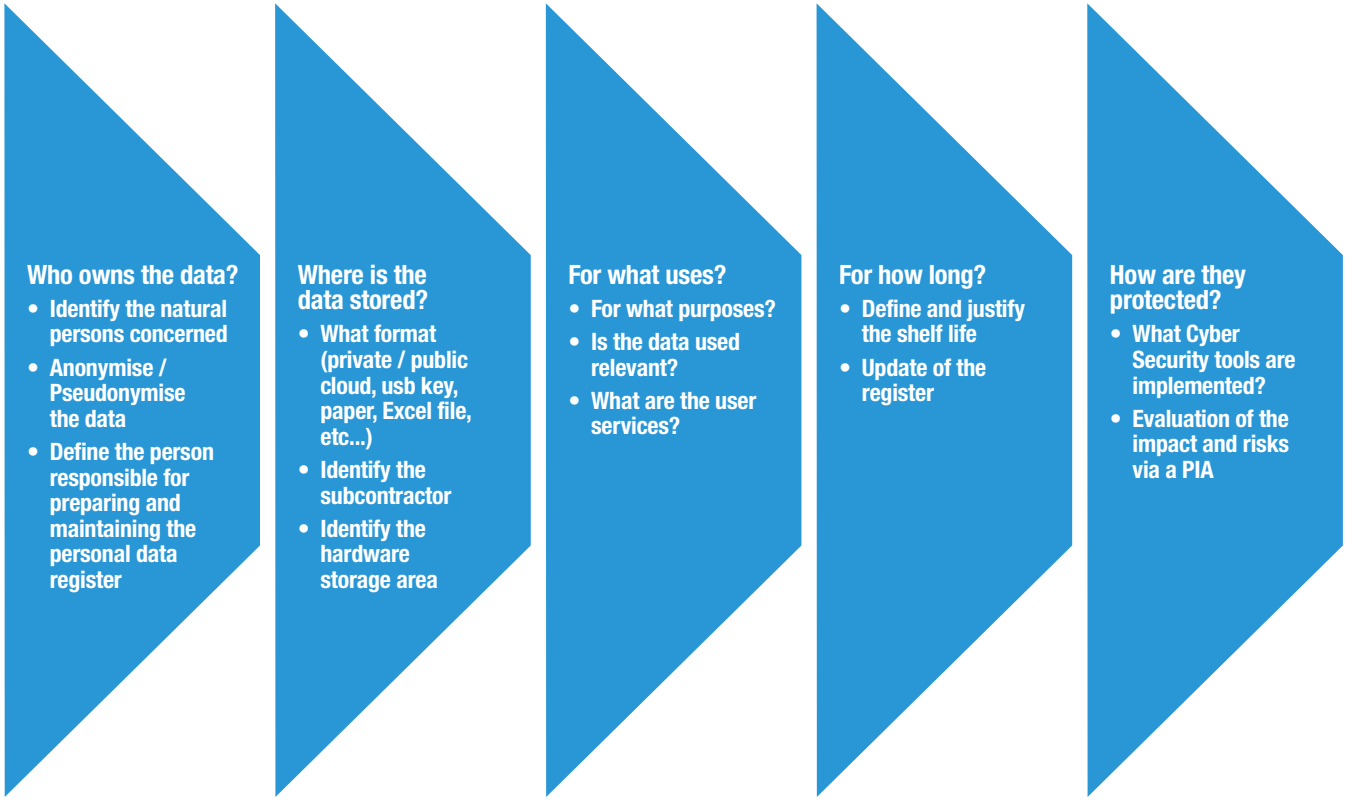
In this article, we will study how to apply this regulation to financial data in accordance with previous regulations.

GDPR: A mandatory framework with an international scope

Like FACTA's regulation for US citizens' taxation or the "*RIA Compliance Rules*" that define certain obligations while using the US Dollar in financial transactions, GDPR is based on articles 7 (*Respect for private and family life*) and 8 (*Protection of personal data*) of the Charter of The Fundamental Rights of the European Union. It thus protects all European Union nationals within the Union and internationally.

GDPR came into existence on 25 May 2018 and companies have been given two years to identify their personal data uses and implement measures to ensure their protection.

In 1971, the Secretary of the United States Treasury, John Connally, said, "*The dollar is our currency, but it's your problem.*" On the same lines, in 2018, as



GDPR was implemented, we can declare, "*The European citizen's personal data is their data, but it's your problem.*"

Apart from the existing legal risks, the credibility, the e-reputation and consequently, the confidence that customers grant to financial institutions are the major stakes of the GDPR compliance.

A special challenge for the banking and the insurance sector

As banking and insurance-related activities become increasingly digitalised, the collection of the personal data of customers has also become routine, before and throughout the duration of the business relationship: both for commercial purposes and in compliance with Know Your Customer (KYC) obligations in the context of anti-money-laundering and financial crime, such as MIFID II/AML/LCB-FT.

What are the requirements of the General Data Protection Regulation?

Regarding the banking sector, the processing of personal data is part of the GDPR when the purpose or effect is[1]:

- Assessment of personal aspects or rating of a person (e.g. financial scoring);
- Automated decision-making;
- Systematic monitoring of people (e.g. remote monitoring);
- Sensitive data processing (e.g. health, biometrics, etc.);
- Data processing of vulnerable persons (e.g. minors);
- Large-scale processing of personal data;
- Cross-reference of all data;
- Innovative uses or the application of new technologies (e.g.: connected objects, Artificial Intelligence, Robotic Process Automation…); and
- Exclusion from exercising a right, engaging a service or a contract (e.g. blacklist).

If your data processing meets at least two of these nine criteria, you should first conduct a Data Protection Impact Analysis (DPIA), before starting the processing operations.

Concretely, while implementing GDPR, organisations must ask themselves the right questions in order to respect the rights of consumers – see diagram above.

The GDPR reserves to consumers one of the rights that may be in contradiction with the obligations relating to the various initiatives, such as anti-fraud/anti-money-laundering, etc., as for example:

- The management of consent: obtaining it in an informed manner and having the ability to provide tangible proof of its collection[2],
- The right to oblivion that requires the deletion of

> **HOW CAN BANKING AND INSURANCE COMPANIES COMPLY WITH GDPR REGULATIONS WITHOUT OVERRIDING THEIR PREVIOUS OBLIGATIONS?**

MEETING THESE REQUIREMENTS CALLS FOR THE DEVELOPMENT OF ORGANISATIONAL PROCESSES, INTEGRATING TOOLS AND SOLUTIONS

personal data; however, especially when it comes to implementing the KYC requirement, banking and insurance stakeholders are required to keep these data and make them available to the different institutions.

- The right of access to the data in the context of portability, which raises the question of which data can be transmitted between the data provided by the consumer and the data that may have been provided by other services, in particular with regard to corporate solvency and bankruptcy.

Meeting these requirements calls for the development of organisational processes, integrating tools and solutions that allow for:

- Transparency for the customer: state clearly and explicitly beforehand the KYC investigation process (collected data, recipients, …) but also inform the customer about the points which can be subject to investigations and alerts;
- Collecting evidence of informed consent and its management i.e. archiving and preservation;
- Data accessibility: develop the transmission process for collected data to respond to requests for access to information as part of the KYC process. Moderation may be established as part of the bank's duty to safeguard information in the event of proceedings being opened, and at the request of a legal institution;
- The ability to operate data transferability; and
- The data retention period:
- Which process to apply for erasing personal data?
- What data to keep and in what format?
- Who will be responsible and which services will have access to this data and for what purpose?

and don't forget to remind the regulatory framework and the requirements for data retention.

The CNIL has responded to these obligations by issuing the Single authorisation AU-003[3] which translates as follows:

The personal nature of the processed data relates to:

"Client identification, where applicable, the owner beneficial in business relationship; the professional situation; the functioning of the account; the financial transactions or the subscribed products, the assets".

The recipients of this data as part of the management of access rights are:

- The national legal authorities (CNIL in France),
- The services responsible for the fight against money laundering within the body holding the data, namely the persons responsible for compliance,
- TRACFIN correspondents of the same banking group,
- The authorities of the State of the head office of the organisation, if it is a member of the European community.

CNIL mentions, "only persons who have the status of TRACFIN correspondent or registrant may receive communication of the existence of a declaration of suspicion and any information on the action that has been reserved by TRACFIN".

The duration of data retention is five years from:

- The closure of the account or the termination of the business relationship with respect to the data and documents relating to the identity of the customers,
- The execution of the transaction, concerning the data and documents recording the characteristics of the transactions mentioned in II of the article L561-10-2.

As a result, the players who are subject to the various anti-fraud regulations are required to provide answers about the organisational processes of collection and data processing, but also about the management of consent and the rights not needing consent, regarding the retention periods of data. For example, the right of access is exercised via an indirect right of access procedure, while guaranteeing the confidentiality of the data.

Implementation:

- Ensure compliance of regulatory requirements by auditing Customer Knowledge Processes (KYC) and analysing organisational and operational models;
- Analyze the impact of customer data through the development of Privacy Impact Asset (PIA) and the maintenance of appropriate registers;
- Develop procedures to notify public institutions within 72 hours and then inform the persons concerned; and
- Analyze risks (economic, organisational, financial), internal and external fraud, and the image and information systems in the context of data processing.

A collective collaboration of organisations for the processing of intra-group data in several states of Group 29 (G29) in the European Data Privacy Board (EDPB)

Banking and insurance companies are free to carry out internal arbitration concerning the processes to be implemented in the context of data sharing between the different departments. In order to facilitate these processes, the Community of the Article 29 (G29) Group, brings together private players and European public institutions in charge of monitoring these data, proposed rules and best practices in order to facilitate the exchange of information between officials within the same multinational.

The legal foundation is based on Articles L511-34 and R 561-29 of the Monetary and Financial Code and the use of the Binding

Corporate Rules (BCR) tool.

This framework facilitates the relationship of the banking and insurance companies and "creates a safe harbor for transfers within a group acting as a subcontractor". This organisation has been replaced by the European Data Protection Board (EDPB) with the following missions:

- Harmonise and ensure that the rules of the European Union (EU) are applied uniformly within the Member States;
- Ensuring the consistent application of the Data Protection Directive;
- Adopt "policy documents to clarify the provisions of European legislative acts" and "provide stakeholders with a coherent interpretation of their rights and obligations";
- Make formal announcements according to the article 70;
- Issue binding decisions in case of disputes between authorities according to Article 64; and
- Develop a common doctrine of EU data protection authorities.

G29's recommendations have thus led to the simplification of the procedures for transmitting data between entities of the same group while complying with the obligations of security and confidentiality of the data. These adjustments should allow to reconcile the duty of vigilance in the fight against money laundering and the financing of terrorism.

Conclusion

In conclusion, GDPR is not an impediment to the previous regulations and provides an additional guarantee against data leakage.

One of the keys to success is the transparency that the private sector players in the banking and insurance sector must demonstrate by adopting a pedagogical approach.

The GDPR's implementation is the opportunity to explain in a transparent way the purpose of the various regulatory frameworks in order to deploy them within organisations.

By extension, this situation also concerns non-financial organisations subject to the same supervisory obligations in the fight against money laundering and anti-terrorism (lawyers, notaries, real estate subsidiaries of a banking establishment, etc.).

The bank, a financial safety vault, has now become a safety vault for sensitive personal data. ■

Footnotes:

1 CNIL, RGPD: points de vigilance, www.cnil.fr/fr/rgpd-points-de-vigilance

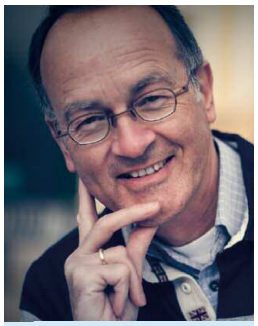
2 RGPD Moment de vérité, Emmanuelle Inacio, INSOL Europe Partners, Spring 2018

3 CNIL, Autorisation unique AU-003 Lutte contre le blanchiment par les organismes financiers www.cnil.fr/fr/declaration/au-003-lutte-contre-le-blanchiment-par-les-organismes-financiers

> **THE BANK, A FINANCIAL SAFETY VAULT, HAS NOW BECOME A SAFETY VAULT FOR SENSITIVE PERSONAL DATA**

Directive on Preventive Restructuring Frameworks:
Political compromise in the trilogue talks and imminent adoption

Prof. Reinhard Bork summarises the compromises agreed ahead of the adoption of the new directive



PROF. REINHARD BORK
University of Hamburg, Germany

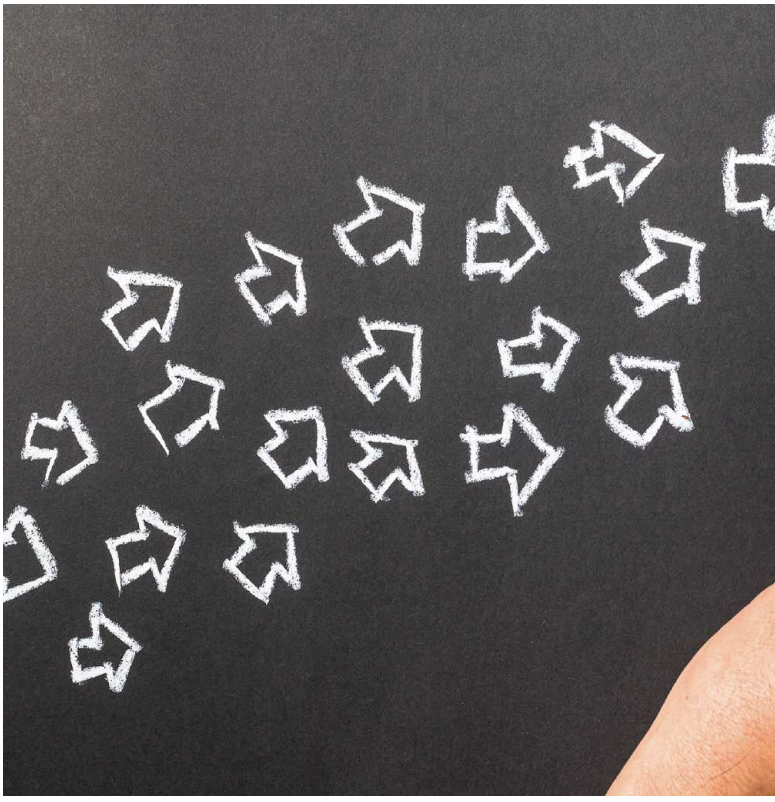
After more than two years of intensive discussions in politics and science, the adoption of the Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30 shortly lies ahead.

The negotiations on the directive have gained significant momentum during the past few months and could finally be concluded in the trilogue talks in mid-December 2018. The agreement reached has made some concessions to the European Parliament in order to find a final compromise, but, in the end, largely respects the principles that Member States have agreed upon in the General Approach of the Council. The compromise text has already been approved by the Committee on Legal Affairs of the European Parliament and should now be ready for its scheduled adoption by the plenary sitting of the Parliament on first lecture on 26 of March 2019.[1] After that, the two-year implementation phase can begin.

The Directive follows on from the recent restructuring trend in Europe and, in the course of this, commits itself to a Europe-wide introduction and harmonisation of efficient preventive restructuring procedures. The now presented compromise essentially retains all the elements of the original Commission proposal but tries to give the Member States sufficient leeway in the concrete implementation of the rules in order to be able to achieve the objectives set in accordance with their existing national framework. Thus, the only binding requirement is that Member States must provide a pre-insolvency restructuring framework with certain instruments; the concrete form of these instruments and of the whole procedure is subject to individual decisions of the national legislators.

However, according to the institutions the compromise text shall be seen as a package of rules aiming to establish a well-balanced regime that takes into account the interests of the debtor, creditors and other interested parties alike. The Directive therefore now comprises the following provisions.

> **THE DIRECTIVE FOLLOWS ON FROM THE RECENT RESTRUCTURING TREND IN EUROPE**

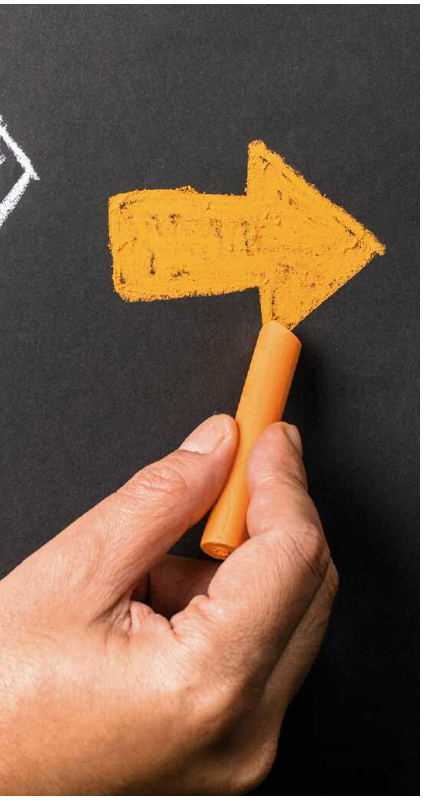


Access to a preventive restructuring framework

Operationally viable, but financially distressed debtors shall, where there is likelihood of insolvency, have access to a preventive restructuring framework that enables them to restructure, with a view to prevent insolvency and ensure their viability (Art. 4 par. 1). The framework exists independently and without prejudice to any other restructuring frameworks under national law (Art. 4 par. 2). It shall be available on application by the debtor but may be extended to requests of other stakeholders such as creditors or workers' representatives, subject to the agreement of the debtor (Art. 4 par. 4a). During the procedure, the debtor in possession generally remains in control of his assets and the day-to-day-operation of the business (Art. 5 par. 1).

Appointed practitioner

Yet the range of this principle proved to be particularly problematic during the negotiations and suitable to prevent a political agreement until the very end of the trilogue. The



institutions specifically argued about whether and in what cases a practitioner should be appointed to monitor and assist the debtor. On the one hand, the European Parliament pleaded for a mandatory appointment at least in some clearly stated cases, where it seems necessary to safeguard the rights of the affected parties.

From the Parliament's point of view, this at least included the cases 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 or where it is requested by the debtor or a majority of the creditors. The Council, on the other hand, argued, that the appointment of a practitioner would interfere with the preventive character of the framework and particularly would increase the costs of the procedure constituting a considerable burden for the debtor. The engagement of a practitioner should be limited to unspecified individual cases, where an appointment is deemed necessary by a judicial or administrative authority.

Finally, the Parliament prevailed and the parties have agreed on the few cases mentioned above, in which a practitioner should act in a supportive manner. However, these cases are drafted in a way which gives Member States the greatest flexibility possible regarding the transposition and certain safeguards were built in to avoid that the procedure becomes costly and burdensome for the debtor (if the appointment is requested by a majority of the creditors, it is the creditors to bear the cost of the practitioner).

Stay of individual enforcement actions

As the debtor is granted a stay of individual enforcement actions, he initially falls under the protection of Art. 6 and 7 for a maximum of four months. Following the Council's position, the duration of the stay may be extended on request of the debtor, a creditor or, where applicable, a practitioner up to a maximum of twelve months. During the stay, all creditors of the debtor – except for the workers – may no longer enforce their claims. They further can no longer refuse to provide services necessary for the debtor's business based on outstanding claims or any contractual clauses or withdraw from such contracts to the detriment of the debtor.

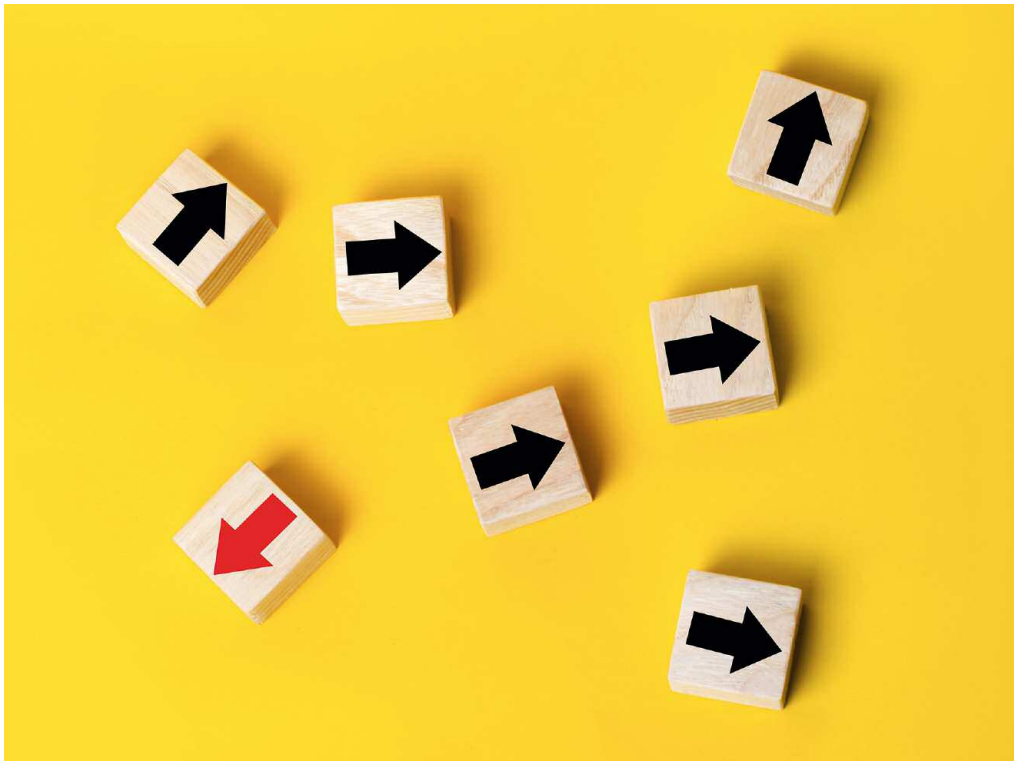
On the other side, the debtor's obligation to file for the opening of insolvency proceedings, which can end in the liquidation of the debtor, shall generally be suspended during the stay. By granting the stay with all its consequences, the Directive enables the debtor to continue his business operations as well as preserve the value of his undertaking during the pending negotiations on a restructuring plan.

Adoption of the restructuring plan

Later on, this restructuring plan needs to be adopted by the creditors and in some cases be confirmed by a judicial or administrative authority entailing a few controversial issues. While the Council had made some concessions regarding the appointment of a practitioner, it decisively insisted on its position when it comes to the adoption of the plan. However, the Parliament respected the Council's desire for greater flexibility and agreed to the corresponding adjustments of the Directive.

Hence, it is no longer mandatory to achieve a double majority in the amount of claims and the number of creditors for a plan to be adopted, though the Member States may require a double majority in each class (Art. 9 par. 4). Furthermore, the Parliament has accepted the Council's approach towards a cross-class cram-down allowing a judicial or administrative authority to confirm a plan under certain circumstances, although it has not been approved by the affected parties in every voting class (Art. 11).

FINALLY, THE PARLIAMENT PREVAILED AND THE PARTIES HAVE AGREED ON THE FEW CASES IN WHICH A PRACTITIONER SHOULD ACT IN A SUPPORTIVE MANNER



> IT IS TO BE FEARED THAT THE FLEXIBILITY OF THE DIRECTIVE ENFORCED BY THE COUNCIL WILL LEAD TO VERY DIVERGENT PROCEDURES IN THE INDIVIDUAL MEMBER STATES

Relative Priority Rule

This instrument was unknown to a number of Member States and raised some concerns again about a possibly more burdensome and costlier framework. However, these concerns have been dispelled by giving the Member States – among others – the option to introduce a "Relative Priority Rule" that ensures dissenting voting classes to be treated at least as favourably as any other class of the same rank and more favourably than any junior class. Finally, the structure of the cram-down-Article 11 has been modified in the talks, but the substance of the Article remained the same as before in the Council's General Approach.

Worker protection

Another controversial point concerned the issue of worker protection in the Directive. In contrast to the Commission's proposal and the Parliament's position, the protection of workers only played a subordinate role in the Council's General Approach.

In the end, the institutions agreed on a no longer mandatory classification of the workers as a separate class in the frame of Art. 9 par. 2. In return a new Art. 12a has been introduced on workers' rights, which indeed does not create any new rights for the workers and seems to be more or less declarative. As regards the protection of new and interim financing in a subsequent insolvency of the debtor, the final compromise is largely equivalent to the text of the Council's General Approach.

Compared to the Commission's proposal the Council decided to reduce the protection scope of Art. 16 and 17, so that most of the national avoidance laws will probably not be affected by this rule. Restructuring consultants and other parties involved in a preventive restructuring procedure must therefore not rely on special protection in the future and should continue to keep an eye on the applicable national regulations on transactions in precedence of an insolvency of the debtor.

On the other side, the Parliament imposed Art. 18, which regards to the duties of directors and was firstly deleted in the Council's General Approach. However, it is difficult to discern a deeper meaning in the re-introduction of Art. 18 as it simply refers to well-known duties such as taking into account the interests of creditors and other stakeholders as well as taking steps to avoid insolvency. Regarding Titles III, IV and V dealing with the discharge of debt as well as measures to increase the efficiency of corresponding procedures and their monitoring, the Parliament largely kept the Council's Approach from May 2018; only little amendments had to be made.

Expectations

What can one expect from the Directive now? It certainly achieves its goal to establish preventive restructuring frameworks throughout Europe. Especially Member States like Germany that so far deliberately refrained from a preventive restructuring procedure will be under pressure to take action. At the same time, however, it is to be feared that the flexibility of the directive enforced by the Council will lead to very divergent procedures in the individual Member States. Finally, the opportunity and advantages of a harmonised procedure throughout Europe might be missed. ■

Footnotes:

1 The compromise text is part of the note that has been published by the presidency of the Council on 17/12/2018 and can be accessed at: https://data.consilium.europa.eu/doc/document/ST-15556-2018-INIT/en/pdf

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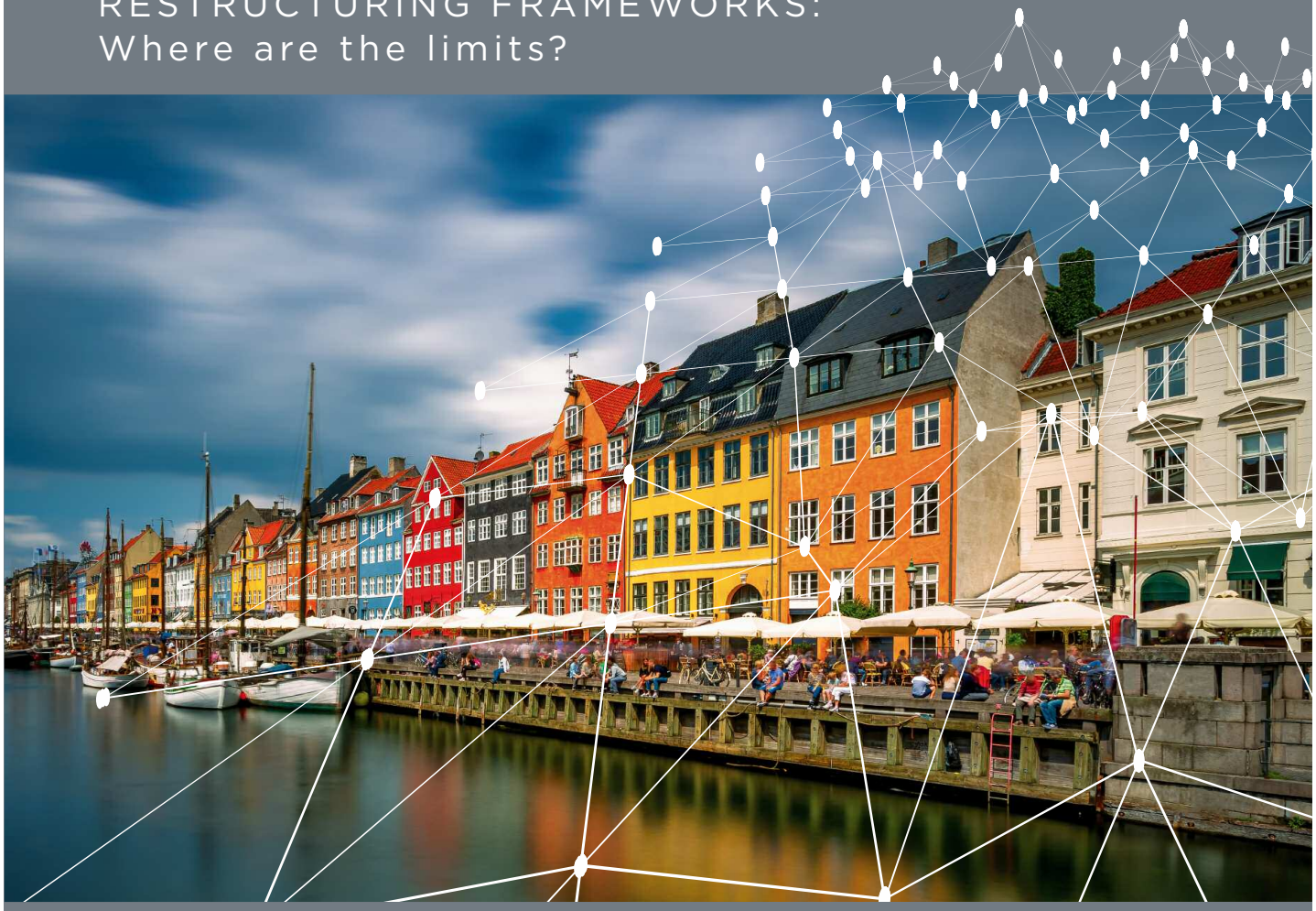

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The Preventive Restructuring Directive: A French perspective

Jean-Luc Vallens writes on the impact of the Directive on French practitioners

JEAN-LUC VALLENS
Honorary judge,
Professor emeritus, France

The Preventive Restructuring Directive ("PRD"), which is about to be adopted by the European legislator, deserves the close attention of French practitioners, as it will become part of Book VI of the Commercial Code.

More effective prevention

The PRD anticipates putting into place a framework for preventive restructuring that is both efficient and light: involvement of a judge is no longer considered indispensable (Article 4), except for a few matters: evaluation of the business' financial situation, stays of individual action to permit the parties to negotiate and the approval of an agreement. The initiative is left to the debtors or, with their consent, to one of the creditors (Article 4).

The debtor may also be supported by a practitioner if the Member States see it as desirable (Article 5), which will be necessary to guarantee the professionalism of those involved in preventive restructuring. The PRD provides for a temporary stay of individual actions limited to 4 months, though with a possible extension to 12 months, subject to creditors being able to petition for its being lifted in case of unfair prejudice (Articles 6-7). A creditor providing financing for restructuring will enjoy a preference under this framework.

Except for the optional nature of the court intervention possible, the orientation of the procedure is largely inspired by the French *conciliation* procedure. Confidentiality is not, however, given priority by the European law-maker as a necessary procedural tool, though the PRD recommends a limited power for courts to intervene and provides that stays of individual actions should only affect those creditors who have been informed of the negotiations. The PRD also permits the Member States the possibility of introducing or maintaining procedures which do not adhere to the notice conditions, falling within the field of application of the Recast European Insolvency Regulation, to be included within the list in Annex A.

> **THE ORIENTATION OF THE PROCEDURE IS LARGELY INSPIRED BY THE FRENCH CONCILIATION PROCEDURE**

A reinforced restructuring procedure

The PRD contains rules destined, it being the case, to apply to preventive procedures, but perhaps also, in an indirect way, to existing restructuring procedures, such as *sauvegarde* and *redressement judiciaire*. In effect, it prescribes the formation of creditor classes to vote on the restructuring agreement: creditors will be grouped together, by reference to the preferences they enjoy and to any existing agreements, into different classes reflecting comparable economic interests.

Creditors thus grouped together will be required to vote on the restructuring proposals (Article 9). At least two classes will be created, one for creditors benefiting from preferences and security, the other for unsecured creditors. A class containing employees may also be put into place. Another class could bring shareholders together, which could increase the chances of a plan being approved via a cross-class cram-down.

With these changes, the French law will move from a classification of creditors within the existing committee structure based on the status of creditors, to a classification in function of the type of debt. For smaller businesses, the Member States may set aside this mechanism as long as they determine what will be acceptable thresholds for approval. Voting majorities may be set freely, subject to an overall limit of 75% of the amount of debt in each class, so as to facilitate the approval of restructuring plans despite the opposition of some creditors.

The scope of application of these principles might extent to *sauvegarde* and *redressement judiciaire* procedures, not just the conciliation procedure. *Sauvegarde* is tied to the criterion of the probability of insolvency, and it is likely that similar rules should apply for the *sauvegarde* and *redressement judiciaire* procedures, for the adoption of plans which have the same outcomes.

The PRD empowers courts with a detailed, though formal, oversight of matters. Assessment will concern, namely, class formation, formalities in relation to the casting of votes, fair information to smaller creditors, the calculation of majorities. The equality of treatment of creditors belonging to the same class will also be a criterion for approval. Inspired by American law, other elements will be introduced, such as the "best interests test", by a comparison between the positions of opposing creditors within the

proposed plan and their situation in a liquidation and the absolute priority rule (Article 10 and 11). Such criteria go further than the current conditions for approval of rescue plans.

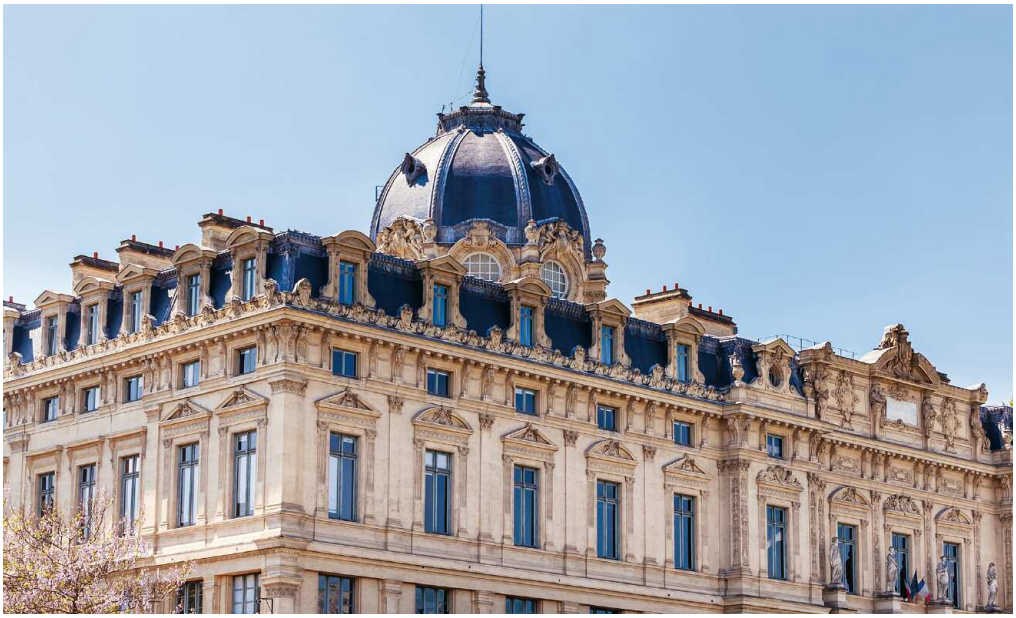
Finally, courts should be entitled to reject a proposed plan if it does not offer a reasonable prospect for the avoidance of insolvency or does not ensure the viability of the business. This sounds similar to the current French law (Article 13).

The plan that is approved will be binding for all affected parties. Legislators however may provide that the plan should not in any event affect the rights of workers. In case of an appeal against the court's approval, the Member States will have to provide rules for a fast procedural treatment, and if an appeal stays the application of an order, the affected creditors should receive damages, for example interests on late payments (Article 15).

Making directors more responsible

The Member States should impose general duties on directors, such as the duty to protect the interests of creditors in cases where insolvency is probable, to take necessary steps to avoid insolvency, and to avoid gross negligence in carrying out activities that could compromise the viability of the business (Article 18). This draws on duties provided for and sanctioned by the French law in the presence of management misconduct, voluntarily neglecting to declare the insolvency of the business, defects in the keeping of accounts and the misappropriation of assets.

The French Commercial Code will not need substantial modification, except insofar as qualifying what 'management misconduct' might mean. The PRD also prescribes limiting the shareholders' rights: they will be excluded from voting on plans and courts will have the possibility to reject any objection in respect of a plan voted against their will (Articles 9 and 12). The French law currently considers shareholders as unsecured creditors and the legislator will have to amend it.



A rescue eased by debt cancellation

The French law grants individual debtors a general discharge except for some exceptions upon the closure of a *liquidation judiciaire*.

The PRD provides for an automatic cancellation of unpaid debt at the end of a three-year period, depending on a confirmation of a plan, or on opening of an insolvency procedure. Discharge is therefore uncoupled from the end of procedural operations. Any disqualification from professional activity based only on the fact of insolvency (such as in the current French law, during a *liquidation judiciaire*) should also end when the discharge happens. Usual exceptions however may be made where the debtor was acting in bad faith, in case of a substantial breach in the payment obligations, or where the debtor fails to cooperate.

The prescribed three-year duration should be enacted in coordination with the duration of a rescue plan, thus, possibly greater. The longer period of a plan could derogate to the general rule (see Article 20-2(2)). Exceptions are provided for other debts, including criminal sanctions, damages, alimentary and family support, debts arising after the judgment opening the proceedings and for some debtors subject to professional conduct rules (Articles 19-22). The French law will not require substantial modification in this regard.

Experienced professionals

The PRD's model here is largely based on the status of French professionals insofar as the conditions for appointment and practice (transparency, fairness and professional training) are concerned. Parties will get the right to remove practitioners in order to avoid any conflicts of interest (Articles 26-27). Qualification requirements are also introduced for judges in charge of insolvency procedures (Article 24). Training provided to judges by the French National School for Judiciary is very much in line with these requirements (see the World Bank Doing Business Report 2019). ■

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> **THE FRENCH COMMERCIAL CODE WILL NOT NEED SUBSTANTIAL MODIFICATION, EXCEPT INSOFAR AS QUALIFYING WHAT 'MANAGEMENT MISCONDUCT' MIGHT MEAN**

Abengoa subsidiary to face first creditor-forced insolvency proceedings

José Carles Delgado and Carlos Cuesta Martín report on the opening of insolvency proceedings against a subsidiary of global biotechnology company Abengoa in Spain

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Commercial Court nr. 2 of Seville has granted the opening of insolvency proceedings against Abengoa's subsidiary, 'Simosa IT', after the petition submitted by one of its commercial creditors. It was the first time the Commercial Court agreed, since other creditors had also tried this measure against other companies of the group, with no success.

Is the situation of insolvent 'Simosa IT' the prelude of what will happen with the rest of the Spanish group?

Question of insolvency

Spanish Abengoa's mid-year 2018 financial report[1] shows a total debt of 7,496.98 million Euro, out of which 5,182.60 million Euro is short term debt and 1,534.89 million Euro is debt towards commercial creditors. Besides, Abengoa's average payment period amounted in 2017 to 463 days, which means that the company did not comply with the Spanish laws on delinquency[2]. Does this mean that the Spanish company is insolvent?

Last April 6, 2016, Commercial Court number 2 of Seville (Spain) approved the group's master restructuring agreement reached between Abengoa, its subsidiaries (including 'Simosa IT') and its financial creditors. Back then, the "*homologación*" of the refinancing agreement was perceived as good news, although the refinancing agreement only bound financial creditors. Not commercial creditors.

Nevertheless, the Spanish Insolvency Act defines insolvency as the situation in which the debtor is no longer able to duly fulfil its overdue payment obligations ("*current insolvency*") in a regular manner. Therefore, as Abengoa and its subsidiaries were not able to duly fulfil their payment obligations towards the commercial creditors – according to the Spanish press since 2015 – the group (or, at least, some of its companies) was technically insolvent. This resulted in the group's need to reach bilateral agreements with their commercial creditors, one by one.

The technical insolvency of Abengoa's group, as defined by the Spanish Insolvency Act, was aggravated after the ruling of Commercial Court number 2 of Seville of September 25, 2017, which decided the fate of the appeal that challenged the Court-approval of the master restructuring agreement. This ruling dictated that some creditors, such as the bondholders, stated they were not to be bound by the refinancing agreement because the Court considered, back then, that they had been forced to make a "*disproportionate sacrifice*" under the refinancing agreement.

Insolvency petition

In this micro-economic context, at the beginning of 2018, a French commercial creditor, Sopra Steria, filed a compulsory insolvency petition referring to Abengoa's subsidiary 'Simosa IT'[3].

Other creditors of other companies of the Abengoa group followed and tried to have other subsidiaries declared insolvent, such as:

1) Indes Technics & Solutions vs. Abengoa's subsidiary Abener, for unpaid works in Poland since 2015 (Commercial Court nr. 2 of Seville)[4].
2) Bondholders that were not bound by the refinancing agreement due to its "*disproportionate sacrifice*" vs. Abentel (Commercial Court nr. 2 of Seville, rejected by the Court)[5].
3) Bondholders that were not bound by the refinancing agreement due to its "*disproportionate sacrifice*" vs. Asa Desulfuración (Commercial Court nr. 1 of Bilbao)[6].

Of all these proceedings involving companies of the group, Commercial Court nr. 2 of Seville[7] has opened, for the first time, insolvency proceedings of an Abengoa company at the request of a creditor, known now as the creditor-forced proceedings ("*concurso necesario*") of 'Simosa IT', despite the initial opposition motion of the insolvent debtor 'Simosa IT'.

Under Spanish law, the ruling opening the insolvency proceedings of 'Simosa IT' does

not decide yet on the liability of the directors. But there will be a separate side issue inside the Spanish "*concurso de acreedores*", under which the liability of the directors and the *de facto* administrators must be analysed and could affect Abengoa itself. Mainly, because Abengoa was the sole administrator of its subsidiary until the opening of the forced proceedings, which implied the Court removing Abengoa as sole director of 'Simosa IT' and substituting it by the insolvency practitioner Ernst and Young.

Director's liability

One of the reasons that implies the director's liability, under the Spanish Insolvency Act, is that the director aggravated the insolvency situation of the company due to not filing for an insolvency petition in due time (art. 165.1 states this delay as a *iuris tantum* presumption for liability). According to the Spanish media, the insolvency would go back to 2015 in this case – almost four years ago – versus the two-month term imposed by the Spanish Insolvency Act (art. 5.1).

Other facts could be taken into account towards the liability of Abengoa. For example, if it is proved that the lack of payment goes back to 2015. The Court-approved master refinancing agreement could have implied, together with the lack of deposit of its Annual Accounts in due time[8], an attempt of the group to simulate a false situation of solvency. This could also trigger Abengoa's liability under art. 164.2.6º of the Spanish Insolvency Act, in this case, a *iuris et de iure* presumption for the liability of Abengoa as sole director. Most clearly, if it is proved, as it has been claimed, it will show that 'Simosa IT' was a front company for its parent company and that Abengoa has used the subsidiary to avoid paying its obligations[9]. In this respect, Abengoa subsidiary's basic purpose was to provide Abengoa and the group with IT & Telecoms services.

Criminal actions

Finally, the insolvency practitioner of 'Simosa IT' could also pursue the criminal actions of the directors and the *de facto* administrators against 'Simosa IT' and Abengoa if it understood that the insolvency was created knowingly (arts. 259 and 260 of the Spanish Criminal Code).

Consequently, we will have to follow closely the insolvency proceedings of 'Simosa IT', to which Carles Cuesta Abogados is the counsel of the creditor that forced the insolvency proceeding, in order to understand what specific implications could arise for Abengoa and the rest of the group. ■

Footnotes:

1 Mid-year report "*Estados financieros intermedios resumidos consolidados a 30 de junio de 2018*" published by Abengoa.

2 See article 4.3 of *Ley 3/2004, de 29 de diciembre, por la que se establecen medidas de lucha contra la morosidad en las operaciones comerciales* (Law on measures against delinquency in commercial transactions) that dictates a maximum payment period, on a case by case basis, of 60 calendar days.
In this respect, the Spanish Supreme Court has ruled (ruling of November 23, 2016) on the mandatory nature of these 60 days, stating that "*all those pacts that exceed that time limit, 60 calendar days, result null and void by contravention of the provisions of the mandatory rule (Article 6.3 of the Civil Code)*".

3 "El juez declara por vez primera el concurso necesario de una filial de Abengoa, Simosa IT" published by Voz Pópuli (Alberto Ortín) on November 16, 2018.

4 "Los proveedores de Abengoa se rebelan: un acreedor insta el concurso de Abener" published by Voz Pópuli (Alberto Ortín) on January 25, 2018.

5 See "Los jueces admiten a trámite demandas de concurso necesario de dos filiales de Abengoa" published by El País (Miguel Ángel Noceda) on March 7, 2018 and "El juez de Abengoa allana el camino para que Ericsson entre en Ezentis" (Miguel Ángel Noceda) on May 23, 2018

6 See "Los jueces admiten a trámite demandas de concurso necesario de dos filiales de Abengoa" published by El País (Miguel Ángel Noceda) on March 7, 2018.

7 The same Court that ruled on the approval of the master restructuring agreement and its challenge

8 Public information on 'Simosa IT' registered under the Commercial Registry of Seville proves that the Annual Accounts for 2016 were deposited in February 2018, while Spanish law provides they should have been deposited before the end of July, 2017.

9 "Abengoa subsidiary's insolvency order raises questions over refinancing" published by Global Restructuring Review (Declan Bush) on November 16, 2018.

> **IF IT IS PROVED, AS IT HAS BEEN CLAIMED, IT WILL SHOW THAT 'SIMOSA IT' WAS A FRONT COMPANY FOR ITS PARENT COMPANY**

The Bends in Ireland: The abuse of *'lis pendens'*

Mark Woodcock looks at how the 'litigation pending' process ('*lis pendens*') is being used to delay the sale of assets in receiverships

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A *LIS PENDENS* MAY BE COMPLETED WITH NO INPUT FROM SOLICITORS OR COUNSEL AND NO REQUIREMENT TO OBTAIN LEAVE OF COURT

It is the case in most European jurisdictions that there are various forms of protection available for parties with an interest in property which places any prospective purchaser on notice, or in some circumstances prevents a sale, where there are competing interests in relation to it.

In Ireland, as in the United Kingdom, where there is litigation in relation to property a *lis pendens* ('litigation pending' or a *Pending Action* in the UK) may be registered by the litigant in the Land Registry which will notify any member of the public that the property is the subject of a legal dispute.

The registration of a *lis pendens* will seriously restrict the manner in which the property in question can be dealt with and obviously have a detrimental effect on its value.

In Ireland this process is increasingly being abused in receiverships by borrowers (companies and individuals) to frustrate the sale of charged assets.

Section 121 of the Land and Conveyancing Law Reform Act 2009 (the "**2009 Act**") provides, *inter alia*, for the registration of a *lis pendens*. Section 121 of the 2009 Act further provides that the Central Office of the High Court shall keep a register of *lis pendens* affecting land.

Steps required to register a *lis pendens*

Order 72A of the Rules of the Superior Courts (the "RSC") sets out the procedure for the registration of a *lis pendens*. It also sets out the requirements to have a *lis pendens* vacated.

Section 1 of the "*High Court Information Booklet on Registering a Lis Pendens*" provides that the following documentation must be lodged in the Judgments Section of the Central Office in order to register a *lis pendens*:

i. Form No. 31 in Appendix C of SI 149/2010 (€25 stamp duty is required on this document).
ii. A duplicate copy of the above form (No stamp duty required).
iii. A copy of the originating document i.e. Summons or Civil Bill.
iv. A Form 64 of the Property Registration Authority rules is lodged if notification on the Folio in the Property Registration Authority is required (pursuant to Rule 128 of the Property Registration Authority rules).
v. If the property is Registry of Deeds, a Form 16 must be lodged in the Property Registration Authority.

The registration of a *lis pendens* can be easily done and there is no necessity to obtain leave from the Court. An application is lodged in the High Court Central Office. There are minimal costs involved and the effect of such a registration can be far reaching for the parties involved.

There is a similarly straightforward and unilateral registration process in the United Kingdom.

Effect of registration

A *lis pendens* puts potential purchasers and third parties on notice that there is ongoing litigation over a property which could ultimately reduce its value or affect the interests of a registered owner.

Potential purchasers will be reluctant to proceed with a sale when they discover that a *lis pendens* is registered. Certainly a prudent solicitor is unlikely to allow a client purchase property so affected.

A *lis pendens* almost always has the effect of preventing a Receiver from selling a charged asset.

Abuse of process

The registration of a *lis pendens* is increasingly being used by lay litigants/defaulting borrowers to frustrate the sale of charged property in Ireland.

The registration of a *lis pendens* may be completed with no input from solicitors or counsel and no requirement to obtain leave of Court. Applications are increasingly lodged in the High Court Central Office relying on a Summons or Civil Bill containing a very limited and badly drafted indorsement of claim. The proceedings themselves are often not pursued at all and the Summons evidently only prepared to effect the registration of the *lis pendens*.

Indeed in the UK the process of registration of a Pending Action is even less onerous. The requirement in the UK is to provide "particulars of the title of the proceedings" only, rather than a copy of the Summons or Civil

Bill itself (see section 5(2) of the Land Charges Act, 1972).

Steps required to vacate a *lis pendens*

In contrast to the straight forward application to register a *lis pendens*, the procedure to vacate is relatively onerous (unless on consent). An application on notice must be brought before the High Court of Ireland. In such an application, one of the issues that the Court will consider is whether the criteria stipulated for the registration of the *lis pendens* under the 2009 Act was complied with. It must be noted that this criteria is not considered at the actual time of registration.

Because of this imbalance between registering and vacating a *lis pendens*, it is often the case that the process is abused by an aggrieved borrower for the purpose of frustrating the sale of a property by a Receiver.

As a consequence, Receivers in Ireland are increasingly finding themselves in the invidious position of having to seek injunctive relief from the Court pursuant to section 123 of the 2009 Act.

Such a motion must be filed, a return date obtained and the various notice parties served. This of course includes the party who registered the *lis pendens* in the first place. Notice parties will immediately file replying affidavits causing the initial return date to be adjourned a number of times before a hearing date is ultimately obtained. The time and expense incurred is needlessly considerable.

Even where a Receiver successfully applies to Court to release the *lis pendens*, another is often registered immediately thereafter, without any requirement for court approval.

Recent case law

There has been recent case law (*Kelly & O'Kelly v IBRC 2012* and *O'Connor v Cotter 2017*) where the Courts have held that where a party that registered a *lis pendens* is unable to definitively establish a proprietary interest in the property, this amounts to an absence of *bona fides* and accordingly, the *lis pendens* should be lifted. The borrower appealed the decision.

The Supreme Court in upholding the judgment of the High Court, commented that it is important that in the interests of justice, a party is entitled to register a *lis pendens* where appropriate and justified and that it is not discreditable to do so.

The recent decision of *O'Connor v Cotter* arose on foot of various sets of proceedings involving the Plaintiff, Mr O'Connor. In 2012, Bank of Scotland (the "**Bank**") obtained a judgment against Mr O'Connor in excess of €7.5 million relating to a property loan. Mr O'Connor at the same time instituted proceedings against the Bank and registered a *lis pendens* on the property, the subject of the Bank's proceedings. The *lis pendens* was subsequently removed by Order of the High Court.

Shortly thereafter, Mr O'Connor instituted fresh proceedings challenging the appointment of a Receiver by the Bank. He did not serve the proceedings but registered a *lis pendens* on the property in an attempt to frustrate the Receiver's ability to sell the property. As soon as the Receiver became aware of the proceedings, he immediately issued a motion in the High Court and was successful in having the proceedings dismissed as they were deemed to be an "*abuse of process*". This decision was upheld by the Court of Appeal.

When a *lis pendens* is registered based on unsustainable grounds, the affected party has an entitlement to apply to set it aside but considerably more time, effort and cost is involved in the Court application to set a *lis pendens* aside.

In *Tola Capital Management LLC v Joseph Linders and Patrick Linders (No.2)* [2014] IEHC 324, the High Court provided that a party seeking to register a *lis pendens* must establish the following:

"*In order to come within the statutory definition … a party seeking to register a lis pendens has to establish*

a) that the plaintiff is claiming a proprietary interest in land;
b) that the defendant has an estate or interest in the land in which the plaintiff is claiming an estate or interest; and
c) that the proceedings themselves make a claim to a proprietary estate or interest in the said lands."

Therefore, if the proceedings pursuant to which a *lis pendens* has been registered are not being prosecuted bona fide, then in such circumstances, a Court should grant an order to have the *lis pendens* vacated.

Conclusion

It is becoming apparent that there is a requirement for the registration process of a *lis pendens* to be reviewed in Ireland.

It is clear from the case law that the Court will not permit a *lis pendens* to be used as an attempt to frustrate a sale on unsustainable grounds. Equally, the legitimate interests of parties with an interest in land must be protected.

The problem is that a *lis pendens* can be obtained with almost no scrutiny of the application at all and the time and expense to vacate it is grossly disproportionate.

An obvious middle ground would be that any application to register a *lis pendens* should also include a motion for directions, which must be served upon the relevant notice parties before the return date. The *lis pendens* could be effective from the date of filing, protecting the genuine interests of an applicant but only confirmed by Court Order, protecting the interests of the notice parties.

All parties' interests would thus be acknowledged and protected. ■

"THE PROBLEM IS THAT A *LIS PENDENS* CAN BE OBTAINED WITH ALMOST NO SCRUTINY OF THE APPLICATION AT ALL"

Bank insolvencies in Central and Eastern European legislation

Dr. Richárd Bódis presents us with an overview of certain aspects of the special regime applied in bank insolvencies in Central and Eastern European legislation, with a focus on the Czech Republic, Estonia, Hungary, Latvia, Lithuania, and Poland[1]

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The financial crisis of 2008 affected the economic players more than ever, with the winding-up of a large number of financial institutions worldwide. Due to the specialisation of banks among other legal entities, insolvency is a scenario to be avoided, with restructuring being the more favourable solution.

The EU established a framework for the recovery and resolution of financial institutions in economic distress by introducing the Bank Recovery and Resolution Directive (BRRD).[2] Even if in a number of cases the Member States were able to intervene in time with the help of the BRRD, sometimes the worst-case scenario of insolvency is inevitable.

Legal framework: general remarks

Financial institutions in general have a very special asset structure and occupy a unique role within the economy, thus requiring special know-how. This is mainly derived from the three characteristic functions of a bank:[3]

- Banks hold highly liquid liabilities (deposits payable on demand), while they generally hold long-term loans on the asset side (which are difficult to sell or to borrow against).
- Services of banks are fundamental to the functioning of a state's economy.
- Banks translate monetary policy into the economy.

Therefore, the usual methods applied in insolvencies might not be effective, and it is in every state's interest to maintain a legal framework aimed at smooth winding-up of insolvent financial institutions.

Since financial services are highly regulated, it is no surprise that winding-up financial service providers is thoroughly regulated as well. The complex structure of banks and the large amount of assets justify deviating from the general selection process of IPs. Most jurisdictions refer bank insolvency cases to a special group of IPs, sometimes even to the competent regulation authority directly.

> FINANCIAL INSTITUTIONS IN GENERAL HAVE A VERY SPECIAL ASSET STRUCTURE AND OCCUPY A UNIQUE ROLE WITHIN THE ECONOMY

Internationally, an almost endless number of solutions is applied regarding the legal framework, with a focus on who is to be in charge of bank insolvencies, what preconditions are to apply for opening proceedings, what special rights should the creditors be entitled to, and so on. We should like to provide a short description of the key specialties in the countries reviewed, subject to an overview as follows.

Domestic overview

How is it regulated?

In most of the jurisdictions reviewed, the act on financial enterprises sets special rules on the insolvency of financial institutions, deviating from the general act on insolvency proceedings. An exception is the Czech Republic, where rules on the insolvency of banks are incorporated in the act on insolvency proceedings.

How is the IP appointed?

In certain countries – such as Lithuania and Poland – the general method of appointing the IP applies. Thus, in Lithuania the IP is selected randomly by IT-driven automatic means.

In the Czech Republic and Latvia, insolvency administrators holding a special permit should be appointed as IPs.

In Estonia and Hungary special organisations affiliated with the domestic financial supervisory authority enjoy exclusive competence to act as an IP in cases of bank insolvency.

What are the key specialties?

One of the key specialties is that in some jurisdictions only the financial supervisory authorities are entitled to initiate bank insolvency proceedings. This applies to Hungary, Latvia, and Lithuania. In these jurisdictions the supervisory authority should therefore be informed about petitions for insolvency filed by other creditors.

In Estonia creditors are also entitled to file for the insolvency of a bank, with previous approval of the financial supervision authority, while in the Czech Republic, besides creditors, the debtor bank itself is also entitled to file for insolvency.

According to the Polish model, a bank must notify the supervisory authority if it becomes insolvent, in which case the authority decides on acquisition of the debtor by another bank or on filing a petition for insolvency.

The BRRD was implemented in all jurisdictions providing a special regime for restructuring financial institutions. However, in Hungary and the Czech Republic, general proceedings aiming at restructuring a bank – existing parallel to the BRRD – cannot be initiated.

Furthermore, claims by creditors arising from deposits placed with financial institutions should not only be satisfied in a privileged manner in all jurisdictions, but also special deposit guarantee schemes[4] apply, securing deposits to the amount of at least €100.000.

Conclusion

All the jurisdictions subject to review apply special procedures in cases of bank insolvencies. These are closely supervised or controlled by the domestic supervisory authorities. The EU's current focus in connection with financial institutions in financial difficulties is on restructuring proceedings, providing special guidelines for the supervisory authorities to monitor the financial stability of banks, and also providing the necessary tools for intervention. The BRRD, however, does not provide for harmonised rules on financial institutions where restructuring fails.

As our research has shown, significant differences exist in the jurisdictions reviewed regarding proceedings aiming at winding-up an insolvent bank, such as IP selection methods or eligibility for applying for insolvency. Insolvency proceedings for groups of companies in the financial sector need further harmonisation as well.

A review of the current resolution mechanism due by the end of this year might come to conclusions on these issues as well.[5] ■

IN SOME JURISDICTIONS ONLY THE FINANCIAL SUPERVISORY AUTHORITIES ARE ENTITLED TO INITIATE BANK INSOLVENCY PROCEEDINGS

Footnotes:

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2 Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council.

3 Eva Hüpkes, Insolvency – "Why a special regime for banks?", CURRENT DEVELOPMENTS IN MONETARY AND FINANCIAL LAW, VOL. 3 (International Monetary Fund, Washington DC, 2003).

4 Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes.

5 Further harmonising EU insolvency law from a banking resolution perspective? link: www.europarl.europa.eu/RegData/etudes/BRIE/2018/614514/IPOL_BRI(2018)614514_EN.pdf

NPLs in Greece: The make-or-break moment

Yiannis G. Sakkas and Yiannis G. Bazinas report on a crucial matter for Greek banks and the Greek economy as a whole

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Almost a decade after the onset of the European debt crisis, Greece continues to struggle. While the country has managed to address many of its fiscal inconsistencies, the real economy has yet to reap the benefits of stabilisation, recording only a sluggish growth of 1.9% in 2018.[1]

A significant factor accounting for the country's economic stagnation is the high level of non-performing loans (NPLs) in the banking system, which negatively affects the availability of credit, tying up significant bank resources (financial and human) and depriving much needed funds from businesses and entrepreneurs. Furthermore, excessive private debt, combined with high levels of overall taxation, discourages foreign investment and continues to hamper private sector growth. At the same time, reducing private sector debt is a crucial component in Greece's efforts to meet the strict fiscal targets agreed as part of the recent debt package for the country[2]. As a result, dealing with the NPL issue has been elevated to the number one priority in the country's attempt to return to sustainable growth

Greece does not only hold the sceptre in the NPL rate among EU peers, but it also has the lowest reduction rate.[3] By mid-2018, the four Greek systemic banks had about €86bn of NPLs on their balance sheets, representing 48% of total loans.[4] While these figures suggest that the stock of NPLs has been reduced over the last three years,[5] the NPL ratio continues to remain high as a result of the absence of new credit. So far, banks have mostly relied on debt write-offs and outright sales of unsecured loan portfolios in reducing their exposures, reserving the use of insolvency and corporate reorganisation tools for the larger and more viable businesses. Nevertheless, as Greek banks and the Single Supervisory Mechanism (SSM) have agreed to dispose €50bn of problematic loans from their balance sheets until the end of 2021, it is evident that a more aggressive approach, which includes the bulk transfer of NPLs, will be required.

Off-balance sheet schemes

In general, the main aim of off-balance sheet schemes, broadly termed Impaired Asset Measures (IAM),[6] is to remove troubled assets from the banks' balance sheets and thereby increase the quality of the bank's regulatory capital.

At the same time, the disposal of impaired assets can relieve banks from the logistical burden of managing NPL resolution, allowing them to refocus on their funding functions. The exact form of these schemes may vary widely, ranging from the establishment of centralised Asset Management Companies (AMCs), as in the case of NAMA in Ireland and SAREB in Spain, to securitisation techniques (with or without state involvement), such as the Italian GACS framework. In the case of Greece, an off-balance sheet scheme would reinforce market confidence on the stability of the banking system and provide a signal to markets that the country has finally turned the corner. In that regard, while the establishment of a centralised AMC has long been considered, the upfront cost of such a scheme, combined with state aid considerations, have discouraged this initiative and have shifted the focus to alternative measures.

The main proposals that are currently on the table envisage the use of 'special-purpose vehicles' (SPVs) to achieve the securitisation of problematic assets and thus the transfer of credit risk to private investors. In particular, a proposal submitted by the Hellenic Financial Stability Fund (HFSF) is based on the adoption of the Italian GACS model. This scheme would involve the transfer of €15bn of NPLs, at market rates, to a centralised SPV. The SPV would finance this acquisition by issuing bonds in the amount of €7bn (considering that the average coverage ratio of NPLs is 50%), with the Greek government guaranteeing the senior tranche on market terms, in order to avoid any state aid implications.

This scheme would allow the banks to retain the senior tranche, thereby maintaining an exposure to the underlying assets (which are mostly collateralised business loans and residential mortgages), while the mezzanine tranche would be offered to private investors. This solution has the benefit of complying with EU state aid restrictions, thereby avoiding any complication with the country's program of fiscal consolidation. Eventually however, the success of the scheme will depend on the commercial attractiveness of the

mezzanine bonds. The pricing of the guarantee is also a significant issue, since calculating the applicable fees based on sovereign 'credit default swap' (CDS) spreads[7] would greatly increase the cost of the state guarantee and render the scheme non-viable.

An alternative proposal by the Bank of Greece envisages the establishment of a centralised SPV and the transfer of €40bn of NPLs along with about €7bn of Deferred Tax Credits (DTC) by the Greek banks. DTC currently constitutes part of the banks' regulatory capital[8] and would serve as the SPV's equity and absorb any losses resulting from the difference between the market value of NPLs, and their current net book value (including loss provisions).

The SPV would also issue bonds to finance the acquisition, with the four systemic banks and the government subscribing to the lower class and private investors receiving the senior and mezzanine tranches. This constitutes a more radical approach and aims, not only at reducing NPLs but also at improving the quality of bank assets by reducing the share of DTC in regulatory capital. Nevertheless, the feasibility of DTC conversion remains to be clarified, while the EU Commission's approval will be required due to state aid considerations. More importantly however, the sheer amount of transferred assets is likely to expose the banks to significant losses; it is expected banks will need an additional €7bn in capital injections upon completion of this plan, echoing fears of a bail-in with the participation of depositors.

The moment of truth

It is evident that the envisaged schemes would be a significant step towards a drastic resolution of Greece's NPL problem and would provide certainty as regards the medium term prospects of the Greek banking system. These securitisation measures would assist in overcoming coordination problems[9] and also allow banks to retain some exposure to the underlying collateral, thereby benefiting from a potential upside in the price of real estate. However, these solutions are front-loaded and thus threaten to expose the Greek banking system to additional capital needs.

On the one hand, the Greek banking system's model would have a clear and immediate adverse impact on capital adequacy, while on the other hand investors remain wary about the asset-guarantee scheme and the commercial attractiveness of the SPV's bonds. In general, there is widespread uncertainty regarding the impact of these schemes on the capital adequacy and the ability of the Greek banks to fund them. The cost of this uncertainty is being reflected on the market performance of bank shares that have lost over 50% of their value in the last six months,[10] as important market players seem to suggest that more funds will be required, a development that is sure to cause significant dilution of existing shareholders.

Since the announcement of these plans, one of the four systemic banks, Eurobank, has rejected them and presented its own independent plan to deal with NPLs.[11] This suggests that, even within the banking community, there is considerable doubt as to the viability of a centralised impaired asset scheme. At the same time, banks are likely to face additional pressure, as the government is planning to introduce a new consumer insolvency law,[12] which would apply to consumers with debts less than €120,000, and provide insolvency protection to their assets, especially primary residence, up to €200,000 in value. The significant value of real property that the law would shield from enforcement could encourage a new wave of strategic defaulters, putting additional pressure on the banks' balance sheets. It therefore seems that time is running out and that Greek banks will finally have to face their "make or break" moment. ■

Footnotes:

1 Based on estimates by the Hellenic Statistical Authority (ELSTAT)
2 Y. G. Sakkas, Y. G. Bazinas, *Greek debt deal: Breakthrough or ball and chain?* Eurofenix, Autumn 2018.
3 European Central Bank data
4 Bank of Greece data
5 Since 2016, when NPLs amounted to €100bn , see BoG data
6 EC Staff Working Document. AMC Blueprint accompanying the Second Progress Report on the Reduction of Non-Performing Loans in Europe, 14.3.2018
7 Deloitte, "*Italian non-performing loans-State guarantee and securitisation scheme… Unlocking the NPL log-kam?*", 2016 available at www2.deloitte.com/content/dam/Deloitte/uk/Documents/corporate-finance/deloitte-uk-fa-italian-nonperforming-loans.pdf
8 Law 4465/2017 provides for the possibility of converting the deferred tax assets (DTAs) into final deferred tax credits against the State (DTCs), effective year 2016. In fact, according to the law, the deferred tax credit may be offset against the income tax due for a period of 20 years. The same period is also provided for the gradual amortisation of losses due to write-offs and disposals of non-performing loans.
9 Alexander Lehmann, "*After the ESM: Options for Greek bank restructuring*", Bruegel Blog Post, January 2019
10 Athens Stock Exchange data
11 Eurobank decided to merge with a subsidiary Real Estate Investment Company (Grivalia Properties), in order to strengthen its regulatory capital and adopt a more proactive resolution approach to NPL resolution. In this context, the bank aims to adopt a scheme that would involve a securitisation of €9bn of collateralised NPLs in a specialised SPV, in an effort to reduce its NPL ratio to single digits by 2021. See www.bloomberg.com/news/articles/2018-11-26/eurobank-grivalia-properties-to-merge-securitize-npes
12 The preexisting consumer insolvency legislation was envisaged as an emergency measure and the protection provided to consumers' assets expired in 2018.

> **THE ENVISAGED SCHEMES WOULD BE A SIGNIFICANT STEP TOWARDS A DRASTIC RESOLUTION OF GREECE'S NPL PROBLEM**

A SWOT-test of insolvency reform: Lessons for emerging and developing economies

Paul Omar comments on the effect of the accelerated pace of reforms across Europe

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The speed of reforms across the world in insolvency law is truly breath-taking. In Europe and neighbouring countries, the pace has accelerated of late. Countries, such as Armenia, France, Greece, Latvia, Poland and Romania, *inter alia*, have within the past decade carried out reforms, many under very challenging economic conditions.

Within the European Union, the presence of texts such as the Recast European Insolvency Regulation and the soon-to-be adopted Directive on Preventive Restructuring add a veneer of complexity and a cross-border dimension to the map of domestic procedures. Changes to insolvency law rarely take place without consideration of background economic circumstances, though reforms to domestic rules have on occasion been situated in the context of other structural changes to the justice system or to financial frameworks.

Strengths

At the local level, many of these reforms have taken place with project assistance from international institutions, including the European Union, the Council of Europe, EBRD, World Bank and IMF. With the profusion of international actors able to assist, national reform strategies are able to rely on considerable expertise and skills built up over time, some of which have been translated into guidelines, best practices and recommendations serving as useful benchmarks for the reform process. Though the various players have different strategies and motives for providing assistance, overall there is considerable advantage for countries in having access to the expertise the international organisations can marshal, which can also be accompanied by technical and financial assistance to ensure projects happen successfully.

Weaknesses

Not all is so positive in the reform process, however. There are some weaknesses in the quest for ideal insolvency processes, particularly when that occurs against a challenging economic climate, in which insolvency is often seen as a regulatory tool to help resolve not just the financial difficulties faced by businesses, but also the need to ensure market stability and exit for failed firms. The tendency to use insolvency law as a tool for economic control can lead to iterative reforms as the economic cycle fluctuates, with the unintended consequence that the law does not have sufficient time for the reforms to bed in before new reforms need to take place. On occasion, the comparison process which informs legislators and policy-makers of developments elsewhere that may be worth emulating leads to adoption of models that may not be wholly appropriate for transplant.

In any case, Parliamentary scrutiny can be problematic where reforms are of a very technical nature and not amenable to the cut and thrust of political debate. The role of legislators can be quite limited, especially where reform is driven by projects supported by the international institutions with considerable expert input meaning that texts can only be dissected with difficulty. However, more pressing issues can arise with respect to stakeholder engagement in the process, especially when it is intended to occur. Often, consultation occurs at an early stage to ensure stakeholder buy-in with input from practice, judiciary and (occasionally) academia informing the shape of reforms. At other times, though, engagement can be an afterthought, with pressure from key groups sometimes prompting a last-minute realisation that their views might need to be ascertained to help the reforms stand a better chance of acceptance and eventual success.

Opportunities

Some of the scope of the reform process can, nonetheless, also provide opportunities. There can be some experimentation with some insolvency law models (albeit conditioned by the risk-averse nature of politics). As economies develop and become more complex, countries can move away from the "one size fits all" approach and develop more sophisticated responses to the need of particular constituencies, such as MSMEs, industrial groups, financial institutions etc. While punctual reforms are always desirable and recourse to legislation too frequently is not, periodic intervention is possible in a system that retains some flexibility to anticipate when reforms may be necessary, as

> **THE TENDENCY TO USE INSOLVENCY LAW AS A TOOL FOR ECONOMIC CONTROL CAN LEAD TO ITERATIVE REFORMS AS THE ECONOMIC CYCLE FLUCTUATES**

opposed to reacting to fluctuations and stresses in the economic and/or financial systems. As for the content of the reforms, given how rescue and restructuring are the watchwords of today, such interventions in the context of a flexible system can see how best to develop procedures to reflect these imperatives.

Threats

There are nonetheless a few threats to the system overall. The first is related to the role of insolvency, whether it is simply a private, though collective, form of dispute resolution, provided by the state as an efficient tool to enforce obligations, or whether its use as an economic tool, with consequent public policy overtones, creates a dissonance in the role of the state as system-provider and user. This also demands a closer understanding of the overall imperatives of insolvency, in particular how to reconcile Government oversight and involvement with all that means in terms of how the state often translates its views on social policy into the insolvency framework. Further, the political and economic sensitivities of insolvency can get in the way of a rational debate about the extent of possible reform and development. In the context of reform, the state's attitude to improving the infrastructure it provides, particularly judicial processes and enforcement through the courts, also plays a role: if the state does not carry out sufficient capacity building, this will hinder the success of the reforms.

Conclusion

In summary, there is much more work to be done, particularly as far as issues, such as stakeholder buy-in, capacity building and the general provision of resources for an effective insolvency framework, are concerned. There certainly needs to be more engagement with stakeholders at an early stage and perhaps not just by domestic institutions, but also the international bodies involved in many of these reform projects. Overall, more education and training for debtors and other stakeholders alike in basic business concepts and the function of insolvency cannot hurt. ■

> **AS ECONOMIES DEVELOP AND BECOME MORE COMPLEX, COUNTRIES CAN MOVE AWAY FROM THE "ONE SIZE FITS ALL" APPROACH AND DEVELOP MORE SOPHISTICATED RESPONSES**

RICHARD TURTON AWARD

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

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

- Are a national of a developing or emerging nation;
- Work in or are actively studying insolvency & restructuring law and practice;
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- Be under 35 years of age at the date of the application;
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A judicial "cookbook" and recipes for international insolvency cooperation

Nicoleta Mirela Năstasie recounts how the idea first began and how the story is developing

NICOLETA MIRELA NĂSTASIE
Judge, Bucharest Tribunal, Romania

In 2014, I attended a training programme related to guidelines and best practices for judicial cooperation in cross-border insolvency.[1]

Explaining that in my daily judicial activity I had insufficient time to determine the most appropriate method to transform general guidelines and rules into concrete measures in pending litigations, someone asked me: "*What do you want, Judge, a cookbook for insolvency?*"

My direct and immediate answer was: "*Yes, if a cookbook helps me to find practical solutions and be efficient*".

I have been trying since then to verify if my answer was or was not correct. Nowadays, I am also involved in an EU project in connection to judicial cooperation[2] and I would like to address the same question to practitioners, academics and members of the judiciary. This is the subject I propose as an epic literary work.

> **SOMEONE ASKED ME: "WHAT DO YOU WANT, JUDGE, A COOKBOOK FOR INSOLVENCY?**

The exposure: A short theory of the concept of soft-law

The interest for soft-law mechanisms from a theoretical point of view became more pronounced after 1980, with different theories being developed. Soft-law is generally described as non-binding legal instruments, general standards and instructions produced by international organisations, used in many domains of law with practical effects. International soft-law is seen as a "*legal metaphor*"[3] or "*grey zone*"[4]. The term "*soft law*" brings about terminological issues, ambiguous and even conflicting interpretations.[5]

It is beyond the scope of this article to provide a comprehensive analysis of academic writing related to the concept of soft-law, global disputes regarding its normative position and effects, its enthusiastic proponents or radical critics, or even to find the correct answer to the question of whether soft law is a "*law*" at all, and what the conditions might be for its legitimacy and effectiveness. This article focuses less on general aspects as rules for creating soft law, instead it concentrates more on their practicality and how the judiciary as well as academics should cooperate for this purpose.

Soft-law may provide the ground for changes in international law, a step "*towards traditional law-making*".[6] The use of soft-law tools is an expression of the positive obligations of private actors in the context of internationalisation and globalisation, not just in the field of cross-border insolvency. For the judiciary it is essential to see the link between legal professions in correlation to the new role of private actors for the development of international insolvency law and soft-law instruments.

The intrigue: Recital 48 of the Recast EIR

The Recast EIR, through its 226 referrals, especially Recitals 48, 49 and 50, Articles 41, 42 and 43 as well as Chapter V, brings to our attention that cooperation and communication are fundamental mechanisms for cross-border insolvency. Courts and practitioners have the duty to cooperate "*in any form, including the conclusion of agreements or protocols*".

Recital 48 describes best practices and guidelines for cooperation and communication developed by international institutions and organisations as veritable solutions for transforming general goals of cooperation into practice. This text brings to scholars, practitioners and judges multiple questions related to what are the "*best practices*", what they should look like and how should they be put in practice as adequate instruments for international insolvency.

The conduct of the action: From theory to EU practice, with possible difficulties related to soft-law mechanisms

EU soft-law experience reveals the need to adapt the international guidelines to the specificity of different civil and common law multilingual EU jurisdictions. The present is a time of speed and informatisation, leading to the requirement of quick solutions for the international community. The informational circuit is so intense that we have objectively to recognise that there is no time to think in depth about each step or stage in every concrete international insolvency case. We should also keep in mind that not only in the Southeast European jurisdictions, but everywhere, the vast majority of cases are simple, involving only a few companies or creditors.

At the European level there are differences in the legal culture

of the judiciary and the academia. Because of some inflexible, contentious and inconsistent national legal dispositions and procedures, the need for harmonisation of the civil continental and common law systems is real. Judges or academics are not the final beneficiaries of soft-law instruments, but their creators or simple intermediaries. The final goal is the development of a performing environment for those professionals struggling to connect to the pulse of intracommunity and extra-European commerce.

Brexit and its effects may induce for the main actors of international businesses the concern of being marginalised. It may also bring changes and polarisation toward new jurisdictions that are more flexible and favourable to fast restructuring procedures.

Using guidelines in practice is not always an easy activity, taking into consideration their increasing number and the large quantity of information and related commentaries provided by each soft-law instrument. Another issue is that international guidelines are not very well known by the EU practitioners and judges active in different EU jurisdictions, because they are not translated into national languages. Thus, there are fewer references in the domestic literature about them, without available explanations and examples of their value for practical activity. Even the UNCITRAL guidelines are not promoted in some national EU jurisdictions in a manner easy to understand or apply.

The climax: A pragmatic approach

The academics have an important influence not only on the effectiveness of the judiciary specialised in cross-border insolvency, but on the judiciary overall. On the other hand, the soft-law has significant capabilities to encourage the development of cooperation between academics and the judiciary, if they all focus more on practical obstacles and questions facing the international insolvency, than on debating abstract ideological interprofessional differences.

As a former lawyer and actual member of the judiciary I am sympathetic to those scholars promoting a more pragmatic perspective. But what is pragmatism for the judiciary? There may be judges who consider each case on its individuality, judges exercising their job as a natural activity, without overestimated theoretical sophistication, judges who know how to be accurate, but also imaginative, in their decisions. What is pragmatism for academics? It may be the ability to bring their guidance from a theoretical sphere closer to day-to-day activities. For both professions, it may be a flexible interpretation of legal provisions, soft-law mechanisms and legal doctrines, in order to ascertain explanations, clarifications and solutions to difficult situations appearing in cross-border insolvencies and the situation of multinational businesses in financial distress.

The role of academics and the judiciary is essential for the promotion of international soft-law instruments and their implementation in correspondence with the specificity of different Member States' legal systems. Some alternatives may be to create examples connected to the national reality and practice, describe concrete situations in international cases, where one or several guidelines are used to facilitate solving relevant issues. Simple template-type standards connected to relatively similar or complementary procedures in different jurisdictions, translations of legal terms, accessible online, and not only for judges or practitioners, but also for other interested parties, simple formulations and explanations, in a language accessible regardless of the mother tongue of the person accessing the information, may be convenient.

The outcome which may solve the problem

Is a cookbook the answer?

Searching for practical solutions for international cooperation in the insolvency domain, we should try and forget for a moment that we are judges, practitioners, academics, and to become members of a chef's team, working together to create the most appropriate recipes for European peculiarities. We are all aware that recipes for this special "cookbook" of international insolvency are the result of hard work, and plenty of less successful experiences or failed endeavours. The recipes should be precise and simple, desired, easy to read and follow, both for sophisticated practitioners, multinational business owners, and for individuals and small actors in the market.

Do we need a European team for soft-law development?

Since I have started to write this material, one expression has been in my mind: "*the European Team*". Developing efficient soft-law mechanisms for international insolvency requires team work, it is not a game for individuals. To be part of such a team needs more than mutual respect, and requires confidence and empathy, as components of a whole where each part has an essential role.

Because I have not found the answers to these questions yet, my hope is that we will all write together this part of the story. ■

Footnotes:

1 *EU JudgeCo Project*, Website available at: www.universiteitleiden.nl/en/research/research-projects/law/eu-judgeco-project.
2 The project "*Judicial Co-Operation supporting Economic Recovery in Europe*" (JCOERE), led by Professor Irene Lynch Fannon, University College Cork, involves the Titu Maiorescu University Bucharest and University of Florence. The author is acting as the PhD researcher from Titu Maiorescu University.
3 Laslo Blutman, *In the Trap of a Legal Metaphor: International Soft Law* (2010) 59 ICLQ.
4 JHH Weiler and AL Paulus, "*The Structure of Change in International Law or Is There a Hierarchy of Norms in International Law?*" (Symposium, Part 2) (1997) 8 EJIL p.554.
5 A. Aust, *Handbook of International Law* (2nd edn) (CUP, 2010), 11; Blutman, 610; MA. Fitzmaurice, "*International Protection of the Environment*" (2001) 293 RdC 9, 125; AT. Guzman, "*The Design of International Agreement*" (2005) 16 EJIL 579, 583–584; LF. Damrosch and others, *International Law. Cases and Materials* (4th edn) (West Group, 2001), 34.
6 Blutman,617.

> **RECIPES FOR THIS SPECIAL "COOKBOOK" OF INTERNATIONAL INSOLVENCY ARE THE RESULT OF HARD WORK, AND PLENTY OF LESS SUCCESSFUL EXPERIENCES OR FAILED ENDEAVOURS**

Cross-Border Insolvency:
English High Court ruling impacts Delaware Chapter 11 case

David Conaway reports on a ruling by the English High Court in late 2018 that impacted the US Chapter 11 proceedings in Delaware

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A ruling by the English High Court in late 2018 impacted the U.S. Chapter 11 proceedings in Delaware. The case involved Videology Limited, an English and Wales Company ('Limited') and a wholly-owned subsidiary, Videology Inc., a Baltimore-based Delaware corporation.

The *Videology Group* ('*Videology*') including '*Limited*' developed and sold video advertising technology. The *Videology Group* filed Chapter 11 in Delaware. The English Court ruling refused to grant *Videology Group*'s request to automatically enjoin individual or collective creditor actions against '*Limited*' in the UK. Rather, the English Court compelled the Chapter 11 debtor to prove grounds for the injunction against creditors.

> GLOBAL COMPANIES ARE LIKELY TO HAVE ASSETS, LIABILITIES, CONTRACTS, PROPERTY OR EMPLOYEES THROUGHOUT THE WORLD

This is important because…

In a Chapter 11 case of a US company group that includes its foreign subsidiaries, the ability to enjoin creditor action against the foreign subsidiaries or their assets outside the US is essential to preserve the value of the global business enterprise for a successful restructuring or Section 363 sale of assets. The ruling by the English court makes this goal less clear.

Cross-border insolvency: A step back

A company doing business globally will inevitably encounter issues with its foreign customers or counter-parties in the supply chain. Such issues include foreign insolvency proceedings of such a customer or counter-party in their "home" country. Since there is no uniform global insolvency law, the outcome for the company is primarily dependent on the insolvency law in the foreign jurisdiction.

Global companies are likely to have assets, liabilities, contracts, property or employees throughout the world. If such a company initiates insolvency proceedings in its home country, it is likely the company will also need to address issues in other countries. In recognition of this, and to promote comity and 'universalism' among countries, in 1997, the United Nations Commission on International Trade Law (UNCITRAL) published its Model Law on Cross-Border Insolvency. To date, 44 countries have adopted the Model Law, including the US, which adopted the Model Law in 2005 as Chapter 15. The UK's version of the Model Law is The Cross-Border Insolvency Regulations 2006 (the CBIR).

A principal tenet of the Model Law is for each adopting country to recognise and cooperate with insolvency proceedings in a home country. In *Videology*, the home country of the insolvency proceedings was Delaware. As part of its Chapter 11 restructuring, *Videology* sought to simultaneously protect '*Limited*', its UK subsidiary, from individual or collective creditor action against it or its assets in the UK.

To achieve the injunction, '*Limited*' followed the normal procedure to open ancillary insolvency proceedings in the UK, by filing a petition for recognition of the Chapter 11 case as "*foreign main proceedings*", defined in the Model Law and CBIR as proceedings initiated by a debtor in the jurisdiction where its "*centre of main interest*" (COMI) is located. Had the UK Court accepted that the US was '*Limited*'s COMI, the Model Law would have automatically granted a broad injunction against creditor action. No doubt that was the outcome *Videology* expected.

However, the English Court refused to recognise the Chapter 11 case as foreign main proceedings, after concluding that '*Limited*'s COMI was not in the US, but rather in the UK. Under the Model Law, and the CBIR, there is a rebuttable presumption that COMI is where a company is registered or incorporated, which in this case was England and Wales. The English Court found that *Videology* did not rebut that presumption even though it showed that '*Limited*' was 100% owned and controlled by its US parent, the sole director of '*Limited*' was the co-founder and CEO of the US parent, all the software used by '*Limited*' (by license) was owned by the US parent, and that '*Limited*' was "*essentially an American company, run by American management, based in America.*"

Following the cases of *Eurofood IFSC Ltd* (ECJ 2006) and *Interedil Srl v Fallimento Interedil Srl* (ECJ 2011), the English Court rejected *Videology*'s position and concluded that '*Limited*'s COMI was in the UK, based in part on the facts that "*in addition to being the place of its registered office, the UK is where the Company's trading premises and staff are located, where its*

customer and creditor relationships are established, where it administers its relations with its trade creditors on a day-to-day basis using those premises and local staff, and where its main assets…are located."

A distinction with a difference

Despite its conclusion, the English Court nevertheless granted *Videology* substantially similar relief: an injunction against creditor action. Specifically, rather than automatic application of an injunction, the Court exercised its discretion to enjoin individual and collective creditor action against '*Limited*', after considering factual support from *Videology*.

Even though '*Limited*'s COMI was not in the US, the English Court concluded that '*Limited*' had an "establishment" in the US, allowing the Court to recognise the Chapter 11 proceedings of '*Limited*' as "foreign non-main proceedings". The ancillary insolvency proceedings in the UK, based on the "foreign non-main proceedings" do not automatically enjoin creditors as it would in the case of foreign main proceedings. Rather, the UK Court retains the discretion to enjoin creditors, or not, based on the facts and circumstances of the case.

The English Court took note that the Chapter 11 proceedings were in the advanced stages of a Section 363 sale, including the assets of '*Limited*', which would result in the disposition of *Videology*'s assets and distribute the proceeds and assets to its creditors.

Appropriately noting its duty to protect the interests of creditors of Great Britain, the Court needed to determine whether the US Section 363 sale would do so. Ultimately, the Court was satisfied that the Section 363 sale would fairly distribute the proceeds of the sale among *Videology*'s creditors, who would have a meaningful voice and role in the US Section 363 sale process. By declining recognition of '*Limited*'s US Chapter 11 proceedings as foreign main proceedings, the Court reserved for itself the discretion and ability to evaluate whether the Section 363 sale was fair to the creditors located in Great Britain. Section 363 sales can occur at warp speed, are often engineered by pre-petition lenders as an exit strategy, and do not always protect the interests of all stakeholders. Particularly vulnerable are foreign creditors.

Takeaways

- The English Court ruling should encourage US Chapter 11 debtors to address the interests of stakeholders worldwide in pursuing its goals and strategies in the Chapter 11 case, such as a Section 363 sale, which is the intent of the Model Law.
- The factual analysis by the English Court provides guidance to restructuring companies on when recognition of ancillary insolvency proceedings in the UK will be based on foreign main proceedings or foreign non-main proceedings. This in turn shows whether restructuring companies will obtain the relief needed to effectuate their business goals.
- The ruling also provides a roadmap for restructuring companies (and their lenders) on the requirements to present foreign recognition petitions that will succeed initially and which will avoid risks and costs to the process and their business objectives.
- The ruling likewise provides creditors of restructuring companies, especially foreign creditors, a roadmap to oppose petitions for recognition, which could prohibit or limit their action of pursuing claims against their contract counter-parties. Though the English Court determined creditor injunctions were appropriate in this case, under different factual circumstances, it may not enjoin creditors.

Global implications

The *Videology* case happened to involve a restructuring in the US pursuant to Chapter 11 which included its UK subsidiary. The issues addressed by the English Court's ruling were based on the CBIR and the Model Law. Because the Model Law has been adopted by 44 countries to date, the same issues could arise in many other jurisdictions. The thorough analysis of the English Court in *Videology* could be used as guidance for courts in other Model Law jurisdictions in considering similar issues. ■

> **"EVEN THOUGH 'LIMITED'S COMI WAS NOT IN THE US, THE ENGLISH COURT CONCLUDED THAT 'LIMITED' HAD AN "ESTABLISHMENT" IN THE US"**

Turkey introduces new legislation regarding mandatory mediation for commercial disputes

Orçun Çetinkaya and Burak Baydar summarise the likely impact of the new laws

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Turkey has recently adopted new legislation requiring application to mandatory mediation for commercial disputes before filing a lawsuit.

The Law on Starting Legal Proceedings for Monetary Receivables Arising from Subscription Agreements, numbered 7155, published in the Official Gazette, numbered 30630 and dated 19 December 2018, introduced new provisions to the Turkish Commercial Code, numbered 6102 ("**TCC**") and to the Law on Mediation in Civil Disputes, numbered 6325 ("**Mediation Law**").

The mediation requirement is regulated as a compulsory prerequisite for filing a lawsuit according to the new legislation entering into effect as of 1 January 2019. Correspondingly, parties to a commercial dispute pertaining to monetary receivables must firstly apply for mediation before filing a lawsuit in the local court. They will be allowed to file a lawsuit only if they fail to reach an agreement at the end of the mediation process. Otherwise, the case will be dismissed on procedural grounds.

Scope of mandatory mediation

The mandatory mediation requirement will apply for acts and operations deriving from private law at the parties' free disposal. In other words, matters that can be solely settled by a judge cannot be subjected to commercial mediation.

According to the recently introduced Article 5/A of the TCC, it is mandatory to apply for mediation with regards to commercial lawsuits regulated under Article 4 of the TCC and other legislation concerning monetary receivables and compensation claims.

As per Article 4 of the TCC, lawsuits arising from the following are considered as commercial lawsuits and are within the scope of the mandatory mediation:

- Issues regulated under the TCC.
- Certain articles of the Turkish Code of Obligations.
- Relevant articles of the Turkish Civil Code regarding pawn brokers.
- Certain regulations under intellectual property legislation and legislation concerning banks and other financial institutions.

In addition, mediation is mandatory for issues and lawsuits that are not expressly stated under Article 4 of the TCC, involving parties that are merchants on both sides of the dispute and disputes concerning the commercial enterprises of said parties.

With regards to cases that are within the scope of the above-mentioned commercial disputes, mediation is stipulated as a compulsory prerequisite before filing a lawsuit. According to Article 18/A-2 of the Mediation Law, in case of filing without applying to mediation first, courts must dismiss the case on grounds of absence of prerequisite without any further examination. This is not to be construed in a way that means parties cannot apply for mediation with regards to disputes outside this scope. In these cases, parties have the option to resolve their present disputes by means of voluntary mediation and if parties chose to file a lawsuit instead of resorting to mediation, the case cannot be dismissed on grounds on nonfulfillment of the mediation precondition.

In this context, mandatory mediation is not a prerequisite for provisional remedies such as interim injunction and interim attachment requests. However, as per the newly introduced Article 18/A-16 of the Mediation Law, if such requests are granted by courts of first instance prior to filing a lawsuit, the term of litigation (two weeks and seven days, respectively) stipulated under respective codes will not lapse until the preparation of the final record by the mediator.

Pursuant to Article 18/A-18 of the Mediation Law these mandatory mediation provisions will not be applied

- if mandatory arbitration or alternative dispute resolution methods are prescribed for certain disputes under special laws, or
- in the event of the existence of an arbitration agreement between the parties.

Similarly, mediation is not mandatory with regards to non-contentious proceedings, concordatum, or enforcement proceedings without judgement.

Finally, as per Provisional Article 12 of the TCC, mandatory mediation will not be applied with regards to cases pending before courts of first instance, regional courts of justice and the Court of Cassation as of the date of these regulations' entry into force.

Consequences

Mandatory mediation is regulated as a prerequisite for filing lawsuits concerning commercial disputes. As per Article 115 of the Code on Civil Procedure, numbered 6100 ("CCP"), the existence of these preconditions will be considered *ex-officio* by the court, and parties to the dispute can argue the non-existence of such precondition at any stage of the proceeding.

In line with these general provisions set forth under the CCP, Article 18/A-2 of the Mediation Law dictates that when a lawsuit is brought before the court without applying to mandatory mediation, the case will be dismissed on procedural grounds without any further examination of the merits of the case.

Procedure

According to Article 18/A of the Mediation Law, the mediation application will be made to the mediation bureau within the jurisdiction of the competent court with regards to the subject of the dispute at hand and a mediator will be selected by the mediation bureau unless parties agree on the identity of the mediation amongst themselves.

As per Article 5/A of the TCC, the mediator will complete the mediation process within six weeks beginning from the appointment, and this period can be extended for maximum two weeks, if deemed necessary, by the mediator.

According to Article 18/A-11 of the Mediation Law, if mediation fails due to one party's non-participation in the first mandatory session held by the mediator, without a valid reason, that party will be burdened with the total cost of the proceedings, even if the court rules in its favour.

If the parties reach an agreement, the necessary expenses of the mediation will be paid by the parties equally, unless decided otherwise. In case they fail to settle, the party that the court rules against will be burdened with these expenses. However, the mediator's fee for the first two hours will be paid from the budget of the Ministry of Justice.

As per Article 18/A-2 of the Mediation Law, if the parties fail to reach a settlement, the plaintiff must include the final report prepared by the mediator displaying that the parties have duly carried out the mediation process but failed to reach an agreement.

Conclusion and controversial topics

The new regulation is important as it serves as an alternative dispute resolution method that could potentially resolve commercial disputes without bringing them before courts. Consequently, they could decrease the workload of the courts and shorten the length of the litigation while allowing the parties to settle their disputes to their benefit in a cost- and time- efficient manner, therefore increasing flexibility and confidentiality, as well as efficiency.

It is important to note that there is a debate surrounding these regulations with regard to the scope of mandatory mediation as defined under Article 5/A of the TCC, while the text of the Article suggests that this new requirement will only be applied for lawsuits regarding receivables and compensation claims. It is also argued that these new regulations should be applied to other actions concerning monetary disputes, particularly negative declaratory actions, given the purpose and objective of the regulations. Since the legislation has been recently introduced, the scope of the mandatory mediation requirement will be determined based on case law and practice of the Court of Cassation. ■

> **IT IS ALSO ARGUED THAT THESE NEW REGULATIONS SHOULD BE APPLIED TO OTHER ACTIONS CONCERNING MONETARY DISPUTES**

Country Reports

Spring 2019

A short selection up updates from the Czech Republic and Germany

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The Czech Republic: Amendment to the Bond Act anticipates the introduction of a security agent extending beyond bonds

In January, an amendment to the Bond Act came into effect. The amendment prepared by the Czech Ministry of Finance comprises new rules governing secured bonds as well as the introduction of a security agent in connection with bonds.

However, an inconspicuous provision in the final part of the Act quite revolutionarily expands the concept of the security agent beyond bonds – typically to commercial loan security.

Below we summarise the main points of the amendment and its potential impact on business practice, particularly in connection with syndicated and club loans in the Czech market.

Security agent for bonds

Redemption of a bond and payment of the yield (or any bond-related debts) may be secured, inter alia, by the establishment of a pledge. The amendment anticipates that the rights of a creditor, a pledgee or any other recipient of the security may be exercised by the security agent on his own behalf for the benefit of the entitled persons. For example, the security agent could exercise the right of pledge in distress proceedings or submit the security in insolvency proceedings.

Security agent

The amendment stipulates no restriction as to who a security agent may be. It is at the sole discretion of the creditor to decide who will exercise the rights on the creditor's behalf against the debtor and third parties.

Implementation of the security agent concept and other aspects

The agreement entered into with the security agent must be in writing. The agent's authorisation is effective towards all, i.e. *erga omnes*. Typically, the agreement should define the security agent's rights and obligations (including the right to a fee), as well as the requirements for the agent's activities, mainly in view of a potential change of the agent in the future.

Security agent not related to bonds

As a new and revolutionary rule in Czech law, the amendment permits the concept of the security agent to be also used for securing debts not related to the issue of bonds. A typical example is syndicated loans made available by banks.

Today, a security agent usually becomes involved in syndicated loan security by means of 'active solidarity' (i.e. the security agent, as one of the creditors, is a joint and several beneficiary together with the other creditors and, for this reason, may exercise all rights and fulfil obligations under the security with effect for the other creditors). In the past, this legal concept was tested in several large insolvency proceedings. A certain restriction on this concept is the necessity for the security agent to be a creditor of (at least a minimum part of) the loan at any time. This may in particular restrict the transferability and trading of the loan on a secondary credit market.

The new concept in the Bond Act allows a regime (more common in international practice) where the security agent need not be a creditor (of a loan) himself directly. The security agent exercises the rights of a creditor, a pledgee or another beneficiary of the security on his own behalf for the benefit of the beneficiaries. This also applies to insolvency proceedings, the enforcement of a judgment or distress relating to the pledger or any other security provider or their assets. The performance obtained from the security then belongs to the beneficiaries in a ratio specified in the loan agreement or any other similar financing document.

The question is, of course, when and how the new rule will be applied in bank financing practice. We can expect that creditor banks will be cautious in introducing it, in view of the risk associated with the novelty and interpretation of the legal regulation.

German ESUG:
An official look back

In 2012 the German legislator enacted a landmark reform of the German Insolvency Code aiming at three main goals:

1. The influence of creditors on the selection of office holders in corporate insolvencies should be increased.
2. Where the restructuring of viable enterprises was at risk because of shareholder dissent, the reform was introduced to involve shareholders, dilute their position by debt-equity-swaps, diminishing or even relieving them of their position by a Chapter 11 type of process (*Insolvenzplanverfahren*).
3. The introduction of a so called protective shield proceeding (*Schutzschirmverfahren*), a preliminary proceeding aiming at incentivising early filing by allowing the debtor to choose the office holder and maintain control in a debtor-in-possession ("DIP") process, in specific circumstances.

At enactment the legislator already ordered that after five years the law should be subject to review. As a consequence, in 2017 the German parliament appointed a team of professors to review the application of the law and to make suggestions for changes. The approach the team took was threefold:

1. Firstly, they submitted a questionnaire to the 'usual suspects' in insolvency proceedings (creditors, judges, debtors, consultants, office holders and directors). The return rate was at 41% – extremely high for such a mailing.
2. In addition, all of the DIP proceedings of enterprises since 2012 were reviewed. 1,690 files plus court files for some 15 proceedings were looked at in detail.
3. Thirdly, the team reviewed jurisdiction literature and added own reflections on the law that had been subject to a wider ranging discussion.

The report is some 325 pages strong accompanied by a 20-page summary. It has been subject to commentary by interest groups as well as professional journals. And no surprise, while there is only one report, the range of interpretations may leave you with a different impression.

The overall verdict is positive. The change seen necessary is marginal. They did not find evidence of creditors impacting the choice of the office holder to the disadvantage of others.

The reform has significantly increased Chapter 11 like *Insolvenzplanverfahren*. Also positive is the impact on shareholder rights. In practice these are predominantly transfers of shares and reductions of share capital. The debt-equity-swap introduced with the law is of no major relevance.

The protective shield proceedings have encountered the same fate. Application has been well below expectations. The contemplated far earlier filing has as of yet also not occurred. The authors are tempted to say that to have an impact on actual practice it takes more than five years. Also, institutional lenders and professional stakeholders are reluctant when it comes to breaking new ground and risk aversion does result in significant lead time for new tools to become common in actual practice.

The researchers find it may be of use to more precisely define circumstances and prerequisites appropriate for DIP. The criticism on the still widely varying practice of the courts is strong. The aim should be to increase the professionalism of the courts and to assure a more consistent application of the law.

The legislator has begun to discuss the results of the study with interest groups. Action will likely not be taken in the short term. Likely the legislator will wait for expected release of the preventive restructuring framework directive to deal with the results of both. Looking into the rear view mirror at the history of the German legislator dealing with a directive which is not well received, it may happen that legislative changes, if any, are faraway. ■

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> **INSTITUTIONAL LENDERS AND PROFESSIONAL STAKEHOLDERS ARE RELUCTANT WHEN IT COMES TO BREAKING NEW GROUND**

Focus on the collection of national insolvency data within the EU

Myriam Mailly, Co-Technical Officer of INSOL Europe, writes about the information available on the INSOL Europe website about national insolvency statistics, in particular from the perspective of the future application of the Directive on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures (hereafter, the 'Insolvency Directive Proposal').

MYRIAM MAILLY
INSOL Europe Co-Technical Officer

> **INSOLVENCY STATISTICS CAN BE USED AS AN INDICATOR TO ENABLE CREDITORS TO SECURE THEIR CHOICE IN LENDING IN ONE MEMBER STATE RATHER THAN ANOTHER**

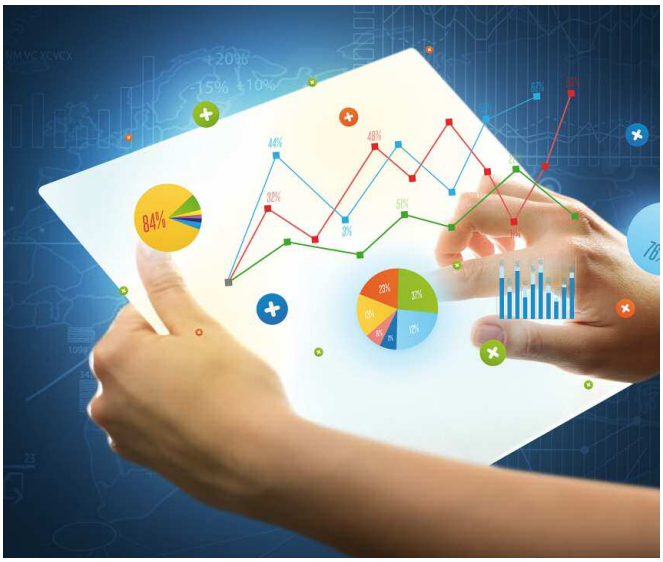
Current national insolvency data

At EU level, insolvency statistics are viewed as a means of measuring the efficiency of national insolvency frameworks from a cross-border investment angle. It is true that insolvency figures are generally used as a tool to measure the country's good social and economic health. From a creditor's perspective, these insolvency statistics can be used as an indicator to enable them to secure their choice in lending in one Member State rather than another. From a debtor's point of view, figures can also highlight the successfulness of a specific type of proceedings rather than another.

That is why new or updated national insolvency statistics are regularly published on the INSOL Europe website. Currently, national insolvency statistics are available for Austria, Belgium, Croatia, Cyprus, Denmark, England & Wales, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Portugal, Romania, Scotland & Northern Ireland, Spain, Sweden and Switzerland at: *www.insol-europe.org/technical-content/national-insolvency-statistics*.

New insolvency data required by the (future) Insolvency Directive

The Insolvency Directive proposal (as published in November 2016) contained a title V which was



entitled '*Monitoring of restructuring, insolvency and discharge procedures*'. Under that title, the European Commission had listed a number of criteria which would further improve the quality of insolvency statistics at European level (art. 29 'Data collection').

To that end, Member States were required to communicate on a yearly basis the number of proceedings (preventive restructuring, liquidation and proceedings leading to a full discharge of debt for natural persons), their outcome, and their length and average costs. In addition, the Member States were asked by the European Commission to compile other information, including, where relevant, the number of applications rejected for lack of available funds in the debtor's estate, the recovery rates for secured and unsecured creditors, separately, as well as the number of proceedings with zero or no more than two percent total recovery rate in respect of each type of proceedings falling under the scope of the Directive proposal.

The Directive proposal also included among the figures to be provided by Member States, the information which would enable to point out the number of preventive restructurings which failed within a specific time period of 3 years and those relating to the opening of new proceedings against an entrepreneur who was previously discharged of its debts.

Last but not least, these

figures should have been produced by national authorities taking into account several criteria, and more precisely:

(1) the size of the debtors involved depending on the weight of the working force,
(2) whether debtors are natural or legal persons, and
(3) where relevant, whether the procedures concern only entrepreneurs or all natural persons in respect of the discharge provisions.

EU Relations Working Group

It is true that depending on the number of details published at national level, insolvency statistics can also shed some light on the type of proceedings available within a national insolvency framework, whether they are used in the day-to-day practice and how successful they are from both the debtors' and the creditors' perspectives (in the 'real world').

This is the reason why local experts have worked on this subject under the aegis of the **INSOL Europe's EU Relations Working Group**, chaired by Robert Van Galen and assisted by Paul J. Omar (INSOL Europe Technical Research Coordinator) and myself. Relevant information on national insolvency statistics by outcomes is thus now available for the following countries: Bulgaria, Cyprus, Czech Republic, Denmark, 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/eu-draft-directive*.

It is also important to remind you that the European Parliament will soon examine the latest version of the text of the Insolvency Directive Proposal, after the EU Council published, on 17 December 2018, a final compromise text to agree on. *The text is available at: www.insol-europe.org/technical-content/eu-draft-directive*.

(Future) data collection

On data collection, the EU Council text still contains a title V (with a slightly amended title) with an Art.29 dedicated to it. This article demands more or less the same type of information required initially in the EU Commission proposal. However, Member States would not be asked anymore to compile the number of applications rejected for lack of available funds in the debtor's estate or the number of proceedings with zero or no more than two percent total recovery rate in respect of each type of proceedings falling under the scope of the Directive proposal. Instead, Member States would be required to collect the number of applications for restructuring procedures which were declared inadmissible, were rejected or were withdrawn before being opened.

Member States would also be required to collect additional data, such as the number of debtors who, after having undergone restructuring or insolvency proceedings (including those leading to a discharge of debt) launch a new business, as well as the number of job losses.

A novelty concerns also the possibility for Member States to collect and aggregate the required data through a sample technique which would ensure that the samples are representative in terms of size and diversity. And last, but not least, the annual data collected by the European Commission services would be communicated 'in an accessible and user-friendly manner' through a publication on its website.

In a very near future, reliable national insolvency statistics should then be required from Member States in order to improve the quality of insolvency statistics at European level, but let's see how the data will be collected and how it will be used…

If you have any questions regarding this article, please do not hesitate to contact me at mailly.myriam@orange.fr ■

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

Le Droit de l'Insolvabilité Internationale
(International Insolvency Law)

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

Within its thirteen substantive chapters, the book's coverage may roughly be divided into four parts. The first part describes the European cross-border insolvency regime, namely Regulation (EU) 2015/848 on insolvency proceedings (Recast European Insolvency Regulation), including an interesting first chapter on how the case law of the European Court of Justice (CJEU) is to be understood and how it has largely inspired the European legislator during the review of the original European Insolvency Regulation (Regulation (EC) 1346/2000) (the book is up to date with the case law of the CJUE at the end of 2017).

The first part then focuses on specific issues in more detail, such as the scope of the European Insolvency Regulation, the court's insolvency jurisdiction, the recognition and enforcement of decisions (including foreign insolvency-related judgments), secondary proceedings, applicable law, treatment of groups of companies and protection of employees. The second part then deals with international insolvency law applicable outside European borders. In this dedicated chapter, both corporate and personal insolvencies are covered (which is not the case in the first part of the text, as personal insolvency is excluded from the scope of the European Insolvency Regulation when it applies to French proceedings).

The third part is dedicated to the specific judicial and administrative insolvency regimes for banks and their impact on security interests while the fourth part focuses on the harmonisation of insolvency laws in the European Union in the light of the Directive Proposal published on 22 November 2016. For ease of reference, appended at the end are both the European Insolvency Regulation and the Commission Implementing Regulation (EU) 2017/1105 of 12 June 2017 establishing the forms referred to in it.

It is clear that the book's coverage is very wide and reflects the authors' experience as two of the best-known French practitioners who have been involved in a range of European and international cross-border cases. A key strength of the book is the in-depth analysis of a number of EU and national cases facilitating an understanding of the subject. In summary, all the chapters are the product of experts' analysis and readers (practitioners and academics alike) may add this very valuable book to their library of essential insolvency works.

Myriam Mailly
Joint Technical Officer, INSOL Europe

Best Practices in European Restructuring

Lorenzo Stanghellini, Riz Mokal, Christoph Paulus and Ignacio Tirado (2018, Wolters Kluwer/CEDAM, Milan), xx and 280pp, €32, ISBN 9788813370961

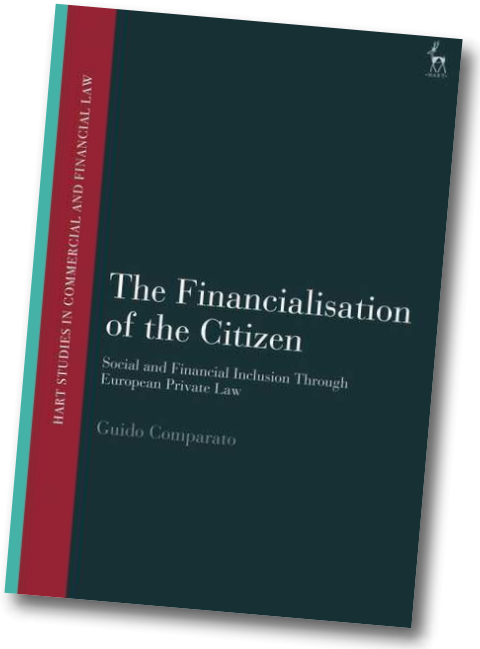
This text is the product of an empirical study into the law and practice in four key European jurisdictions (DE, ES, IT and UK) by a team composed of some of the most eminent scholars in Europe and supported by European Commission funding. The work, which comes out in the wake of the dissemination event in Brussels in July 2018 is addressed to legislators, policy-makers and stakeholders alike. It attempts to postulate a role for best practice and guidance in the design of future restructuring and insolvency processes, whether formal or informal/consensual. In that light, the inclusion in Appendices at the end of the work of a set of Guidelines and Policy Recommendations distilled from the research is a natural outcome.

The book is fairly concise with its findings concentrated in eight chapters. The theme of micro-, small- and medium-enterprises is certainly a hot topic in modern insolvency law literature, to which this work also gives a focus in its final chapter. Preceding this, though, are chapters devoted to understanding and identifying "crisis" as a precursor to triggering the need for intervention, issues of fairness between stakeholders in the process, the goals and structure of a restructuring plan, the role of professionals in drafting plans, as well as three chapters outlining plan negotiation, examination and implementation. Overall, the material is well-structured and easily accessible.

The authors have endeavoured to summarise their findings without losing the analytical element. As such, the work can be recommended for a place in any insolvency library.

Paul J. Omar
Technical Research Coordinator

The Financialisation of the Citizen: Social and Financial Inclusion through European Private Law



Guido Comparato (2018, Hart Publishing, Oxford), 232pp, £70, ISBN 9781509919222

The book examines if the established rules and principles of private law in the European Union (EU) and its Member States are still adequate to produce the policy goals of social and financial inclusion of citizens in the context of financialisation (i.e., an increasing importance of retail financial services for both economic welfare and social participation). The focus is on four aspects: access to a basic bank account, access to affordable credit, the problem of household over-indebtedness, and the promotion of financial education.

By combining insights from the field of political economy with analyses of EU policy documents and of legal rules by the EU and the Member States, the author argues that the traditional notions of private law, such as autonomy or freedom of contract, are insufficient to deal with the 'financialisation of the citizen'. This is not least because new financial practices such as securitisation have moved the consequences of financial risk-taking and debt default far beyond the originating debtor-creditor-relationship and have thus produced new ('systemic') risks of financial instability.

The study, written as part of a research project on European regulatory private law led by Prof. Hans-W. Micklitz (University of Bamberg), is an excellent overview of the treatment of financial and social inclusion in European private law. It will surely stimulate further research and should be read especially by academics and policymakers working on private law, financial regulation and social policy, though should also be of interest to practitioners.

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