INSOL EUROPE

#80 · Summer 2020

eurofenix®

The journal of INSOL Europe

COVID-19

Coping with the crisis across Europe

In this special edition:

- How the courts are adapting
- Changes to director's duties
- The limits of EU harmonisation
- What's next for the EU Directive?
- Responding to the crisis

...and more

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Welcome from the Editors


FRANK HEEMANN


CATARINA SERRA

As you will have noticed by now, Catarina and I take turns writing editorials for eurofenix. Usually, when this privilege falls on me, I go through all contributions trying to identify a central theme, a leitmotif, which I then try to put into some broader political or economic context. Sometimes this is easy, sometimes a bit tricky, at least for an amateur editor like me.

Yet, for this edition of eurofenix my usual approach appears to be a no-brainer. Why? Since for the first time, at least as far as I can recall, we have dedicated a complete edition of eurofenix to one single topic. As a result, you are holding in your hands a COVID-19 special entirely dedicated to the topic which in the past months has pervaded the private, professional, economic, social and political life of literally billions of people around the globe. The central theme of this edition is therefore crystal-clear. Almost every page of this edition addresses aspects of COVID-19 related measures in the context of economic crisis, financial distress, restructuring and insolvency.

You will thus find a broad range of useful information explaining how the executive, the legislative and judicial bodies, as well as the professionals in numerous countries adapted to the pandemic, starting from these editorial lines and Piya's President's column, continuing through our standard sections like the IT&DA, Technical Insight, Technical Update and the US column, to the guest editorial of professor Martel (p.8), continuing in our feature articles (like Catarina Serra's instructive comparative study on director's duties under the COVID-19 legislation (p.20), and culminating in a striking number of country reports from 12 (sic!) jurisdictions (starting p.30).

But what is the leitmotif within our central theme? What is it that shines through all the articles in this edition? Could we for instance discern from the many expert reports a particularly successful way for governments and lawmakers to adjust or supplement the legal framework for insolvency and restructurings? Or a preferred way to confine the worsening of an already stark economic crisis? Probably it is too early to tell. In any case, I leave the answers to you. Because for me the thread shining through most articles is something completely different.

It is the fascinating ability of mankind, including our members, to adapt decisively and often creatively to a very sudden and challenging change in circumstances. This is evidenced by the speed and resoluteness by which legal frameworks were adjusted and financial support made rapidly available at dimensions unimaginable half a year ago. It is also shown by the way our profession and this organisation have been successfully dealing with the situation. To name just a few examples: courts, IPs and other professionals switched to remote communication tools (see the IT&DA column, p.12), a COVID-19 tracker of insolvency reforms was put in place (together with Lexis Nexis) and made accessible on our website, an informative series of weekly COVID-19 coffee breaks is published on the website and social media.

Nevertheless, we probably all agree: coping successfully with the ramifications of the pandemic does not come close to the pleasure and benefits of meeting in person. It is therefore extremely unfortunate that many events scheduled for this year had to be cancelled, including our flagship event, the Annual Congress in Sorrento. However, with COVID-19 related restrictions being lifted throughout Europe I am optimistic that INSOL Europe will be able to have events in the second half of this year. I keep my fingers crossed and hope to see you soon.

Frank

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Light at the end of the tunnel?

PIYA MUKHERJEE
INSOL Europe President

Piya Mukherjee updates us on the recent activities of INSOL Europe

> *From early May INSOL Europe has been sending out short web-videos on a weekly basis featuring INSOL Europe Country Coordinators*

We are fortunate in Denmark. The peak of the crisis has been left behind and since the end of March the number of hospitalised COVID-19 patients has seen a steady decrease. We are now back in our offices, restaurants are again open, although with restrictions, and Tivoli – our flagship amusement park in Copenhagen, dating from 1843 – opened recently. As of mid-June, we will be able to travel to Norway, Iceland and Germany and receive visitors from these countries.

Not all of our co-citizens in Europe are so fortunate. However, the restrictions imposed due to the COVID-19 crisis are overall gradually being relaxed, in order, among other things, to revive the ailing tourism business which is a sizeable source of income in many European countries.

Compensation packages

Looking at the business community, many countries across Europe and beyond have introduced financial compensation packages to support businesses that have seen their turnover vanish overnight due to the pandemic. The million – or should I rather say the billion – dollar question is now when and how to phase out these rescue packages without causing a tsunami of liquidations. On the other hand, the States should not support businesses that are neither viable, nor have any prospect of becoming viable as our world returns to the "new normal".

What has INSOL Europe been up to?

Tracker of reforms of insolvency legislation

Many European countries have also enacted reforms of their insolvency legislation in order to protect businesses from liquidation due to the financial repercussions of the pandemic.

LexisNexis Legal & Professional, a leading global provider of legal, regulatory and business information and analytics, has produced a tracker that gives an overview of such insolvency reforms globally. The tracker is produced in partnership with INSOL Europe and our Country Coordinators have put a lot of effort into contributing to the tracker. The tracker and the COVID-19-crisis-related national reports can be accessed on INSOL Europe's website (https://www.insol-europe.org/technical-content/covid19). Many are present in this issue of eurofenix as 'Country Reports'.

COVID Coffee Breaks

From early May INSOL Europe has been sending out short web-videos on a weekly basis. Each 20-minute video features two or three INSOL Europe Country Coordinators, who gave snapshots of the situation in their respective countries and what, if any, reforms of insolvency law have been enacted to counter the consequences of the pandemic.

If you have not had the opportunity to watch these web-videos, read further on in this edition and you will find the link to the latest episodes. They go very well with a cup of coffee!

A big thank you to Emmanuelle Inacio, our Conference Technical and Training Course Director, and the rest of the secretariat for making these web-videos happen and a big thank you to all the participating Country Coordinators.

Brand new logo!

May also saw the launch of the new logo of INSOL Europe.

The INSOL Europe logo had not been updated since the turn of the century and we have long considered it due for an overhaul. The map in the logo has always been a contentious issue with subtle changes over the years, but there comes a point where the design will not represent our future goals no matter how much tweaking and finessing it is given.

Since our new website was launched in 2015 and had been revamped several times to keep up with the new focus of our organisation, the logo was showing its age in the new digital world. It was definitely time for a re-brand!

The new logo has a strong graphical connection to the old design. The map of Europe in the new logo is replaced by a blue dot positioned where Europe is generally shown on globes. This represents INSOL Europe at the heart of the network on many different levels, whether geographically or metaphorically.

The new logo was designed by our brilliant Communications Manager, Paul Newson who has a long career in graphic design and corporate branding. A huge thank you to Paul for this great design, which captures perfectly the heart and soul of INSOL Europe.

Annual Congress

Alas, with a heavy heart we made the tough decision to cancel the annual conference in Sorrento, scheduled for 1-4 October 2020.

I am sure that I am not the only one who with anticipation looked forward to visiting beautiful Sorrento and therefore is very disappointed about not having this opportunity to follow the footsteps of Ulysses.

Therefore, I am delighted that Sorrento has been chosen as the venue for the Annual Congress in 2024, the venue for the 2021 conference being Dublin (Ireland), as already planned, while the 2022 conference will take place in Dubrovnik (Croatia) and the venue for the 2023 conference will be Amsterdam (the Netherlands).

Ordinary General Meeting

The Ordinary General Meeting of INSOL Europe will be held in Autumn as an online event, as well as the working group meetings and a series of webinars in place of the Sorrento Congress. We will also publish many of the planned interventions in Eurofenix as they are updated to reflect the ongoing crisis.

Rest assured – INSOL Europe is remaining as active as possible in these challenging times!

I wish you all a lovely summer. ■

> *INSOL Europe is remaining as active as possible in these challenging times!*

SAVE THE DATE

INSOL EUROPE | FRAUD ADVISORY PANEL | Association of Business Recovery Professionals R3 Rescue Recovery Renewal

Joint Fraud Conference • 27 October 2020, London, UK

The counter-fraud practitioner's toolkit: preparing for the new world

We are pleased to announce that we will be holding a joint conference with R3 and the Fraud Advisory Panel on 27 October 2020 at the Chartered Accountants' Hall (Moorgate Place), London.

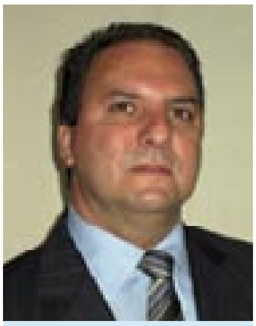
This one-day conference will focus on topics related to global financial crime, tackling rogue companies, UK compensation orders, asset tracing, cryptocurrency fraud, and digital forensics, with speakers from international police agencies, insolvency and fraud specialists, academics and many more.

Further details and a draft programme will be announced shortly.

If circumstances don't allow us to meet in person, we will hold the event online.

Time to stay calm and act rationally

French economist Jocelyn Martel gives his personal views on the COVID-19-related financial and economic crisis



JOCELYN MARTEL
Professor of Finance, ESSEC Business School, France

In January 2020, the world woke up facing a phenomenon that some had predicted but few wanted to hear about or were prepared for: a global pandemic, now commonly called the COVID-19 crisis. Immediately, many economists were convinced that the world was heading for a stock market crash and an economic crisis.

They were right. The stock market sank, and all countries that imposed strict lockdown measures face a significant contraction in their GDP.

Clearly, this is not the first nor the last time that the world faces a stock market crash and a recession. Yet, this is the first time in our generation that a recession results from a pandemic. In addition, the speed and the magnitude at which this is happening is unprecedented. The S&P 500 lost 34% between 20 February and 23 March (which then increased by almost 30% by 8 May) and all countries are expected to lose many percentage points of GDP this year only. In a majority of countries, confinement policies forced most of the population to stay home to reduce the spread of the virus. Although teleworking was highly encouraged, millions of workers in every country have been laid-off, at least temporarily. National governments, who have learned from the last financial crisis, decided to step in to stop the bleeding. Massive recovery plans were adopted to help workers and companies to survive the crisis. At the same time, Central banks around the world announced a historical debt repurchase plan in order to support the economy.

But this situation was untenable. In early May 2020, many countries decided to loosen up on their confinement policies. Economic activity is slowly recovering in some industries while others are expected to continue suffering from the crisis for years to come. I think that there are three key aspects of this COVID-19 pandemic crisis that, unfortunately, our society will have to accept, at least for some time: mass unemployment, bulging government deficits and record bankruptcies.

Falling GDP

First, GDP has already dropped and unemployment around the world is expected to increase significantly. France's GDP went down by 6% in Q1 2020 and its unemployment rate could increase to more than 12%. However, I believe that the drop in GDP has two components.

The first one is transitory. Because of the uncertainty, consumers have significantly increased their savings and postponed many expenditures, especially for durable goods. Most of these expenditures will occur when uncertainty goes down and the economy recovers.

The second one is permanent and is lost forever. Services such as a meal in a restaurant or a haircut cannot be postponed to a future date, although some of the savings can be reported on future consumption. Although there is no empirical estimation of the relative importance of each component, I suspect the transitory part to dominate. This could explain why the stock markets have erased part of their losses over the last two months. In spite of the uncertainty, financial markets seem to have integrated the gravity of the crisis, including the zones of turbulence to come. They are now looking forward for the increased consumer spending and economic recovery.

A second aspect of this crisis is that governments' deficits have gone off the roof. For instance, the debt to GDP ratio of France is expected to go from 100% to 116% before the end of the year. This significant increase in deficits is mainly explained by the governments' decisions to preserve the purchasing power of individual workers and to save firms from bankruptcy. Given that many countries can now borrow at close to zero, if not negative interest rate, this may be a sound policy in the short run. Whether or not this is a sound policy in the long run is open to debate, but it would be wise to remain cognisant of the deleterious effects bulging government deficits have had on economies following other crises, as the first and the second oil price shocks.

A third aspect of this COVID-19 crisis that relates to the drop in GDP is the number of bankruptcies. Historically, bankruptcies lag variations in GDP and unemployment by a few months and no one doubts that the number of bankruptcies will shortly rise. A number of laid-off workers will default on their mortgage or personal loans and the number of consumer bankruptcies is expected to surge. Large firms may find their way out through restructuring, but many SMEs are bound to

> *Historically, bankruptcies lag variations in GDP and unemployment by a few months and no one doubts that the number of bankruptcies will shortly rise*

disappear. Many national governments have announced a series of measures that attempt to avoid this future wave of bankruptcies. The French government even declared that it would not let any firm go bankrupt because of the crisis.

Urgent changes

Further, some insolvency professionals are calling for urgent changes to bankruptcy legislations to prevent what can be commonly called "COVID-19 bankruptcies". Whether or not this is necessary is open to debate but in my view, this is getting into dangerous territory. As argued by Jackson (1986), "the basic problem that bankruptcy law is designed to handle, both as a normative matter and as a positive matter, is that the system of individual creditor remedies may be bad for the creditors as a group when there are not enough assets to go around. Because creditors have conflicting rights, there is a tendency in their debt-collection efforts to make a bad situation worse."

Bankruptcy law is designed to handle the resolution of financial distress irrespective of the state of the economy. There is no bankruptcy law either for boom periods or for recessions. It can be amended to respond to structural changes in the economy, but not to economic cycles. Doing so would open the door to continuing demands by creditors and corporations to modify the law at their convenience. In addition, bankruptcy is a natural phenomenon in a market economy and some firms would have disappeared even without the COVID-19 crisis. The objective of the government should be to offer the necessary breathing space to viable firms faced with short term liquidity problems rather than trying to save all firms at all cost. I believe that some of the measures announced by the governments represent a strong signal in this direction and that nothing justifies adopting a new "COVID-19" bankruptcy law.

From a financial perspective, financial markets will continue to exhibit high volatility. Risk averse investors have become more sensitive to information and many are desperately looking for good news. Of course, one should not overlook the fact that the drop in the stock market could translate into significant losses for investors. The sudden drop in the stock market is akin to systematic risk inherent to investment activities. Thus, long term investors need to be patient. Although we are likely to observe a rise in the market risk premium that will impinge on a full market recovery, the current circumstances may offer good investment opportunities to investors who are willing to accept some additional risks.

Surviving the crisis

Finally, the last century has seen numerous economic and financial crises, among which the 1929 Great Depression, the 2000 internet bubble and the 2008 Global Financial crisis. To put things into perspective, the CAC 40 (French stock market index) lost 65% of its value from its peak to its lowest value following the internet bubble. Following the 2008 financial crisis, the S&P 500 lost 55% of its value between January 2008 and March 2009. Needless to say, all these indices have recovered, some ending up at their all times high just before the COVID-19 crisis. On the unemployment front, the US unemployment rate went from 4.5% early 2008 to 10% by 2010. It was at 3.5% at the end of 2019. Thus, the world has been through terrible crises in the past and there is no doubt that it will survive this one too. But how long will this take? No one really knows. Although there is little doubt about the fact that the national unemployment rates will rise in the coming two quarters and could stay above historical levels for some time, economists debate on whether the economy will evolve in a V-shape, a W-shape or a U-shape. The shape of the recovery may well depend on whether or not we get hit by a

second wave (or a series of waves) of the pandemic. In the meantime, my recommendation would be to stay calm and act rationally in the face of heightened uncertainty. The cost that the society will have to bear for the series of measures taken by governments around the world is a serious concern. Alternative economic decisions could have been taken. But they were not. Time will come for a complete cost-benefit analysis of these decisions (confinement, increased leverage, unemployment, queuing, but also innovation, technological leapfrogging, European integration, …) and hopefully we will learn from it.

But today, we need to look ahead and to be confident. Consumer and investors' confidence will be essential to surmount this crisis and to find a path to recovery. Any crisis represents its own challenges with its risks and opportunities.

We now know the risks. It is our duty to seize these new opportunities. ■

> *Time will come for a complete cost-benefit analysis of these decisions… confinement, increased leverage, unemployment, queuing, but also innovation, technological leapfrogging, European integration…*

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

INSOL Europe launches series of web-videos: 'COVID Coffee Breaks'

We are very excited to have recently launched a series of webinars – 'COVID Coffee Breaks'. These are short videos in which two or three INSOL Europe Country Coordinators share personal experiences of the COVID-19 crisis in their countries and give highlights of reforms and challenges of national insolvency framework to address the current crisis.

We have published several videos now featuring participants from:

- France, Luxembourg and Belgium
- The Netherlands and Germany
- Italy, Austria and Switzerland
- UK, Ireland & Channel Islands
- Bulgaria, Hungary and Romania
- Latvia, Lithuania and Estonia
- Cyprus and Greece... and more!

You can watch the videos at: www.insol-europe.org/publications/web-series

The COVID Coffee Breaks are free for all to view, so please do share the coming invitations with your colleagues and friends. Take a break, have a coffee and enjoy the COVID Coffee Break!

The COVID Coffee Breaks are brought to you in partnership with LexisNexis with whom INSOL Europe is honoured to collaborate on the COVID-19 tracker of insolvency reforms globally.

We will be expanding the series of videos to include wider insolvency reforms and updates about other INSOL Europe activities, so watch this space!

Council Elections

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

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

Therefore, members from these countries will have received an email requesting nominations for candidates from their country.

In the meantime, one non-reserved seat vacancy on Council (which may be occupied by any country) will also become available.

Look out for further updates arriving in your in-box!

Nigel Davies RIP

Steffen Koch, Past President of INSOL Europe writes on the sad passing of a dear friend.

It is with great sadness that we have to inform you that our dear family member Nigel Davies is no longer with us. He passed away from a heart attack in Abidjan/Ivory Coast where he worked since 2016 for the African Development Bank.

Personally, I first met Nigel 2006 in London on occasion of a conference ending at lunchtime. Spontaneously, he invited me for lunch in his club, the East India Club just in walking distance. This legendary lunch ended at 6pm and I had severe difficulties to find my way back to the hotel to pick up my luggage... This was the starting point of a life-long friendship which now has ended way to early.

In 2007 we met again at the INSOL International conference in Cape Town where he hosted a dinner in the Cape Town City Club with friends from around the globe. There I took the picture you see, perfectly describing his character: friendly, warm sense of humour and a true mastermind of socialising.

Another legendary meal ended on the balcony of my hotel room facing the sea where we had a 'very last' Gin & Tonic together. Unfortunately, I involuntarily locked the door so that we were trapped in the sixth floor, having our mobiles in our jackets inside, of course... So what to do? Crying for help was the only solution! Some hotel guests down on the terrace heard us and the hotel staff quickly helped us out our miserable situation. Since then, we often called ourselves 'The Balcony Boys', having both a smile on our faces.

In the following years of our deep friendship we frequently met at numerous conferences, as we were both quite active within the INSOL Europe family, for some time both being members of the esteemed Council of INSOL Europe. Our emails always finished with "Freundschaft", the greeting of the FDJ (Freie Deutsche Jugend – socialist youth organisation in

former German Democratic Republic) and perfectly reflecting our common sense of humour.

We exchanged cufflinks of the Clubs we are members of and since the sad news of his death I wear them with even greater appreciation.

I cannot express the sadness I am feeling better than to say: "Farewell, my friend. Rest in peace. Freundschaft!".

The INSOL Europe family has suffered a great loss and will never forget what he has done for us!

Gerhard Gispen RIP

Edward de Bock and Albert Knigge, The Board of Houthoff write on the sad passing of Gerhard Gispen on 13 May.

It is with great disbelief and sorrow that we must inform you that our highly esteemed colleague and fellow managing partner Gerhard Gispen passed away unexpectedly on 13 May 2020. Our thoughts and sympathy go out to his wife and children and all those for whom he was dear.

We are saddened and shocked by this sudden loss of our beloved board member, partner, colleague and friend with whom we have worked with so much pleasure.

Gerhard joined Houthoff in 2016 as a top tier lawyer and partner in the Restructuring and Insolvency practice. His extensive experience and reputation have contributed greatly to the growth of our firm in recent years. He joined the board of Houthoff in 2019, and in our work together, we came to know him as a passionate and collegial managing partner, with a determined spirit, a big heart and great ambitions for the entire firm. We owe him a huge debt of gratitude for everything he has done. Gerhard had reached the age of 60.

It is hard for us not to be able to come together now to find support. Nevertheless, we find that support in the great collegiality of all of our colleagues.

We will miss Gerhard dearly.

This new section of eurofenix will bring you the most relevant news in the field of insolvency tech and digital assets. To contribute an article to a future edition, please send your proposal to: *insolvencytech@insol-europe.org*
or the individual Chairs:
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Was court-life across Europe prepared for the COVID-19 crisis?

José Carles, Laurent Le Pajolec and David Orsula, co-chairs of the Insolvency Tech & Digital Assets Wing, report on how the Coronavirus crisis has changed the relationship of lawyers and insolvency practitioners with Courts within the European Union and in other countries.

> *In Italy, local courts are authorised to hold hearings online through MS Teams and Skype*

COVID-19 and the correspondent lockdown measures have affected our lives in many ways. From a legal perspective, it has proven that jurisdictions that were already adapted to technology have provided a better response in the administration of justice.

This means, ultimately, better guarantees towards the right of legal protection of European citizens as well as a guarantee of the effectiveness of the principle of separation of powers. Therefore, the relevance of technology within the administration of justice has become more evident than ever: *nowadays, without technology, there is no effective justice*.

What is the situation in different European countries after the coronavirus outbreak?

Italy

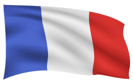
Giorgio Corno and **Gianluca Grasso** from Studio Corno Avvocati in Milan explain that Italy uses since 2009 the so called **PCT** (electronic civil trial). It operates through a state-owned platform whereby both courts and private practitioners can manage their procedures fully remotely. Italian practitioners benefit as well from a variety of e-tools designed to liaise interactions among creditors and judicial receivers, as well as to simplify and ensure publicity, efficiency and reach an unprecedented degree of transparency.

Therefore, in Italy, court activities have not been affected by the COVID-19-related measures from a technical perspective. However, as court clerks' presence at court has been reduced given the restraints related to the COVID-19 pandemic, the Italian government suspended the main procedural terms from 9 March to 11 May and thus justice has functioned in a far slower mode than usual.

With regard to pending insolvency proceedings, local courts are authorised to hold hearings online through MS Teams and Skype (previously tested by the Ministry of Justice). However, the great majority of Italian insolvency courts have preferred to assign terms to the parties to file their defences, using MS Teams only for discussions aimed at issuing the requested judgment.

Spain

Carlos Cuesta from Carles Cuesta Abogados in Madrid explains that the situation is similar to that of Italy, although the telematic relationship with the court uses different platforms depending on the regions and does not include direct communication between insolvency practitioners and the parties involved (i.e. Madrid uses **LexNet** and it requires a previously activated electronic signature). Even though the country is perfectly prepared to deal with any formalities in writing, procedural terms were suspended from 14 March until 4 June because the administration of justice was not prepared for remote work. Therefore, the activity of commercial courts (including hearings, also suspended so far) has been paralyzed almost completely. In this regard, **Her Honor Amanda Cohen**, advisor to the State Secretary of Justice in Spain, states that Andalusian Courts have been testing a system called **Circuit** to be able to hold trials through videoconference, although there is a concern on the recording of the trials (essential with regard to any further appeal).



France

Emmanuelle Inacio explains that the ordinance **n° 2020-304** of 25 March 2020[1] was adopted to lighten the functioning of courts by allowing the information of the parties and the organisation of contradictory procedures by any appropriate means. The provisions of the ordinance apply from 12 March to 24 June 2020. Proceedings without hearings are allowed where the representation is mandatory or where the parties are assisted or represented by a lawyer. The ordinance provides for digital hearings using audio-visual telecommunication means in order to ensure the identity of the parties, the quality of transmission and the confidential communication between the parties and their lawyers. Besides, since 10 April, debtors can file for formal pre-insolvency and insolvency proceedings before the commercial courts on the website www.tribunaldigital.fr.

The French Government also adopted the ordinance **n° 2020-341** of 27 March 2020[2] which provides provisional amendments to the insolvency law in order to mainly promote the access to preventive proceedings and extend statutory time limits of insolvency proceedings. This ordinance also provides special rules regarding communication between the courts and the insolvency practitioners. The hearing ordinarily planned two months after the opening of a reorganisation procedure and the ruling on the continuation of the observation period have been postponed for up to one month after the cessation of the state of health emergency, i.e. 24 June 2020. Further, the acts allowing the referral to the court by the debtor shall be provided to the court administration service by any appropriate means up to one month after the cessation of the state of health emergency. Communication between the court and the parties shall be achieved by any appropriate means up to one month after the cessation of the state of health emergency.

Denmark

Bo Christensen from Horten points out that bankruptcy courts have used phone meetings (as opposed to physical meetings) during the lockdown. In addition, court hearings and decisions have been completed, when possible, on a written basis, which is a possibility under the Danish Administration of Justice Act. Courts are slowly reopening and summoning physical meetings, but no specific or new technologies are applied.

Finland

Robert Peldán from Borenius reports that the Bankruptcy Ombudsman's Office upholds a digital portal called **Kosti**. Kosti provides a base for the estate administrator, the Bankruptcy Ombudsman's Office, the debtor and the creditors to communicate and share information relating to the on-going bankruptcy and restructuring proceedings. Not only does the digital portal enhance insolvency proceedings by improving communication and distribution of documents between parties, but it also provides valuable information and statistics for the monitoring insolvency proceedings in the Finnish economy on a larger scale.

Iceland

Páll Eiríksson from Borgarlog-menn highlights that the only court that has adapted electronic communications is the District Court of Reykjavik (that hears more than half of all court cases). For filing of documents, the District Court of Reykjavik uses **Signet**, a cloud solution for individuals and companies to digitally sign all kinds of documents with a certified time and certification that the signer is who he claims to be. Other district courts are about to follow but neither the Court of Appeal nor the Supreme Court are planning a similar approach.

Belgium

Bart Heynickx from Altius explains that since 2018, both bankruptcy filings and requests to open judicial reorganisation proceedings must be done electronically through the online platform **Regsol**. When filing for bankruptcy, Regsol provides a nine-step plan to follow. After filing the bankruptcy request, the court will still have to issue a judgment, which will also be communicated through Regsol. Regsol also provides a form for debt declaration for creditors.

Poland

Michal Barlowski from Wardynski and Partners explains that an electronic Information Portal of Common Courts has been introduced to the legal system back in 2007 and since then courts around Poland have introduced such an access. This is an innovative solution for lawyers representing clients and participants of legal proceedings who can gain direct access to information contained in court files in an electronic form, can check the status of the case, dates of hearings, actions performed by the court and dates of their performance, the content of documents in the case, and hear electronic protocols. The system automatically generates email notifications about the status and changes made in each individual case.

The anti-coronavirus emergency laws have affected the operation of courts, *inter alia* suspended hearings (except for urgent cases), but courts sittings in insolvency (bankruptcy) and restructuring cases are in general processed, though, at a slower pace. The Information Portal is functioning.

Lithuania

Frank Heemann states that the

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DAVID ORSULA
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> **A judge of the Nevyansk city court of the Sverdlovsk region examined on 30 March the case of an administrative offence using a video call through WhatsApp Messenger**

court system has functioned electronically for some years already, with **e.teismas**. Interaction with the court (inbound, outbound) works electronically, including decisions which are uploaded to and sent through the system, so there was no need to change anything because of the coronavirus crisis in this respect.

With regard to hearings, there is a formal recommendation to avoid oral hearings with presence of individuals, except for certain urgent matters. The use of remote and video call solutions is recommended. The general tendency is to postpone oral hearings, where possible, but some judges have decided to have oral hearings using **Zoom** or similar platforms. This is rather new and you might question whether using this platform is meeting all criteria of proper proceedings (including guaranteeing access of the general public as in normal civil proceedings, which is a right often enshrined in Constitutions).

Slovakia

David Orsula notes that courts are working despite of the coronavirus crisis, although they decide only in mostly urgent cases and cases without physical presence of parties. Online dispute resolutions proceedings (electronic payment orders), are conducted without the participation of the parties in an electronic, semi-automated procedure.

Lawyers, courts, and other parties involved in court proceedings may file documents in electronic form. Communication between attorneys and the court must be electronic only. For the last several years Slovak legislation allows to conduct court hearings by electronic means. The tool is certified by the Ministry of Justice and requires the use of a Slovak eID. However, this option is seldom used, despite the fact that courts have been technically equipped. Commercial solutions (MS Teams, Skype, etc.) are not certified and thus not permissible for official use.

Bulgaria

Stela Ivanova from bnt attorneys in CEE explains that there are electronic databases related to insolvency but that they have a common problem: they are only useful for persons who can speak Bulgarian and can write with Cyrillic letters.

Ukraine

Anton Molchanov from Arzinger points out that the Ukrainian courts operate in accordance with the COVID-19-related insolvency measures by holding court sessions via token-authorised videoconferences and using the e-court system (limited to a few courts in pilot mode) providing electronic submission of all procedural documents, all case materials in the personal e-cabinet (again limited to a few courts, in pilot mode) and a unified state register of all court decisions (introduced 12 years ago and still working well).

Russia

Ilya Kokorin from Leiden Law School explains that the courts have been closed due to the coronavirus crisis and only a limited number of matters are still being decided (mostly urgent cases and cases which do not require the physical presence of parties). The Russian Parliament is considering a bill that will regulate online justice and the Russian Supreme Court has tested the first online hearings with the use of a Russian software called **Vinteo**.

Despite Russian courts being usually very conservative, some regional courts have taken the initiative and are using other ways to hold online hearings. For example, a judge of the Nevyansk city court of the Sverdlovsk region examined on 30 March the case of an administrative offence using a video call through **WhatsApp Messenger**. Another court in the Komi Republic held a hearing on 1 April using Skype software. Unprecedented times require unprecedented solutions.

United Kingdom

Frances Coulson from Moon Beever considers that the profession is managing well on **Zoom** and **Skype**. The High Court is working largely on Skype for business, as it also has electronic filing. On the other hand, county courts are largely paper-based and are working mostly by telephone (rather that video). The unavailability of administrative staff to enter orders is causing adjournments and delays.

Serbia

Djuro Djuric reports that due to the state of emergency, the High Court Council issued a special Conclusion on 18 March with Instructions for hearings and sessions in urgent matters.

Regarding civil and insolvency matters, this Conclusion allows the insolvency procedure to take place only if a decision on interim measures has to be ordered, the delay extended or terminated. In all other cases main hearings are suspended as from 19 March 2020 until the state of emergency is lifted (6 May).

During the state of emergency, commercial courts dealing in insolvency matters communicated privately with each other and with their superiors via internet. Communication and delivering decisions in e-form are still not official in Serbia (although the National Parliament of the Republic of Serbia adopted the Act on Electronic Document, Electronic Identification and Trust Services in Electronic Business on 17 October 2017, which came into force on 27 October 2017, and E-Governance has been working in Serbia for almost 2 years).

Turkey

Burak Baydar from Moroglu Arseven explains that there is a recent legislative proposal awaiting, aiming to amend the conditions for lawyers to participate in civil court hearings through video calls.

The current regulation allows the participation of lawyers, expert witnesses and witnesses to hearings through video calls if both parties consent on it, which makes it almost inapplicable in practice. The amendment bill though suggests that the court can decide the participation of a party or an expert witness or a witness through video call upon a party's request, thus aiming to enhance these hearings.

Conclusion

It is clear that most European courts still need to adapt to the new technologies in order to allow justice to be delivered from anywhere and despite anything, like the current pandemic. The technology adopted will need to comply with the necessary legal requirements, equality in treatment, confidentiality and guarantees (i.e. a right to a public procedure through streaming solutions, data protection, due identification of participants, cyber threats, etc.).

Thus, IT and data protection experts will be crucial when designing new solutions and protocols. ■

Footnotes:

1 www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000041755577&dateTexte=20200406

2 www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000041762344&categorieLien=id

"IT and data protection experts will be crucial when designing new solutions and protocols"

The seven commandments for virtual hearings

In the United States there are a number of major platforms that were already being used for remote calling to court hearings.

With COVID-19, the use of these platforms has been extended to trials and arguments. But as the technology already existed, American attorneys have easily got used to it.

Evan Zucker, Of Counsel from Blank Rome in New York, shares some very useful tips for INSOL Europe members to successfully appear (virtually) before European commercial courts.

1 Test the Technology:
Ensure that your internet /Wi-Fi is secured and stable. Determine in advance what device you will use to participate in the hearing. Make sure your device's camera and speakers are working properly. If possible, log in to the platform beforehand to test the technology and to practice.

2 Set Up Your Virtual Office:
Have a clean office and a wall in the back with no objects which could attract interlocutors from what you have to tell. Consider where you set up your camera and what is behind you. To the extent possible use a solid background. Pay attention to lighting. For example, depending on the time of day, if you are sitting in front of the window, the glare of the sun can interfere with the video.

3 Minimise noises and distraction:
When you are not speaking, mute your microphone. Avoid using the mouse for opening or closing the microphone and learn the relevant shortcuts.

4 Speaking:
Look at the camera when you are speaking. Position the camera at about eye level if possible (you can use books and other objects to raise your laptop temporarily). Speak slowly and clearly. There may be an audio lag, so pause occasionally.

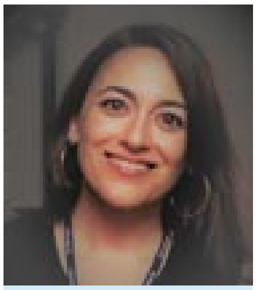
5 Flexibility:
Do not be hard on yourself – technical glitches will happen, embrace them, everyone understands and is going through similar issues.

6 Virtual Documents:
If your materials are all digital, consider combining all of them into a single PDF document with bookmarks and hyperlinks to make jumping to the relevant document seamless during oral arguments. A second monitor can also make a big difference to having the courtroom on one screen and your documents on the other.

7 Trial Team:
To the extent permitted by the local court,if you have multiple colleagues participating in the hearing, establish a protocol for communicating during the hearing (e.g., through WhatsApp or another messenger). Use different channel to discuss with different participants (For example: WhatsApp between lawyers and with the court and Signal app for discussing with your client) to avoid mistakes.

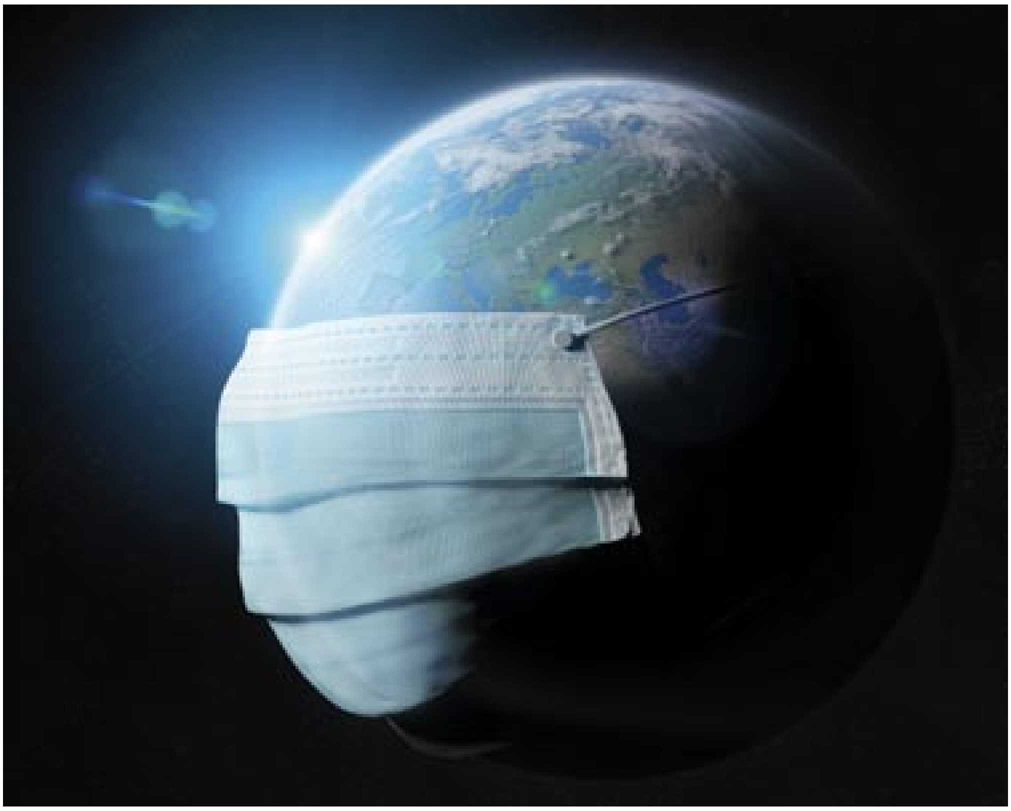
A closer look at...

The remedy of (pre-) insolvency law to the COVID-19 crisis



EMMANUELLE INACIO
INSOL Europe Conference Technical and Training Course Director

> *These temporary national reforms are aimed to increase the success of the regulatory measures and affect mostly insolvency proceedings and the rights of creditors*



At the time of writing, European countries have emerged from long and massive nationwide COVID-19 lockdowns to restart their economies, which were in an induced coma[1].

Temporary national insolvency reforms

After adopting aid packages to prevent viable businesses affected by the COVID-19 pandemic to go insolvent, most European countries have adopted new provisions amending or impacting their respective insolvency laws.

These temporary national reforms are aimed to increase the success of the regulatory measures and affect mostly insolvency proceedings and the rights of creditors. In most of the countries, the national insolvency reforms are the result of a declared state of emergency and mainly suspend the possibility for creditors to file for the insolvency of their debtor, suspend the debtor's duty to file for insolvency and correlated debtor's liability, extend the time limits of insolvency proceedings and/or grant the debtor a moratorium.

In this regard, **INSOL Europe** is collaborating with **LexisNexis** on a **COVID-19 tracker of insolvency reforms globally**[2], which is regularly updated and already covers 35 jurisdictions in Europe and beyond. Moreover, **INSOL Europe** in partnership with **LexisNexis** is organising weekly 20-minute webinars titled "**COVID Coffee Breaks**"[3] for members and non-members of INSOL Europe. In these webinars, INSOL Europe Country Coordinators and contributors to the INSOL Europe/LexisNexis tracker of insolvency reforms globally are invited to share their personal experiences and views on the current COVID-19 crisis and give highlights of reforms and challenges of national restructuring and insolvency law framework to address the current crisis in their own jurisdictions.

The national lockdowns are being lifted, but declared states of emergency are being extended, and correlatively so are the national provisions amending or impacting restructuring and insolvency law. Indeed, after being at the trough of the wave, businesses hit hard by the COVID-19-related economic peril will need time to recover.

Future European restructuring and insolvency reforms

As in past financial crises, after the end of the temporary national insolvency measures, massive numbers of insolvencies are expected. The question of how to deal with these huge number of insolvencies will be raised. National formal insolvency legislations will need to be adapted and convergences certainly will arise. Flexible formal proceedings will be necessary to facilitate restructuring and preserve business value. Simplified liquidation proceedings will also be necessary for non-viable businesses. The intervention of the European legislator would be necessary to achieve the harmonisation of restructuring and insolvency law.

Similarly, courts dealing with insolvency cases will have to be prepared for the flow of insolvencies and avoid an overload which could compromise successful formal restructurings of viable businesses. The efficiency of the restructuring proceedings will not only depend on the judiciary skills and expertise but also on the reactivity of the appointed insolvency practitioners, especially in countries where the profession is regulated. Indeed, national associations of insolvency professionals are also expected to anticipate the increased number of businesses that will need to be restructured or liquidated.

European prevention of insolvency

Very few legislatures have adopted temporary reforms encouraging preventive treatment of businesses' difficulties along the lines of the EU Restructuring Directive 2019/1023 on Restructuring and Insolvency as France did[4].

However, it is urgent to implement a rescue culture in all Member States – adapted to prevent insolvency related to the COVID-19 pandemic[5]. Indeed, preventive restructuring frameworks could address financial distress in the short-term and also help avoiding overburdening the courts with out-of-court arrangements.

Preventive restructuring frameworks must be available for debtors to enable them to address their financial difficulties when it appears likely that their insolvency can be prevented, and the viability of the business can be ensured. In order to enable the debtor to continue his business operations and preserve the value of his business during the pending negotiations on a restructuring plan, a general stay of individual enforcement actions should automatically be granted and majority-driven restructurings via pre-insolvency proceedings should also be facilitated. New financing and interim financing should always be protected if its aim is to prevent liquidity problems resulting from the COVID-19 pandemic.

Action from INSOL Europe

INSOL Europe will publish several **Guidance Notes on the Implementation of the EU Restructuring Directive on Restructuring and Insolvency**[6] with the aim of assisting EU Member States with (i) putting the restructuring frameworks mandated by the Directive in place as soon as possible, where no similar restructuring frameworks exist and in a manner that will be useful to other markets under strain from the COVID-19 crisis; or (ii) where equivalent restructuring frameworks do already exist, refining and adapting them to the directive.

In April 2020, INSOL Europe published its first guidance note on the key points of classification of claims, voting and confirmation of restructuring plans, including by way of a cross-class cram-down. The second guidance note was published in May 2020 and it deals with the stay of individual enforcement actions to be enacted pursuant to articles 6 and 7 of the Directive.

Over the course of 2020, INSOL Europe plans to publish more guidance notes, which will offer technical insights and policy considerations relevant to the implementation of the EU Directive on Restructuring and Insolvency.

Faced with the COVID-19 crisis' effects on the health of businesses, not only a formal but an informal insolvency restructuring remedy should be part of each legal framework. ■

> **Very few legislatures have adopted temporary reforms encouraging preventive treatment of businesses' difficulties along the lines of the EU Restructuring Directive**

Footnotes:

1 See E. Inacio, *Legislating out of lockdown* in Recovery 2020 Summer Edition, available at: www.r3.org.uk/technical-library/recovery/recovery-magazine/

2 The LexisNexis PSL/INSOL Europe Tracker of Insolvency Reforms is available at: www.insol-europe.org/technical-content/covid19

3 The INSOL Europe COVID Coffee Breaks are available at: www.insol-europe.org/publications/web-series

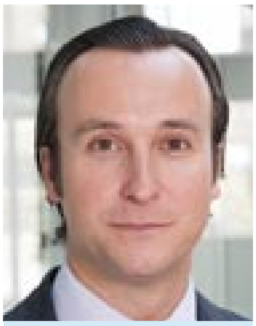
4 The emergency law n° 2020-290 of 23 March 2020 empowers the French government to take inter alia, by ordinance, any measure modifying the insolvency law contained in Part VI of the Commercial Code. The French Government adopted the ordinance n° 2020-341 of 27 March 2020 which provides temporary amendments to the insolvency law in order to mainly promote the access to preventive proceedings and extend statutory time limits of insolvency proceedings. The ordinance n° 2020-596 of 20 May 2020 mainly precise and extend the provisions previously adopted.

5 See E. Inacio, *A closer look at… The impact of COVID-19 on (pre-)insolvency* in *eurofenix*, 2020 Spring Edition, n°79, available at: www.insol-europe.org/publications/about-eurofenix

6 The Guidance Notes on the Implementation of the EU Restructuring Directive 2019/1023 on Restructuring and Insolvency is available at: www.insol-europe.org/publications/guidance-notes

The Preventive Restructuring Directive – What next: A Pre-pack Directive?

Adrian Thery writes on the change of paradigm in corporate restructuring



ADRIAN THERY
Partner, Garrigues, Madrid, Spain

The Directive (EU) 2019/1023 on preventive restructuring frameworks ("the Directive") was passed on 20 June 2019 bringing about a change of paradigm in corporate restructuring. A change that should allow the States of the European Union to catch up with countries adhering to the Anglo-Saxon model, both in restructuring and insolvency matters and also upstream, in financial matters, due to the influence of the insolvency legislation on the provision of credit *ex ante*.

This change of paradigm imports into the insolvency arena the distinction between ownership and control that, despite later than in the US, was also being observed in Europe as a result of the proliferation of listed companies. The features of listed companies had already permeated the European corporate law. Although because up until the 2008 downturn listed companies rarely went bust, the insolvency regime in the European Union continued to be focused on privately or closely held companies, in which ownership and control were fused together. Thus it made no sense to consider the restructuring of a company without the involvement of the owner/entrepreneur, because the business simply could not operate without him/her.

> *The change of paradigm imports into the insolvency arena the distinction between ownership and control*

The Directive requires the Member States to adapt their insolvency regimes to enable a restructuring of the capital structure at publicly traded companies. At this type of company, the members of the capital structure are simply investors, either in debt or equity. Therefore, their position is expendable and there is no operational consequence for any investor classes which are out of the money to be wiped out of the capital structure where there is a likelihood of insolvency.

The priority is to deleverage an over-indebted viable company and observe the subordination agreements entered into between investors. By introducing shareholder cram-down, the Directive thus aims for post-restructuring equity to be assigned to the class of creditors where the value breaks (the so called "fulcrum class"). This ensures that the rights of control associated with equity are assigned to the residual creditor.

The residual or marginal creditor is the creditor that gains or loses the first euro resulting from the rightness or wrongness of each corporate decision. It is in the interests of the law for the marginal creditor to hold the control rights over the company, in order to rule out moral hazard in corporate governance.

By introducing measures designed to ensure that the restructuring of the capital structure implies the reassignment of equity and of the resulting control rights to the fulcrum class (unless the restructuring is consensual – in which case post-restructuring equity is reassigned in a way that will be agreed among the classes themselves), the Directive seeks for the reorganisation of the company to involve the realignment of the company's interests (both those of the owners and of their appointed managers) with the interests of the community. With the Directive, restructuring now becomes in EU a new playground of the market for corporate control.

As we shall see, however, this regime is focused on public or listed companies. Firstly, because, as we have said, at these companies the role of the owner or the equity is expendable. And, secondly, because of the fragmentation of their capital, only listed companies have a problem related to owners and managers being contractually unable to provide the company's shares as security to creditors.

That problem does not exist at privately or closely held companies (typically SMEs): if the creditor does not have a security interest in the shares, it is only because he/she did not bargain for it. Consequently, the cross-class cram-down mechanism makes less sense at SMEs than at listed companies.

Alongside this, the existence of a restructuring surplus, which is the reason for the restructuring in the first place, will not be common at SMEs. It is therefore predictable that the complex restructuring mechanism devised by the Directive will not prove efficient for SMEs.

The Directive has been focused on restructuring because it embodies the example of a pre-insolvency solution. In view of the Member States' reluctance to cede ground on mature matters such as insolvency, pre-insolvency was the natural way for the EU to enter this area, and it has done this through the Directive.

Though, the Member States cannot now rest on their laurels and be confident that with the implementation of the Directive they have completed their restructuring and insolvency duties. Quite the opposite in fact, this is only the beginning. As we have explained, the Directive only actually covers the restructuring of large companies, but it does not comprehensively cover, despite its attempts, the needs of SMEs, and SMEs make up the bulk of businesses in the European Union.

If this is the case, how can EU members now fill the gap for SMEs? By improving the legal regime applicable to liquidation, not to the assets of the liquidated company but to the underlying businesses as going concerns.

The regime of liquidation of companies by insolvency proceedings, where the liquidation value for the business as a going-concern is higher than its piecemeal liquidation value, should allow for the underlying businesses to be transferred as a going concern free and clear of debt. Few regimes in the EU enable companies under liquidation by insolvency proceedings to be rescued effectively. A number of elements are needed to achieve this.

Legal certainty

The first is the legal certainty that the purchase of the company by the purchaser takes place free and clear of debt and liens. The legal certainty also has to enable visibility for the purchaser of the employees' rights in the event of the transfer of undertakings.

Treatment of debt vs executory contracts

Secondly, a clear distinction between the treatment of debt (which will come to be repaid with the price of the transfer) and the treatment of executory contracts is needed. An adequate treatment of the latter warrants special protection so that they can continue being performed normally, with the result that the insolvency proceedings will only affect the capital structure, not the underlying business, thereby avoiding the association of a commercial stigma with the proceedings themselves. Additionally, the liquidation regime should allow the liquidated company's contracts to be taken over by the purchaser without requiring the counterparty's consent, so that the transfer of the business in liquidation and the consequent transfer of business do not result in the disappearance of the attached network of contracts that is necessary for the business to operate (also determining special rules, in relation, for example, to intellectual property).

Bidding options

Thirdly, the entrepreneur should not be prevented, as it happens in certain jurisdictions, from bidding for his own business. Otherwise, the entrepreneur will wait until it is too late to seek insolvency proceedings, when there will be no business left to rescue.

Enhanced scrutiny

Fourthly, allowing the entrepreneur to bid for his own business implies a need for enhanced scrutiny by the insolvency practitioner and by the bankruptcy court to allow interested third parties to take part in the auction on an equal footing with the entrepreneur and to have access to the same information. The system must assure that if the entrepreneur wins at the auction, this is because it was objectively the best bidder under market principles, by eliminating any suspicion of fraud associated more with other eras and incompatible with the scrutiny of a judge and professional insolvency practitioner. The entrepreneur will be the natural purchaser for many small businesses, which will then be willing to make the highest bid to maintain the business and thus maximize recovery for creditors after a market process. Fraud should not be something to be presumed before the event (preventing the entrepreneur from bidding), but rather penalised ex-post on the credit record of entrepreneurs who put to auction their businesses more than once.

Last but not least, an effective and efficient liquidation regime is the cornerstone of the insolvency system. The main aim of the insolvency regime is to maximise recovery for creditors, eliminate inefficient competitors from the market, and reassign resources efficiently to the person who can make the most profitable use of them.

If the liquidation regime is not efficient, any liquidation will result in recovery for creditors that will tend to zero. This may have the perverse side effect of justifying almost any restructuring: if the liquidation value is inefficiently low, it contributes artificially to a restructuring surplus, which may appear to justify restructuring (whereas, under normal conditions, it would be better for the creditors to liquidate the company and reassign the business and its resources). The restructuring of companies that ought to be liquidated is the source of macro-economic issues related to debt overhang and a zombified economy.

At a time when the European countries should reassign their resources effectively (including credit, which otherwise becomes trapped in zombie companies instead of being put to good use in innovative projects), the need for a rescue regime for businesses through liquidation by insolvency proceedings should become a priority of the legislative policy.

In short, following the publication of the Directive, the Member States, or otherwise the European Union (in view of the implications on the free movement of capital and the freedom of establishment, among others), should work on improving the regimes of liquidation by insolvency proceedings. A restructuring regime will never be effective if it is not built on an efficient regime of liquidation by insolvency proceedings that allows the rescue of businesses through their transfer to third parties as going-concerns. ■

Few regimes in the EU enable companies under liquidation by insolvency proceedings to be rescued effectively

Directors' duties under COVID-19 legislation: A comparative perspective

Catarina Serra compares the roles of Directors in light of new legislation in response to the crisis

CATARINA SERRA
Justice of the Portuguese Supreme Court

> *The suspension or freezing of the duty to file for insolvency is a positive measure; it requires, however, some precautions*

The case for Insolvency Law

It goes without saying that the COVID-19 crisis had a huge impact on the economy and gave rise to a wave of emergency legislation aimed at supporting the survival of businesses.

On the brink of the transposition of the European Union Directive on restructuring and insolvency, one of the most fruitful areas of intervention is Insolvency Law. With the appropriate temporary adaptations, the usual instruments of Insolvency Law may play a vital role in addressing the current widespread situation of businesses. Sometimes, however, the only thing which is necessary is to temporarily suspend or put on hold their enforcement. This is precisely what happened with the catalogue of directors' duties laid down on Article 19 of the Directive, for the event of likelihood of insolvency.

In jurisdictions which provide for the duty to file for insolvency, one of the most immediate measures (the only measure, in some cases) was the suspension of the duty. The justification is obvious: since the breach of duty leads to the liability of company directors, the measure brings them some sense of relief. In the remaining jurisdictions, steps were also taken towards a certain appeasement of directors' duties.

How are these measures useful to tackle the business crisis?

Suspending the duty to file for insolvency

Germany was one of the first countries to intervene in the domain. The duty to file for insolvency[1] is blocked until 30 September 2020 (with the possibility of extension until no later than 31 March 2021, if this appears necessary due to the continuing demand for available public aid, ongoing financing difficulties or other circumstances). The suspension is accomplished through a well-thought system of negative pre-requisites facilitated by presumptions. More precisely, the suspension shall not apply where insolvency is not a result of the COVID-19 pandemic or where there are no prospects of remedying the insolvency; where the debtor was not illiquid on 31 December 2019, it is assumed that the insolvency is a consequence of the COVID-19 pandemic and that there are prospects of remedying the insolvency.

Other legislators followed the path, although using different methods. In Spain, the duty to file for insolvency[2] is suspended until 31 December 2020. In Portugal, the suspension was established even in a plainer way, i.e., the duty to file for insolvency[3] is suspended with absolutely no requirements until further notice. The French legislator used a distinct formula: for the period of three months following the cessation of the emergency state the debtor's situation is to be assessed with reference to 12 March 2020 (when the emergency period commenced). By means of this "crystallisation", the duty to file for insolvency[4] is, in practice, "frozen" during the period of three months following the cessation of the emergency state.

The suspension or freezing of the duty to file for insolvency is a positive measure; it requires, however, some precautions.

When – but only when – the company's insolvency is a consequence of the COVID-19 crisis it is justified (fair) that directors are exempted from the duty to file (the COVID-19 crisis is an exogenous factor, a cause beyond their reasonable control). Besides, only then is insolvency likely to be temporary and there are good prospects of rescuing the company. Hence, an indispensable normative requirement is the evidence or the assumption that the company's insolvency is a COVID-19-crisis-related insolvency.

As the ultimate concern in this scenario is to solve the insolvency problem, the duration is another core aspect. Restructuring attempts involve sometimes imaginative and complex operations; directors ought to be given enough time to carry them out. Thus, the suspension should last for a (realistically) reasonable period, with the possibility of extension, depending on the circumstances.

Unfortunately, not all legislators have paid attention to the need to limit the scope of application and to establish a reasonable duration, in the above-described terms.

In any case, the suspension of the duty to file for insolvency falls short of the necessary measures. In order to give directors scope for action and encourage them to strive for the company's rescue, additional measures must accompany it.

Blocking the opening of insolvency proceedings upon request

It is useful, for one, to suspend, in similarly cautious terms, the opening of insolvency proceedings upon request of the debtor, the creditors and other individuals entitled to do it. The final aim is to restrain the probable "insolvency tsunami", within which a large number of companies would be doomed to a (most likely unjustified) asset liquidation.

Measures of this kind were adopted in some (but not all) of the countries where the duty to file for insolvency is suspended. In Germany, in the period from 28 March 2020 to 28 June 2020 (likely to be extended to 31 March 2021), no insolvency proceedings are to be open except if they are based on an insolvency situation which pre-existed (i.e., existed prior to 1 March 2020). And in Spain, until 31 December 2020, courts are not allowed to open insolvency proceedings upon request; should the debtor file for insolvency before 31 December 2020, his/her request will have priority even if submitted on a later date than the other persons' request.

Alleviating the duties and the liability of directors

As the duty to file for insolvency is not the sole duty of company directors (and, in certain jurisdictions, it does not even exist), it is appropriate to mitigate further the rules on directors' duties and liability.

Again, some (but not all) of the countries which suspended the duty to file for insolvency adopted measures of this kind. In Germany, the risk of directors' liability has been considerably reduced, with the law providing that payments which are made in the ordinary course of business, in particular those payments which serve to maintain or resume business operations or to implement a restructuring plan, are deemed to be consistent with the due care of a prudent director and that credit granted and collateral provided during the period of the suspension are not deemed to be contributing, *contra bonos mores*, to the delayed filing of a request for insolvency. In Spain, the legislator elected a different target: since company directors may be liable when there is a serious loss of the legal capital (when net assets fall below 50% of the legal capital) and they fail to adopt the measures prescribed by law (namely, to promote the dissolution of the company), it is laid down that the losses in the financial year of 2020 shall not be taken into consideration for the purpose of assessing directors' liability.

As previously noted, in some jurisdictions the duty to file for insolvency does not exist as such and instead, a general duty to abstain from insolvent trading is in place. In these jurisdictions, the legislative intervention focuses on liability for insolvent trading and aims at granting company directors what is called a "safe harbour". In Australia, for a period of six months, company directors shall be temporarily relieved of their duty to prevent insolvent trading with respect to any debts incurred in the ordinary course of the company's business, except in cases of dishonesty and fraud (which will be subject to criminal penalties). In New Zealand, directors' decisions to keep on trading, as well as decisions to take on new obligations shall not result, for a period of six months, in a breach of duties if the director, in good faith, is of the opinion that: (1) the company has, or in the next six months is likely to have, significant liquidity problems, which are, or will be, a result of the effects of COVID-19 on the company, its debtors, or its creditors; (2) as at 31 December 2019, the company was able to pay its debts as they became due in the normal course of business; and (3) it is more likely than not that the company will be able to pay its due debts on and after 30 September 2021.

Finally, in the United Kingdom, wrongful trading provisions are suspended since 1 March 2020 for the estimated period of three months (which may be extended). The general belief is that the existing laws for fraudulent trading and the threat of director disqualification will continue to act as an effective deterrent against director misconduct.

To be sure, measures of this kind have to be very well balanced so as to avoid the total elimination of directors' duties, in particular the duty "*to consider or act in the interests of creditors of the company*" [in the wording of Article 172(3) of the UK Companies Act 2006] or "*to have due regard to the interests of creditors, equity holders and other stakeholders*" [in the wording of Article 19, a), of the Directive], which is somehow present in every jurisdiction and acquires special relevance these days.

Final remarks

Clearly, the adoption of all the measures mentioned above, either alone or combined, is neither sufficient nor does it allow us to imagine that the problem of business insolvency is solved. Nevertheless, it is likely to contribute to the reduction of the avalanche of insolvency proceedings which will certainly hit commercial courts and drive to a fast track liquidation of otherwise viable businesses.

More importantly, it prevents that well-intentioned and responsible company directors become averse to taking on decisions and to engaging in operations which, although apparently risky, may be indispensable to accomplish the recovery.

It is true that the rules were not always put in place in the most appropriate ways and that, in certain jurisdictions, some of the rules may even be lacking. This might undermine the whole purpose of the solution (to give directors scope for action). But there is still time to address the shortcomings wherever necessary. ■

> "Clearly, the adoption of all the measures, either alone or combined, is neither sufficient nor does it allow us to imagine that the problem of business insolvency is solved"

Footnotes:

1 Under German law, directors shall file for insolvency, at the latest, three weeks after the commencement of insolvency (*Zahlungsunfähigkeit*) or overindebtedness (*Überschuldung*) (Section 15a *Insolvenzordnung*).

2 In Spain, the period to comply with the duty is two months since the directors were aware or ought to have been aware of the company's insolvency (Section 5.1 *Ley Concursal*).

3 In Portugal, directors have thirty days from the moment they were aware or ought to have been aware of the company's insolvency (Section 18, n.º 1, *Código da Insolvência e da Recuperação de Empresas*).

4 In France, directors must comply with the duty within forty-five days since the commencement of the insolvency (*cessation des paiements*) (Section L.631-4 *Code de Commerce*).

The limits and logic of the EU harmonisation process in the wake of COVID-19

Members of the Younger Academics Network of Insolvency Law (YANIL) report*

> For countless companies across Europe, preventive restructuring mechanisms are of little help to deal with the consequences of lock-down measures

Harmonisation of insolvency laws has been at the top of the EU institutions' agenda for the last decade. This frenzy precipitated in the aftermath of the Global Financial Crisis. European institutions have been prolific in creating a comprehensive EU-wide framework.

These efforts culminated with the recast European Insolvency Regulation (2015) and the Preventive Restructuring Directive (2019). The sweeping nature and devastating effects of the COVID-19 pandemic, however, have put both the pre-insolvency craze and harmonisation momentum to a halt.

The European institutions have lately put all their eggs in one basket focusing predominantly on preventive restructuring. Little attention has been paid to the harmonisation of other, more frequently used formal insolvency procedures. The crisis ensuing from the COVID-19 pandemic reveals the limits of such a one-sided approach. For countless companies across Europe, preventive restructuring mechanisms are of little help to deal with the consequences of lock-down measures.

Member States reacted by implementing piece-meal laws to control the economically and financially destructive effects of the pandemic. The Younger Academics Network of Insolvency Law (YANIL) board discusses national responses to the COVID-19 crisis from six European countries – Denmark, France, Germany, Italy, the Netherlands, and the United Kingdom (UK) – to determine if the *logic* of harmonisation remains compelling.

Adjusting tried and tested measures

France, Italy, Germany and the UK reacted with a "safe harbour" approach, by making use of existing and reliable procedures.

The French Government is not departing from its extensive toolkit, comprised of five pre-insolvency measures. Rather, it has mostly tweaked existing provisions. France has not modified the threshold of insolvency criterion of payment failure situation. However, the financial situation of the debtor is now assessed as of 12 March 2020, applying the insolvency threshold on that date. Consequently, debtors who were solvent on 12 March can still use preventive restructuring mechanisms even if they are insolvent at the time of filing.

Italy follows a similar approach. The current legislative response relies on the existing toolkit, coupled with the introduction of some emergency measures. The country also opted to postpone the entry into force of the new Insolvency Code until 2021, believing that practitioners and courts prefer dealing with the crisis caused by the pandemic with tested procedures. Key emergency measures include:

(i) a six month postponement of legal obligations arising from pre-insolvency compositions and debt-restructuring agreements;
(ii) the possibility to amend, postpone deadlines or file new plans in pre-insolvency compositions and debt restructuring agreements that have not yet been approved by creditors; and
(iii) a general stay until 30 June 2020 for any bankruptcy filing and insolvency petitions for most companies.

Germany's legislative response has seen temporary adjustments to its current insolvency law regime in order to:

(i) encourage directors to continue trading by a suspension of filing obligations and a relaxation of director's liability (for debtors not insolvent by 31 December 2019) and
(ii) incentivise debt capital investments by suspensions of claw back provisions, the principle of lender liability, and the subordination of shareholder loans.

The UK has also fallen back upon an "old reliable" procedure: administration. The "light touch" administration (see *Debenhams*' second time's the charm attempt to administration) applies the existing insolvency procedure in an innovative way. In light touch administrations, administrators rely on a provision of the Act to give consent to the board to continue to exercise certain board powers during the procedure. As a result, administration is transformed into a debtor-in-possession procedure. The directors' powers are exercised within agreed parameters, enabling the directors to run the business without fully handing it over to administrators, so long as administrators have a reasonable belief that the company can be rescued.

Introducing new restructuring and insolvency mechanisms

The crisis has also been used by some countries to accelerate or re-think the introduction of new insolvency and restructuring mechanisms.

In the Netherlands, pending discussions on introducing pre-insolvency proceedings in the *Wet homologatie onderhands akkoord* (WHOA) have intensified since the outbreak. The WHOA, a debtor-in-possession procedure, was drafted in line with the Directive but its scope is wider than mere prevention of insolvency. It is designed to be also used to prevent the imminent collapse of companies that could be rehabilitated through restructuring. Italy also introduced a new Insolvency Code, which promotes the use of alert and composition procedures.

The UK Government recently introduced a Bill on Corporate Insolvency and Governance that aims to protect otherwise viable companies from collapse by:

(i) providing protection for directors who continue trading through the pandemic; and
(ii) suspending the use of statutory demands and winding-up petitions without court review where the pandemic has prevented a company from satisfying debts.

These temporary changes will continue until at least 30 June. The Bill also introduces permanent measures, including a restructuring plan (with cross-class cram-down) and a temporary "company moratorium" to facilitate discussions on a rescue plan. Once approved, these procedures could prove effective in preventing the collapse of distressed yet viable companies.

Non-insolvency solutions

The COVID-19 pandemic has triggered calls for emergency fiscal and legislative measures to specifically support distressed companies and their employees. These non-insolvency solutions share many commonalities, ranging from suspension of tax payments, state guarantees/loans, subsidies for businesses and freelancers, and measures halting redundancies dictated by economic reasons.

While these measures have been deployed by all countries discussed herein, it is interesting to note that Denmark has relied solely on non-insolvency measures in its response.

Conclusion

The COVID-19 crisis has highlighted some of the *limits* of the European substantive harmonisation efforts of the last decade. The crisis has pushed some countries to pause their current efforts around preventive restructuring. Regulatory and legislative attention was (re)directed towards more hybrid and formal restructuring and insolvency proceedings. Other countries have perceived their insolvency frameworks as well-equipped to deal with the crisis. Therefore, they have merely tweaked existing mechanisms or introduced emergency measures to support their economy.

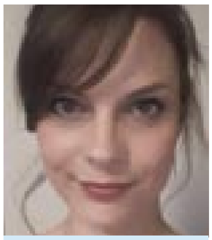
Falling back on state-centric insolvency solutions is not surprising. As seen in the wake of the Global Financial Crisis, national policies tend to shift towards rejecting supranationalism, protecting sovereignty, and preferring solutions that prioritise domestic interests in times of crises. Nevertheless, this discussion reveals a shift away from preventive restructuring towards the other end of the insolvency paradigm, suggesting the emergence of a phenomenon of natural convergence across the EU. Despite the limited supranational coordination and Member States' reversion to solutions protecting domestic interests, many of the adopted strategies exhibit striking similarities.

It must be acknowledged that although the European harmonisation effort has been put on the back burner, the EU is not completely absent from the COVID-19 crisis. For instance, the Commission and the Council put in place an EU-wide framework tackling some aspects of the crisis, such as relaxation of state aid rules and loans to some Member States.

Despite previously known and accepted challenges and bottlenecks, it is argued that harmonisation efforts should nonetheless be extended to other areas of insolvency, including formal procedures. In taking further steps, the EU institutions should bear in mind the convergence phenomenon that has emerged during the crisis and rely on future studies to determine the effectiveness of the state-centric solutions implemented during this period. Such empirical evidence could represent the bedrock of "phase-2" of the European substantive harmonisation effort in insolvency.

To conclude, while the crisis revealed the limitations of a harmonisation effort focused on the narrow area of preventive restructuring, it does not challenge the relevance of harmonisation. When moving forward after the pandemic, the EU should also ensure that formal insolvency regimes too are resilient enough in times of crises when prevention is no longer an option. The *logic* of harmonisation remains compelling, despite the *limits* evidenced in the wake of the COVID-19 pandemic.

Footnotes:
* Based on the law as of 22 May 2020.



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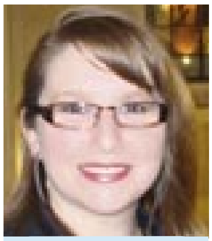

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Keeping the courts open in the Crown Dependencies and Overseas Territories

The authors outline some of the measures taken in the Crown Dependencies and Overseas Territories to meet the challenges that the pandemic has brought to financial and insolvency professionals

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The rapid and largely unheralded global spread of COVID-19 has transformed the world in a few short months. Measures intended to shield the vulnerable have greatly reduced freedom of movement and triggered very significant economic challenges, to which we are all trying to adapt.

As financial and insolvency professionals seek to navigate these uncharted waters, many of the businesses they work with will have cross-border and offshore connections. In that context, this article seeks to outline some of the measures taken in the British Virgin Islands (**BVI**), Cayman Islands (Cayman), Guernsey and Jersey (together, the Crown Dependencies and Overseas Territories (**CDOTs**)), to meet the challenges that the COVID-19 pandemic has brought.

Overview

The positive news is that the governments, courts and professionals within the CDOTs have reacted very quickly, to ensure that the CDOTs remain fully functional and open for business.

In common with many larger countries, all four CDOTs temporarily closed their borders to minimise the spread of the virus. They also quickly implemented measures, including amendments to their courts' practice and procedures, to ensure that they remain fully functioning and well placed to deal with the increasing demand for insolvency and restructuring solutions as the world's economic challenges develop.

Court administration and hearings

The starting point: courts within the CDOTs remain open for business, virtually, at this time. The previous use of technology has been enhanced and extended to all matters coming before their courts. For example, cases are being managed electronically by way of electronic filing, and hearings are taking place remotely, either by video-conferencing or tele-conferencing, or in applicable cases, administratively, on the papers.

All of the CDOTs' appeal courts have begun sitting remotely. For example, in Cayman, part-time non-resident Grand Court Judges and the entire Court of Appeal are now permitted to convene from overseas. In support of the principle of open justice, some hearings in Cayman and Guernsey are being live-streamed and are open to the public.

Procedural deadlines and other time limits

Time, in relation to procedural deadlines in court proceedings, continues to run in the ordinary way. If it becomes apparent to a party that it will not be able to meet procedural deadlines, it should consider seeking to agree necessary extensions with the other parties, or by making an application to the court directly. Other deadlines, including the statute of limitations also remain unaffected by the pandemic, so it remains important to keep these closely monitored.

Swearing and Service of documents

Several of the CDOTs, including Jersey and Cayman, have put in place legislation to enable documents to be notarised or sworn remotely, over a video call, rather than having to be present in person. In the others, it remains practicable to do this in person.

Several of the CDOTs have also put in place temporary measures loosening the requirement for physical service of court documents. In the BVI service may be effected by emails sent to legal practitioners and limited companies. In Guernsey, service of documents to local companies can be arranged via the Court Registry and the rules also provide that it is open to the Court to proceed if it is satisfied that the party has notice of the document.

Jersey has issued a new practice direction under which parties should reach an agreement on alternative service where necessary. Such agreements shall be in writing and sent to the Master of the Royal Court for ratification and subsequent publication. Further measures are in place to deal with instances where agreement on the method of service is not reached.

There are no temporary service rules in Cayman, but lockdown restrictions are already being eased there and some process servers have already resumed business. If, for any reason, physical service is not possible, it is highly likely that the Cayman court would be amenable to make an order permitting substituted service, for example, via email.

Changes to insolvency legislation

As matters stand, none of the CDOTs have made changes to their insolvency legislation, to deal with the impact of the COVID-19 crisis, although all are keeping this under review.

It is worth bearing in mind that Guernsey had already introduced significant amendments to its corporate insolvency laws in January 2020, which are not COVID-19 driven. These are expected to come into effect shortly. Similarly, the Cayman government recently circulated a bill improving and modernising its restructuring regime, and this is also likely to come into force soon.

It is also worth bearing in mind that although the CDOT's wrongful trading rules have not been modified, they are all more relaxed than the equivalent English rules. For example, in Jersey, Guernsey and the BVI, once a director concludes (or should have concluded) that there was no reasonable prospect of the company to avoid bankruptcy, he/she has a duty to take **reasonable** steps to minimise the potential loss to the company's creditors. By contrast, the UK equivalent test is that the director must take **every** step. In Cayman, the position is dealt with solely through the prism of fraudulent trading, which requires proof of intention to defraud creditors, such that it rarely arises in practice.

Restructuring options available in the CDOTs

CDOTs have globally recognised robust legislative and judicial frameworks to effectively facilitate cross-border insolvencies and restructurings, with effective procedural rules in place to deal with the unprecedented challenges faced by both legal practitioners and the courts at this time.

In Cayman and the BVI the primary route to restructuring is to impose a moratorium on creditor claims by appointing provisional liquidators over a company, and then using that breathing space to enable a scheme of arrangement to be implemented. In Cayman, there is a statutory basis for a company to seek the appointment of provisional liquidators over itself, to implement a restructuring[1]. In the BVI, the Courts have very recently come to the same result and held that, notwithstanding the lack of a specific statutory gateway, it still has the jurisdiction to appoint "soft touch" provisional liquidators to aid the company's reorganisation[2]. Schemes of arrangement can also be used by the existing company management, without any appointment of provisional liquidators, if no moratorium is required.

Guernsey maintains a broad range of restructuring mechanisms. While informal, consensual restructuring is popular, parties can also effect restructuring by way of court supervised processes. Schemes of arrangement operate in a similar way to those in the UK. Guernsey also has an administration process, which allows for the appointment of an administrator to manage a company's business and affairs. Once an order is made, the company will have the benefit of a moratorium against claims from unsecured creditors, allowing it time to achieve either the survival of its business or more advantageous realisations of its assets than on a winding up. Administration orders may also be used to effect a "pre-packaged" sales of a company's business.

In Jersey, there is no administration regime or other formal rescue mechanism, however, a company may restructure as part of either a just and equitable winding up process, or a *désastre* process. The just and equitable winding up grounds broadly correspond to the equivalent power of the English Court. It has led to the Royal Court sanctioning 'pre-packaged sales' and permitting the continued trading and restructuring of a business, where

it has been in the interests of creditors to do so. A *désastre* is a court supervised winding up process, which operates in a way similar to a court supervised winding up in other common law jurisdictions. The key distinction, however, is that désastres are administered by the Viscount of the Royal Court, who is the Court's Executive Officer and performs a role similar to that of the UK Official Receiver.

> *"The courts in the CDOTs have demonstrated they have robust continuity plans, ensuring as little disruption as possible to the timely disposal of cases in these unprecedented times"*

Final observations

The courts in the CDOTs have demonstrated they have robust continuity plans, ensuring as little disruption as possible to the timely disposal of cases in these unprecedented times.

Given the likelihood of social distancing measures continuing for the foreseeable future in order to mitigate the spread of COVID-19, the above-mentioned measures taken by the courts within the CDOTs may remain in place for some time. However, this should not deter anyone from seeking to engage with the CDOT's courts, especially if (readily available) restructuring or insolvency relief is required. ■

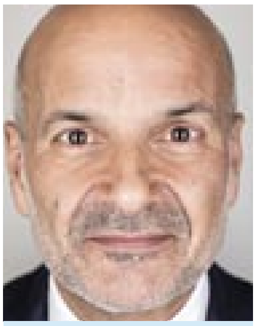
Footnotes:

1 This will become a restructuring officer, when the anticipated legislation is brought into force.

2 *In the Matter of Constellation Overseas* [BVIHC (COM) 2018/0206, 0207, 0208, 0210, 0212]

Adjusting a pre-insolvency scheme to respond to the COVID-19 crisis

Nuno Líbano Monteiro and Catarina Guedes de Carvalho report on changes to the Out-of-court Business Recovery Scheme (RERE) in Portugal



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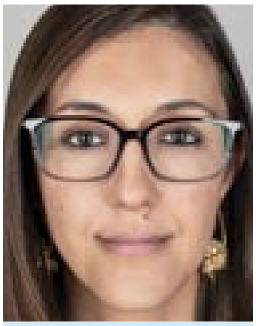

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According to the OECD, Portugal is in the top three countries in terms of implementing new measures to face this COVID-19 pandemic.

However, regarding the legal framework of insolvency and restructuring, the only direct, exceptional and temporary measure approved by the Portuguese authorities was to suspend the time limit for the debtor itself to petition for insolvency[1], with effect from 7 April 2020[2]. *No pre-insolvency exceptional measures have been adopted.*

In order to avoid a huge and unprecedented increase in insolvency cases after the end of the current pandemic period – because preventing the insolvency of businesses is also crucial to minimising the impact of COVID-19 in the economy – other urgent measures could be implemented, especially as regards pre-insolvency measures for companies. In fact, we believe a few adjustments to the existing legislation would be enough for this purpose.

In Portugal, the PER (Special Revitalisation Process) and the RERE (Out-of-court Business Recovery Scheme) are the key pre-insolvency measures for companies. If a company is only in a difficult economic situation or facing imminent insolvency, but still capable of recovery, it can use the PER or RERE to try to recover by adopting a recovery/restructuring plan.

As such, the possibility for a company to use the RERE (or the PER), even if it is already in an insolvency situation (at least, if the insolvency situation was

originated by COVID-19 crisis[3]) could be an example of an efficient and simple measure to be urgently implemented. In fact, that has already been (successfully) tested, since the RERE could be used by insolvent debtors[4] for an initial transitional period of 18 months (which ended on 2 September 2019).

A couple of days before this article was written, the Government has announced the creation of a new extraordinary process for company viability (**PEVE**). The PEVE is exceptional and temporary in nature. It can be used by any company which, not having a PER pending, is in a difficult economic situation or in a situation of imminent or actual insolvency as a result of the economic crisis caused by the COVID-19 pandemic. However, the company must demonstrate that it is still potentially viable. The objective of this process is to obtain judicial approval of an out-of-court agreement reached between the company and its creditors. It is an urgent process and it takes priority over the processing and judgment of similar processes. We will have to wait for the publication of the legislation that will provide the regulations for this new process, but it already seems certain that the Portuguese legislature's choice was not to use the processes that already existed to respond to the crisis.

Meanwhile, let us now have a brief look at the **RERE's legal framework**[5]:

The RERE is quite a new out-of-court procedure (it has been in place for about two years). It begins with a written agreement (called a Negotiation Protocol), signed by the debtor and by at least 15% of the non-subordinated creditors, stating that the signatories are interested in negotiating a restructuring agreement, which is deposited at the Commercial Registry.

The RERE is voluntary in nature and the parties are free to apply or to sign up for it. As such, the debtor can call on all or only some of the creditors. He/she should call on the ones considered most suitable to achieving the restructuring agreement and its desired viability.

The procedure will be confidential, except where there is an agreement between the parties or a number of exceptions of a legal nature: the Tax Authority, the Social Security and the employees must be informed of the deposit of the negotiation protocol and of its content whenever they are owed money by the debtor.

The deposit of the protocol gives rise to a specific set of obligations for the debtor and the signatory creditors, in particular with respect to (i) the suspension of any judicial proceedings and to (ii) the running of any time limits to petition for insolvency. Essential public utilities, such as electricity, natural gas, water, sewage and electronic communication, cannot be suspended while negotiations continue.

The negotiation period should not take more than three months from the date of deposit of the Negotiation Protocol. The negotiations close with the deposit of the Restructuring Agreement, which takes effect as of this date and only for the future (except if there is a provision to the contrary in the agreement itself), and it only binds the signatories[6]. The parties are free to establish the content of the agreement and it is not subject to the principles that an insolvency plan or PER must respect (equality of the creditors and no creditor worse off). The Restructuring Agreement also allow for tax benefits if the credits restructured represent at least 30% of the total liabilities of the debtor.

If the Restructuring Agreement is subscribed to by creditors that represent the majority as provided for the approval of a plan under the PER (that is, a majority of two thirds), the debtor can obtain the formal judicial approval of the restructuring agreement, with a cramdown effect in relation to the creditors not signing up for the RERE.

The conclusion of the negotiations without the approval of a Restructuring Agreement has no effect for the debtor (specifically, with respect to its potential situation of insolvency).

These proceedings have no fixed costs[7] and can be done in "one shot" (skipping the negotiation period), by presenting the Negotiation Protocol and the Restructuring Agreement at once if all requirements are met.

Probably because it is a recent procedure, it has been little used. However, we can give a good and successful example that PLMJ handled: the RERE of a large company in the motorway concession business. This company benefited from the transitional period (allowing an insolvent debtor to begin a RERE) and ended up with the approval of the restructuring agreement by all the signatory creditors. In this particular case, there was a legal need to obtain the Government's consent to the agreement, so the parties agreed that the restructuring agreement's effects were subject to a condition (since that could not be fulfilled within the 3-month negotiation period): the Government's consent, within a certain period of time. In the meantime, due to the COVID-19 crisis, the Government has focused on the urgently needed response, so all the parties agreed to an extension of the time limit to obtain the consent.

Considering that Portugal already has pre-insolvency procedures and that there is an urgent need for some adjustments in order to respond to the COVID-19 crisis, this could also be the opportunity to bring forward the implementation of the Directive on Preventive Restructuring Frameworks adopted in June 2019.

Indeed, professor and supreme court judge Catarina Serra[8] believes that the RERE corresponds precisely to the type of instrument foreseen in the Directive. However, we fear that the urgency of the current situation is not conducive to its implementation, particularly in view of all the other choices the Directive left to the discretion of the Member States and to the complex and slow work that would imply for the Portuguese legislature.

> *this could also be the opportunity to bring forward the implementation of the Directive on Preventive Restructuring Frameworks adopted in June 2019*

Footnotes:

1 A company is insolvent when it is not able to pay the debts that have fallen due (under article 3(1) of the Insolvency and Corporate Recovery Code – "CIRE"). Company directors/management have a legal obligation to submit an application for insolvency within 30 days of becoming aware of the insolvency situation (under article 18(1) of the CIRE). Breach of this legal obligation could lead to the insolvency being classified as culpable.

2 The wording of article 7 of Law 1-A/2020, introduced by Law 4-A/2020, suspends the time limit for the debtor to petition for insolvency, with effect from 7 April 2020. Law 16/2020 of 29 May repealed article 7, but it also added a new article 6-A to Law 1-A/2020. This new article provides for the (maintenance) of the time limit for the debtor to petition for insolvency.

3 As in Germany, where the government approved the suspension of the obligation to submit an application for insolvency when it was caused by COVID-19 crisis – and a provision is made for a presumption to facilitate its application: the insolvency is the consequence of the COVID-19 crisis whenever, as at 31 December 2019, the company was not insolvent or had the prospects to avoid it – see § 1 da Gesetz zur Aussetzung der Insolvenzantragspflicht und so weiter, das COVID-19 Insolvenzaussetzungsgesetz (COVInsAG), from 27 March 2020.

4 In this transitional period, the declaration from a certified accountant certifying that the company is not in a current insolvency situation was not required.

5 See Law 8/2018 of 2 March.

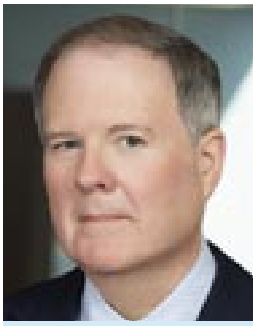
6 The main difference to the PER, besides its judicial nature, is the fact that it binds all creditors, even if they have not participated in the negotiations.

7 In this particular respect, much different from the UK's "English Scheme".

8 See Catarina Serra, "A função (alternativa) do RERE como programa extraordinário para o apoio e a reanimação de empresas" in Revista de Direito Comercial (https://www.revistadedireitocomercial.com/a-funcao-alternativa-do-rere).

COVID-19 "Suspends" US Chapter 11 Proceedings

David H. Conaway sends in his report on the affects of the crisis in the US courts



DAVID H. CONAWAY
Attorney at Law, Shumaker, Loop & Kendrick, LLP

COVID-19 has, and for the foreseeable future will, have an unprecedented adverse impact on the global economy and all companies' business operations.

Governments and banking systems throughout the world have initiated massive aid programs to blunt the impact of the COVID-19 crisis. Regardless, there will be substantial market disruptions including the supply and deliver of goods and services.

The COVID-19 crisis has accelerated and exacerbated the urgency and risk for all stakeholders involved with companies that were already in the zone of insolvency, companies that have now become insolvent, and companies that filed Chapter 11 before the onset of the COVID-19 pandemic. Companies have reacted by working with stakeholders to avoid filing Chapter 11, and by filing Chapter 11 to push through pre-filing strategies of an expedited Section 363 sale or a prepackaged or prearranged restructuring.

> "The COVID-19 crisis has accelerated and exacerbated the urgency and risk for all stakeholders involved with companies that were already in the zone of insolvency"

In some cases, debtors have sought a suspension or modification of their Chapter 11 proceedings and procedures, using Section 105 and the not often relied upon Section 305 of the US Bankruptcy Code:

"Section 105(a)

The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, *sua sponte*, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

Section 305 - Abstention

(a) The court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if:

(1) the interests of creditors and the debtor would be better served by such dismissal or suspension; or

(2) (A) a petition under section 1515 for recognition of a foreign proceeding has been granted; and (B) the purposes of chapter 15 of this title would be best served by such dismissal or suspension.

(b) A foreign representative may seek dismissal or suspension under subsection (a)(2) of this section."

In particular, debtors in the Chapter 11 cases of *Modell's Sporting Goods, Inc.*, *Pier 1 Imports, Inc.* and *CraftWorks Parent, LLC* have all requested the Bankruptcy Courts to temporarily suspend their Chapter 11 proceedings, to accommodate a suspension or "mothballing" of their business operations. The purpose of the suspension is to allow these debtors to delay their restructurings or liquidations until the COVID-19 crisis abates.

Modell's Sporting Goods, Inc. (New Jersey)

Modell's filed Chapter 11 to liquidate their 134 stores and e-commerce site through store closing sales, which requires a consensual use of the lenders' cash collateral. The COVID-19 crisis prevented the debtors from conducting robust liquidation sales and left them with no alternative but to temporarily mothball their operations to preserve value, with the hope that they can recommence operations and successfully liquidate their inventory when stores can be open for the liquidation sales.

On 23 March 2020, Modell's filed a motion to mothball its operations in compliance with the government directives regarding non-essential businesses and to comply with social distancing mandates, with a temporary suspension of all deadlines and activities in the Chapter 11 case for 60 days.

In addition, Modell's sought to defer payment of all but absolutely essential expenses. Modell's ceased its operations, including closing all 134 retail stores, the termination of store-level and distribution center employees; and cessation of all in-person operations at corporate headquarters and termination of most corporate employees, leaving in place a skeleton crew of essential employees to effectuate critical human relations, finance, and infrastructure technology functions during the operational suspension.

The basis for the debtors' suspension was Section 305 of the Bankruptcy Code, which is considered an "*extraordinary remedy*" where the movant bears the burden of proving that "*the interests of the debtor and its creditors would benefit from … the suspension of proceedings under § 305(a)(1).*" Modell's asserted that the suspension will enable the debtors to avoid incurring unnecessary administrative costs, including professionals' fees, and the automatic stay will ensure no creditor will take action detrimental to the debtors' estates, including its creditors.

The pre-petition lenders supported the suspension and agreed to allow Modell's to use the lenders' cash collateral pursuant to the stripped-down budget, only paying essential expenses for the debtors to "*reoperationalise*" in order to maximise the success of store closing sales after the COVID-19 crisis. However, many of Modell's landlords objected that relieving debtors of the post-petition obligation to pay rent for 60 days would strip the landlords of rights to receive rent post-petition, as provided by Section 365 of the Bankruptcy Code. The Bankruptcy Court nevertheless ordered the requested suspension, initially for 34 days, to 30 April 2020, which order was subsequently extended to 31 May 2020.

Pier 1 Imports, Inc. (Virginia)

In Pier 1, the debtors filed Chapter 11 to seek a reorganisation or going-concern sale of substantially all of its assets. The debtors refused to "*sit idly by and let the global pandemic control their fate,*" and interfere with their efforts to maximise the value of the Chapter 11 estates for the benefit of creditors.

Prior to the impact of the COVID-19 crisis, the debtors were in extensive negotiations with potential going-concern bidders including possibly some of the pre-petition lenders. Pier 1 also obtained lender support to allow Pier 1 to use the lenders' cash collateral to pay critical expenses under an approved bare-bones budget. In addition, all motions and hearings would be adjourned for no less than 45 days.

Unlike Modell's, Pier 1 sought relief under Section 105, not Section 305. The Bankruptcy Court entered an order which approved a bare-bones budget, approved a temporary cessation of non-critical payments, and adjourned motions and court hearings. On May 19, 2020, however, Pier 1 "*threw in the towel*" and sought Bankruptcy Court approval to liquidate all stores with a July 15, 2020 auction date.

Craftworks Parent, LLC (Delaware)

CraftWorks is a leading US operator and franchisor of brewery and craft-beer, focused on casual dining restaurants. CraftWorks and affiliates filed Chapter 11 to pursue a Section 363 sale of substantially all of the debtors' assets.

The debtors' prepetition lenders have supported the Chapter 11 by agreeing to provide DIP financing, and by submitting a stalking horse bid for the assets.

As a result of the COVID-19 crisis, the debtors were forced to cease all operations for their 261 restaurants and to "mothball" their operations. On 20 March 2020, the debtors filed a Motion to establish temporary procedures for not less than 60 days, primarily designed to limit parties from taking action in court in order to minimise professional fees and litigation stress while the debtors' retail operations are closed. The temporary procedures included that attorney conferences are required prior to the filing of any pleadings, and all hearings will be held telephonically.

Telephonic court hearings

As US and foreign insolvency professionals are aware, participating in US Bankruptcy Court hearings telephonically has been a growing trend in the US. As a direct result of the COVID-19 crisis, bankruptcy courts throughout the US have expanded and streamlined the use of telephonic court appearances. Being substantially involved in several major Chapter 11 cases in the US's bankruptcy "hotspots," Delaware (Borden Dairy), the Southern District of New York (LSC Communications) and the Southern District of Texas (McDermott International, Dean Foods and Neiman Marcus), we have observed these courts have adapted to the crisis and embraced and encouraged telephonic court appearances. Parties are able to make oral arguments, examine witnesses and present testimony, as well as "listen only." The recent "first day" hearing in Neiman Marcus had over 300 telephonic appearances.

> *Bankruptcy courts throughout the US have expanded and streamlined the use of telephonic court appearances*

Chapter 15 Suspension

Sections 105 and 305 are also applicable in Chapter 15 cases, such that foreign insolvency administrators may take advantage of the automatic stay to protect US assets but suspend the proceedings if the foreign representative can demonstrate the benefit of a suspension to the debtors' estates and to the creditors. ■

In this special edition of *eurofenix* we bring you short updates from our members regarding insolvency measures in response to the COVID-19 crisis in their jurisdictions. To contribute to a future edition, please contact: *paulnewson@insol-europe.org*

Croatia: Emergency measures in response to the COVID-19 crisis

JELENKO LEHKI
Attorney at law and trustee in bankruptcy; President of the Croatian Association of trustees in bankruptcy

> *The government issued a regulation through which it would pay employers an amount of HRK 4,000 (€530) per employee*

The measures in the Republic of Croatia can, in principle, be divided into two groups, the first of which relates to the (primarily financial) assistance to the economy, and the second, to the revision of the regulatory framework partly related to bankruptcy proceedings.

Part of the direct assistance to entrepreneurs, the government issued a regulation through which it would pay employers an amount of HRK 4,000 (€530) per employee, with an additional payment of a portion of the contributions (in the first month it was HRK 3,250 (€425) without contributions), provided that the employers kept their workers employed for twice the amount of time they received this payment for[1].

Another change is the date when the payment of VAT (value added tax) becomes due, which is determined to be due only after the payment of an invoice, while, until now, it was prescribed that the VAT payment was due immediately after issuing an invoice (except for lower-income businesses).

Regarding insolvency proceedings, the regulatory framework is undergoing change and a special act entitled "*Act on Emergency Measures in Enforcement and Bankruptcy Procedures during Special Circumstances*" will prescribe a

moratorium on the initiation of automatic mandatory bankruptcy proceedings by FINA[2] after 120 days of continuous insolvency.

Also, prior to this, electronic public auctions conducted by FINA for the sale of assets in court (enforcement procedures), including bankruptcy proceedings, were suspended until the extraordinary circumstances had elapsed. This extends also to enforcement proceedings on funds.

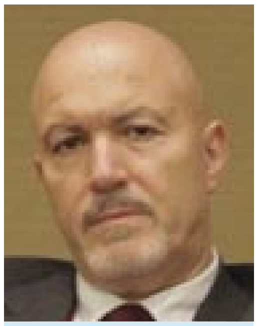
Part of the measures related to bankruptcy proceedings seem appropriate at the moment, with the assumed ratio being leaving additional time for entrepreneurs to adjust to the new circumstances, although the question remains as to how long they will remain in effect, and what the effect on the duration of the proceedings and their final the outcome will be, given the deferred time of the initiation of proceedings for businesses that were already eligible for initiating bankruptcy proceedings even before the extraordinary circumstances occurred. ■

Footnotes:

1 The average net salary in the Republic of Croatia in 2019 was HRK 6 418 (EUR 855).

2 FINA - Financial Agency, a government-owned legal entity that (among other things) performs a part of its technical and administrative activities in bankruptcy and enforcement proceedings.

Cyprus: Relief for directors affected by the COVID-19 crisis



CHRIS IACOVIDES
Director, CRI Group, Cyprus

ANDRI ANTONIOU
Director, CRI Group, Cyprus

In today's financial climate, and the near-total meltdown of the economic system due to the COVID-19 pandemic, business viability depends on access to capital.

The ECB has taken unprecedented measures, making available up to €3 trillion in liquidity at the lowest interest rate ever offered, -0.75%. European banking supervisors have also freed up an estimated €120 billion of extra bank capital, which can support considerable lending capacity for the eurozone banks. However, the effectiveness of these measures in Cyprus will depend on the Cypriot and other governments' initiatives and the decisions to ensure that those companies which need financial support will ultimately benefit from it and that they are given the crucial breathing space they will need.

The current uncertainty imposes the question whether the technocrats and legislators will act with sufficient foresight and speed to introduce legislative measures that will provide the necessary mechanisms to aid the business community to survive and recover.

In Cyprus, bitter experience, through the introduction of Examinership, should have taught us that for any urgent rescue mechanism to function and be effective in assisting ailing companies to survive, it must require minimal court involvement. Beyond that, principles which could be incorporated should include the ability to compromise debts, prior to insolvency, similar to a Liquidator's powers, pursuant to the provisions of section 233(1)(e) of Cap 113 and/or Schemes of Arrangements with creditors in accordance with the provisions of section 198 of Cap 113, enabling all creditors to be treated on a *pari passu* basis.

The suggestion could be made that amendment provisions be incorporated with the help of professionals with practical experience and that the compromising of securities be expressly prohibited in any Scheme of Arrangement. An additional recommendation is that section 300 of Cap 113, to the extent that it applies to preferential taxes, should be suspended temporarily.

Measures being adopted in the UK[1] could also be emulated in Cyprus, in particular a moratorium period giving companies and businesses the breathing space they will need during this difficult period, going beyond the suspension of loan repayments and interest. The economy in Cyprus is already highly geared, we need other tools, such as effective restructuring mechanisms, to give debtors the lifeline they will need to survive and to introduce amendments to our existing legislation, especially foreclosure powers.

It is abundantly clear that the Examinership regime forced upon us has failed miserably, without a single successful appointment nearly five years after its introduction. Now, more than ever, businesses will need the right tools, financial aid and support if they are to weather this storm; burdening them with more loans will be the last thing they need, and could be the straw that breaks the camel's back!

One suggestion that could be considered going forward may be that the concepts introduced as part of the EU's Restructuring and Second Chance Directive, adopted in June 2019, with a focus on preventive restructuring frameworks, could assist those responsible for enacting it in Cyprus to introduce mechanisms which will actually function with the Cypriot legal and court system. One can only hope that this time we will get it right. ■

Footnote:

1 See the author's Inside Story, April 2020: '*Relief for Directors in the Coronavirus Crisis: UK Developments and Lessons for Cyprus*' atwww.insol-europe.org/news/inside-stories

"Now, more than ever, businesses will need the right tools, financial aid and support if they are to weather this storm"

Czech Republic: Legislative development in a time of crisis

PETR SPRINZ
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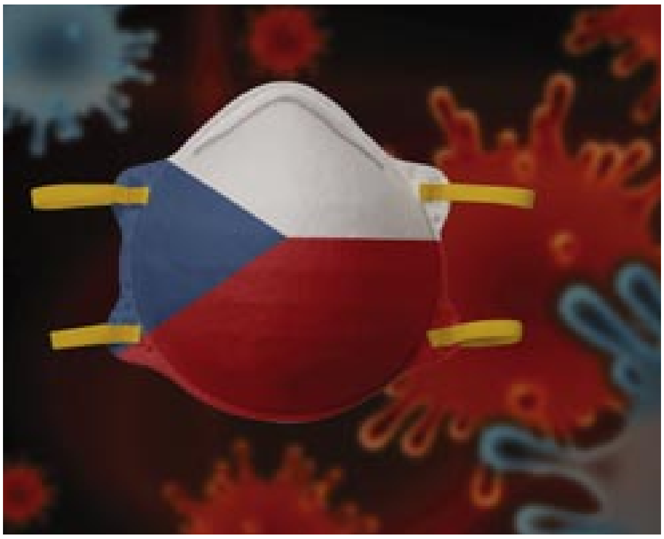
> *These extraordinary amendments aim at relaxing a bit the mood of those affected by the pandemic*



The current crisis caused by the COVID-19 virus can be seen as a very abnormal situation. Measures adopted to prevent acceleration of the infection spreading may have a devastating impact on a number of companies that are healthy in normal circumstances.

For obvious reasons, the Czech Parliament adopted the new bill called *Lex Covid* and many others acts. Please find below a general overview of the new rules presented mainly from the perspective of entrepreneurs.

Extraordinary moratorium as a fast means of protection for a viable entrepreneur

The main objective of the extraordinary moratorium, in the drafting of which we participated along with other insolvency law experts, is to help them overcome the loss of available funds by temporarily restricting realisation of collaterals or the commencement of enforcement proceedings or execution. It should create a breathing space. However, a declaration of a moratorium also entails several restrictions.

To declare an extraordinary moratorium the insolvency court should mainly check the formal aspects of the filed application. A debtor wishing to further extend an extraordinary moratorium will have to obtain consent by an absolute majority of their creditors.

The extraordinary moratorium is intended only for those debtors who face problems in connection with the COVID-19 pandemic and were not been bankrupt before the state of emergency was imposed.

Protection of the debtor's management

The *Lex Covid* brings a substantial change to the debtor's obligation to file an insolvency petition due to bankruptcy. This obligation will be suspended from the effective date of the adoption of the *Lex Covid* until the lapse of six months from the termination or cancellation of the pandemic emergency measure. However, this exemption is not applicable where bankruptcy had occurred before the extraordinary measure was adopted or where bankruptcy was not caused in connection with the pandemic.

Temporary limitation of creditors' rights to file an insolvency petition

Lex Covid introduces a substantial limitation to creditors' rights: without any exceptions, a creditor's insolvency petition cannot be filed until 31 August 2020.

Some important changes

The Parliament has inter alia also approved a new act, which allows, based on the debtor's request, the suspension of the payment of broadly defined credit loans (covering not only claims under loan agreements) until 31 October 2020. Simply said, the suspension has effect only on (i) credit loans agreed upon and drawn before 26 March 2020 or (ii) credit loans related to the acquisition of real estate or its development which were agreed upon before 26 March 2020 but not yet drawn. There are many exceptions to the general rule.

Conclusion

These days are full of news negative in tone. Therefore, these extraordinary amendments aim at relaxing a bit the mood of those affected by the pandemic and at putting the economy in motion again. Thus, *Lex Covid* can be regarded as a significant change in insolvency law despite its temporary nature. ■

Italy: COVID-19 and insolvency developments

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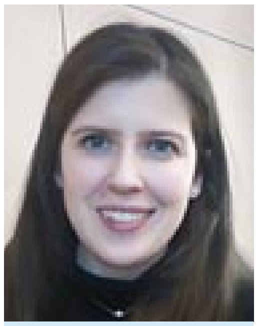
Studio Legale BNP, Rome



FRANCESCA BURIGO
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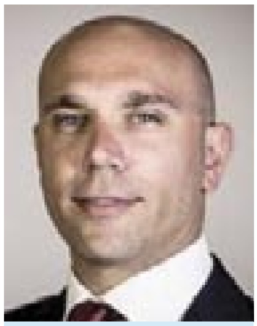

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Italy's national lockdown started on 9 March 2020 with the adoption of several rules aimed at containing the economic and financial impact.

Law Decree of 17 March 2020, no. 18 ("*Cura Italia*") set the first remedies involving judicial and procedural measures without modifying directly the insolvency law, and providing that, with some exceptions, all hearings fixed between 9 March and 11 May should not be held but postponed accordingly to the Court office schedule. Some aspects of insolvency proceedings were randomly affected, such as the suspension of the 60/120 day-term for filing the restructuring proceedings ("*concordato preventivo*") or agreements with creditors ("*accordi di ristrutturazione*").

In addition, the *Decreto liquidità* brought the following measures with the aim of safeguarding the continuity of businesses by several "suspension mechanisms":

Postponement of entry into force of the insolvency law reform

Article 5 postpones until September 2021 the enforcement of the new bankruptcy regime ('*Codice della crisi e dell'insolvenza d'impresa*'). Some provisions related to corporate governance and organisational structures have already been enforced in 2019.

This delay is due to prevent an early enforcement (originally envisaged by August 2020) of such a reform, that would have led to operational concerns and uncertainty, causing further damages.

Deferment of bankruptcy filings or requests

Coherent with the suspension of the obligation to file for bankruptcy, Article 10 states that petitions for winding-up proceedings filed in the period between 9 March and 30 June 2020 are inadmissible.

This provision does not apply to voluntary petitions (whereas insolvency was not attributable to pandemic), where the filing is made by a Public Prosecutor who requested the granting of precautionary measures, and in some cases the end of restructuring proceedings. It is provided that in case of a future winding up, the period of suspension will not be considered by:

- Article 10 of the Insolvency Law (IL), (winding up within one year from the Register of Companies cancellation);
- Article 64, 65,67 and 69-bis IL (forfeiture of clawback petitions).

Terms extension for restructuring proceedings and agreements with creditors

Article 9 provides six additional months for all deadlines expiring between 23 February 2020 and 31 December 2021 (also in case of consumers' over-indebtedness proceedings) for the fulfilment of restructuring plans formed under judicial restructuring proceedings already approved by creditors and courts.

Other provisions refer to the motion in case of restructuring proceedings not yet approved, in order to obtain (due to certain conditions) a new non-extendable term (of maximum 90 days) for filing a new restructuring plan or a new proposal to creditors.

The new terms can also be waived by the debtors who have improved a certified restructuring plan ("*Piano attestato di risanamento*"), as out-of-Court proceedings.

Impact on the Italian Civil Code

Some measures of the "*Decreto liquidità*" influencing company law affected the **Italian Civil Code**. Thus, Article 6 provides the suspension of rules concerning the cases of reduction of capital pursuant to losses of more than one third and even when it falls below the legal minimum: until 31 December 2020, the directors' and the shareholders' meeting not being obliged to compel with the rules set by Articles 2446, 2447, 2482-bis, 2483-ter, 2484 and 2545-duodecies.

Article 7 sets the assumption of business continuity in the 2020 financial statement in the case of positive assessment of being a going concern in the previous financial year (closed before 23 February 2020). The provision recalls Article 106 of Law Decree no. 18/2020, in light of the restrictions enforced for in-person meetings with direct impact on the functioning of companies' bodies.

Article 8 suspends the subordinations of new financing coming from shareholders set under certain circumstances by Articles 2467 and 2497-quinquies of the Civil Code to the claims of the other creditors of the company.

Strictly related to this issue is the rule provided by Article 26 of the law decree of 19 May 2020 no. 34 ("*Decreto rilancio*") on the contribution in cash given by investors of specific types of companies, that under certain conditions grants a tax credit to the shareholder (20% of the contribution) and to the company (50% of the losses).

Conclusion

All measures adopted* on the grounds of this particular emergency period are necessary to solve urgent problems, but need a more long-term approach to manage the economic crisis. Therefore, the insolvency scenario shall be further integrated due to the general uncertainty of the length of this pandemic crisis. ■

* As at 8 June 2020.

Lithuania: Legal framework modified in response to the crisis

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The legal framework of Lithuania required modification to respond to the disruption caused by the COVID-19 crisis.

On 21 April 2020, the Parliament of the Republic of Lithuania adopted the Law on the Impact of the Consequences of the Coronavirus (COVID-19) Crisis ("the Law"), which modified the Law on Insolvency of Legal Entities of the Republic of Lithuania.

The Law came into force on 25 April 2020: it applies to legal entities facing financial difficulties and/or insolvency due to the impact of the COVID-19 crisis after 16 March 2020, when a widespread quarantine was announced by the government of the Republic of Lithuania. The so-called corporate bankruptcy moratorium aims to balance the situation among entities affected by financial difficulties. It seeks to make it easier for debtors that face massive solvency and liquidity problems to continue trading and it will help businesses to gain state support.

The Law provides a number of support measures for companies that are facing insolvency problems or financial difficulties due to the quarantine:

- The obligation of the head of a legal entity to apply to a court for restructuring or insolvency proceedings or to initiate the out-of-court bankruptcy proceedings shall be suspended temporarily for the period of the quarantine period and for three months after the end of this period.
- It should be noted that the managers' obligation to initiate timely insolvency proceedings has not been removed and has not been suspended indefinitely: this obligation remains and must be fulfilled eventually. However, during this period, company directors retain the right (but not the obligation) to file for bankruptcy. The new regulation aims to give directors time to find a way to survive the difficulties: it provides the freedom for legal entities to seek solutions without fear of liability under the Law on Insolvency of Legal Entities of the Republic of Lithuania;
- The principle of protection of creditors' interests remains the priority, but for creditors who have already initiated insolvency proceedings against a legal entity, the calculation of the term to conclude the agreement regarding financial aid is suspended during the quarantine period (according to the Law, a term of 15-30 days for concluding the agreement is set);
- The Law stipulates that the restructuring process cannot be discontinued during the quarantine period and for three months thereafter.

Because of the uncertainties regarding the market recovery and the duration and the impact of these processes on the solvency of legal entities, the government has the right to extend the above measures, until no later than 31 December 2020.

Quite importantly, the financial problems of legal entities and the insolvency proceedings that arose before the announcement of quarantine do not receive the benefits of the new Law. ■

> *Insolvency proceedings that arose before the announcement of quarantine do not receive the benefits of the new Law*

Poland: How to treat the wave of bankruptcy petitions

The COVID-19 pandemic has caused turbulence on world markets. Each of the countries where the virus appeared introduced different restrictions on the rights and freedoms of citizens.

This has translated into a deterioration of the economic situation both at macro and micro level. Many entrepreneurs, due to the specific nature of the industry in which they operate, have noticed a drastic decrease in revenue with fixed costs of doing business. Their ability to settle current liabilities has become worse or has been lost.

Deadline for filing a bankruptcy petition

The existing Bankruptcy Law obliges a Polish entrepreneur who has lost the ability to pay to file a petition for bankruptcy (cash-flow test of insolvency). The deadline for the entrepreneur and a member of the company's management board for filing the application is 30 days from the date of the insolvency. Failure to submit the petition on time may have far-reaching consequences. These consequences include personal property liability for the damage caused to the creditors as a result of the late filing, or on being prohibited from conducting business activity for a period of 1-10 years.

In order to avoid a significant number of bankruptcy petitions filed by entrepreneurs and to protect them from the consequences, the Polish Government has introduced a legal solution under the pending draft law.

Under the Bill, which was adopted on 9 April 2020, where the basis for declaring a debtor insolvent has arisen during the state of the epidemic emergency due to COVID -19, the period for filing an application for bankruptcy does not start immediately, but will restart when the official state of emergency has ended.

At the same time, there is a presumption that a state of insolvency created during an at-risk or epidemic situation is equivalent to that created by COVID -19. It is also specified that the periods for which the date of filing for bankruptcy is to be calculated are extended by the number of days between the date of filing for bankruptcy and the last date on which the application must be filed (it would apply e.g. to avoidance actions).

The presented legal solution differs from the those introduced so far in other EU countries. The Polish government has not suspended the obligation to file a bankruptcy petition for a predetermined period of time and has indicated that the deadline for filing the petition will not start until the end of the epidemic emergency. This means that after the end of the COVID -19 epidemic, the Polish entrepreneur will have 30 days to file an application to declare bankruptcy.

The simplified restructuring proceedings

The Polish government went a step further and introduced a special protective procedure to prevent bankruptcy of entrepreneurs during the pandemic. The simplified restructuring proceedings are based on the provisions on the arrangement approval proceedings, which we described in *Eurofenix Winter 2019/20 (#78)*. This procedure allows to make an arrangement by way of an independent collection of votes by a majority of two thirds of the value of claims and more than half of the voting creditors.

The arrangement is concluded outside the court under the supervision of a licensed restructuring advisor. Such an arrangement is then approved by the court. A new feature is the moratorium granted to the debtor in the form of an enforcement ban and a ban on terminating some key agreements. This protection takes place automatically, without the participation of the court, on the day of the announcement of the opening of proceedings in the Court and Commercial Gazette.

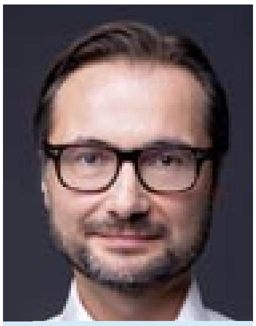
If the arrangement proposals provide for a level of repayment not lower than that resulting from the agreement concluded with the debtor or than the level of repayment potentially obtained in bankruptcy proceedings, the arrangement will also cover creditors secured *in rem*, without any separate consent.

During the protection period, the right to administer his own property remains with the debtor, but the consent of the arrangement supervisor is still required for activities exceeding the ordinary management. Creditors are also protected as they may file a motion with the court to set aside the moratorium if it is detrimental to all creditors. The creditors will also be entitled to an additional claim for damages if they prove that the debtor is carrying out the procedure in bad faith.

The protection can only last four months – during this period, the debtor must apply for approval of the arrangement.

The act also introduces restrictions as to the amount of the supervisor's remuneration in the case of small and medium-sized enterprises by using a degressive scale depending on the successful conclusion of the arrangement and on the amount to be awarded to creditors pursuant to the provisions of the arrangement (15% up to the amount of €23,000, 3% on amounts between €3,000 and €113,500 and 1% above €113,500). In the absence of an arrangement, the remuneration will not exceed twice the average monthly remuneration for the third quarter of the preceding year, which currently amounts to about €2,350.

This procedure to a large extent fills the current gaps in the Polish legal system as regards the implementation of Directive 2019/1023 on preventive restructuring frameworks. ■



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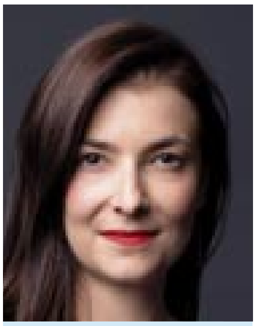
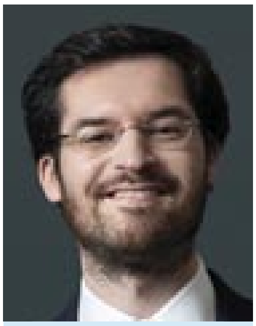


MARTA ROMAŃSKA
Attorney-at-law, Filipiakbabicz Legal, Poland

> *The presented legal solution differs from the those introduced so far in other EU countries*

Portugal: The urgency of a company's recovery after the COVID-19 crisis



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A legislative response that is both sensitive to the current context, and at the same time simple and quick to implement, is urgently needed

The COVID-19 pandemic and the economic slump have a particularly severe impact on hundreds of Portuguese companies that are subject to recovery and insolvency plans.

Therefore, a legislative response that is both sensitive to the current context, and at the same time simple and quick to implement, is urgently needed.

In a first phase (coinciding with the decree on the State of Emergency and with the decision on the compulsory confinement of citizens), although there was no "winter sleep" mechanism implemented for micro and small enterprises (allowing them to disappear during this period and to return later, at a time when the market is operating under normal or more favourable conditions), the Portuguese government implemented protectionist measures to address the cash flow difficulties of companies, with the aim of avoiding their immediate insolvency.

With special attention placed on the recovery of companies, the following measures were taken:

(a) the suspension of the directors' duty to file for insolvency within a certain deadline (30 days after taking notice of the insolvency situation);
(b) a moratorium (until 30 September 2020) for the payment of debts (principal and interest) of micro, small and medium enterprises with the financial system institutions (mainly banks), through Decree Law no. 10-J/2020 of 26 March 2020.

Although these are worthy measures, they are not enough for companies to cope with the COVID-19-related economic and financial crisis.

As such, in a second phase, (coinciding with the decree on the State of Emergency and with the decision on the compulsory confinement of citizens), we consider the following groups of measures to be necessary:

(i) To promote restructuring depending on the companies' insolvency situation;
(ii) To facilitate self-financing at the expense of hetero-financing;
(iii) To ease insolvency and pre-insolvency procedures (Special Process of Revitalisation [PER] and Extrajudicial Recovery Procedure [RERE]; and
(iv) To strengthen the logistics of commercial courts.

Regarding the first group of measures, it should be noted that the aforementioned suspension of the director' duty to file for insolvency within a certain deadline should be applied in broader terms. As to the scope of application, it should not concern only the trustees, but also the creditors, on the basis of the assumption that the insolvency is a consequence of the pandemic. The deadline should also be extended till the end of 2020).

As for the second group, we stress that the measures taken to make bank financing more flexible (such as the reduction of interest rates and the increase of grace periods), are not sufficient; instead it is necessary to encourage financing by shareholders for the rescue of their own companies. As such, we suggest that shareholders' loans should be considered as general security preferential rights (rather than subordinated claims), being paid after secured creditors and before ordinary and subordinated creditors, and not subject to clawback, provided they are made with the sole purpose of preventing the company's insolvency in the context of the COVID-19-related crisis.

Concerning the third group, it is pertinent to create a legal solution that allows companies to request, within the Revitalisation Plans and insolvency proceedings themselves, the adjustment of the approved/in execution plans, in the light of the "abnormal modification of the circumstances in which the parties founded the decision to contract", thereby taking advantage of all the procedures that have already been developed (e.g. ruling on the verification and ranking of claims, information regarding the plan's approval). This would avoid many disputes between debtors and creditors regarding non-compliance with obligations and the (im)possibility of modifying such plans.[1]

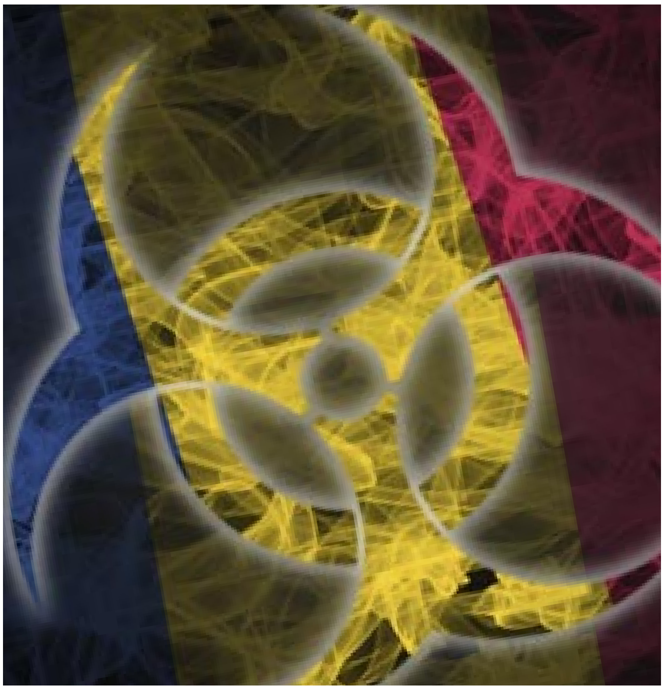
Lastly, regarding the logistics of the courts, the pandemic should be the basis for the definitive implementation of digital tools (Webex, Zoom) which allow for reconciling the complexity of major insolvency proceedings with the urgent nature of the procedure and the preparation of all the involved parties, thus avoiding the excessive delays in resolving this type of proceedings/negotiations.

These normative suggestions seek to ensure liquidity for companies in order to gain time with a view to understanding the economy emerging from the post-COVID-19 economic and financial crisis. This is a different economy, the "*new normal economy*", in which the conservative and sanitary measures imposed in the behaviour of citizens competes with the companies' policies to encourage consumption. ■

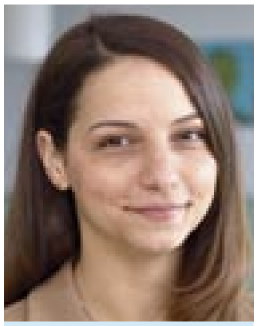
Footnote:

1 Following the presentation of the Economic and Social Stabilization Program (presented on 9 June 2020), the Government foresaw the creation of a new extraordinary process for the viability of companies (PEVE), of exceptional and temporary character, which can be used by any company in a difficult economic situation or insolvent due to the economic crisis caused by the COVID-19 pandemic, as long as the company demonstrates that it is still susceptible to viability.

Romania: Insolvency proceedings during the COVID-19 pandemic



SPERANTA MUNTEANU
Senior Advisor to KPMG and Managing Partner at Veridio Transformation, Romania



LUIZA RADULESCU
Lawyer/Insolvency Practitioner, KPMG Restructuring SPRL, Romania

The Romanian legislator has decided to implement certain new measures regarding companies in insolvency and the effect the COVID-19 pandemic has had on such companies. Below you will find some of the most relevant measures introduced by Law 55/2020.

As such, for the duration of the national alert (which ended on 15 May 2020), the insolvent debtors have been eligible, but not obliged, to file an insolvency request to the relevant court, the 30 days within which the debtor was required to submit the insolvency request being suspended for the entire duration of the national alert, plus another 30 days afterwards.

Accordingly, a creditor's insolvency request may not be approved if he cannot prove that reasonable attempts were made to reach a payment agreement, by any means of communication. Proof of these negotiations (i.e. printouts of the emails) shall be submitted together with the insolvency request.

During the state of national alert, subsequent to it, and implemented since 15 May, for debtors who have either fully or partially ceased their activity as a result of the decisions issued by the Authorities (according to Presidential Decree no.195/2020 and extended by Presidential Decree no.240/2020), the insolvency threshold for opening the proceedings has been raised from RON 40,000 to RON 50,000. This provision applies regardless of the filing of the insolvency request.

A moratorium has also been implemented, that is, the enforcement of current debts older than 60 days and having been due during the ongoing insolvency proceedings is suspended, while for ongoing creditor arrangements ("*preventive concordat procedures*") the drafting period, or the negotiation period, is extended by a maximum of 60 days, depending on the current situation.

Another change brought by Law 55/2020 is that the observation period of the ongoing insolvency proceedings is extended by three months as of 15 March 2020. Similarly, the term for submission of reorganisation plans is extended by three months. For reorganisation plans which were already submitted, if the effects of the COVID-19 pandemic have changed the recovery prospects in relation to the possibilities and specifics of the debtor's activity, an amended reorganisation plan may be submitted within three months, starting with the entry into force of Law no. 55/2020.

For debtors currently in judicial reorganisation, the plan shall be extended by two months. If their activity has fully ceased as a result of the decisions issued by the Authorities during the state of national emergency, they can file a request for a suspension of the reorganisation plan for up to two months. At the same time, the court may grant an extension of the reorganisation period, without exceeding a total duration for the plan of five years. This provision applies to both ongoing reorganisations and new reorganisation plans.

Although these measures aim to help companies in distress, they are perceived as merely sufficient, taking into consideration that during the state of emergency the debtors' financial situation may have severely been deteriorated.

Therefore, the business community looks forward to seeing how Directive EU 1023/2019 would be implemented in the local legislation. ■

> "The business community looks forward to seeing how Directive EU 1023/2019 would be implemented in the local legislation"

Russia: New package of emergency legislation measures

ALEXANDER POPELYUK
Partner, Lidings, Moscow

During the COVID-19 crisis, Russian regulators implemented a package of emergency legislation including measures referring to the insolvency law. The law was published on 1 April 2020, and on 3 April the Government exercised its right to introduce a 6-month moratorium on initiating bankruptcy proceedings for certain categories of debtors.

Here is the list of affected debtors covered by the moratorium:

- Organisations and individual entrepreneurs whose primary activity code is specified in the list of individual areas of activity.
- Systemically important companies, with the approval of the Government Commission.
- Strategic enterprises, strategic organisations and strategic joint-stock companies, with approval by a Presidential Decree.

However, the affected debtor may waive the special regime. For this purpose, the debtor shall submit a notice to the Unified Federal Register of Information on Bankruptcy.

The moratorium is introduced in the following way:

- Suspension of the duty to file for bankruptcy for debtors affected by the COVID-19 crisis.
- Interdiction for the creditors to initiate a bankruptcy petition, charge penalties and fines for breach of contracts of such debtors.
- Interdiction for the creditors to enforce their collateral interests for a default on payments by debtors affected by the COVID-19 crisis.
- Interdiction for the debtors to pay dividends to shareholders, to increase their income by shares and to distribute profits to the shareholder.
- No permission for offset of counterclaims if the priority of creditors' claims is breached.
- Suspension of ongoing enforcement proceedings on property and monetary claims which appeared prior to the introduction of the moratorium.
- Possibility to hold creditors' meetings in absentia, regardless of the attribution to the affected debtor.

Moratorium aftermath

If the affected debtor becomes bankrupt within three months after the expiration of the moratorium:

- an amicable out-of-court agreement is allowed with separate creditors; and
- the terms for challenging fraudulent transactions are extended in order to cover the moratorium period.

“The terms for challenging fraudulent transactions are extended in order to cover the moratorium period”

Slovakia: Temporary protection of entrepreneurs introduced

DAVID ORSULA
Insolvency Practitioner, bnt attorneys in CEE, Bratislava, Slovak Republic

Slovakia has introduced temporary protection for entrepreneurs whose companies were affected by the COVID-19 crisis.

Under the new legislature, temporary protection (hereafter "TP") is granted to the companies that:

- have their registered seat or place of business in the Slovak Republic;
- were licensed for business before 12 March 2020;
- were not insolvent as at 12 March 2020; and
- have been affected by the negative impacts of the spread of COVID-19.

TP cannot be granted to banks, e-money institutions, insurers or health insurance companies, collective investment entities or payment institutions and creditors licensed to provide consumer credits without limitation in scope.

To apply for protection, a legal entity must submit an electronic form application issued by the Ministry of Justice of the Slovak Republic to the relevant court. Private individuals are obliged to submit the application by post or personally.

If the application meets the requirements, the court will issue a confirmation of TP. The information that the applicant is under temporary protection will be published in the Commercial Journal and becomes effective following the publication.

During the protection period, the requests for bankruptcy filed by creditors after 12 March 2020 against a TP entity will be suspended. The same applies to the bankruptcy motions filed by creditors during the temporary protection period. Further, during this period, the entrepreneur under TP and its statutory directors are not obliged to file a petition for bankruptcy in respect of own assets.

On top of that, enforcement proceedings initiated after 12 March 2020 against an entity under TP for the satisfaction of a claim resulted from entrepreneurial activities will be suspended for the entire duration of the temporary protection period.

A creditor cannot enforce liens created over a business, item, right or any asset belonging to an entrepreneur under temporary protection.

Claims that originated against a company after it was granted temporary protection cannot be set off with earlier receivables.

After granting temporary protection, the other party may not terminate the contract, withdraw from the contract or refuse performance under the contract due to non-performance of the company under temporary protection, if the non-performance arose between 12 March 2020 and 12 May 2020 and was caused by COVID-19.

Limitation periods for the exercise of the rights against a company under temporary protection, including the limitation periods for challenging a transaction, will be suspended for the duration of the temporary protection period.

During the protection period, the entity under protection is obliged to give priority to the common interest of creditors over its own interests, must not distribute profits or any other equity and is obliged to refrain from disposing of its assets.

Loans or similar payments granted to the entrepreneur during the temporary protection are subject to a special regime.

The TP will expire on 1 October 2020, but the Government may extend the TP period for all entrepreneurs until 31 December 2020. The TP may be cancelled upon the request of the entrepreneur or withdrawn by a court decision. ■

> "Claims that originated against a company after it was granted temporary protection cannot be set off with earlier receivables"

Spain: Removing obstacles from insolvency legislation

MIGUEL SANDALINAS
Lawyer, Begur Legal, Spain

Faced with the COVID-19 crisis, the legislator has chosen to remove obstacles from insolvency legislation and "force" business viability. This movement is clearly intended to maintain the production network in the hope that the current crisis is situational rather than structural.

Two Spanish laws have been drafted in one month amending the significance of the presumption of insolvency when applying for proceedings: Royal Decree-Law 8/2020, of 17 March and Royal Decree-Law 16/2020, of 28 April. The legislator has attempted to adapt the legislation to the crisis.

The previous Spanish insolvency legislation foresaw the debtor's duty to apply for insolvency proceedings within two months from detecting the situation of insolvency. The legislation also authorised creditors to present a bankruptcy petition against the debtor, the so-called "necessary bankruptcy proceedings". Furthermore, if the application was not made within the two-month period, the proceedings could be classified as fraudulent insolvency due to the delay.

With COVID-19, insolvency proceedings against companies have become less "necessary" for our economy and the new legislative measures are an attempt to prioritise business continuity.

First, RDL 8/2020 extended the presentation period and limited the opportunity for creditors to request insolvency proceedings for a company. Just one month later, however, RDL 16/2020 amended the previous legislation and extended the time horizon for applications for insolvency proceedings until 31 December 2020, regardless of when the state of insolvency is acknowledged, thereby providing

companies with a shield in this crisis.

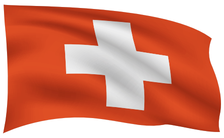
In the same spirit, this emergency regulation takes a fresh approach to debt renegotiations. The debtor may modify the initial creditors' agreement and may even accept credits in the insolvency proceedings that were entered into as part of the agreement, with the creditors' consent. A renegotiation mechanism is available for insolvent debtors who have breached the terms of the agreement. At the same time, the obligation to apply for the opening of the liquidation phase due to breach of the agreement has been relaxed.

The door has also been opened for shareholders to contribute funds, without prejudice to their credit entitlement over other creditors for the next two years. Company law has been amended permitting non-liquidation due to losses arising in the 2020 financial year.

While governments are seeking a vaccine against COVID-19, they are also looking for a vaccine against the economic crisis. Further legislative change will be required, especially in relation to public credit, which is a priority in Spain's insolvency legislation. The government will have to understand that in the public credit field as well there will have to be debt relief, the interruption of executions from public credits and managers´ personal liability, in short, it must understand that now is not the time for privileges but for debt mutualisation. In the 2008 crisis the government helped the financial sector, now it will undoubtedly have to help the business sector. ■

> *"While governments are seeking a vaccine against COVID-19, they are also looking for a vaccine against the economic crisis"*

Switzerland: Special COVID-19 moratorium created for SMEs



On 16 March 2020, the Swiss government, the Federal Council, proclaimed the extraordinary situation according to the Epidemics Act. This empowers it to issue ordinances for a certain period of time without the involvement of the Parliament. 8,000 soldiers (militiamen) were mobilised to support hospitals and the border guards. This was the largest mobilisation since World War II.

On 18 March 2020 the Federal Council ordered a general legal standstill until 4 April 2020. This was then extended until 19 April 2020 to cover the Easter holidays. During this period all debt collection activities were suspended. At the same time, all respite running in current proceedings were generally suspended.

On 16 April 2020 the Federal Council issued the Ordinance on Insolvency Law Measures to deal with the Corona Crisis (COVID-19 Ordinance on Insolvency Law). It is valid for a period of six months. The general legal standstill was not extended. This ordinance addresses three issues:

1. The obligation to notify the bankruptcy judge in case of over-indebtedness has been suspended.
2. The conditions for granting the debt-restructuring moratorium have been simplified.
3. A special COVID-19 moratorium was created for small and medium-sized enterprises.

In Switzerland, if there is reasonable cause for concern of over-indebtedness, an interim balance sheet must be drawn up and submitted to an approved auditor for review. If the interim balance sheet shows that the claims of the company creditors are not covered either at the going-concern value or at the liquidation value, the board of directors has to notify the judge unless company creditors subordinate their claims behind all other company creditors to the extent of this shortfall. Provided that the company was not over-indebted on 31 December 2019 (whereby subordinations are not to be taken into account) and that the over-indebtedness was presumably removed by the end of 2020, the obligation to notify the judge in the event of over-indebtedness is now suspended by six months.

In addition, the normal debt-restructuring moratorium is now granted without any examination of the prospects for recovery. The total duration of the provisional moratorium has been extended from four to six months.

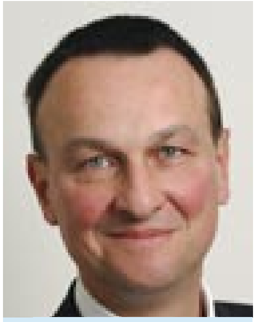
The newly created COVID-19 moratorium is intended to provide small and medium-sized businesses with a simple moratorium, as the normal debt-restructuring moratorium is rather designed for larger companies. The prerequisite for granting the COVID-19 moratorium is that the debtor was not over-indebted on 31 December 2019, or that he was over-indebted but creditors had subordinated their claims. In addition, the balance sheet must not exceed certain parameters. The COVID-19 moratorium is granted by the court upon application by the debtor for a maximum of three months and can be extended once thereafter for a maximum of three months.

In contrast to the normal debt-restructuring moratorium, the COVID-19 moratorium does not usually involve an administrator (commissioner). The COVID-19 moratorium is published and a silent moratorium is not possible, unlike the normal debt-restructuring moratorium.

During the moratorium, the debtor may not pay the debts incurred before the moratorium was granted. This does not include alimony claims and claims by employees. The COVID-19 moratorium has similar but not as far-reaching effects as a normal debt-restructuring moratorium. The claims subject to the moratorium cannot be pursued and assignments of future claims are cancelled. The debtor may continue his business activities but must treat his creditors equally. During the moratorium, the debtor may not sell or encumber fixed assets without the court's consent.

In contrast to the normal debt-restructuring moratorium, the COVID-19 moratorium expires after the end of the period without further notice or court involvement. Neither a successful restructuring, nor the adoption of a reorganisation plan is required to exit the moratorium. The COVID-19 moratorium does not rule out the possibility that an application for an ordinary provisional debt-restructuring moratorium may be made during or after the COVID-19 moratorium.

On May 20 the government declared a general moratorium until September 30 for all claims against organisers and retailers of package tours for failure to provide a travel service. ■



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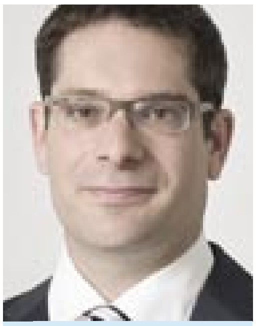

LUKAS BOPP
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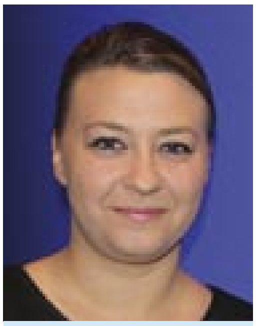
"The newly created COVID-19 moratorium is intended to provide small and medium-sized businesses with a simple moratorium"

Technical Update: Summer 2020

Myriam Mailly writes about the latest information made available to the INSOL Europe members in relation to the impact of the COVID-19 pandemic on national insolvency legislations.



MYRIAM MAILLY
INSOL Europe Technical Officer

Lexis Nexis & INSOL Europe COVID-19 Tracker of insolvency reforms

With the COVID-19 pandemic outbreak, the national legislators continued playing an increasingly significant role for companies in distress. The pandemic caused an unprecedented demand forcing the governments around the globe to adapt their laws straight off and prevent as far as possible wide-scale bankruptcies in some segments of the economy, which could result in unemployment and severe economic hardship.

In that context, a **Coronavirus (COVID-19) Tracker** of insolvency reforms, globally, which is produced by Lexis Nexis in partnership with INSOL Europe, has been published for free for all INSOL Europe members. The tracker is available from the INSOL Europe website at: www.insol-europe.org/technical-content/covid19

The tracker has been updated and published on a daily basis along with national reports whose majority was written by INSOL Europe members. At the time of writing, national reports for the following countries are available: Argentina, Armenia, Australia, Belgium, Bulgaria, Channel Islands, China, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Hungary, India, Italy, Japan, Latvia, Lithuania, Luxembourg, New Zealand, Poland, Portugal, Romania, Scotland, Spain, Singapore, Sweden, Switzerland, Turkey, Ukraine, the United Kingdom and the United States.

> *A Coronavirus (COVID-19) Tracker of insolvency reforms has been published for free for all INSOL Europe members*

So as to be aware of new expediting reforms amending

restructuring and insolvency laws, temporarily suspending onerous insolvency law provisions, increasing limits for statutory demands, suspending enforcement powers and introducing other measures to deal with the coronavirus crisis, a regular announcement is also posted on LinkedIn. Feel free to join the INSOL Europe network on LinkedIn (www.linkedin.com/company/insol-europe/) to be notified on any new contributions or updates on the tracker!

COVID Coffee Breaks

In doing so, you will also be notified on the new episodes of our series entitled '**COVID Coffee Breaks**' which are short videos in which a number of INSOL Europe Country Coordinators share personal experiences of the COVID-19 crisis in their countries and give highlights of the reforms and challenges they face. At the time of writing, several videos have already published including France, Luxembourg and Belgium (1st episode), The Netherlands and Germany (2nd episode), Italy, Austria and Switzerland (3rd episode), Ireland, Channel Islands and UK (4th episode), Bulgaria, Hungary and Romania (5th episode) and Latvia, Lithuania and Estonia (6th episode).

Visit the website for all the new episodes: www.insol-europe.org/publications/web-series

Other useful links

Other useful links related to measures taken in the COVID-19 context were published on the INSOL Europe website at: www.insol-europe.org/eu-study-group-links

First of all, the European Commission has published a table which provides an overview of measures taken by the Member States in order to cope with the COVID-19 situation and to prevent insolvencies of viable businesses caused by this temporary shock. In the latest updated table, DG JUST reports on:

(1) substantive insolvency law, including the suspension of the duty (for debtors) and the possibility (for creditors) to file for insolvency or moratoria on the enforcement of claims or the termination of contracts;

(2) procedural insolvency law relating to the interruption of court proceedings, time-periods and various types of time-limitations;

(3) additional measures related to insolvency situations of businesses (e.g. avoidance actions, reorganisation plans, informal agreements, etc…);

(4) and where applicable in the Member States, wider measures helping entrepreneurs to get over the economic difficulties caused by the COVID-19 pandemic (e.g, payment deferrals, bank loans, social security, health insurances, business subsidies, etc…).

You will find also an overview on **COVID-19-related governmental measures in CEE** which will give you information on laws, regulations and governmental measures enacted in different areas due to the Coronavirus pandemic (COVID-19) in Central and Eastern Europe (including Belarus, Bulgaria, Czech Republic, Estonia, Hungary, Estonia, Latvia, Lithuania, Poland, Romania and Slovakia). Please note that up-to-date versions are accessible on the bnt attorneys in CEE website.

A '**Model Standstill Agreement**' may also assist any insolvency practitioner in COVID-19 time. This document was authored by Prof. Jonathan Lipson and Norman Powell and published under the auspices of the Business Law Section of the American Bar Association (ABA). The information was posted on Prof. Dr. Bob Wessels' blog on 17 April 2020.

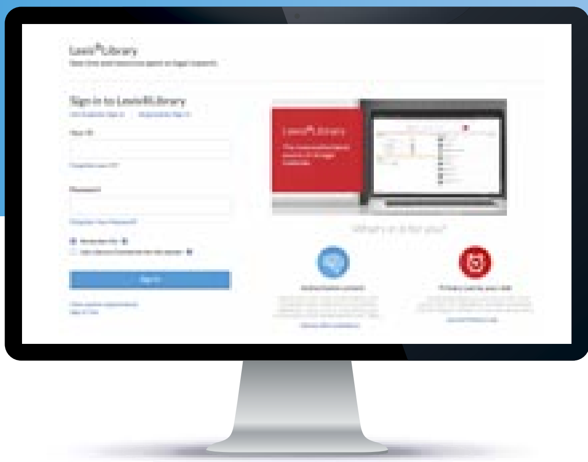
You may find also useful the information published on the Global Insolvency website entitled '**Global Responses to Limit the Economic Impact of the COVID-19 Pandemic**' which highlights individual measures undertaken by the various countries in a comparative format, summarising the macro- and micro-economic efforts in response to the COVID-19 crisis. At the time of writing, the countries featured include British Virgin Islands, Canada, Cayman Islands, Chile, Cyprus, Finland, France, Germany, Guernsey, Hong Kong, India, Italy, Jersey, Mexico, the Netherlands, Russia, Singapore, Spain, Thailand, the United Kingdom and the United States.

If you want to publish any information which would be relevant for the INSOL Europe members, please email to me at: technical@insol-europe.org

How to access the Case Register

While the Case Register's management and moderation remains the responsibility of INSOL Europe, since 2014, the Case Register has been hosted by LexisNexis and, accordingly, is accessible under: ***http://tinyurl.com/y7tf2zc4***

INSOL Europe members should have received an email with individual login details (user name) and passwords. If these have been forgotten, or the email lost, there is a LexisNexis dedicated mailbox for INSOL users (INSOL-Users@lexisnexis.co.uk) which can be contacted to be sent a reminder.



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

Useful Links

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Updated Insolvency Laws
\> www.insol-europe.org/technical-content/updated-insolvency-laws

National Insolvency Statistics
\> www.insol-europe.org/technical-content/national-insolvency-statistics

EIR Case Register
\> http://tinyurl.com/y7tf2zc4

European Insolvency Regulation
\> www.insol-europe.org/technical-content/useful-links-to-be-aware-of-before-applying-the-recast-insolvency-regulation-2015848

\> www.insol-europe.org/technical-content/outcomes-of-national-insolvency-proceedings-within-the-scope-of-the-eir-recast

\> www.insol-europe.org/technical-content/state-of-play-of-national-insolvency-data-by-outcomes-currently-available

\> www.insol-europe.org/national-texts-dealing-with-the-eir-2015

EU Directive on Restructuring and Insolvency (2019)
\> www.insol-europe.org/technical-content/eu-draft-directive

\> www.insol-europe.org/technical-content/eu-directive-on-restructuring-and-insolvency

Brexit Publications
\> www.insol-europe.org/technical-content/brexit-publications

USBC Chapter 15 Database
\> www.insol-europe.org/technical-content/introduction

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\> www.insol-europe.org/academic-forum-documents

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Books

Here we regularly review or preview books which we think are relevant and interesting to our readers.

If you would like to suggest a book for a future edition, please contact Paul Newson on: *paulnewson@insol-europe.org*

Rescue of Business in Europe

PAUL OMAR
INSOL Europe Technical Research Coordinator

It is difficult to see what may be missing, if anything, from the range of issues canvassed all the way from pre-insolvency steps to specialist processes for a range of entities, from corporate groups to SMEs

European Law Institute (eds) (Part I); Bob Wessels, Stephan Madaus and Gert-Jan Boon (eds) (Part II)

OUP, 1st edition, 2020, 1504 pages, ISBN 978-0-19882-652-1, £295

Conceived in the wake of the Global Financial Crisis, the project, from which this text takes its title, set out to survey the legal landscape in 13 jurisdictions across Europe on the basis of a very elaborate and comprehensive questionnaire addressed to national reporters, drawn from eminent academics and practitioners in the field of insolvency and restructuring. The fruits of the 3½ year project can be seen in the work that has just been published, just as the world now slides into another crisis, this time occasioned not by greed or speculation, but by nature in the form of a pandemic.

The book, weighing in at over 1500 pages, is divided into two parts. The first, edited by the European Law Institute, under whose auspices the project was initiated, presents the 115 recommendations adopted by that organisation, whose mission is, *inter alia*, to facilitate the type of research that can provide practical guidance building towards European legal integration and improved law reform. The recommendations, which are structured as part of an Instrument adopted by the organisation, contain suggested solutions on a wide range of matters connected to the themes of restructuring and insolvency affecting all stakeholders. It is difficult to see what may be missing, if anything, from the range of issues canvassed all the way from pre-insolvency steps to specialist processes for a range of entities, from corporate groups to SMEs.

The second part of the work is edited by Professors Bob Wessels and Stephan Madaus, also the prime movers behind this project, ably assisted by Gert-Jan Boon. It contains the survey materials from which the recommendations have been distilled, covering a range of countries with different legal traditions and at different stages of the development cycle. This is accompanied by an inventory of international recommendations made by international organisations working in the field, e.g. UNCITRAL, EBRD and the World Bank. These have been used to inform the shape of the overall recommendations in ten key areas, including the governance role of creditors and the formulation of rescue plans and their contents.

Overall, it is difficult not to appreciate the vast amount of effort taken in the conception and execution of this project, which has incidentally provided much material for policy-makers and insolvency stakeholders to consider. This remains equally valid, even as the world is dealing with a pandemic and many countries are moving to reshape insolvency law procedures to cope with the enormous financial distress and likely economic fallout of health measures taken to stem the outbreak. The lessons learnt from the last financial crisis explored in this magnum opus will serve to inspire the next wave of reforms in this crisis and also once it is over. As such, a copy of this work will be an indispensable reference point for all those involved in the fields of restructuring and insolvency.

System Prawa Handlowego (Tom 6): Prawo restrukturyzacyjne i upadłościowe

(The System of Commercial Law (Volume 6): Restructuring and Bankruptcy Law)

Anna Hrycaj, Andrzej Jakubecki and Antoni Witosz (eds), Ksiegarnia Beck, 2nd edition, 2019, 1632 pages, ISBN 978-83-8128-960-3, PLN 399

The System of Commercial Law is a multi-volume compendium of knowledge devoted to issues of commercial law (as broadly understood). In Volume 6, legal issues regarding the Polish system of restructuring and bankruptcy law are analysed. The authors of the individual parts of the book are eminent theoreticians and practitioners of insolvency law in Poland (among others: academics, judges, insolvency practitioners, attorneys-at-law). The second edition of this book describes thoroughly and comprehensively the issues related to the Restructuring Law of 15 May 2015 (Journal of Laws of 2019, item 243) and the Bankruptcy Law of 28 February 2003 (Journal of Laws 2019, item 243) with subsequent amendments adopted in 2019.

Both Restructuring and Bankruptcy Laws together constitute a comprehensive set of legal rules, the subject of which are the legal relationships between insolvent debtors or prospectively insolvent debtors (in the case of restructuring) and their creditors. Polish Bankruptcy Law governs both the consequences of the insolvency of entrepreneurs and non-entrepreneurs. The recent amendments, dealt with in the text and which were adopted in August 2019 becoming effective in March 2020, have significantly modified the rules of the so-called consumer bankruptcy proceedings. Pursuant to the new provisions, the main part of bankruptcy proceedings is to be conducted independently by a trustee. The trustee is thus entitled to carry out the process of liquidation of the bankruptcy estate, generally without the participation of the bankruptcy court , except where rulings on the repayment plan and/or the discharge of consumer debts is required.

The work also covers the details of the Restructuring Law, which regulates the principles of concluding an agreement between an insolvent debtor or a debtor threatened with insolvency and the creditors. Outlined in the volume are the four different types of restructuring proceedings: (1) proceedings for the approval of an arrangement; (2) accelerated arrangement proceedings; (3) arrangement proceedings; (4) remedial proceedings, each well analysed and dissected. Moreover, the text deals with the option given in the Restructuring Law for the restructuring of secured debts by way of a partial arrangement, despite the fact that some secured creditors may be against restructuring proposals.

Overall, the book is a work intended for a wide audience, both theoreticians and practitioners alike. This is an extensive opus (over 1,600 pages), though as a result, it allows for the finer detail of the institutions of the Polish Bankruptcy and Restructuring Laws to be known. Additionally, the book also comments on international insolvency proceedings as governed by Regulation (EU) 2015/848. As such, it can be recommended for its coverage and depth.

Bartosz Sierakowski, Insolvency Practitioner, Zimmerman and Partners Law Office (Warsaw)

De la faillite internationale à la procédure d'insolvabilité européano-suisse dans le cadre du règlement 2015/848: les effets en Suisse

(From cross-border insolvency to Euro-Swiss insolvency proceedings in the framework of Regulation 2015/848: Effects in Switzerland)

Elodie Kleider, LGDJ, 1st edition, 2020, 492 pages, ISBN 978-2-275-07260-9, €57

Complicated things should be explained as simply as possible – but not simpler. The (essential) last part of that phrase may explain why the title of this recent publication could not reasonably be simpler than the one it has, which may be translated as "From cross-border insolvency to Euro-Swiss insolvency proceedings in the framework of Regulation 2015/848: Effects in Switzerland). Under this title, Dr. Elodie Kleider's doctoral thesis offers a unique piece of research: a comprehensive and up-to-date analysis of the application of the Recast European Insolvency Regulation (Recast EIR) in respect of third states, including recent developments, as well as the jurisprudence of the ECJ.

The analysis does not stop at the Recast EIR but focuses on its application in France and its interaction with the Swiss legal system (non- Recast EIR), discussing concrete problems and offering possible solutions. The *Schmid*-Decision, Article 6 of the Recast EIR and Chapter IV of the recast text build the legal cornerstones of the work. Almost in passing, Elodie Kleider's book constitutes the first publication comprehensively analysing the legal framework in Switzerland on recognition of foreign insolvency decrees and decisions since its reform of 2018. The thesis unsurprisingly concludes with a plea for an improved third-country regime in the EU, but also with practical and well-founded advice on how to cope with the current legal framework.

The practical relevance of this subject cannot be overestimated: there is hardly any larger or even middle-sized international insolvency case that will not include non-EU Member States, even such in Europe. Lawyers and scholars that think the cross-border volume in respect of third-country jurisdictions like Norway, Iceland and Switzerland is a *quantité négligéable* should be reminded that the UK will very likely soon join the ranks of those jurisdictions.

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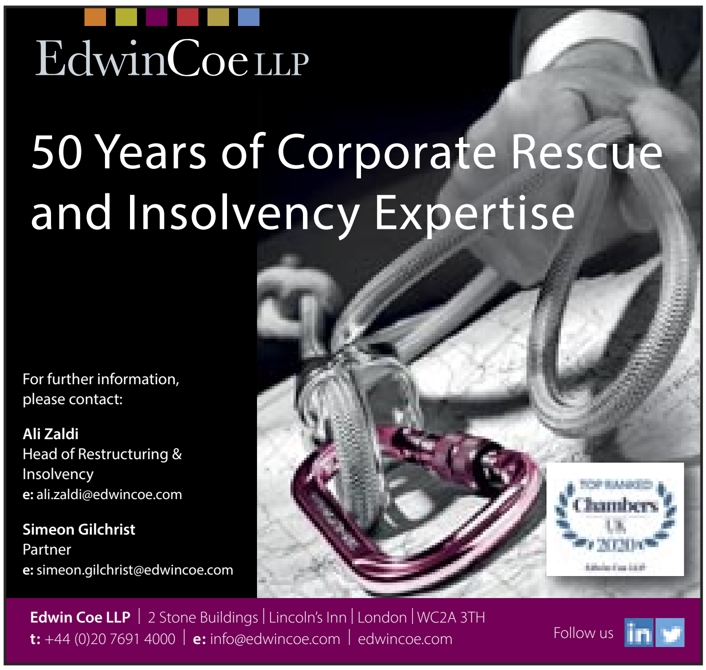

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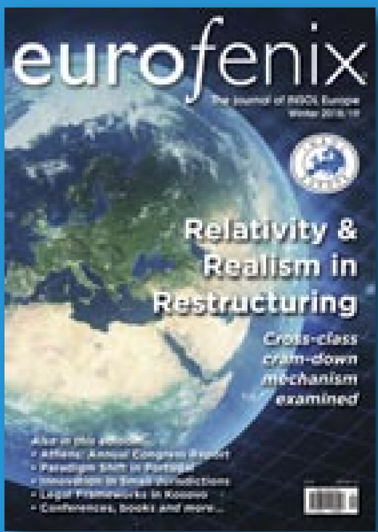

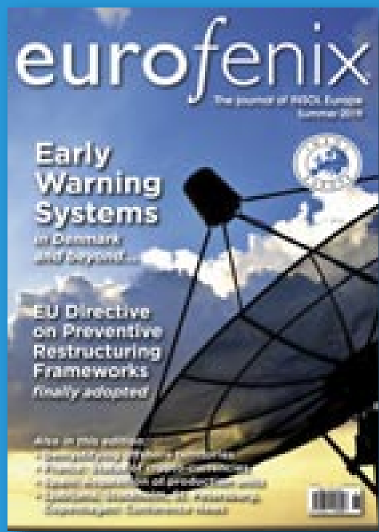

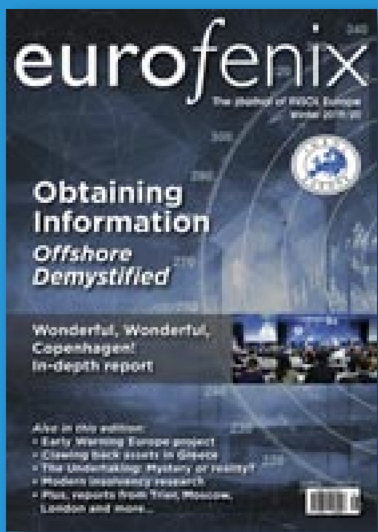

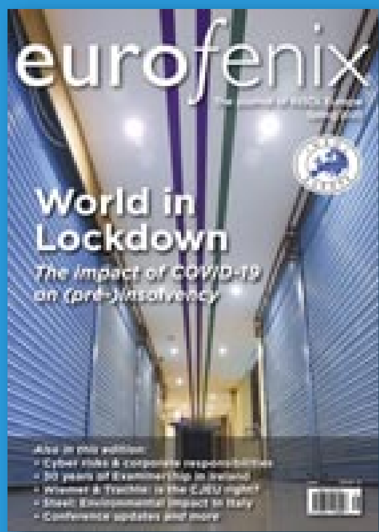

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