INSOL EUROPE

#81 · Autumn 2020

eurofenix®

The journal of INSOL Europe

Towards a New World

INSOL Europe events go online

Divergences and convergences of 'COVID-19' recovery plans

Also in this edition:
- COVID-19 and the retail sector
- The collapse of Wirecard
- Country reports
- Book reviews
- *...and more*

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Welcome from the Editors


FRANK HEEMANN


CATARINA SERRA

One year after the last INSOL Europe Congress (Copenhagen), the words of the keynote speaker, Vincent Hendricks, keep coming back to me: "*Without sound information as bedrock for formation of political opinion, decision-making and action, individual agency and political sovereignty of the people are crippled*"[1]. Only now do I completely realise their meaning.

Every day for the past six months we have been flooded with news, breaking news, on one single topic. Facts, expert studies, political decisions, and mere opinions appear often tangled and contradictory. Is all this information to be trusted?

As to policy makers, they are still groping in the mist. They are aware that there is insufficient knowledge. What they forget is that there are limits to the changing of attitudes. From the outset, there is the limit to the information we can process and internalise. As much as the requisites of the so-called "new normal" got through to all, the key issue is: can we do it? Is there really an alternative to the "classic normal" human behaviour? Can we keep socially distant, and for how long? To paraphrase the Italian philosopher Giorgio Agamben[2], I doubt that a community founded on "social distancing" is humanly and politically livable.

Philosophical doubts aside, it is vital to keep the economy going in Europe. The most necessary is to create sound policies for micro, small and medium-sized businesses, that enable them to solve the illiquidity problem (protection of new financing and interim financing, namely granted by shareholders) and to ensure swift restructuring where needed. It must also be kept in mind that the Directive on Insolvency and Restructuring is to be transposed by Member States until July 2021. So whatever measures are adopted, they must be carefully thought through and be consistent with the precepts, the principles, and the purposes of the Directive.

Relevant for the national reforms, working as a good starting point, we offer, in this issue, a selected set of short studies and inspiring pieces: a comparison between recovery plans in three major economic areas (p.17), a comparative look at changes to the law and State aid in the Baltics (p.20), an overview of the technology challenges for insolvency practice ahead (p.22), a group of updated reports on the recent policies adopted in specific countries, as usual (p.36), and much more.

To be sure, the highlight goes to the Annual Conference, which for the first time in the history of INSOL Europe will be held online (8, 15, 22 and 29 October 2020) (see p.30). With a venue initially planned for Sorrento, Italy, the Conference, not by chance entitled "**Towards a New World**", will end up taking place in every city/country you are.

To conclude, I would like to pay tribute, on behalf of the editorial board, to Frank Heemann, who, after three years as brilliant co-editor of Eurofenix, is now stepping down. He embraced other challenges in INSOL Europe which will keep him close by, so this is just a "see you around". From the next issue on, the co-editor will be Edvīns Draba. He is warmly welcomed. May the dark clouds pass and we all meet in person very soon!

Footnotes:

1 Hendricks/Vestergaard, *Reality Lost*, Springer Open, 2019.

2 https://www.quodlibet.it/giorgio-agamben-distanziamento-sociale.

Catarina

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The times they are a-changing

PIYA MUKHERJEE
INSOL Europe President

Piya Mukherjee reflects on her achievements throughout the last 12 months

> Change has indeed been the keyword for my presidential year

My year as President of INSOL Europe will come to an end in October, where I will pass the baton on to Marcel Groenewegen (CMS).

Change has indeed been the keyword for my presidential year.

In the 2019 winter edition of Eurofenix, in my first editorial as President, I listed the six 'balls' that would be my task to keep rolling.

Ball 1: Membership Development Committee

In 2018 the Council resolved to set up the Membership Development Committee, responsible for identifying Country Coordinators in all countries in Europe. As affirmed by the Strategic Task Force 2025, INSOL Europe recognised a need to enhance the presence of the association in all countries in Europe in order to increase its relevance and impact. The Country Coordinators prepared plans for raising awareness of the offerings INSOL Europe on a national level. However, as most plans involved physical meetings, the execution of these plans was impeded by the COVID-19 pandemic.

Instead, the Country Coordinators have contributed massively to various projects and events in the past year. Without the dedicated and committed efforts from our Country Coordinators we would not been able to get the following projects off the ground:

LexisNexis Tracker

Contributions to the LexisNexis Tracker of reforms of insolvency legislation.

COVID Coffee Breaks

Each featuring two or three Country Coordinators, these were published from May to July, and have been resumed from the end of August.

EBRD Core Principles

Input to INSOL Europe's Consultation Response on the EBRD Core Principles. The EBRD (European Bank for Reconstruction and Development) is currently revising its 2005 core principles for insolvency and contacted INSOL Europe for a consultation on the revised version. This provided INSOL Europe with an excellent opportunity to, in the long term, shape/develop national insolvency law. 23 Country Coordinators responded to the questionnaire and Technical Officer Myriam Mailly and Technical Research Coordinator Paul Omar drafted INSOL Europe's response to the consultation which recently was submitted to the EBRD. The revised principles have been published on the website of the EBRD.

IOH and Turnaround Wing new project on the Directive

The Insolvency Office Holders' Forum (IOH) and the Turnaround Wing of INSOL Europe have launched an exciting new joint project on Art. 5 of the Directive on Preventive Restructuring etc. Art. 5 concerns the appointment of a practitioner in the field of restructuring under preventive restructuring procedures and therefore is highly relevant to the major part of our membership. The Country Coordinators have contributed to mapping

(i) national legislation currently in force, meaning before the implementation measures;
(ii) the implementation process; and
(iii) new legislation in force or draft publicly available.

We look forward to the presentation of the project, when finalised.

Ball 2: Collaboration with kindred associations

Alas, because of the COVID-19 pandemic, all scheduled joint and co-labelled events in 2020 were cancelled.

However, I am pleased to let you know that this does not mean that INSOL Europe's collaboration with kindred associations is mothballed entirely. The Anti-Fraud Forum, chaired by Carmel King (Grant Thornton) and Bart Heynickx (Altius) is working hard on organising an event in February 2021 in collaboration with R3 and the Fraud Advisory Panel, both UK. In 2019, the Young Members Group kickstarted a collaboration with the International Association of Young Lawyers (AIJA) and the new co-chairs are working behind the scenes on a joint event mid 2021.

A huge thank-you to the co-chairs for their dedication to make these events happen.

Ball 3: Rebranding

May saw the launch of the new logo of INSOL Europe – and we are very pleased to note that the logo was well received!

Ball 4: Insolvency Tech & Digital Assets Wing

From the 2019 winter edition of Eurofenix and going forward, this newest wing of INSOL Europe, created in 2019, and chaired by Laurent le Pajolec (EXCO), José Carles (Carles Cuesta) and Dávid Oršula (BNT) has provided valuable insight into hot tech topics.

In our increasingly tech-driven world we all need to know what is going on out there and I am immensely grateful to the co-chairs of our young wing for providing news and insight on a regular basis.

Ball 5: Transparency and rotation

Immediate Past President, Alastair Beveridge, and Treasurer Chris Laughton will be leaving the Council as their term ends. I thank both for support and guidance in the past years and especially 2020, which has been a year of challenge and new opportunities.

In October I look forward to welcoming new Council members and to a fruitful as well as enjoyable collaboration.

Along with the invitation to all members to stand for election to vacant seats on Council went out a description of the role of the Council as a body and the role of the individual Council members. This 'job description' aimed to share with the members – and potential Council members - the expectations and benefits of being a Council member.

Ball 6: Changes in the organisation

In February we welcomed INSOL Europe's new Co-Director of Administration, Catherine Dyke-Price, who has since worked alongside Caroline Taylor, our Director of Administration for over 30 years. In October, Caroline's role in the association will transition to Event Strategy Director, which will be a part-time position. We cannot thank Caroline enough for all she has done to bringing forward INSOL Europe to the professional and relevant association it is today and are grateful that Caroline still will be part of the association going forward.

Catherine brings new ideas and new perspectives to the association; we have enjoyed working with Catherine during the past months and look forward to her contribution to ensuring that INSOL Europe evolves and continues to stay relevant to its members.

Other balls set in motion...

Online events

With challenges come new opportunities – and INSOL Europe embraced the opportunity to share knowledge and practices within its membership through online web videos. Our COVID Coffee Breaks, limited to 20 minutes each, turned out to be a great way to reach out to the membership – in this case to keep you all on top of how national insolvency legislators have responded to the COVID-19 pandemic. We are pleased to note that these web videos attracted a large audience.

Registrations are now open for INSOL Europe's Online Conference in October: '**Towards a New World**'. The Technical Committee has succeeded in putting together an exciting program, each piece no longer than a nice lunch break, but jam-packed with exciting panel sessions as well as a keynote speech.

Collaboration with EBRD

In addition to the consultation on the EBRD's Core Principles, mentioned above, INSOL Europe is invited to contribute to EBRD's new assessment on the state of business reorganisation frameworks across the regions where the EBRD invests.

The EBRD invests in 38 countries and 27 of them are represented in INSOL Europe which is well-placed to contribute to this exciting project and we look forward to this – and further – collaboration with the EBRD.

Guidance notes

The 'Directive Project', chaired by Adrian Thery (Garrigues) prepares Guidance Notes for legislators in the Member States who are in the process of turning the EU Directive into updated or brand-new national legislation.

In April, the first Guidance Note was published on Claims, Classes, Voting, Confirmation and the Cross-Class Cram-Down. In May, the second Guidance Note was published on Stay of individual enforcement actions.

More Guidance Notes are coming!

High-Level Forum's report on the Capital Markets Union

The High-Level Forum is a group set up by the EU Commission to advise on matters of the Capital Markets Union and present specific recommendations as to how the goals and objective of the Capital Markets Union may be achieved. In June, the High- Level Forum published a report: 'A New Vision for Europe's Capital Market'.

Amongst the recommendations in the report are the following of interest to the members of INSOL Europe:

The Commission is invited to

- Adopt a legislative proposal for minimum harmonisation of certain targeted elements of core non-bank corporate insolvency laws, including a definition of triggers for insolvency proceedings, harmonised rules for the ranking of claims (which comprises legal convergence on the position of secured creditors in insolvency), and further core elements such as avoidance actions.
- Set up an expert group tasked with elaborating common terminology for the principal features of the various national insolvency laws.

The following legal amendment is recommended

- A new, stand-alone Directive on insolvency, namely definition of insolvency/ trigger of proceedings and creditors' ranking; new recommendation on certain other insolvency issues to complement the Directive.

In effect, the High-Level Forum recommends a harmonisation of core insolvency principles and such a harmonisation, if the Commission follows the recommendation, will have a substantial impact on national insolvency law as we know it.

The EU Study Group of INSOL Europe has provided comments to the High-Level Forum on the draft report and will closely follow the Commission's response to the recommendations.

And finally...

My year as President has indeed been eventful as well as enjoyable. I am confident that our incoming President, Marcel Groenewegen, and incoming Deputy President, Frank Tschentscher, will enjoy supporting our members and bring INSOL Europe to new heights.

Finally, I would like to thank Caroline Taylor, Catherine Dyke-Price and the rest of the Secretariat for their huge support and dedication to INSOL Europe.

Take care out there!

> *My year as President has indeed been eventful as well as enjoyable*

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*

'COVID Coffee Breaks' continue

Our 'COVID Coffee Breaks' have resumed for the Autumn with further updates from our Country Coordinators, and also from our Working Groups, with news about their activities in the coming months.

The latest videos feature Denmark & Norway, Croatia & Slovenia, Ukraine & Russia, and the Young Members Group.

Watch the videos on our website at: www.insol-europe.org/publications/web-series

Look out for further episodes coming soon.

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!

INSOL Europe events go online for 2020!

Annual Conference: 8/15/22/29 October 2020

This year our iconic annual event will be held online as a series of four sessions under the heading '**Towards a New World**'. Each weekly session will feature a different keynote speaker and two live panels with a hand-picked selection of international experts speaking on a range of highly relevant and important topics.

Registration will be free for members or €100+VAT per weekly session for non-members. A discount of 25% will be given to non-members booking onto all 4 sessions.

With thanks to our main conference sponsor, NetBid (www.netbid.com).

Academic Forum Conference: 30 September 2020

In line with our other events, the annual Academic Forum Conference, which usually precedes the main Annual Congress, has also gone online this year, taking place on Wednesday 30 September 16:00 - 17:40 (CET). There will be two highly relevant presentations by Professors Horst Eidenmüller and Kristin Van Zwieten, both of University of Oxford, and by Lydia Tsioli of King's College London.

Registration is free for members or €50+VAT for non-members.

With thanks to our Academic sponsor, Edwin Coe (www.edwincoe.com).

EECC Conference: 3 & 10 December 2020

On 3 and 10 December 2020, we will be holding our first online EECC conference '**Tectonic Changes in Eastern European Insolvency**', bringing together fresh insight and exceptional speakers.

As the evolving impacts of COVID-19 ripple through our communities, we are all facing unforeseen challenges. With a renewed spotlight on insolvency, gaining fresh insight and real life examples will help us, as insolvency professionals, stay on top of our game, enhance business resiliency, ensure business continuity and most importantly, stay connected.

We feel that it is our responsibility to help flatten the Coronavirus curve and keep you safe. While we are still as dedicated as ever to offering amazing content and networking opportunities, your safety comes first.

As such, we have transitioned our in-person Eastern European Countries' Committee Conference into a virtual conference. Watch, listen, and ask questions from the convenience of your home or office, no travel needed.

With thanks to our EECC conference sponsor, BDO Restructuring GmbH, Germany (www.bdo.de/restructuring).

Details of all these events are on our website: www.insol-europe.org/events

Prestigious Richard Turton Award goes to Carla Cervantes of Peru

The Award Panel is pleased to announce that the 2020 winner of the Richard Turton Award is Carla Cervantes from Peru. Carla is currently working as a legal assistant at Estudio Martinot Abogados.

It was a difficult decision as this year there were a record number of applications. The panel adjudicating this year's applications was made up of Robert van Galen, INSOL Europe; Neil Cooper, INSOL International; Christina Fitzgerald, R3 and Maurice Moses, IPA.

Ms Cervantes will be writing a paper on "**Necessary reforms: Adaptation of insolvency regimes in Latin America due to the crisis**", which will be published in summary in one or more of the Member Associations' journals and in full on their websites.

As part of the award, Ms Cervantes will be invited to attend the INSOL Europe Congress in Dublin (Ireland) in October 2021.

As we are not able to invite Ms Cervantes to the Annual Congress this year, she will accept her award during the INSOL Europe OGM (online) on 2 October 2020.

We would like to congratulate Carla on her excellent application, and also thank all the candidates who applied for the award this year and wish them a successful career in their chosen field.

Young Members Group Wine Tasting

If you are already a member of INSOL Europe aged 45 or below, we welcome you to join our virtual wine tasting session on **Thursday 29 October from 17:00-18:00 CET**. Simply select this optional extra on the registration page and we'll post 6 small bottles of carefully selected wines straight to your door; log into the session and you'll be guided through the tasting process. The perfect way to unwind from the comfort of your home whilst networking online with like-minded professionals.

Contact our Event Manager, Harriet Taylor, email: harriet@insol-europe.org if you have not already registered.

Please note, spaces are limited on a first come first served basis!

With thanks to our Young Members Group sponsor, Schiebe und Collegen

Stimulating the local visibility of INSOL Europe in Member Countries

The INSOL Europe Membership Development Committee (MDC) has been established to stimulate the local visibility of INSOL Europe in each country, to increase our membership and facilitate the networking between INSOL Europe members.

In order to reach that goal, Country Coordinators have been appointed in several jurisdictions. Some of the Country Coordinators have already devised a country plan to find new members and to increase local networking opportunities. The plans consist of networking events, meetings, seminars with academic content, articles etc. It is noted that the plans that are in progress for some of the countries differ considerably, depending on the structure of the insolvency profession in that specific jurisdiction.

We need to find the way to facilitate networking and increase the membership of INSOL Europe, that is most effective for each jurisdiction.

Due to COVID-19 the meetings and events that the Country Coordinators planned for 2020 have been postponed, but we are sure that those activities will be planned as soon as it is possible.

Furthermore, the MDC is still searching for several Country Coordinators. New INSOL Europe Council members, who will be elected for the reserved and non-reserved seats will be asked to fulfill the position of Country Coordinator for their specific jurisdiction.

If you are a member of INSOL Europe in a country without a Country Coordinator (for a list of Country Coordinators take a look at the website at www.insol-europe.org/country-coordinators) and you have ideas of how to increase INSOL Europe membership and also how to organise effective local networking opportunities, feel free to contact the members of the MDC in your country.

You can also contact Alice Van Der Schee, joint chair of the MDC by email at alicevanderschee@vbk.nl

The conjunction of applicable Law and cross-border insolvency debated

Over two days (18-19 September) in Zagreb, the capital of the EU's latest Member State, 75 delegates attending in person and online were welcomed to a high-level discussion of issues and themes in relation to applicable law in the context of cross-border insolvency proceedings.

Stemming from a collaboration between the European Commission DG Justice and Consumers, the Croatian Presidency of the EU, the Ministry of Justice and Administration of Croatia, the University of Zagreb and INSOL Europe, the purpose of the conference was to elicit contributions and a sense of any consensus on the desirability of embarking on a project in this area prior to an UNCITRAL colloquium on the same theme scheduled for Vienna this December.

Across the conference's seven sessions, experts from around the world gave their views on particular


The Zagreb conference team

issues connected to this offshoot of the private international law sphere. From rules on rights *in rem*, set-off, contracts of employment and current contracts, to jurisdiction and determination of the appropriate law for avoidance actions, the issues canvassed began with substantive rules. Moving on to procedure and policy, the debate covered how choice of law determines the extent of protection for local interests and the scope of interaction between proceedings and arbitral instances, pending lawsuits and enforcement processes elsewhere. Recognition of foreign insolvency-related judgments and insolvency representatives were also featured, as did the procedural content of the *lex fori* in the field of the claims process. Mention of Brexit and its inevitable impact on cross-border cases was also made in passing.

The conference was rounded off with a panel canvassing the views of international organisations involved in the reform arena and those representing insolvency practice. Speakers from the The World Bank, UNCITRAL and The Hague Conference gave updates on work in the general insolvency law arena as well as specific experience in applicable law issues. With views from practice provided by INSOL International and INSOL Europe, the overall sense was that developments in this area would be welcomed if grounded on strong policy reasons and firm consensus for a future rule-building exercise.

Paul Omar, INSOL Europe Technical Research Coordinator

New survey on formal business reorganisation procedures launched

The European Bank for Reconstruction and Development (EBRD) has launched an insolvency assessment on formal business reorganisation procedures.

The survey is being carried out in partnership with INSOL Europe and other international organisations working in the field of insolvency law reform, such as UNCITRAL, the International Law Development Organisation, INSOL International and the European Commission.

A formal event, at which **Piya Mukherjee, INSOL Europe's President**, spoke, was held on September to launch the survey. The purpose of the survey, writes Catherine Bridge Zoller, Senior Counsel at the EBRD, is to help highlight areas where a country's legal or institutional framework needs improvement.

In the current economic environment, the EBRD assessment is of utmost importance, as businesses across Europe and near countries have been affected by the coronavirus pandemic. There is general agreement that the crisis is particularly hard on small and medium sized enterprises (SMEs), because of their small operating margins and lack of reserves to withstand the downturn in business activity without government support.

The crisis affects all economies, whether emerging, developing or developed, but is especially challenging for emerging economies with limited resources and without a developed legal infrastructure that supports business. For more information on the survey and the help from INSOL Europe members required to complete it, see www.insol-europe.org/eu-study-group-news

Reinhard Dammann goes it alone

Hall of fame insolvency and restructuring lawyer Reinhard Dammann builds his own structure after 12 years at the head of Clifford Chance's Paris restructuring practice and 19 years at White and Case's.

Reinhard Dammann, having reached 61, left Clifford Chance's Paris office this year to set up his own legal boutique.

As an expert in the French and European insolvency market, he benefits from the reputation he built by taking on most of the high-profile restructuring cases of the last twenty years, among which Eurotunnel, Nortel, Thompson Technicolor and Saur.

In addition to being the facilitator at INSOL Europe's Annual Conference this October, Reinhard has also helped setting the scene advising the European commission for the last 10 years on the 2015/848 insolvency regulation (recast) and the new 2019/1023 European restructuring directive.

Also, Reinhard continuously collaborates with the World Bank in reforming and rethinking national insolvency laws (Egypt, Ethiopia, Lebanon). He has recently been appointed as a member of the advisory panel for the Singaporean International Commercial Court and restructuring rules committee on cross-border insolvency cases.

His firm will focus on providing tailor-made and strategic advice on complex restructuring and insolvency cases. Benefiting from the substantial experience he gained throughout his professional career,

he is sure to meet great success in the coming years and to continue to shape the restructuring and insolvency market. On top of that, he broadens his scope of services by proposing to act as trustee under the French trust law that he knows in-and-out for having participated in its drafting.

A closer look at...

Record low number of insolvencies: Calm before the storm?

EMMANUELLE INACIO
INSOL Europe Conference Technical and Training Course Director

> *European Governments are still providing financial support to businesses and national provisions amending or impacting insolvency law have mostly been extended*

In order to prevent viable businesses affected by the COVID-19 pandemic to go insolvent, most European countries have provided them with temporary support measures such as tax deferrals, social security charges and loan repayments, guaranteed loans, etc.

Most European countries also adopted new provisions amending or impacting their respective insolvency frameworks. These temporary national reforms are aimed to increase the success of the temporary support initiatives and affect mostly insolvency proceedings and the rights of creditors.

In this regard, INSOL Europe is collaborating with LexisNexis on a COVID-19 tracker of insolvency reforms globally[1], which is regularly updated and already covers 36 jurisdictions in Europe and beyond. Moreover, INSOL Europe, in partnership with LexisNexis, organised weekly 20-minute webinars titled "**COVID Coffee Breaks**"[2] available for members and non-members of INSOL Europe. In these webinars, INSOL Europe Country Coordinators, contributors to the INSOL Europe/LexisNexis tracker of insolvency reforms globally and INSOL Europe Working Groups are invited to share their personal experiences and views on the current COVID-19 crisis and highlight the reforms and challenges of the national insolvency law framework addressing the current crisis in their own jurisdictions.

We learned from the INSOL Europe/LexisNexis COVID Coffee Breaks that many European countries have been particularly reactive, introducing temporary changes, such as Germany, France, the UK and others. These temporary national reforms 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. However, none of these temporary changes in insolvency frameworks have the same end date.

Calm

At the time of writing, European Governments are still providing financial support to businesses and the national provisions amending or impacting insolvency law have mostly been extended, which explains the record low number of formal insolvency proceedings across Europe.

Indeed, from January to August 2020, France has seen its insolvencies falling by an estimated -36% compared to 2019 and The Netherlands by -7%. From January to June 2020, the UK has seen its insolvencies falling by an estimated -20% compared to 2019 and Germany by -6%[3].

Storm

However, most temporary government financial support measures and national insolvency measures will cease to apply by the end of 2020. As in past financial crises, massive numbers of insolvencies are expected.

According to the Euler Hermes Report of 24 September 2020[4], the gradual phasing out of temporary policy measures designed to support companies will lead to a major trend reversal in business insolvencies, with a +31% increase expected by the end of 2021 compared to 2019. This trend reversal will begin in the last quarter of 2020 in most countries and accelerate in the first half of 2021 amid the gradual withdrawal of various support measures and the zombification of many companies.

Unlike in the 2007-2009 financial crisis, however, this time all regions and economies are likely to post double-digit increases in insolvencies by 2021. This would lead insolvencies to increase by +10% in 2020 and by +19% in 2021 compared to 2019. The largest increase will be recorded in North America (+64% by the end of 2021), while the bulk of the rise in 2020 was +39%. In Western Europe, the rise in insolvencies by 2021 will exceed +32% and Central and Eastern Europe will be of over +34%.

On the one hand, the Nordic countries, Italy, Spain and Portugal will see a stronger rise in insolvencies in 2020. Indeed, they have been less impacted by lockdowns of insolvency courts, they have not implemented major temporary changes in insolvency frameworks (e.g. Sweden, Ireland) and the rise of the number of insolvencies will start from a low/stable level of

insolvencies in 2019 (e.g. Italy, Portugal). *De facto*, Italy, Spain and Portugal have all enacted temporary changes in insolvency laws, but not all companies are expected to use this opportunity and a rebound, right after the end of these adjustments, is expected. Italy would post a +18% rebound in 2020, from a -2% decline in 2019, and Spain a +20% surge after +6% in 2019. Both countries will see a continued rise in the number of insolvencies in 2021 (+8% and +17%, respectively), pushing their annual number of insolvencies up to 2014-2015 levels (to 14,000 and 5,850 cases, respectively).

On the other hand, the remaining countries, or one out of three, should record a delayed acceleration in business insolvencies, with a stronger rise seen in 2021 than in 2020. This is due to the major effects of lockdowns on insolvency courts activity (with the suspension of judicial functioning) and some changes in insolvency laws playing up to the end of 2020 or even until further notice.

Insolvencies are expected to gain traction with the end of the suspension rule in the last quarter of 2020 and the first half of 2021 and the lack of recovery momentum.

In the UK, where companies already took a hit on their activity and margins prior to the crisis due to Brexit, and where the length and strictness of the lockdown have been stronger, insolvencies would rebound again by +43% by 2021 to 31,500 annual cases –less than the 2009 level. In France, massive insolvencies are expected in the last quarter of 2020 and first half of 2021, also due to the gradual easing of supportive measures: the final outcome would be a +25% increase by 2021 to a record high level (64,300 cases in 2021). Extrapolating the commercial debt at risk from additional insolvencies, the economic cost of additional bankruptcies in 2020 could be as much as EUR4.2bn, and EUR5.7bn in 2021. In total, over 2020-21, COVID-19 would have brought EUR10bn liabilities to the economy or 0.4 GDP points. Germany will show more resilience, notably thanks to stronger initial conditions, a shorter and less strict lockdown, and the earlier opening of the economy, on top of a larger fiscal stimulus. However, we expect insolvencies to rebound from their historical low level reached at the end of 2019, by +12% near the end of 2021[5].

Besides, the probability of a no-deal Brexit at year-end has considerably increased (45%) and this could cause a serious economic disruption…

To be continued… ■

> Most temporary government financial support measures and national insolvency measures will cease to apply by the end of 2020

Footnotes:

1 The LexisNexis PSL/INSOL Europe Tracker of Insolvency Reforms is available at: www.insol-europe.org/technical-content/covid193

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

3 www.eulerhermes.com/en_global/news-insights/economic-insights/Living-on-with-a-Covid-19-hum.html

4 www.eulerhermes.com/en_global/news-insights/economic-insights/Living-on-with-a-Covid-19-hum.html

5 www.eulerhermes.com/content/dam/onemarketing/ehndbx/eulerhermes_com/en_gl/erd/publications/pdf/Final-2020_07_16_InsolvencyTimeBomb.pdf

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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Laurent Le Pajolec *lpa@exco.pl*

Wirecard – Serial fraud or an exceptionally pathological case?

The Insolvency Tech & Digital Assets Wing in association with the INSOL Europe Anti-Fraud Forum write on this very recent and very important case of the collapse of Wirecard.

The first collapse in June 2020 of a Dax30 company, Wirecard, which was also the first fintech listed in the Dax 30-index, has made a lot of noise inside and outside the financial sector. Will this particular case affect the credibility of the whole fintech sector, which included 29 unicorns worldwide, with a cumulative valuation estimated at $84.4 billion in 2018?

Wirecard is a German payment processor and financial services provider which started out as an internet payment provider in the early 2000's and experienced a steep and rapid growth. It was listed on the German stock exchange and, in 2018, included in the Dax30-index. Wirecard was one of the few German fintech stars. In 2018, Wirecard shares reached their peak with a company value of €24 billion.

Its international operations reached to East Asia and had global coverage. In its most recent form, its range of products and services included general banking services, credit cards, prepayment cards, mobile payment applications, virtual payment card, etc. and facilitated the trade in cryptocurrency (e.g. Bitcoin).

In April 2020, questionable accounting practices were revealed through the publication of an audit report prepared by KPMG following Wirecard's appointment of KPMG to investigate irregularities. In this report, KPMG questioned the willingness of Wirecard's staff to cooperate. As a result of the investigation process, the publication of the annual accounts was postponed several times.

In a press release dated 22 June 2020, Wirecard revealed that €1.9 billion was "missing". Two banks in the Philippines who were allegedly holding the money claimed that they did not have these funds and that they never did. The share value decreased and the CEO and majority shareholder, Markus Braun, resigned.

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Criminal investigations were initiated and on 22 June 2020 Markus Braun was arrested. Soon thereafter, an additional two board members and other executives were also arrested. Wirecard's COO, Jan Marsalek, also in charge of Asian operations, was subject to an arrest warrant and was last reported to have fled to Belarus or Moscow.

On 25 June 2020, the German holding Wirecard AG filed for insolvency in Germany. In the meantime, Wirecard's UK activities were temporarily frozen by local authorities.

Extent of alleged fraud

At present, it may still be too early to determine the nature and extent of the offences or frauds that seem to have been committed. We may however anticipate that at least the following points will be closely investigated in Germany and abroad.

Wirecard's former management

The first questions will of course be regarding the potential actions and/or omissions of Wirecard's former management. Who set up the fraud scheme? When, how and why was it developed? Who knew that the €1.9 billion was fake? Apart from administrator liability in general, it seems that charges regarding falsification, market manipulation, money laundering, theft, among others, could be reviewed.

EY's role

EY was Wirecard's auditor for over 10 years. Although the first major rumors concerning Wirecard's financial standing started in 2015 with the publication of a series of Financial Times articles raising questions about potential accounting irregularities, as early as 2008 a German shareholder association made an accusation against Wirecard which resulted in the appointment of EY as the group's auditor. It seems that the "missing" Asian funds had been in the books for years. Certain shareholders will question why it took EY so long to discover irregularities. The Financial Times alleged that EY had not requested account information from any bank in Singapore for more than three years while at the same time Wirecard claimed to hold €1 billion in cash for third party acquisitions. EY will certainly provide its own version of the events.

National and European authorities

The German financial regulator BaFin is accused of failing to correctly follow up on Wirecard and even prohibiting short-selling on its shares. The ESMA, upon the EU Commission's request, opened an investigation to find out if BaFin broke EU rules on financial reporting especially the Transparency Directive and the Guidelines of the Enforcement of Financial Information.

Third parties

In order to set up a fraud scheme of this magnitude, the support and collaboration of "third parties" is necessary. Fake bank documents seem to have been created and people both in the EU and in the Philippines are accused of having played an essential role in supporting and furthering the fraud scheme. However, the Central Bank of the Philippines already stated that Wirecard's missing cash balances did not appear to have been recorded in the Philippine financial system.

The Wirecard case also raises various questions related to the valuation of listed companies, especially in the field of fintech.

Valuing a fintech

In essence, the valuation of fintech companies is inherently difficult. Fintech companies have very few physical assets. Given the dematerialised nature of the technological and financial activities, the organisation itself is frequently complex, legally and otherwise, usually with international aspects. Growth is frequently achieved by acquiring other companies rather than from existing activities. This volatility is reinforced when the company is listed.

Correctly valuing the activities of fintech companies is challenging, despite these companies being under (i) the strong supervision of regulators as listed companies involved in regulated financial sectors and (ii) the control of statutory auditors.

Wirecard seems to perfectly encapsulate these difficulties which *prima facie* may be seen as high risk for investors if not for the economy:

Quick listing

After its founding in 1999, Wirecard was quickly listed on the Frankfurt Stock Exchange in 2006 by taking over the listing of a defunct call centre group. Retrospectively, this may be seen as a way to circumvent the scrutiny on valuation at the stage of the initial public offering.

Initial share value

Wirecard's share value then experienced remarkable growth, coinciding with the decline of traditional banks, Deutsche Bank in particular. Business and technological achievements as reported by Wirecard contributed to this increase in share value. The share was valued at €6 in 2006 and reached approximately €40 in 2016. Initially focused on guaranteeing payments for pornographic and gambling sites, the company was among the few which resisted the Internet bubble burst of the early 2000's.

Wirecard then shifted gears to focus on the development of solutions for processing bank and credit card transactions, and was a pioneer in mobile payment in the early 2010's, culminating in a partnership with Orange in 2015.

Rise in share value

As from 2016, the rise in share value was exponential, going from around €40 in 2016 to over €190 in 2018. At this point in time, the Dax30 was the first major European stock exchange to integrate a fintech.

Group performance

Based on the reported accounts, the performance achieved by the group partly explains this increase. The growth in turnover since 2010 was multiplied by 7.35. The company's net profit was €8 million in 2006, €45 million in 2009, €267 million in 2016, €347 million in 2018.

Other factors contributed to this rise of share value as well. Wirecard made a number of acquisitions, with a significant increase in foreign acquisitions starting precisely in 2015 with the largest buyout of Indian payment companies in a 340 million euro deal. This growth led to a more complex organisation with the creation of several companies, only some of which were regulated. Furthermore, the increased diversity of business sectors where the group was active led to a more complex comparison in terms of value with other fintech companies.

Irrationality

The success story reported by the group led to irrationality on the part of some investors who chose to forego basic analysis.

One of the main paradoxes is that the rise in share value was never stronger than when the group was publicly challenged by both the press and the short-sellers. In 2015, the Financial Times began to raise questions about inconsistencies. In 2016, anonymous short-sellers published allegations related to money laundering, which Wirecard denied. Many short-sellers

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> *The lessons taken from this case will not necessarily have to be applied to the whole fintech sector*

considered that there were possible accounting irregularities within the group. The BaFin investigated Zatarra, the publisher, for market manipulation. Short-sellers' campaigns can indeed worsen a company's difficulties. But in 2017, a clean audit from EY renewed investor enthusiasm for Wirecard shares, which more than doubled in price.

The apparent support of BaFin and the auditors seems to have played a fundamental role in this "misunderstanding" from investors.

Transparency

Allegations of breaches of transparency rules and accounting irregularities increased considerably between 2019 and 2020. However, in May, the company announced that its first quarter results increased EBITDA by 26% to restore investor confidence following the opening of regulatory investigations.

Wirecard AG filed for bankruptcy after the share price dropped more than 98% within 15 days in June 2020. Betting on the downfall of the company, short-sellers received a total of at least €2.4 billion.

Lessons learned

Lessons will certainly be learned from the Wirecard case which is still in the early stages in terms of understanding exactly what happened. It is possible that Wirecard's bewildering collapse will come to be seen as the result of fraud and failures combined in an exceptional manner. The lessons taken from this case will not necessarily have to be applied to the whole fintech sector. For various reasons which include the following:

1) Fraud and related overestimation of value are not exclusive to the fintech sector. Other similar cases were found in the non-financial technological field (e.g. Enron in the US), or in the more traditional sectors (e.g. Carillon in the UK, William Saurin in France, Parmalat in Italy).
2) Even in the case of Wirecard, certain investors had better understood the situation at the early stage, and not only the short-sellers. In particular, investors more sensitive to non-financial factors had limited their risk-taking with the company, such as Sycomore, a French investment company specialising in responsible investment, which had downgraded the company's value in 2016, particularly in terms of governance criteria and accounting risks.
3) Investors seem to continue to weigh market potential and growth for the fintech sector, beyond the COVID-19 context, which has reinforced the potential growth of tech companies in general. In the US, at the end of 2019, fintech companies remained priced at a premium to the broader markets with the S&P 500 priced at ~18.3x estimated forward earnings.

The development of fintech, and more generally, of digital activities, is relatively recent. It is obvious that these activities are different from classical activities, which makes certain traditional regulations, accounting and valuation supervision methods ineffective as applied to fintech companies. Therefore, the market, the authorities and the applicable rules will need to adapt. However. the balance between regulation of, on the one hand, financial and non-financial as well as listed and non-listed companies and, on the other hand, shareholder activism, which is also an equilibrium between regulation, competitiveness and efficiency of financial markets, remains extremely complex to find.

Online conference

On Thursday 29 October, during INSOL Europe's online conference, the Insolvency Tech and Digital Assets Wing will have the pleasure to develop the lessons learned from the failures of the fintech company Wirecard Case thanks to the expertise of the panelists (lawyers, M&A Advisor, IPS, Capital market specialists). We look forward to your questions and participation to this webinar. ■

Divergences and convergences of 'COVID-19' recovery plans in the United States, China and the EU

Ludovic Van Egroo compares the recovery plans in these three major economic areas

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The COVID-19 pandemic emerged in the context of an exacerbated economic war between China and the United States. The customs duties rises during the year 2019 illustrate this situation.

"*Global economy in 2020 is at -3.3% in comparison to the biggest recession since World War II. This corresponds to losses in global gross domestic product (GGDP) of USD 9 trillion*"[1].

At first glance, it appears that the pandemic has:

- spread because of the rivalry between the powers for world governance, due to the paralysis of international organisations (UNO, WHO, WTO, MFI ...), illustrated by the withdrawal of the USA from the WHO and the brakes of China;
- become a geopolitical accelerator, justifying the questioning of economic and financial relations between states, already initiated through "trade wars" (the pandemic was the perfect pretext to cut off economic relations, for example, between the United States and the EU and China); and
- revealed to leaders and citizens the interdependencies between nations, both in terms of vital assets for the states and in everyday consumer goods.

The pandemic: A crisis exogenous to the economy, revealing global interdependencies

Whole sections of the global economy depending on these economic and financial interdependencies are directly threatened: tourism, hotels, aviation and aeronautics, and leisure, to name only the main ones.

Euler Hermés reports[2] that global trade is threatened with losses of $3.5 trillion. This means a 15% drop in the volume of goods and services traded and an even more severe drop in the value of goods: -20%.

Measures taken in each geographical areas (United States, European Union, China)

In this global crisis context, governments reacted differently in terms of healthcare, without real coordination, but activated similar levers in terms of support for their economic and social life.

The support measures are summed up hereafter:

- For the **banking sector**: liquidity (in the three areas).
- For **sectors economically threatened** with nationalisations (mainly in the European Union - for instance 'Alitalia' in Italy, but also in the United States): preventing their insolvency. For illustration, the FED reserves the right to enter the capital of Middle Cap companies in order to prevent their insolvency. However, paradoxically, 'Hertz', which filed for section 40 chapter 11 bankruptcy, saw its shares price increase.
- For the **domestic demand** (in the three areas, but in different ways – see table).
- For **key activities**: relocation of those likely to be excessively dependent (mainly in the European Union).

In China, the support measures worked via financial actors. The financial aid ("*Total social financing*", TSF) registered in June its highest level since March 2018 (+12.8 % vs +12.5 % in May) under the effect of the dynamics of corporate bond issues (+21.5 % in June vs +20.4 % in May). The rising rate of new bank loans remained high, at +13.3% in June[3].

Within the European Union, the measures differ depending on the social-economic shock-absorbers in each country. Thus, the Western European Union countries used partial unemployment schemes, which is not the case in the Eastern countries, where they do not exist. We can fear social and political crises in such countries, because of radical leaders.

Underlying economic consequences

A domino effect on the economic relations:

- A drop in the bankruptcy rate due to artificially maintained companies (the so-called "zombie companies"[4]).
- State supervision of economics sections (direct and/or indirect nationalisations).
- Political structures jeopardised all around the world (rise of populism and geopolitical tensions to grab resources).

Short-term consequences on the structure of the world economy:

- Economical withdrawal.
- The rise of protectionism, with measures to relocate activities. The Heuler Hermés report warns about

> "Governments reacted differently in terms of healthcare, without real coordination, but activated similar levers in terms of support for their economic and social life"

> **Globalisation as we have known it is ending… a new kind of globalisation should emerge**

the negative effects of protectionism, which could threaten economic recovery by slowing trade recovery.

- Business bankruptcy booming and social and societal distress (end of "zombie companies").
- Decline in economic exchanges and interdependencies.

Consequences on the structuring of the world economy by 2022-2030

1) The end of the post-Cold War economic and financial globalisation and of the influence of international organisation governance (ONU, WHO…), lead to the end of the Pax Americana model.
2) The rise of a new digitised, "Covid-19" or "pandemic-compliant" globalisation, based on data collection treatment and valuation.
3) New society models: after "security against freedoms", now "personal data against healthcare". Hence, the issues of data use and protection, such as presented the GDPR[5], to review.

Consequences for the insolvency professionals

Insolvency professionals will see their activities grow due to a sharp rise in the number of business failures. In addition, in order to deal with the insolvent companies in this exceptional context, insolvency professionals may need to:

- develop new approaches for debt treatment, in particular governmental and administration debts, and the fate of associated privileges. The harmonisation of the ranking of claims and retention of title and security clauses within the European Union could provide an operational solution in this scenario[6];
- revalue assets on the balance sheet, taking into consideration the capacities of companies to deploy business continuity plans (also called BCP or PCA[7]). Insolvency professionals can rely on digital assets. Indeed, the Covid-19 crisis has undermined the physical assets of companies, particularly their real estate assets, and highlighted the role played by information systems: the digital assets' main value is intangible compared to the valuation of the tangible assets within the balance sheet; and
- to put into perspective, within the economic and social relationship, the situation of the bankrupt company in the value chain and the interdependencies, in particular in cross-border situations. Should the European regulation be readjusted concerning the profession in order to acquire this expertise?[8] For the record, in July 2021 each Member State of the European Union must dispose of professionals trained to face the announced challenges in order to prevent company difficulties.

Conclusion

The end of interdependence is a phenomenon that humanity has already known. The *Pax Romana* was based on a model of society implying just "bread, games and a *jus comun*" (common law). Economic and financial interdependence had been threatened then by plague and cholera epidemics, sestertius depreciation, barbarian invasions and political rivalries. Would the *Pax Americana* experience the same implosion phenomenon? At a time when global governance is struggling, we are faced with an announced death of international organisations, in the same way as it happened to the *League of Nations*.

Globalisation as we have known it is ending. A new kind of globalisation should emerge, based on digital assets, on tools proposing a working solution to the need of social distancing, as a result of the reduction of material and human interdependencies. At stake are the business valuation and the social contract, with the risk of giving up personal data in order to favour healthcare. ■

Footnotes:

1 Coronavirus pandemic leads to a worldwide wave of insolvencies of +20%; News release Allianz Heuler- Hermès
2 COVID-19: QUARANTINED ECONOMICS; Global Economic Outlook of April 2020 rapport Euler Hermés
3 Suivi hebdomadaire Covid-19 : situation au 14 juillet 2020 ; Service économique régional de Pékin Antennes de Shanghai, Wuhan
4 COVID-19: QUARANTINED ECONOMICS; Global Economic Outlook of April 2020 rapport Euler Hermés
5 GDPR Principals; European Commission, https://ec.europa.eu/info/law/law-topic/data-protection/reform/rules-business-and-organisations/principles-gdpr_fr
6 Final Report of the High Level Forum on the Capital Markets Union, European Union, June 2020 https://ec.europa.eu/info/sites/info/files/business_economy_euro/growth_and_investment/documents/200610-cmu-high-level-forum-final-report_en.pdf
7 In French PCA : Plan de Continuité d'Activité
8 Final Report of the High Level Forum on the Capital Markets Union, European Union, June 2020 https://ec.europa.eu/info/sites/info/files/business_economy_euro/growth_and_investment/documents/200610-cmu-high-level-forum-final-report_en.pdf
9 NDL: United Kingdom information has not been taken into account, since the United Kingdom is not a party to the decisions of the European Union in the perspective of Brexit.
10 COVID-19: QUARANTINED ECONOMICS, Economic, Capital Markets and Industry Research, as of April 2020, Heuler Hermés, Allianz.

United Kingdom information has not been taken into account, since the United Kingdom is not a party to the decisions of the European Union in the perspective of Brexit

Main implementation mechanisms comparison (Semester n°2 2020, USA, European Union, China)[10]

	USA	European Union	China
Central Bank and financial markets	150bp rate cut	Bold & generous TLTRO terms with average rate below MRO plus an interim TLTRO round for immediate liquidity	10bp cut to the policy rate (Loan Prime Rate)
	Restart of QE to the tune of USD700bn	EUR120bn QE envelope till end 2020 on top of monthly EUR20bn QE pace	Liquidity injection through open market operations: RMB1.7tn in early February.
	USD1.5tn of supplementary liquidity injections in the repo market to backstop liquidity in the Treasury market	Temporary capital & operational relief to banks	Liquidity injection through medium term lending: RMB300bn in total over February and March.
	Three months' credit in US dollars on a regular basis and at a rate cheaper than usual arranged among the G6 central banks	PEPP EUR750bn with no issuer limit or capital key restrictions	Liquidity injection through reserve requirement ratio cut: RMB550bn, with cut between 50 - 200bp depending on banks.
	Instalment of commercial paper funding facility (CPFF)	Deferral of charges for companies	Credit support: RMB350bn provided by policy banks, RMB300bn earmarked loans from PBOC to banks.
	Further increase in QE purchase		PBoC said it would increase the tolerance threshold for the level of bad debts
	Liquidity swaps with major central banks		
	Money Market Mutual Fund Liquidity Facility		The Politburo of the PCC may increase in the budget deficit, the issuance of special bonds from the central government ("Central Government Bonds"), an increase in the quota of bond issues that local governments can issue ("special purpose bonds"), a drop in the PBoC (Loan Prime Rate) benchmark lending rate and stimulation of consumption
	USD 1.5 trillion of liquidity injections, easing of prudential conditions		
Private economic actors	Commercial Paper Funding Facility (CPFF), potential activation of the GBCF (Government Backed Credit Facility)	France: €1 billion in financing for industrial relocation projects and no delocalization	Landlords will be encouraged to lower rents for individual businesses. Exemptions for micro, small and medium enterprises from paying their contributions to the three types of social insurance
	Financial FED support to SMES in order to avoid insolvency	Nationalization, e.g. Alitalia	
	Looser banking regulation	Looser EU state aid, fiscal rules & banking regulation Relief of insolvency constraints, particularly in terms of declaring insolvency	Postponement of contributions to the housing (provident fund)
		France 100 billion dedicated to economic recovery: • 30 billion for energetic transition • 35 milliards for competitivity (tax cut, digital transition, equity support, infrastructures investment, industrial development) • 35 billion for social and territorial cohesion (employment, territories development, research, healthcare)	Financial institutions are encouraged to defer principal repayment of loans from micro, small and medium enterprises.
			Extension after the end of May, and until December 31, of the VAT exemption scheme for small taxpayers
			Businesses benefit from a 5% reduction in the price of electricity
			Extension until 2023 of the tax advantages enjoyed by credit institutions lending to very small businesses, self-employed persons and private farms
Consumer support	Sending checks to households	Partial unemployment schemes depending on the Member States	Provinces started to distribute "consumer coupons"
	Guarantee sick leave payment		State Council extended car purchase tax exemption for consumers until end of 2020
	Allow tax exemptions for 2020		
	Increase investments in infrastructures		
	Increase health expenditure		
	Authorise loan forbearance		Reduce health insurance contributions during 5 months
	Provide food aid		

Glossary: Bp: basis point; TLTRO: Targeted longer-term refinancing operations; MRO: Main Refinancing Operations; QE: Quantitative easing; Bn: billion $; RMB (renminbi also called Yuan (CNY)); tn: Trillion $; repo: Sale and Repurchase Agreement; PEPP: Pandemic Emergency Purchase Programme; PBOC/PboC: People's Bank of China; PCC: communist chinese party; FED: Federal Reserve Board.

COVID-19 and the retail sector: The perspective of Estonia, Latvia and Lithuania

A comparative look at changes to the law and state aid in the Baltics since the COVID-19 pandemic

> With the start of the pandemic, the retail sector in the Baltics was hit hard, as were many other sectors

Upon the arrival of the COVID-19 pandemic, in the Baltic states specific amendments were adopted to existing insolvency rules and specific packages of state aid measures were introduced.

Legal framework: overview

In **Estonia**, the main amendment to the Bankruptcy Act was a stay on the obligation of directors to file for bankruptcy for the duration of the pandemic as well as a stay on the running of recovery terms during the pandemic. These amendments were in force until mid-July.

In **Lithuania**, the Law on the Impact of Consequences Caused by a New Coronavirus (COVID-19) on the Application of the Law of the Republic of Lithuania on the Insolvency of Legal Entities (the "Law") was adopted. Similar to Estonia, the Law suspended the obligation of directors to apply to a court for the opening of insolvency proceedings during the quarantine period and also for three months after the end of the quarantine. The Law also restricted creditors' right to initiate insolvency proceedings against a debtor until the end of the quarantine (provided the debtor's financial difficulties were due to the pandemic).

A broader moratorium was adopted in **Latvia**, where creditors were prohibited from applying for insolvency proceedings against a debtor until 1 September 2020 irrespective of whether the financial difficulties arose due to the outbreak of the COVID-19 virus. However, it is interesting to note that in Latvia, companies' directors' duty to file for bankruptcy was not postponed. Latvian law also provided for extended terms in restructuring proceedings. In cases where the spread of COVID-19 prevented the implementation of a restructuring plan, the deadline for implementing legal protection proceedings could be further extended by another year.

Lithuania's legal environment did not go that far, establishing a rule that non-fulfilment of the plan did not automatically constitute a reason for termination of the restructuring process. However, this had little benefit, as Lithuanian companies are now forced to apply for adjustments to restructuring plans because implementation of the plans was not frozen during the quarantine. This means that even though restructuring was not terminated due to non-compliance with the plan, companies still had to comply with the plan which had been calculated as feasible before the pandemic.

In **Latvia**, on the contrary, the time allowed for implementation of legal protection proceedings was subject to extension by one year if consequences of the crisis caused by COVID-19 were what prevented the debtor from implementing such proceedings. Latvian law also established additional support regarding the term of restructuring proceedings: for legal protection proceedings (restructuring) declared up until 31 December 2020, the maximum length of the plan was set at four years (previously it was two years).

Impact of the COVID-19 crisis on retail trade

With the start of the pandemic, the retail sector in the Baltics was hit hard, as were many other sectors. The main reason was uncertainty on the part of consumers and the visitation restrictions imposed on large malls. Retail companies faced a series of difficulties: from reduced demand and financial difficulties to health safety at work and long-term supply challenges, to the challenge of moving trade to the Internet. Lithuanian statistics show that insufficient demand was crucial among the factors which restricted activities in the retail sector during the quarantine period.

Latvia's retail sector faced the steepest decline of any industry in the country. Due to the COVID-19 crisis, the decline in retail sales in Latvia in April this year was the biggest in the last ten years, with turnover at constant prices down by 9% year-on-year. Sales decreased in both food and non-food trade.

Lithuania saw similar numbers. In April retail sales fell by an annual 15%, though already in May and June year-on-year growth of 3.6% and 5.9% was recorded. It is evident that April was the most difficult month of lockdown for the retail sector, as after that restrictions were gradually lifted.

While Latvian retail sales in grocery stores rose sharply in March this year (up 7.1% from a year before) as people built up food reserves amid concerns that all grocery stores might close soon, those fears soon subsided and in April grocery stores' sales decreased by 3.5% year-on-year. But after declines in April and May, relatively strong growth was registered again in June. According to the Central Statistical Bureau of Latvia, trade volumes at constant prices increased by an annual 4.6% in June.

Statistics Estonia also suggests the situation does not look so bad, reporting that overall sales in the retail sector in that country in June were 671 million euros, which is 7% more than in June 2019. The office also notes that although the industrial commodities sector was down in April and May this year, it recovered in June, even seeing a 12% increase in sales versus the same month last year.

Increased online shopping was a key factor helping some parts of the retail sector recover after April's drop. In Estonia, for example, some companies selling essential commodities saw their online sales triple during the COVID-19 crisis. In Lithuania, Internet retail sales increased by 58% in the period.

Decreasing number of insolvency proceedings in Latvia and Lithuania

The statistics show a general decrease in bankruptcy cases. In **Latvia**, where in April-July 2019 there were 197 bankruptcy cases, in the same period of 2020 there were only 81, for a 59% decrease. Among the 81 cases, 13 companies were retail sector companies, though their total combined turnover was less than 3 million euros. So, from the perspective of insolvency, the Latvian retail sector was not significantly affected by the COVID-19 crisis.

Lithuanian statistics show that in the first quarter of 2020, the total number of bankruptcies fell by 25.6% compared to the same period of 2019. Such a decreasing trend, however, has been observed in Lithuania for several years. During the quarantine period, from 1 March to 1 July 2020, 205 companies in Lithuania went bankrupt, i.e. only about half the number in the same period of 2019. In the first quarter of 2020, most bankruptcy proceedings opened were for wholesale and retail businesses (23.7%). Also, the new Lithuanian Insolvency Law that took effect as of 1 January 2020 fundamentally changed the regulation of insolvency. Hence the decline in the number of bankruptcies in Lithuania could also be a result of the change in the legal environment. However, economists emphasise that while companies operating in the retail sector, i.e. 81%, are considered to be of average or low bankruptcy risk, up to 51% of them, or one of every two companies, are seen to be at risk of being particularly strongly impacted by the quarantine. This signals a possible increase in the number of bankruptcies in the retail sector.

Increasing number of bankruptcy cases expected

The state aid measures mentioned above were adopted with the aim of coping with disruptions to the economic activity of companies due to the COVID-19 crisis. It is too early to say, however, whether the state aid with respect to insolvency laws was indeed effective for managing the crisis.

As the retail sector involves a wide range of company activities, it is difficult at this stage to pinpoint the full impact of the COVID-19 crisis on the sector as a whole. Still, it can be said that there are signs the retail sector is coping with the crisis and making a good recovery. Much of course depends on the further development of the COVID-19 pandemic and the threat of a possible "second wave" this autumn. Since the amendments to the insolvency laws postponed filing for bankruptcy, it is widely noted that the effect of the amendments was temporary and the Baltics could see a wave of bankruptcy and reorganisation applications this autumn. This would surely affect the retail market also, especially those companies which have not been able to cope with the changes in consumer behaviour and the rise of online commerce. ■

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"it is difficult at this stage to pinpoint the full impact of the COVID-19 crisis on the sector as a whole"

Innovation required: Technology challenges for insolvency practice ahead

Paul Omar looks at the EU regulatory environment in the context of recent technology challenges

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The onset of the coronavirus pandemic has put electronic communications and virtual platforms to the fore. Given quarantine restrictions on face-to-face meetings and travel, insolvency practice has moved, apparently seamlessly, to enabling working from home, remote access to information and even virtual teamwork.

Depending on the country and the preparedness and adaptability of the civil justice system, access to the courts has enabled case-management to continue, hearings to take place and judgments or orders to be obtained. Yet, technology and its potential were not always the uppermost considerations when it came to understanding how practice functioned once upon a time.

> “The onset of the coronavirus pandemic has put electronic communications and virtual platforms to the fore”

Early assessments of the practice environment

In 2014, the European Bank for Reconstruction and Development (“EBRD”) published the results of a comprehensive survey into the insolvency practice environment in its client group, of which 27 out of 35 were the subject of an assessment.[1] The two-year project resulted in individual country profiles being created and made available online and which were subsequently updated in 2016. While insolvency law reform had been and still is a feature in many of these States, the project was also apparently the first time that research had been undertaken into the structure of the insolvency profession in these jurisdictions. Since then, the results of the project have informed further technical assistance projects to some countries, such as Croatia, Cyprus and Greece.[2] In fact, in Cyprus, the EBRD is still engaged in a number of projects, recently producing a 2019 report on the enforcement of commercial creditors’ claims in that jurisdiction. It has also been participating in two other projects focusing on implementing the new insolvency framework in the country, through assistance to the newly-founded Insolvency Service, as well as supporting the new framework for insolvency practitioners through benchmarking best practice and carrying out capacity building, this latter being a joint collaboration with the Ministry of Energy, Commerce and Industry.

The most essential component of the 2014 project’s findings was the great diversity in terms of status, qualification and training of insolvency practitioners, and the framework for their registration, supervision and discipline. Nonetheless, interesting trends emerged from the analysis, notably the strong correlation between the presence of self-regulatory models or state-sponsored regulatory agencies with performance across the assessment criteria. Overall, while minimum educational standards and professional entrance exams were often prescribed, the project revealed weak performance in areas such as continuing professional development and training needs. Similarly, lacunae also existed at the level of the development of professional associations and of ethical rules. Finally, issues were identified in relation to the court supervision of insolvency office holders with a risk of over-monitoring present in some jurisdictions, while overall the structure of the appointments system in cases, as well as remuneration, were felt to be insufficiently encouraging of competition for professional services.[3] In summary, the terms of the 2014 report revealed that there was much to do relative to improving the environment and framework for practice in almost all of these States. The 2016 updates for the countries involved were able to report some positive changes happening even in the relatively short interval.

One palpable difference, apparently, between the 2014 and later projects has been the understanding of technology as a part of practice. The 2014 project largely encompassed structural issues, only mentioning in passing the experiment in some States with electronic appointment systems. Later projects have been much more conscious of the changing environment of practice, consonant with the increasing adoption of technology seen in work milieus and the evolution of these technological developments. These have gone beyond workaday communications to involving more sophisticated data processing and analysis, as well as changes affecting the very substance of processes within the practice environment. In general terms, looking towards essential capacity building, more recent projects have also sought to determine the preparedness of the insolvency practice environment for challenges, to identify the necessary steps towards familiarisation with changes in practice and to assess the scale of exposure to new technologies.

The EU regulatory environment and technology

Within the European Union, some of whose Member States were also subject to the EBRD assessment, the regulatory environment in insolvency has come to be conscious of technology, albeit in a modest way and mostly directed at information and data-sharing. The Recast European Insolvency Regulation[4] ("Recast EIR") sets out a paradigm in its recitals and articles for a technological underpinning to insolvency processes. The main objectives of the framework are to cure the problem of information asymmetry (on as costless a basis as possible), all the while balancing public access and data protection and privacy concerns. Enhancing procedural participation appears to be a conscious by-product of this initiative which incidentally serves to underpin the communication and cooperation imperatives behind this text.

The framework requires Member States to enable access by creditors and other stakeholders to information contained in one or more registers made publicly available and interconnected via the European e-Justice Portal.[5] A minimum content of information is stipulated, which must be provided on a costless basis.[6] So too, the technology support itself for interconnection is a shared charge between the European Union and the Member States.[7] The Member States are free to add to the information provided and potentially to charge for access to information beyond the stipulated minimum.[8] An exception is provided, though, for information in relation to individual debtors (those not incorporated or with entity status), which can be limited to information deriving from their business operations.[9] Where the registers do contain information about procedures involving individual debtors, extra search criteria may be required to positively identify subjects (limiting the scope for random enquiries/searches) or a legitimate interest may need to be shown to access that data.[10] Otherwise, Member States could choose not to include such information, but would still be required to create a pathway for individual notification to creditors, though the absence of notification must not impact the status of creditors participating in the proceedings.[11]

Further information that Member States would need to include on the registers specifically addresses information on time-limits for claim filings and challenge periods.[12] In fact, where individual creditors have been notified of relevant deadlines, failure to comply can have adverse consequences, in contrast to the general principle of the absence of legal effect of any information accessible via the portal.[13] Payments in ignorance of information about the existence of insolvency proceedings may nonetheless be protected.[14] Fulfilling the needs of the interconnection project, a broad outline of technical specifications was set out in the Recast EIR,[15] to which end an Implementing Regulation[16] authorised by that text was passed in 2019 following the successful conclusion of an experiment involving 7 Member States that had proceeded with interconnection of their registers.[17] Due to the pandemic, the second wave of interconnection is expected to be completed in 2021.

Adding to this, the recently adopted Preventive Restructuring Directive[18] ("Directive") provides for the possibility of online access to dedicated early warning tools that can include, on the basis of notifications or communications, alert mechanisms based on default in payments, incentives for connected parties (such as tax authorities and auditors) to flag up developments to the debtor, as well as the provision of services in connection with early warnings.[19] This reflects some of the services already being provided by national organisations in countries such as France, providing commercial analysis of the business environment and providing diagnostic and other services. Other references to technology in the Directive focus on electronic means of communication and the possibility for procedural steps to be undertaken by means of technology, including filings, notifications, document service and submissions, as well as the lodging of appeals.[20]

The way forward

While the assessments of the practice environments have begun to get to grips with the impact of technology, the regulatory frameworks have so far been more modest in limiting the recognition and assistance of technology to dedicated avenues, mostly in communications, data-sharing and the fulfilment of procedural steps. This is not to say that there are no other technology-based challenges to practice. The oblique reference to electronic appointment systems in the 2014 EBRD Assessment is now the prevailing reality of operations in a number of Member States, which is not without its own challenges, particularly in ensuring that practitioners with appropriate skills are matched to complex cases. In fact, the Directive also reflects concern about appropriate levels of training for practitioners and judges in its provisions.[21] In light of the current crisis, many training providers have very quickly explored the potential for moving operations online and using increasingly sophisticated technologies to deliver e-learning, but issues of parity of access to training across Europe are still real.

Going beyond this, in recent years, the practice environment has also a hotbed of experimentation with electronic platforms for valuations and auctions, technological means for widening procedural participation and access, as well as the use of artificial intelligence, in treating data collection and analysis. The ongoing COVID-19 crisis has only accelerated the way in which consideration of the benefits of technology is being undertaken, not just as an adjunct to practice, but as a stimulus to considering how practice itself may change to take advantage of technological change. Eventually, and perhaps because of the push towards more and more technological solutions that is evident around us today, regulatory systems will have to better accommodate the reality of developing practice in the creation of insolvency frameworks and reflect, as best they can, this ever-changing environment in which technology never stands still. ■

"The recently adopted Directive provides for the possibility of online access to dedicated early warning tools"

Footnotes:

1 EBRD, Assessment of Insolvency Office Holders: Review of the Profession in the EBRD Region (2014), a copy of which is available at: www.ebrd.com/what-we-do/sectors/legal-reform/debt-restructuring-and-bankruptcy/sector-assessments.html.

2 Ibid.

3 Ibid., Executive Summary, at 7-9.

4 Regulation (EU) 2015/848 of 20 May 2015.

5 Ibid., Recital 76; Article 25(1).

6 Ibid., Article 27(1).

7 Ibid., Article 26.

8 Ibid., Article 27(2).

9 Ibid., Recital 77; Article 24(1)-(4).

10 Ibid., Recital 79; Article 27(3)-(4).

11 Ibid., Recital 80; Article 24(4).

12 Ibid., Recital 78.

13 Ibid., Article 24(5).

14 Ibid., Recital 81.

15 Ibid., Recital 82; Article 25.

16 Commission Implementing Regulation (EU) 2019/917 of 4 June 2019.

17 See: https://e-justice.europa.eu/content_insolvency_registers-110-en.do.

18 Directive (EU) 2019/1023 of 20 June 2019.

19 Ibid., Recital 22; Article 3.

20 Ibid., Recitals 90-91; Article 28.

21 Ibid., Articles 25-26.

The rise of a new phoenix: The English light-touch administration

Eugenio Vaccari investigates if 'Light Touch Administrations' are a welcome addition to the rescue toolkit of English practitioners

EUGENIO VACCARI
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The economic impact of the COVID-19 outbreak has triggered calls for emergency fiscal and legislative measures to address liquidity and legal problems. Some of the measures directly aimed to companies in distress make it harder for creditors to wind-up companies.

However, in the wake of governmental intervention, the industry came up with ingenuous solutions to avoid the demise of distressed yet viable businesses. One of these solutions is restructuring or "light touch" administration ('LTA'). This article investigates if the rise of LTAs is a welcome addition to the rescue toolkit of English practitioners or a mischievous phoenix for the English insolvency framework. It will also speculate on the impact of the announced regulatory reforms for the future of LTAs.

LTAs are a current and quite popular feature of the English insolvency framework. They were recently reinstated in a briefing to the Government prepared by the Insolvency Lawyers Association ('ILA'). [1]This idea originated as a mechanism to combine the principles of receiverships and the powers of the administrators.

Under English insolvency law, upon the appointment of an administrators, the directors remain in office and have a duty to co-operate with the appointed insolvency practitioner ('IP'). However, usually, in a traditional administration, the management is replaced by IPs upon the opening of the procedure. While administration is widely seen as a management-displacing procedure, the law allows the administrators to leave management powers to the existing directors of the company.[2]

> *Under English insolvency law, the directors remain in office and have a duty to co-operate with the appointed insolvency practitioner*

In LTAs, the management is, therefore, not replaced by the appointed administrator. Within the process, the respective powers and duties of the administrators and directors are regulated by a 'Consent Protocol'. A recent template of a protocol was prepared for the ILA and the City of London Law Society by Mark Phillips QC, William Willson and Stephen Robins of South Square and is subject to ongoing review.[3]

LTAs have happened in the past in high profile cases, such as *Railtrack*, *Metronet* and *Turner and Newall*. More recently, the retail company *Debenhams* announced its intention of using a LTA to turn around its business.[4] There is evidence that several of UK retailers and restaurant chains such as *Oasis* & *Warehouse* intend to follow *Debenhams* down this road and are in talks to make use of LTAs during the COVID-19 pandemic.[6]

The management displacing aspect of administration arises out of a deeply rooted belief in English law that the party responsible for the company's problems ought not to be left in control. However, the debtor's crisis might be determined by external factors, such as the closure of a business due to Covid-19 emergency legislation and the ensuing downturn in the economy. In these circumstances, the argument that directors should be replaced because they are responsible for the company's demise is less powerful. Hence, the need to explore solutions that retain the expertise of the existing management and workers, while providing respite from financial problems.

LTAs seem to represent a valid mechanism to achieve this objective as they afford the company a breathing space in which the business can be stabilised and protected by individual actions from the creditors. In LTAs, the existing management team remains in place under the control and supervision of administrators. This debtor-in-possession approach emulates what happens during US Chapter 11 proceedings.

The idea behind the LTA is to protect the company when it cannot trade due to the lock-down measures or – more broadly – due to the consequences of the Covid-19 epidemic. Once these measures are lifted, the stores reopen and the economy bounces back, the staff who has been put on furlough will come back and there will be extra money injected by the current owners and lenders.

All these elements seem to suggest that LTAs represent a powerful tool to enhance the rescue options available to English companies and let breathe the otherwise under-used rescue procedure.

Davey v Money

The judiciary have also supported the use of LTAs. In Davey v Money,[7] Snowden J gave three main guidelines on how to conduct these procedures:

1. Administrators have no obligation to consult on the shareholders and existing directors to decide the best course of action in insolvency;

2. The persons who manage the company under the supervision of the administrator may be appointed or otherwise connected with the creditor who submitted the administration petition; and
3. There is no obligation to sell the debtor's assets in a competitive tendering process.

The decision in this case, however, may fail to properly put into practice the predicament that LTAs are not the modern version of old administrative receiverships.

The court held that the chosen objective should be open to challenge only if it was made in "bad faith or was clearly perverse". This threshold was not reached in the instant case despite the fact that the IP was constrained in the exercise of his functions as administrator by pre-appointment arrangements on fees with the secured creditor.

Furthermore, the court held that it is not necessary for the administrator to appoint property agents who are independent of the charge-holder. However, it is a well-established principle of common law that officers of the court like administrators should "maintain an even and impartial hand between all the individuals whose interests are involved" in the procedure. Referring the day-to-day management of the assets of a company to a non-independent party who has no duty or obligation towards the creditors as a whole is potentially a breach of the administrators' duties.

Finally, the court held that administrators will not necessarily breach their duties by selling real property following a 'soft marketing' campaign where only particular specialised and complex potential purchasers are targeted and contacted. It follows that, according to the Davey's guidelines:

a) IPs have almost unfettered discretion to decide whether administration should take place as a pre-packaged, light touch or fully-fledged procedure;
b) Courts exercise a light touch revision of the administrators' decisions, even if there is evidence of extensive negotiations between appointor and administrator before the commencement of the procedure, the persons in control of the company during administration are not independent of the charge-holder and the assets are not sold in a competitive tendering process.

The way forward

The analysis of these guidelines shows a pro-LTA attitude of the English commercial courts. If unchecked, this may favour the interests of some parties (mainly, the appointor and leading creditors) at the expense of other key, interested players. It is surprising, but, to a certain extent, encouraging that the light-touch approach has not been followed by other companies such as Antler[9] that found themselves in a position comparable to *Debenhams*. It is to be hoped that the new emphasis on LTAs will not bring about a rise of phoenix practices, as well as issues of transparency and fairness similar to those observed with reference to pre-packs before the Graham Review and the ensuing reforms.

Some of the concerns raised in this paper might have been indirectly addressed by the recently enacted *Corporate Governance and Insolvency Act 2020*,[10] which received Royal Assent on 25 June 2020. This Act introduces two new corporate restructuring tools:

1. A new moratorium to give companies breathing space from their creditors while they seek a rescue;
2. A new restructuring plan for companies in financial distress. This includes new cross-class cram down procedures that allow a class of creditors to be bound by the restructuring plan even if they do not agree to the plan (provided that dissenting creditors are no worse off than they otherwise would be in the next most likely outcome and that the plan is fair and equitable and in the interests of creditors as a whole).

The new restructuring plan is a debtor-in-possession procedure modelled after the UK schemes of arrangement and the US Chapter 11 procedure. This could be used by companies with a connection to the jurisdiction or English law governed credit agreements or contracts, even if the moratorium is unlikely to have effect outside the UK.

There is no space here for a detailed analysis of the proposed restructuring plan. However, several features suggest that this plan is likely to replace LTAs in the future. First, the debtor-in-possession aspect is a key characteristic of the plan. Then, there is the possibility to combine the plan with a moratorium, even if this moratorium is narrower in scope than the one provided in administration. In fact, under the new moratorium all amounts falling due under financial contracts, including loan agreements, must continue to be paid during the moratorium. Finally, the cross-class cram down could potentially limit the ability of "hold-out" or ransom creditors to block a viable restructuring proposal which has the overwhelming support of those creditors who retain an economic interest in the business.

Conclusion

The administration procedure is open to abusive or at least opportunistic practices when debtors are allowed to run their business in LTAs. The guidelines provided by English courts do not seem to be exhaustive and appropriate. LTAs raise issues of transparency and fairness. However, it is expected that these issues will be confined to a few – albeit high profile – cases due to the rise of a new restructuring toolkit: the restructuring plan and moratorium outlined in the recent *Corporate Insolvency and Governance Act 2020*. ■

"It is to be hoped that the new emphasis on LTAs will not bring a rise of phoenix practice, as well as to issues of transparency and fairness"

Footnotes:

1 Insolvency Lawyer Association. "Changing the Narrative around Administration" (26 March 2020), available at: www.citysolicitors.org.uk/storage/2020/03/UKP1-ChangingtheNarrative.pdf.

2 Paragraph 64, Schedule B1, Insolvency Act 1986.

3 Available at: www.r3.org.uk/technical-library/england-wales/technical-guidance/covid-19-contingency-arrangements/more/29356/page/1/the-consent-protocol-administration/.

4 J. Booth, "Debenhams administration could provide blueprint for 'freezing' companies during coronavirus crisis" (*City A.M.*, 6 April 2020), available at: www.cityam.com/debenhams-administration-could-provide-blueprint-for-freezing-companies-during-coronavirus-crisis/.

5 E. Jahshan, "202 immediate job cuts as Oasis & Warehouse files for administration" (*Retail Gazette*, 15 April 2020), available at: www.retailgazette.co.uk/blog/2020/04/202-immediate-job-cuts-as-oasis-warehouse-files-for-administration/.

6 J. Eley and T. Kinder, "Companies explore 'light touch' administration in the wake of Debenhams" (*Financial Times*, 16 April 2020), available at: www.ft.com/content/76c7c985-ff8c-4707-b4e4-28eb7a8f7b62.

7 *Davey v Money* [2018] EWHC 766 (Ch), [2018] Bus. L.R. 1903.

8 *Re Contract Corp* (1872) 7 Ch App 207, 211. The judgment was issued with reference to the duties of liquidators in a winding-up procedure but it applies to all officers of the court.

9 E. Thicknesse, "Luggage brand Antler collapses into administration" (*City A.M.*, 19 May 2020), available at: www.cityam.com/luggage-brand-antler-collapses-into-administration/.

10 For the text of the Corporate Insolvency and Governance Act 2020, see: www.legislation.gov.uk/ukpga/2020/12/contents/enacted.

INSOL Europe Annual Conference: Heading towards a new world in 2020!

Emmanuelle Inacio previews INSOL Europe's flagship event, online for 2020

EMMANUELLE INACIO
INSOL Europe Conference Technical and Training Course Director

The INSOL Europe Technical Committee members of the now cancelled 2020 Sorrento Annual Congress are working relentlessly behind the scenes to prepare for the first time in the history of INSOL Europe the 2020 Annual Online Conference on topics that will be highly relevant to our industry!

The Co-chairs of the INSOL Europe 2020 Annual Online Conference Technical Committee - Giorgio Corno (Studio Corno Avvocati, Italy) and Simeon Gilchrist (Edwin Coe, UK) assisted by John Briggs (South Square, UK), Cristina Fussi (De Berti Jacchia Franchini Forlani, Italy), Robert Hänel (Anchor, Germany), Piya Mukherjee (Horten Law Firm, Denmark), Michael Quinn (High Court, Ireland), Adrian Thery (J & A Garrigues, Spain) and Frank Tschentscher (Luther, Germany) agreed that the title of our 2020 October Online Conference will remain the same as our cancelled 2020 Sorrento Annual Congress: "**Towards a New World**". Indeed, this theme could not be more evident as it appears that we are more than ever heading towards a new world, even though not in the direction we were all expecting. Indeed, with the COVID-19 pandemic, restructuring and insolvency actors are going towards a new world where they will have to be very inventive and innovative to save viable businesses hit by the COVID-19 crisis.

> *The 2020 Annual Online Conference Technical Committee, demonstrating superb agility, embraced also the opportunity to rethink our flagship event*

New format

The 2020 Annual Online Conference Technical Committee, demonstrating superb agility, embraced also the opportunity to rethink our flagship event.

Our event will take the form of an Online Conference allowing the delegates to interact with our panellists. Moreover, the 2020 Online Conference will consist of four weekly sessions of one-hour and a half on the Thursdays 8, 15, 22 and 29 of October.

In total, four keynote speakers and eight panel debates on hot topics of high relevance to all professionals in the field of insolvency and restructuring will take place in no longer than a nice lunchbreak.

Reinhard Dammann (Dammann Avocat/Sciences Po Paris, France, *see page 11*), our Facilitator, will act as the conductor of this orchestra playing the theme "**Towards a New World**".

Thursday 8 October

Lars Liebst, who was *inter alia* the CEO of Tivoli (the second-most popular seasonal theme park in the world, which opened in 1843 in Copenhagen, Denmark) from January 1996 to August 2020 has honoured us by accepting our invitation to open our first weekly session with a keynote speech. Lars is also the chair of one of the eight committees set down by the Danish government to advise on the restart of the business sector in Denmark. Lars' perspective as an experienced CEO of the entertainment sector particularly hit hard by the COVID-19 crisis will be very topical and is sure to be extremely interesting!

The first panel session, chaired by Cristina Fussi (De Berti Jacchia Franchini Forlani, Italy), will focus on "*Directors in the Twilight Zone*". Considering the devastating effects of the COVID-19 pandemic, and the very important task that the EU Members States have to fulfil in the coming months, i.e. the implementation of the Directive on restructuring and Insolvency, Cristina and her panellists, Anton Molchanov (Arzinger, Ukraine), Michael Thierhoff (Andersen Tax & Legal, Germany) and Suzanne Jones (Seddons, UK), will question (i) whether and how the legislator has alleviated the duty and liability of directors during and following the pandemic and (ii) whether there is concern about possible implications for the directors following the implementation of the Directive on restructuring and Insolvency.

Indeed, on 20 June 2019, the European Parliament and the Council published in the Official Journal of the European Union the text of Directive 2019/1023 on Restructuring and Insolvency which seeks to introduce a minimum standard among the EU Member States for preventive restructuring frameworks available to debtors in financial difficulty and to provide measures to increase the efficiency of restructuring procedures. The Member States must implement the Directive into national law by 17 July 2021, subject to a one-year extension. Thus, this panel led by Adrian Thery (Chair of the INSOL Europe Directive Project, J&A Garrigues, Spain) and his panellists, Frank Tschentscher (Luther, Germany), Alastair Beveridge (AlixPartners, UK) and Ondrej Vondracek (Civil Justice Unit, DG Justice & Consumers, European Commission), will offer an update on *the implementation of the Directive on Restructuring and Insolvency* and focus on the consequences of the main legislative choices in the light of the COVID-19 crisis.

Thursday 15 October

Ondrej Vondracek, who is a legal and policy officer of the Civil Justice Unit, DG Justice & Consumers of the European Commission, will open our second weekly session and share the European Commission's views on the actual COVID-19 crisis and its projects.

After the keynote speech, Mark Fennessy (Proskauer, UK) will be discussing *the rescue of SMEs during the pandemic* – which have been the hardest hit – and take a look at the opportunities and difficulties that lie ahead together with his panellists, Marcia Shekerdemian QC (Wilberforce Chambers, UK), Catherine Ottaway (Hoche Avocats, France) and Ivo-Meinert Willrodt (Pluta, Germany).

The second panel session titled "*Stick or Carrot? The (new) role of the practitioner in the field of restructuring*" led by Robert Hänel (Co-chair of the IOH Forum, anchor rechtsanwälte, Germany), together with Jean Baron (Co-chair of the IOH Forum, CBF Associés, France) and Stela Ivanova (bnt attorneys in CEE, Bulgaria) will analyse this new (?) "animal in the restructuring and insolvency zoo"[1] – born with the Directive on Restructuring and Insolvency - together with Jean Baron (Co-chair of the IOH Forum, CBF Associés, France) and Stela Ivanova (bnt attorneys in CEE, Bulgaria).

Thursday 22 October

Elisabetta Pagnini, who is the Group General Counsel of Banca Intesa Sanpaolo in Italy, will open our 22 October session sharing the views of the banking sector on the COVID-19 crisis.

John Briggs (South Square, UK) will launch the panel session "*Voluntary arrangements with creditors in the time of Covid: has legislation helped?*" together with his panellists, Paolo Vitale (Studio Legale Vitale, Italy) and Catarina Serra (Supreme Court, Portugal). The main forms of voluntary arrangements with creditors in UK, Italy & Portugal will be presented, as well as the recent legislation and other measures designed to help voluntary arrangements to succeed in the time of COVID-19 and we will learn if such legislation has achieved its aims.

Then, a "*Battle of Schemes*" will take place and oppose *UK and The Netherlands*. Simeon Gilchrist (Edwin Coe, UK) and Marcel Groenewegen (CMS, The Netherlands), in a delightful verbal jousting, will compare the restructuring and flexible tools available in their respective jurisdictions to help saving viable businesses which offer cross-class cram-down mechanisms: the New Restructuring Plan introduced by the UK Corporate Insolvency and Governance Act and the Dutch New Scheme introduced by the Bill on the Confirmation of Private Plans.

Thursday 29 October

Professor Christoph G. Paulus, who was *inter alia* professor of law between 1994 and 2019 at the Humboldt-Universität zu Berlin and is now Of Counsel at White & Case (Germany), will deliver a keynote speech on the European sovereign debt restructuring.

"*Lessons learned from the failures of the Fintech company Wirecard Case*" will then be analysed by Laurent Le Pajolec (Co-chair of the Insolvency Tech & Digital Assets Wing, Exco, Poland), together with his panellists, Bart Heynickx (Co-Chair of the Anti-Fraud forum, Altius, Belgium) and Pierre-Gilles Wogue (Altana, France). Indeed, this panel will question (i) how and why Wirecard failed and (ii) how to avoid this kind of failure in the future.

The Co-Chairs of the Judicial Wing, namely Nicoleta Mirela Nastasie (Bucharest Tribunal – VII Section, Romania), Eberhard Nietzer (Amtsgericht Heilbronn, Germany) and Michael Quinn (High Court, Ireland), will then present a panel devoted to "*Judges faced with a COVID world*".

The Young Members Group's "*Virtual Wine Tasting Session*", sponsored by Schiebe und Collegen, will close the Conference. Thus, if you are forever young and simultaneously under 45, we do hope you will take this networking occasion by sharing your experiences with the Young Members Group (*see page 9*).

Finally, INSOL Europe would like to thank very much indeed our Conference Main Sponsor NetBid and the weekly Sessions Sponsors, AlixPartners, Horten, Proskauer, Hoche Avocats, Anchor Rechtsanwälte, bnt attorneys in CEE, Grant Thornton and CITR Group, for their generous support of our 2020 Annual Online Conference!

We invite you all to join us in cyberspace! ■

Footnotes:

1 Bob Wessels, "If you're the IP, I'm the Pifor", available at: <https://bobwessels.nl/wp-content/uploads/2017/03/2017-03-24-wessels-ip-and-pifor.pdf>

EVENT DETAILS:

8, 15, 22 & 29 October 2020

Online Event: Zoom

Free for members

Register here: www.insol-europe.org/events

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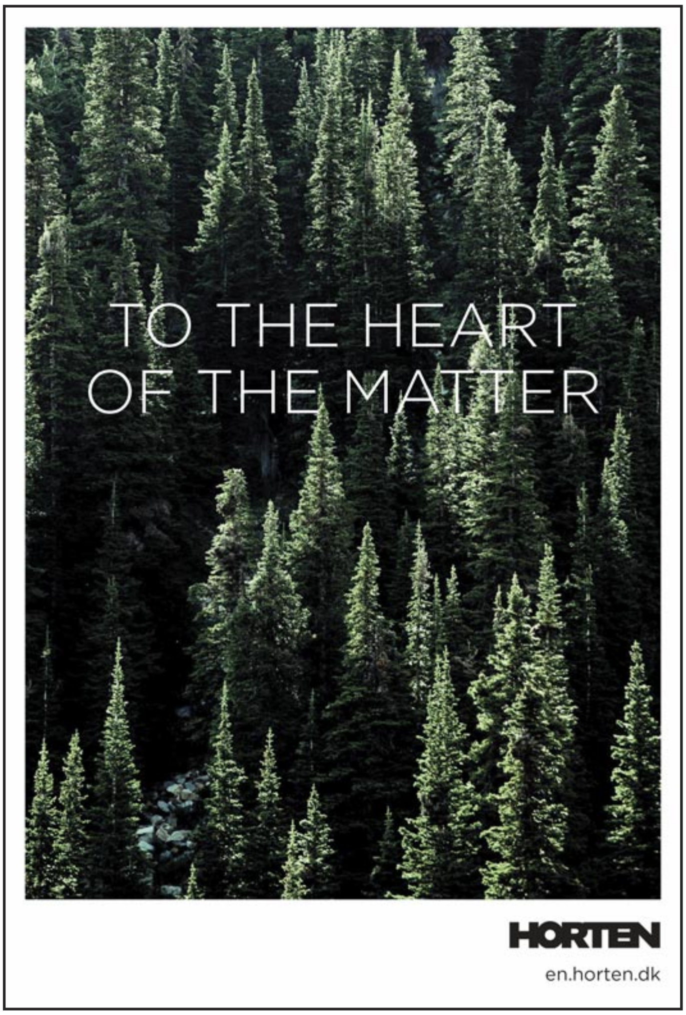

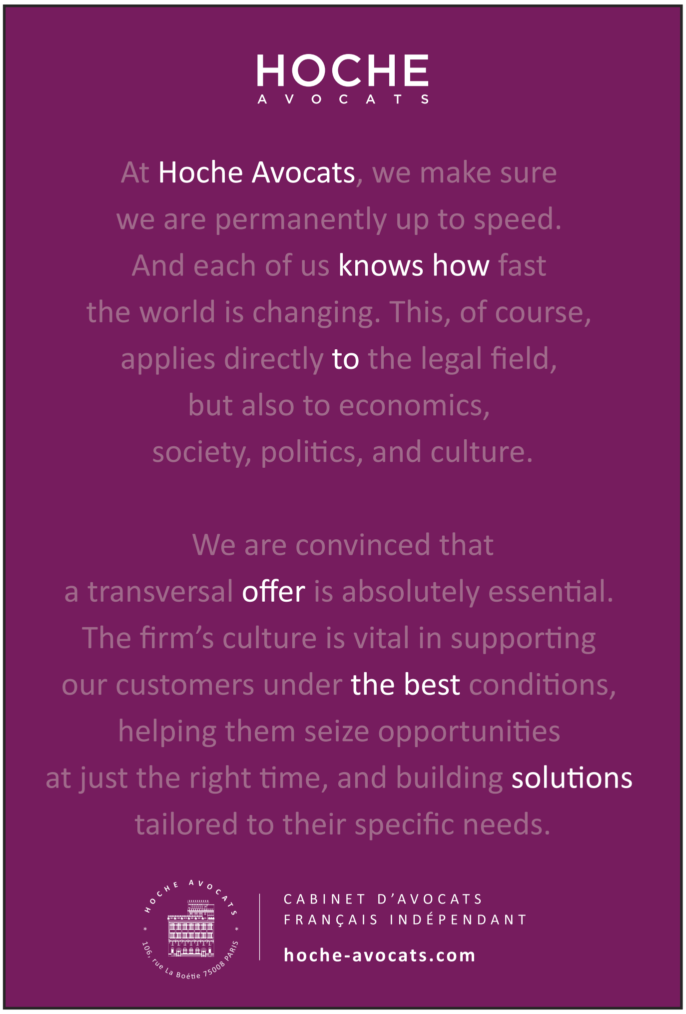

With thanks to our Session Sponsors

Academic Conference 2020: Presenting our 'Virtual Sorrento'

The co-chairs of the INSOL Europe Academic Forum outline the main papers in this year's online event

TOMAS RICHTER
Co-chair of the INSOL Europe Academic Forum, Associate Professor, Charles University Prague; of Counsel, Clifford Chance Prague

LINE LANGKJAER
Co-chair of the INSOL Europe Academic Forum, Assistant Professor, Aarhus University, Denmark

This year, due to the ongoing pandemic, our annual event will be taking place online in what we are dubbing a 'Virtual Sorrento'.

Inspired by the submissions for the now-cancelled event, we have produced a much shorter programme suitable to the online format. It will feature two highly relevant papers by Professors Horst Eidenmüller and Kristin Van Zwieten, both of University of Oxford, and by Lydia Tsioli of King's College London.

Session 1: Stabilising Corporate Workouts (Out-of-Court Restructurings) in Times of the COVID 19-Pandemic and Beyond: The Case for Creditor Cooperation Duties (Prof. Horst Eidenmüller and Prof. Kristin Van Zwieten, University of Oxford*)

In this presentation, the authors investigate the case for creditor cooperation duties in corporate workouts.

They will demonstrate how such duties could facilitate beneficial out-of-court restructurings and what their doctrinal basis is or could be in key jurisdictions (United States, United Kingdom, Australia and Germany).

The COVID 19-Pandemic causes financial distress for firms on an unprecedented scale. Millions of economically viable firms worldwide are affected. A large subset of these firms will need to be restructured. Workouts (out-of-court restructurings) are preferred to court-supervised processes because they involve much lower direct and indirect insolvency costs. But workouts are inherently unstable: they are based on consent and may be undermined by the presence of free-riders (holdouts). Creditors face a multi-party prisoners' dilemma. Cooperating to implement an out-of-court restructuring plan is in the interest of the creditors as a whole (and in the interest of the debtor). However, each creditor has an incentive to hold out and freeride on the contributions of others.

Laws governing corporate workouts differ. Creditor autonomy and contractual freedom are central to the workout regimes in many jurisdictions. At the same time, at least in some jurisdictions, tort laws, rules on quasi-contract or even company laws impose limits on selfish creditor behaviour in a workout setting—for the benefit of the creditor community. These rules may be used to develop a system of "creditor cooperation duties" to stabilize a corporate workout. Under certain specified conditions, creditors would no longer be free to "do what they want" in a workout setting. They would be obliged to negotiate a restructuring plan in good faith, and they might even have to agree to such a plan. The authors explore this idea by investigating the legal regime governing workouts in the United States, the United Kingdom, Australia and Germany.

**Horst Eidenmüller is a Statutory Professor for Commercial Law at the University of Oxford and a Professorial Fellow of St. Hugh's College, Oxford. He is a Research Member of the European Corporate Governance Institute and a Member of the Berlin Brandenburg Academy of Sciences and Humanities.*

Kristin van Zwieten is Clifford Chance Associate Professor of Law and Finance at the University of Oxford and the Gullifer Fellow at Harris Manchester College, Oxford. She is Director of the Commercial Law Centre at Harris Manchester College and a Research Member of the European Corporate Governance Institute.

Session 2: Viability Assessment: Models and filtering mechanisms from US Chapter 11 to the European Directive (Lydia Tsioli, King's College London*)

Distinguishing viable companies from non-viable ones is at the epicentre of the law of corporate distress. Providing for frameworks that facilitate the restructuring of financially distressed yet viable companies, while at the same time succeeding in filtering out non-viable ones towards liquidation has always been a real challenge for legislators.

At European level, despite the numerous references of the directive on restructuring and insolvency to the notion of viability, the latter has not yet received equally high levels of attention in Europe compared to the United States, a leading jurisdiction in this field. In building a true rescue culture upon correct foundations across Europe, a close reflection on the notion of viability, especially on a comparative basis, would thus be beneficial.

As such, this presentation takes as a starting point the intricate notion of viability, its meaning and role for a corporate debt restructuring framework, as well as what these two signify for the scope of such a framework. It then presents the different existing models of viability assessment and subsequently focuses on what the author defines as the "filtering mechanisms" employed by one of these models. More specifically, the paper investigates the filtering mechanisms embedded into US Chapter 11 and juxtaposes these with the provisions of the European directive on restructuring and insolvency with the aim to evaluate the latter under the comparative light of Chapter 11.

In developing the above, the paper uses both legislative provisions and extensive case law in order to demonstrate how the notion of viability both permeates Chapter 11 and constitutes the "litmus test" underlying the filtering mechanisms embedded into its framework. These conclusions serve as a springboard for a close look at the provisions of the European directive. Through this, the paper evaluates the European framework and puts forward suggestions for its interpretation/potential reform in order for it to achieve an effective filtering of viable companies from non-viable ones.

**Lydia Tsioli is a PhD in Law Candidate at King's College London as well as a Qualified Lawyer at the Athens Bar Association. From January–July 2020 she has been a Visiting Researcher at the University of California, Berkeley School of Law.* ■

EVENT DETAILS:

30 September, 2020

16:00 to 17:40 (CET)

Online Event: Zoom

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New online event: Tectonic changes in Eastern European insolvency

Niculina Somlea announces the forthcoming online conference from the Eastern European Countries' Association

NICULINA ŞOMLEA
Co-ordinator to the Eastern European Countries' Committee (EECC)

If there is one thought to take with us from 2020 is that change is the only constant; it has been true even before Heraclitus said this. Change creeps up in every corner of our life at an ever-growing speed, and this pandemic is catalytic.

At the beginning of 2020, before COVID was a permanent presence in our daily life, the economic prospects of Central and Eastern Europe were favourable. Eastern European economies had grown strongly as greater economic diversity made the region more resilient to the ongoing slowdown in Western European economies. Domestic demand has been the main growth driver. Developments in the labour market have supported consumption. Most of the region has experienced fast employment growth, resulting in record-low unemployment and stellar wage growth.

Now, the picture is entirely different; countries across Europe have significantly curbed public life to halt the spread of the COVID-19 outbreak. The travel industry is deeply affected, 80% of hotel rooms are empty, airlines cut their workforce by 90% and tourism destinations are struggling. Expos, conferences, sporting events, galleries and museums have been abruptly closed. While a significant number of businesses are struggling, some are thriving.

The lockdown measures implemented by countries have created a series of adverse economic effects of such intensity that in turn, in a domino effect, new interventions were required, such as deferral of loan repayments and suspending the obligation to file for insolvency.

The lockdown created a massive economic contraction that will certainly be followed by a financial crisis in many parts of the globe, as nonperforming corporate loans accumulate alongside bankruptcies. As it becomes increasingly clear that this pandemic has created an insolvency time bomb, we expect the bulk of insolvencies is still to come, beginning with 2021 and following into 2022 as well. Experts predict that the global insolvency index is likely to hit a record of + 35% in 2021.

Fresh insight

With a renewed spotlight on insolvency, gaining fresh insight and real-life examples will help us, as insolvency professionals, stay on top of our game, enhance business resiliency, ensure business continuity and most importantly, stay connected.

We feel that it is our responsibility to help flatten the Coronavirus curve and keep you safe. While we are still as dedicated as ever to offering unique content and networking opportunities, your safety comes first.

As such, we have transitioned our in-person Eastern European Countries' Committee Conference into an online conference. Join us, for a two-hour panel on 3 and 10 December 2020, for our first online conference entitled '**Tectonic Changes in Eastern European Insolvency**'.

We will be discussing, among others, early warning measures detailing the experience of countries that have implemented the Directive on restructuring and second chance, and its effects during these six months of the pandemic. We also want to bring forward examples of businesses struggling, learning and overcoming the dangers, COVID-19 stories of restructuring and insolvency in Eastern Europe.

See you online! ■

EVENT DETAILS:

3 & 10 December, 2020

Online Event: Zoom

Free for members

Register here: www.insol-europe.org/events

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Chapter 15: US Bankruptcy Court bars class action lawsuit

David H. Conaway and Ronald D.P. Bruckmann report on a recent class action lawsuit

DAVID H. CONAWAY
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RONALD D.P. BRUCKMANN
Attorney at Law, Shumaker, Loop & Kendrick, LLP

We recently represented the Joint Liquidators (and former Joint Administrators) (the "Joint Liquidators") in a UK insolvency proceeding under the Insolvency Act of 1986, to file a Chapter 15 petition regarding a UK-based footwear manufacturer, Mahabis Limited ("Mahabis").

We filed the Chapter 15 petition in the US Bankruptcy Court for the Western District of North Carolina (Charlotte). The purpose of the Chapter 15 filing was to invoke the Section 362 automatic stay regarding threatened class action litigation and obtain other relief provided to foreign representatives under Chapter 15, necessary for the joint liquidators to finalise the liquidation and distribution of assets to creditors.

The Bankruptcy Court entered an order granting the Chapter 15 petition for recognition without issue. In doing so, the US Bankruptcy Court recognised the UK proceedings as foreign main proceedings, invoking application of the Section 362 automatic stay of all existing or future litigation, which included the threatened class action litigation.

Upon receipt of notice of the Chapter 15 Order for Recognition, the potential class action plaintiffs filed a motion to vacate the order for recognition on a number of bases, including lack of notice of the hearing on the Chapter 15 petition and improper venue in the Western District of North Carolina.

> **"The strategy of the potential class action claimants was to ignore and override the UNCITRAL Model Law"**

The strategy of the potential class action claimants was to ignore and override the United Nations Model Law on Cross-Border Insolvency (the "Model Law"), adopted in the US as Chapter 15, with the US tort litigation "system". A subsidiary goal was to obtain discovery from the joint liquidators regarding potential third-party insurance coverage for tort claims.

The Bankruptcy Court denied all relief sought by the potential class action plaintiffs. Notably, the Court concluded the following:

1. Notice

The Chapter 15 petition need not be served on claimants of threatened litigation. Rather, Chapter 15 requires that the petition be served on claimants regarding "pending" litigation, even though the Joint Liquidators disclosed that they had notice of potential claims by the tort claimants.

2. Automatic stay

The Recognition Order "*is clear and unambiguous: No person or entity may (a) commence or continue any legal proceedings (including, without limitation, any judicial, quasi-judicial, administrative, or regulatory proceedings or arbitration) or action against the Debtor, its assets located in the United States, or the proceeds thereof…*" In addition, under Sections 362 and 1520 of the Bankruptcy Code, the automatic stay is a "*bar against filing any legal proceedings against the UK debtor,*" which bar arises by operation of law and is triggered automatically by the entry of the recognition order.

The US Bankruptcy Court noted that the intended purpose of the automatic stay "*provides the UK debtor respite from creditors and their collection efforts by preventing creditors acting unilaterally to the detriment of other creditors…*" The US Court further noted that the "*UK debtor and its worldwide creditors … will suffer prejudice if the Objecting Parties' Class Action Lawsuit is given priority over the UK debtor's right to use a single forum (the UK) to develop and administer an orderly liquidation and to resolve claims…*"

Moreover, "*it is widely recognised that the costs imposed by importing the class action device into the bankruptcy claims allowance process are significant and usually prohibitive. Class litigation is inherently more time-consuming than the expedited bankruptcy procedure for resolving contested matters.*" "*While the objecting parties may prefer the US tort system over the UK insolvency proceedings…, affording the objecting parties different treatment than similarly situated creditors in the UK proceedings would contravene the carefully crafted balance developed by Congress when it enacted Chapter 15.*"

The Bankruptcy Court also took this opportunity to express its views on a US Bankruptcy Court's role in a cross-border insolvency matters. "*The Court is also cognizant of its role in this Chapter 15 case. The United Nations Commission on International Trade Law*

("UNCITRAL") promulgated the Model Law on Cross-Border Insolvency (the "Model Law") in 1997. Chapter 15 of the Bankruptcy Code, which is based upon the Model Law, was adopted by Congress in 2005. Before 2005, former section 304 of the Bankruptcy Code provided the statutory framework for dealing with ancillary cases filed in the US relating to foreign insolvency proceedings. Many of the principles – particularly comity – that were applied in ancillary proceedings under section 304 were carried forward and apply today in Chapter 15 cases. See In re Atlas Shipping A/S, 404 B.R. 726, 738 (Bankr. S.D.N.Y. 2009) ("Nevertheless, many of the principles underlying §304 remain in effect under chapter 15. Significantly, chapter 15 specifically contemplates that the court should be guided by principles of comity and cooperation with foreign courts in deciding whether to grant the foreign representative additional post-recognition relief. This is evidenced by the pervasiveness with which comity appears in chapter 15's provisions.")."

3. Discovery

Under Section 1521(a)(4) of the Bankruptcy Code, the Bankruptcy Court may grant relief "*providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities…*" Regarding the ability of a creditor to obtain discovery of the foreign representative in a Chapter 15 proceedings, the Court stated:

> *"Discovery in a Chapter 15 foreign main proceedings falls under §1521(a)(4). Chapter 15 discovery, like all discretionary relief under §1521, is one-sided, as it can only be granted "at the request of the foreign representative." 11 U.S.C. §1521(a) (emphasis added)."*

Despite the tort claimants' position, the US Bankruptcy Court ruled that only the joint liquidators, not the potential class action plaintiffs, could conduct discovery including examination of witnesses, written interrogatories or document production. "*If the objecting parties wish to obtain documents, they cannot do so in the context of ancillary proceedings such as the Chapter 15 case, but rather must seek such relief in the UK Proceedings. Therefore, the Motion for Clarification's request for a copy of any insurance policy is also denied.*"

The Bankruptcy Court's ruling in Mahabis can be found at 2020 WL (Westlaw) 2731870. The Mahabis ruling is important, and likely quite helpful to foreign representatives from any jurisdiction in pursuing Chapter 15 relief in the US. A survey of extant Chapter 15 cases indicates it is the first ruling to clearly prohibit class action claims in Chapter 15 proceedings as a result of the automatic stay. Foreign representatives can also take note of the court's clear ruling on Section 1521(a)(4) that third parties may not seek discovery from a Chapter 15 debtor or its foreign representative. Finally, the Bankruptcy Court made clear that notice of the Chapter 15 petition need not be provided to claimants with respect to merely threatened or potential litigation.

The ruling also contains a strong policy statement regarding US Bankruptcy Court's role in cross-border insolvency proceedings, particularly that comity is a primary policy goal of the Model Law, which Chapter 15 embraces. ■

"The Mahabis ruling is important, and likely quite helpful to foreign representatives from any jurisdiction in pursuing Chapter 15 relief in the US"

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

Cyprus: Seeking justice, creditors must be prepared for the long haul

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According to a press release issued by the Cypriot police, a 42-year-old Ukrainian national had been arrested in Budapest pursuant to a European arrest warrant, extradited to Cyprus and remanded in custody, in connection with financial fraud totalling $92m, orchestrated through Cypriot-registered companies.

The individual arrested was the CFO of Mriya Agro Holding Public Ltd ("Mriya"), the Cypriot holding company of what was once one of Ukraine's largest agricultural groups.

This is the outcome of a lengthy investigation by the Cypriot police following a criminal complaint made by the Liquidators of Mriya four years ago and it vindicates what has recently been identified in a report of the Council of Europe's anti money laundering body, Moneyval, published in December 2019, where it was identified that Cypriot authorities must be "*more aggressive in pursuing money laundering from criminal proceeds generated outside Cyprus*".

Unravelling sophisticated international fraud committed through complex corporate structures is extremely costly and time consuming and often, the architects of such schemes "bank" on their victims not having the appetite and the perseverance to unravel the fraud, not to mention the deep pockets required to do so. Recognition of liquidators' draconian powers across international borders, when investigating fraudulent schemes is invaluable, but when faced with a complex multi-jurisdictional fraud an efficient and speedy response on the part of the authorities is also key in the fight against money laundering and fraud.

Unfortunately, for those that masterminded the demise of Mriya, which collapsed with over $1 billion in debt, the Liquidators are determined to see this through to the end; several legal actions have been instigated in Cyprus and abroad, including successful applications for disclosure and freezing injunctions, as well as recognition of their appointment in Switzerland, to mention a few.

Having discovered the existence of a luxury villa in Munich, the ownership of which was linked to the fraudsters, the Liquidators expeditiously obtained a freezing injunction over the property before also securing a worldwide freezing order against a number of those who looted Mriya's assets. The freezing order was recognised and enforced with the German Land Registry blocking the transfer of the villa, which was being marketed for sale at $12m and was purportedly sold on the date the freezing order was granted, for $8.6m.

Getting to this stage has been no mean feat, it has been extremely costly, liquidators are often not in a position to cover such costs, but fortunately in this matter, with the support of the creditors and their professional advisors[1] as well as our lawyers, we were able to do so.

However, had the police had the resources and capacity to investigate such matters expeditiously, prosecute those responsible quickly and confiscate their assets, this would have undoubtedly lead to a change in attitude in those seeking to launder proceeds of crime through Cypriot entities. This was also highlighted in the Moneyval report, which identified that "*the competent authorities have not been very proactive at freezing and confiscating foreign criminal proceeds at their own initiative*" and that "*if cases are taking a long time to come to court, this could have a detrimental effect on the effective management of frozen assets*".

We know the perpetrators behind the Mriya fraud have assets in other jurisdictions, however the cost to the liquidation, of freezing those assets, precludes us from doing so. This case is a classic example of why it is crucial for the authorities to take swift action. If by now, confiscation and/or freezing orders had been obtained by the police, this would have also removed hurdles the liquidators have had to overcome and find ways to fund.

Nevertheless, the progress made so far, and the recent arrest will give a warning to those involved in Mriya and others, that despite the obstacles faced, with persistence and patience on the part of all stakeholders, the perpetrators may just be brought to justice[2]. ■

Footnotes:

1 Rothschild, Hogan Lovells, Dentons and L Papaphilippou & Co. LLC

2 Further information in respect of the Mriya case and the actions of the Liquidators can be found in Creditors' Reports at www.crigroup.com.cy/articles-publications/articles-reports/

Estonia: Transposing the Preventive Restructuring Directive

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This article introduces the opinions of the group of insolvency experts ("the Group") in Estonia called by the Estonian Ministry of Justice to discuss the implementation of Directive (EU) 2019/1023 ("the Directive").

Stay of individual enforcement actions

The Group suggested to maintain the suspension of enforcement proceedings as an automatically applicable general measure and to leave the suspension of other measures optional on a case-by-case basis.

The Group proposed setting a specific duration for the suspension of enforcement measures in the Restructuring Act ("the RA") in order to meet the requirements of the Directive. The Group also suggested that a court could decide to terminate the stay at the request of a creditor, IP or the debtor, if the suspension was no longer necessary or became disproportionately burdensome for the creditor.

The Group considered that the RA must restrict the creditor's right to terminate contracts relevant to the debtor's continuation of business before the reorganisation proceedings, following the rules of Article 7 of the Directive, on the condition that creditors must be provided with adequate protection mechanisms.

The restructuring plan

The Group recommended that the creditors' best interest test should be enacted directly by the RA.

The Group suggested that the creditors would be divided at least into four classes: (i) secured creditors; (ii) equity holders; (iii) parties related to the debtor; and (iv) unsecured creditors. When adopting the restructuring plan, the secured creditors would vote in a secured creditors' class only to the extent where their claims have been secured.

The compliance of the plan with the creditors' best interest test will be supervised by the restructuring advisor and by the judge. The Group recommended the development of a team of specialised insolvency judges. Nonetheless, the existence of quick and flexible Estonian restructuring proceedings, the lack of specialised judges and the small size of the Estonian economy are the main reasons why the Group did not support "pre-packs" or special regulation for "SMEs" at the moment.

Cross-class cram-downs

A novelty for Estonians is the cross-class cram-down. The Group was of the opinion that the requirements of Article 12 of the Directive could be solved by allocating equity holders into a separate class and, where they do not approve the plan, by enforcement of the cross-class cram-down under Article 11 of the Directive. For the purpose of implementing the cross-class cram-down rules, including, but not limited to the case of equity holders, the fairness test (including of course the creditors' best interest test) and the relative priority rule should be followed. The relative priority rule was suggested instead of the absolute priority rule, as the relative priority rule is more flexible and efficient in dividing the surplus of the restructuring proceedings. It thus makes restructuring proceedings more efficient and encourages debtors to invest in restructuring efforts.

Interim and new financing

The interim financing shall be protected from claw-back actions, if the interim financing is new and reasonably and immediately necessary for the debtor's business to continue operating or to preserve or enhance the value of that business (as defined in the Directive) and only in case the court approves the plan. There is no requirement for *ex-ante* control of interim financing. Both interim and new financing should receive priority in any future bankruptcy proceedings.

Appeals

The Group recommended to shorten the terms of the rescue proceedings and to restrict the right of appeal as much as possible.

Individual persons

The Group suggested treating individual entrepreneurs and other natural persons on equal terms. The Group proposed for individual persons the compulsory debt counselling before official court procedures. The court should take in consideration the pre-official court counselling procedure and decide whether to direct the individual person to bankruptcy or to rehabilitation proceedings. The period prior to the fresh start is to begin from the declaration of bankruptcy of the individual person and will be shortened to three years. In case of dishonest debtors, the period before a fresh start is to be prolonged or the decision to allow a fresh start may be cancelled. ■

Other contributors to this article:

- Kersti Kerstna-Vaks, Judge, Tartu Appeal Court, Estonia
- Tarmo Peterson, Partner, Rask Law Firm, Estonia
- Toomas Saarma, Insolvency Trustee, Estonia
- Peeter Viirsalu, Partner, TGS Baltic, Estonia
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“ The Group suggested treating individual entrepreneurs and other natural persons on equal terms ”

Italy: Making sense of the COMI definition

ANTONIO LEANDRO
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The centre of main interests ("COMI") mainly works under Regulation (EU) 2015/848 ("EIR") both as a ground of jurisdiction (to open the main proceedings) and as a ground for the Regulation to be applied.

One novelty in the Italian Business Crisis and Insolvency Code (hereinafter, the "Code") is the use of the COMI as a ground of jurisdiction (see Article 11), both in order to open Italian insolvency proceedings and to rule on the so-called "ancillary actions". As a result of the COVID-19 emergency, the Government has postponed the Code's entry into force, with some exceptions, from 15 August 2020 to 1 September 2021.

The novelty of jurisdiction in insolvency matters

As regards the novelties in insolvency matters, the Italian Government has followed the guidelines that the Italian Parliament set forth when delegating it to revise the Italian insolvency law "*taking into account the European Union Law and particularly Regulation (EU) 2015/848*" (see Article 1 (2), law 19 October 2017 no. 155).

Generally speaking, one may agree with the choice to shape the ground of jurisdiction upon the model of the EIR's COMI, so as to treat equally all debtors facing a crisis in Italy, irrespective of where their registered office or other formal seats are located (in or outside the EU). However, since the EIR applies where the COMI lies in a Member State, the Italian jurisdiction will be determined by the EIR, rather than by the Code with respect to debtors having their COMI in Italy. This also happens when the debtor having the COMI in Italy has its registered office in another country.

In addition, Article 26 allows for the opening of insolvency proceedings in Italy with respect to a debtor with a COMI abroad, but who also has an establishment in Italy. Unlike the former regime, it is no longer sufficient that the debtor has assets in Italy for the Italian proceedings to be opened.

The establishment works as a national ground of jurisdiction insofar as the COMI is located in another country. If the COMI were to lie in Italy, the establishment works as EIR grounds of jurisdiction.

Critical remarks

Having the inspiration of the EIR in mind, it is surprising that the Code provides no definition of establishment upon the EIR's model, as it does for the COMI. Admittedly, the explanatory report to the Code, *sub* Article 26, seems to implicitly match the notion of "establishment" to that encapsulated in the EIR. It is thus for the interpreter to draw equal conclusions at the moment of assessing whether an establishment lies in Italy.

Furthermore, Article 26(2) of the Code makes no sense when stating that "*the transfer of the COMI abroad does not bar the Italian jurisdiction if it occurred one year prior to the deposit of the request of opening the proceedings*." Actually, this provision only applies to transfers to third States, as intra-EU transfers are governed by the EIR (see CJEU, Case C-1/04, *Susanne Staubitz-Schreiber* and Case C-396/09, *Interedil*).

If the provision aims at deterring fraudulent or abusive transfers (impairing the interests of creditors), then the reference to the COMI is useless and misleading. One may wonder, in fact, how the transfer of the COMI, which is in itself real, may, according to the law and as a consequence of the rule, have been presumptively fraudulent or abusive in the year before the request to open the proceedings, as this provision seems to imply.

> *If the provision aims at deterring fraudulent or abusive transfers then the reference to the COMI is useless and misleading*

Conclusion

In the light of the foregoing, Article 26 (2) conveys the inappropriate legislative choice not to insert in the Code the presumptions of coincidence between COMI and registered office or an individual's place of business as habitual residence, upon which the EIR's jurisdictional regime rests. Moreover, it could have proven fitting to provide for temporal clauses disconnecting the aforementioned presumptions as regards transfers of registered office or an individual's place of business as habitual residence which would have occurred shortly before the request to open the proceedings.

As the Code is currently under a revision process, the Italian government should take the opportunity to amend the aforementioned provisions. ■

Poland: Preventing the insolvency of businesses due to COVID-19

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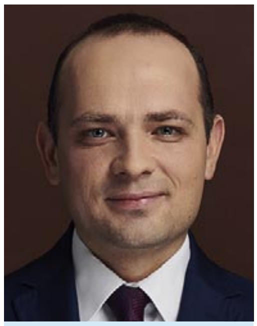

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In order to combat and prevent the detrimental consequences of the COVID-19 pandemic, the Polish legislature introduced a series of laws collectively referred to as Anti-Crisis Shields.

Under these laws, Polish entrepreneurs in various sectors have benefited from individual support instruments.

The first law to regulate the bankruptcy and restructuring matters during the COVID-19 pandemic was the so-called Shield 2.0 which provided for the suspension of the deadline for filing bankruptcy petition. The law entered into force on 13 April 2020.

In order to meet further needs of businesses in Poland, on 24 June 2020 the so-called Shield 4.0 was introduced. Under the Bill the financial support measures were significantly extended and simplified restructuring proceedings were introduced ("SRP"). The SRP were designed with the insolvent businesses and businesses in danger of insolvency in mind. The proceedings are based on the framework of the already functioning proceedings for the approval of an arrangement between debtors provided for in the Restructuring Law, subject to substantial modifications introduced by Shield 4.0. The SRP is aimed at making the restructuring procedure easier, more efficient and less time-consuming for the debtor. Under these regulations the debtor may enter into negotiations with the creditors and become protected against enforcement without the need to receive a formal ruling of the court on the formal opening of the restructuring process.

Simplified restructuring proceedings step by step

A debtor who wishes to commence the SRP needs to enter into an agreement with a restructuring advisor for the provision of services of the arrangement supervisor who oversees the proceedings. Next, once the arrangement proposals have been prepared, and a list of receivables and disputed receivables has been drawn and handed over to the arrangement supervisor, the debtor publishes a pertinent notice in the Monitor Sądowy i Gospodarczy (e.g. Polish official journal), which is tantamount to formal commencing the proceedings.

The debtor has four months since the publication of the announcement in the official journal, i.e. the commencement of the proceedings, to negotiate and establish an arrangement and agree on the principles of restructuring the debt (for instance: reduction of the debt, payment of the debt in instalments).

During the four months the debtor benefits from special protection designed to enable him to effectively carry out the restructuring process. By operation of law the enforcement of debts which arose prior to the commencement of the SRP (including those secured with a mortgage if the arrangement proposals provide for the full satisfaction of such liabilities) is stayed. What is more, the debtor is not allowed to voluntarily pay the debts originating prior to the commencement of the SRP (moratorium on payment of debts).

The successful closure of the restructuring process and entering into an arrangement is the basis for the debtor to file an application with the restructuring court for the approval of the arrangement. It is only at this stage that the proceedings are reviewed by the court. The court verifies whether the arrangement was duly entered into, in accordance with the procedural requirements and the substantive law. Should the arrangement be finally approved, the debtor begins to implement it. Until a ruling on the approval of the arrangement is issued by the court, the debtor enjoys protection against enforcement and a moratorium on payment of debts.

If, however, the debtor fails to file a motion on the approval of the arrangement within four months from the commencement of the SRP, the restructuring process is discontinued by operation of the law.

The SRP also provides for measures to protect creditors against the abuse of the procedure by unreliable debtors. If the debtor commences the SRP in bad faith (e.g. to evade payment of debts by means of a phony restructuring process), he is liable towards the creditors and third parties for the damage caused. In addition to that, each creditor may demand that the restructuring court invalidates the consequences of the announcement on the commencement of the SRP, should they be aimed at harming the creditors.

Temporary nature of new regulations

The SRP is a transitional measure in force until 30 June 2021. In the period until the expiry of the regulation each debtor will be entitled to benefit from the simplified restructuring procedure only once. Irrespective of the above, Poland needs to implement by 17 July 2021 the provisions of the Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks (…). It is thus possible that the SRP or a similar procedure will permanently enter into the Polish legal system as part of the process of implementing the Directive. ■

> **Each debtor will be entitled to benefit from the simplified restructuring procedure only once**

Romania: Insolvency procedures and the state of alert

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Due to the global COVID-19 pandemic, Romania declared a state of emergency, as of 16 March 2020, by Presidential Decree No. 195/2020 (Decree) for 30 days, which, on 15 April 2020 was extended by another 30 days.

The state of emergency imposed "lockdowns" ranging from closing non-essential businesses to limiting public gatherings. Romanian authorities announced on Friday, 15 May 2020, the ending of the state of emergency and the beginning of a 30-day state of alert because of the ongoing COVID-19 pandemic which was subsequently extended and it is currently in force until 14 October 2020.

How were insolvency procedures affected?

The Decree has impacted insolvency procedures in a number of ways: (i) only debtors' requests filed for opening an insolvency procedure could be processed; as a result, creditors' requests were suspended and creditors' claims (appeals, oppositions etc.) against the debtors' requests for opening the insolvency procedure were not processed during the state of emergency; (ii) the statutory time limits for challenging transactions were also temporarily suspended, in order to respect the social distancing measures imposed by the government, as well as to protect distressed companies. As a general effect of the Decree concerning all ongoing or potential court cases, procedural steps such as prescription or forfeitures (time bars) were suspended.

For all ongoing insolvency cases that had to be carried out by means of public hearings, the courts decided to (i) suspend/postpone hearings; or (ii) proceed with them by using digital means (e.g. Zoom, Skype) wherever possible or in situations forced by the particular circumstances of the case; or (iii) complete other procedural aspects which do not imply the presence of the parties at a public hearing.

> *Procedural steps such as prescription or forfeitures (time bars) were suspended*

What happened after 15 May 2020 (the date of relaxing emergency measures)?

The court cases, including insolvency ones, were impacted by (i) the judicial vacation (August) and (ii) the lodging of numerous insolvency requests due to approved emergency measures which will lead to a rise in insolvency cases.

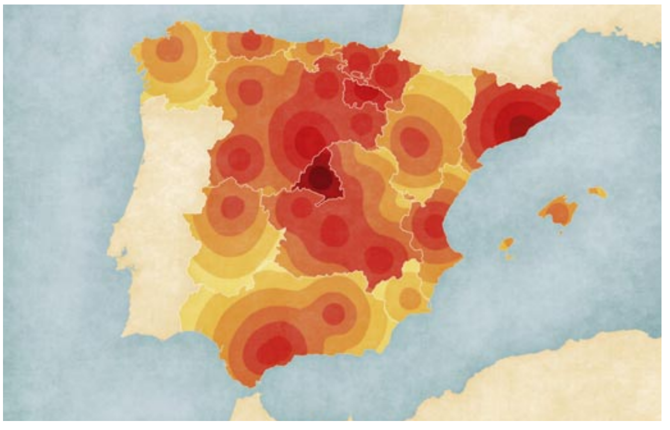
Among the measures introduced can be mentioned:

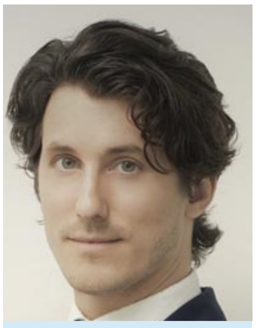
- Debtors in difficulty are no longer obliged to lodge with the court a request for insolvency within 30 days from the date when the state of insolvency occurs.
- Creditors' claims for opening insolvency proceedings against a debtor who has ceased his activity, totally or partially, as a result of the measures adopted during the state of emergency, may only be lodged after a reasonable attempt, proven by documents communicated between the parties by any means (including by electronic means), to come to a payment settlement agreement.
- The possibility of forced enforcement for current receivables of companies which have been insolvent for more than 60 days has been suspended, thus offering an additional possibility for the debtor to recover.
- In the case of debtors who have ceased their activity, totally or partially, as a result of the measures adopted during the state of emergency, maintained as appropriate during the state of alert, the threshold value for opening the insolvency procedure has been increased to RON 50,000 from RON 40,000 (the new figure being approx. EUR 10,500).
- The deadlines for prevention/restructuring procedures in relation to the activity of a debtor in difficulty, such as: the procedure for negotiations for an ongoing arrangement with creditors (*concordat preventiv*), the deadlines for a debtor under observation, for a debtor in judicial reorganisation, the period of execution of a reorganisation plan, as well as the initial duration for the execution of a reorganisation plan, have all been extended during the state of alert.

Summary

These particular measures adopted by the Romanian state, in order to support companies and the Romanian economy severely tested by the COVID-19 crisis, have encouraged companies to find the most suitable solutions to these challenges and follow the example of other European countries. Given the unique situation created by the COVID-19 pandemic, it remains to be seen whether companies will use other types of rescue proceedings, namely pre-insolvency measures (aiming at rescuing the company), which could be first considered both by the debtors and creditors.

Spain: A new Insolvency Act Recast





JOSÉ CARLES DELGADO
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CARLES | CUESTA Abogados

CARLOS CUESTA
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Spain's Insolvency Act dated from 2003, prior to the global crisis of 2008. Since then, the Spanish insolvency regime has been amended in many occasions (among other issues, to adapt to pre-insolvency solutions, which were first introduced in 2009, or to include the debt release for natural persons, included in 2013). Therefore, a recast text had become necessary.

In 2016, a working group was appointed to prepare a proposal for an Insolvency Act Recast in Spain. However, four years passed until the Spanish Government, in the context of the new crisis caused by the COVID-19 pandemic, finally rushed to approve the recast text[1].

As opposed to other countries, like Italy, in which the entry into force of new insolvency codes was delayed in order to avoid more uncertainty in the COVID-19 times[2], Spain passed a new Insolvency Act Recast in the hardest times of the lockdown. It was published in the Spanish Official Gazette on 7 May and came in force on 1 September.

Given the nature of recast texts in Spain, Spanish restructurings will still need to be adapted to EU Directive on preventive restructuring frameworks[3]. Nonetheless, some of the changes that have caught our attention follow here.

An advance towards substantive consolidation

The Insolvency Court may now exceptionally rule on the consolidation of estates of insolvent companies when the procedures have been declared jointly (or later accumulated) and there is confusion among the insolvency estates. This could have a relevant impact in the insolvency proceedings of groups of companies such as, for example, Abengoa, who filed for its pre-insolvency proceedings (*preconcurso*) in August.

Less limits to the compensation of claims

The doctrine of the Spanish Supreme Court which determined that the compensation of claims is allowed if it derives from the same legal relationship (*compensación impropia*) is now expressly included.

The concept of productive unit (unidad productiva) is defined

Besides, in cases of **sale of the productive unit**, there is only succession of business regarding the labour force included as part of the productive unit (therefore, there is no regard for the labour force whose contracts are terminated).

Immunity of public claims to the discharge of debt

The debt release for natural persons requires the debtor to pay public claims. This differs from the criteria of the Spanish Supreme Court and means a step backwards in the Spanish debt release regime.

Refinancing agreements

Rules on the jurisdiction of the court in case of groups are clarified. Furthermore, the recast text defines the concept of disproportionate sacrifice (*sacrificio desproporcionado*) which allows creditors to challenge the Court-approval (*homologación*) of a refinancing agreement.

Finally, it should be noted that the recast text is not even recast since its entry into force, as temporary COVID-19 measures adopted on 28 April[4] will coexist with the recast text until 2022. Among these measures outside of the recast text let us finally highlight (i) a moratorium of the obligation to file for insolvency until 31 December 2020 and (ii) incentives to fresh money from *especially related persons* (not subordinating their claims or even considering them as claims against the estate) until 2022. ■

> *It should be noted that the recast text is not even recast since its entry into force, as temporary COVID-19 measures adopted on 28 April will coexist with the recast text until 2022*

Footnotes:

1 Real Decreto Legislativo 1/2020, de 5 de mayo, por el que se aprueba el texto refundido de la Ley Concursal.

2 Decreto-Legge 8 aprile 2020, n. 23. Misure urgenti in materia di accesso al credito e di adempimenti fiscali per le imprese, di poteri speciali nei settori strategici, nonché interventi in materia di salute e lavoro, di proroga di termini amministrativi e processuali, in its article 5, defers the entry into force of the Codice della crisi d'impresa e dell'insolvenza.

3 Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency).

4 Real Decreto-ley 16/2020, de 28 de abril, de medidas procesales y organizativas para hacer frente al COVID-19 en el ámbito de la Administración de Justicia.

Technical Update Autumn 2020: Have your say!

Myriam Mailly writes about the information in relation to the latest consultations issued by European and International Organisations which may be of interest for INSOL Europe members

MYRIAM MAILLY
INSOL Europe Technical Officer

During the COVID-19 pandemic, national legislations relating to insolvency have been amended in order to cope with the COVID-19 situation and to prevent insolvencies of viable businesses caused by it.

As the consequences of the pandemic situation may still have an impact on our economies for the next few months (or years!), great attention should be paid to the next EU/International actions aiming at reforming national insolvency laws.

Against this background, we would like to draw your attention to a number of recent initiatives published by the European Commission and projects conducted by the EBRD.

We would like to draw your attention to a number of recent initiatives published by the European Commission

Final report of the High-Level Forum on Capital Markets Union

First of all, the European Commission published a call for feedback to the recommendations issued in the **Final Report of the High-Level Forum on Capital Markets Union** published on 10 June 2020. This report which can be found at: https://ec.europa.eu/info/publications/cmu-high-level-forum_en sets out a series of recommendations aimed at moving the EU's capital markets forward, contains three recommendations on insolvency.

Firstly, the European Commission is invited to adopt a legislative proposal for minimum harmonisation of certain targeted elements of core non-bank corporate insolvency laws, including a definition of triggers for insolvency proceedings, harmonised rules for the ranking of claims (which comprises legal convergence on the position of secured creditors in insolvency), and further core elements such as avoidance actions (Recommendation 16a).

The second recommendation is for the European Commission to set up an expert group tasked with elaborating a common terminology for the main features of the various national insolvency laws (Recommendation 16b).

The last recommendation is an invitation for the European Commission to analyse how the current bank supervisory reporting framework should be modified so that banks provide to supervisors the data on non-performing exposures. This would allow for an analysis of the effectiveness of the national insolvency systems of the Member States. On the basis of this supervisory reporting data, EBA should start providing the Commission with bi-annual monitoring reports on the effectiveness of national insolvency systems of Member States (Recommendation 16b).

The call for feedback from stakeholders on the report ended on 30 June but the contribution of INSOL Europe is available at: www.insol-europe.org/eu-study-group-news

EU 'New Consumer Agenda'

Secondly, the European Commission has issued a public consultation on 30 June and which will end on 6 October 2020 on a '**New Consumer Agenda**'. Indeed, in view of the current implementation of the EU Directive on Restructuring and Insolvency in Member States and the various international initiatives in the consumers' insolvencies, we are of the opinion that the EU's new 'Consumer Agenda' cannot ignore the need to modernise personal insolvency laws at an EU level.

In consequence, the EU institutions would need to address more fully the critical issues facing the large number of ordinary consumers suffering from financial distress, by focusing on the appropriate principles applicable to individual debtors in order to complete and make coherent the EU insolvency piece of legislation already in place.

That conclusion may also complete the CMU New Action Plan objectives as a proper (minimum) harmonised personal insolvency regime in the EU and may serve individual debtors and their families which may in turn contribute to a sustainable economic growth. Indeed, consumer over-indebtedness is a matter of great economic and social concern and is closely related to the reduction of debt overhang.

At the very least, a constructive discussion of these issues might signal the potential dangers of certain approaches and produce durable solutions sooner or later.

If you want more information on the way to contribute to this public consultation, please send me an email to technical@insol-europe.org

Looking forward to hearing from you in due course!

Revised version of the EBRD core insolvency principles

The EBRD has recently published a revised version of the EBRD core insolvency principles, in relation to which INSOL Europe provided substantive feedback working to a tight deadline (during the Summer).

The consultation within INSOL Europe which was coordinated by Paul Omar, Niculina Somlea and myself saw responses forthcoming from 23 jurisdictions represented within our organisation.

The revised principles as at September 2020 are available at www.insol-europe.org/eu-study-group-news

EBRD Insolvency Assessment on Business Reorganisations

I am also pleased to inform you that the European Bank for Reconstruction and Development (EBRD) launched on 1st September an **Insolvency Assessment on Business Reorganisations** with various partners including INSOL Europe.

The Assessment aims to provide detailed guidance on legislative gaps to address an expected increase in businesses needing to use formal restructuring procedures following the coronavirus pandemic.

Structured as a questionnaire, the assessment will provide an up-to-date map of restructuring frameworks across the EBRD regions in Europe, Asia and Africa. It aims to provide an overview of the options within pre-insolvency and insolvency frameworks across the economies where the EBRD engages, but, for benchmarking purposes, *the consultation is also open to countries where the EBRD does not invest at present.*

The results of the assessment as well as a report summarising its findings will be made publicly available online and will also be published in due course on the INSOL Europe website.

The survey is available in English, French and Russian and will be open for public consultation until **31 October 2020** at https://ebrd-restructuring.com/

So, please do not hesitate to make your voice heard! We count on the wide participation of INSOL Europe members given the fact that the EBRD has decided to extend the scope of the questionnaire to non-EBRD countries. Do not miss this opportunity!

For additional information, please send me an email to technical@insol-europe.org

Join one of our working groups

We strongly encourage any professional acting in the area of businesses or individuals in distress to join any INSOL Europe working groups (the list of the WGs as well as contact details of their respective co-/chairs are available from the INSOL Europe website at www.insol-europe.org/about-us/about-our-working-groups).

You may also use another channel to make your voice heard by being in contact with the INSOL Europe Country Coordinator in your own jurisdiction (the list of the INSOL Europe Country Coordinator is available at www.insol-europe.org/country-coordinators). ■

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**

COVID-19 Tracker

Please note that the **Lexis-Nexis & INSOL Europe COVID-19 Tracker of insolvency** which has been published for free for all INSOL Europe members is still available from the INSOL Europe website at: **www.insol-europe.org/technical-content/covid19**

A table published by the European Commission which provides an overview of measures taken by Member States and other useful links related to measures taken in the COVID-19 context is also available at **www.insol-europe.org/eu-study-group-links**

Other Useful Links

> Email
technical@insol-europe.org

> LinkedIn
www.linkedin.com/company/insol-europe/

COVID Coffee Breaks
>www.insol-europe.org/publications/web-series

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

Academic Forum Publications
> 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 our book editor **Paul Omar** (khaemwaset@yahoo.co.uk)

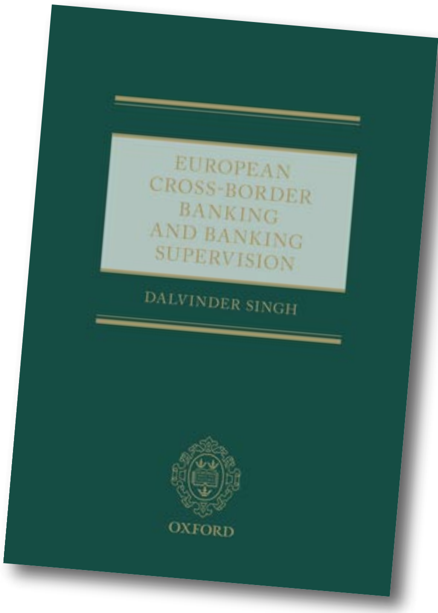
European Cross-Border Banking and Banking Supervision

ILYA KOKORIN
Meijers PhD Researcher and Lecturer, Department of Financial Law, Leiden University

> *As COVID-19 rages and brings the global economy to a near standstill, banks acquire a crucial role in providing the much needed liquidity to struggling businesses*

Dalvinder Singh, OUP, 1s edition, 2020, 320 pages, ISBN 9780198844754, £95

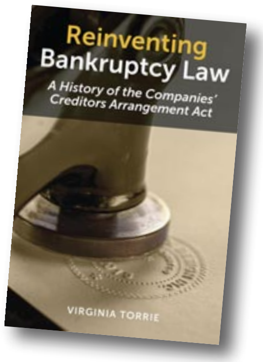
This book, written by a well-known scholar and expert in banking regulation, Dalvinder Singh (The University of Warwick), is not a typical law book. It takes a holistic multidisciplinary approach and begins with the empirical overview of the cross-border banking activity within the EU, which shows considerable differences in the levels of foreign bank interconnection and concentration, the lack of homogeneity in the way banks expand and operate across borders and the prevalence of loans and deposits in international banking. Hence, in times of economic instability some banks and countries may be more exposed to the risk of financial spillovers and cross-border contagion.



The global financial crisis of 2008 has revealed that EU Member States are oftentimes reluctant to cooperate with each other and instead prefer to act in their own self-interest. Since then the principal areas of bank supervision, resolution and crisis management went through fundamental changes, resulting in the creation of the Single Supervisory Mechanism (SSM) and the Single Resolution Mechanism (SRM). Singh thoroughly studies this new regulatory framework from the perspective of information asymmetry and agency problems. He concludes that despite the major progress made in centralising decision-making and reducing asymmetry of information and coordination problems between competent authorities, various dilemmas or areas of potential conflicts remain. For example, they concern significant amount of areas with administrative discretion, lack of a harmonised bank insolvency and liquidation regime, incoherence of state aid rules, complicated relations between home and host authorities, different position and powers of Eurozone Member States and non-participating Member States / non-Eurozone participating Member States.

As COVID-19 rages and brings the global economy to a near standstill, banks acquire a crucial role in providing the much needed liquidity to struggling businesses. At the same time, the rising government debt, unclear prospects of economic recovery and the rapid growth of non-performing loans put the European cross-border banking, bank supervision and resolution under the spotlight, highlighting the importance of close cooperation and solidarity, and making the book by Singh particularly relevant and timely.

Reinventing Bankruptcy Law: A History of the Companies' Creditors Arrangement Act



Virginia Torrie (2020, University of Toronto Press, Toronto) 317 pp., C$ 56.25, ISBN 9781487506421

The book could not come at a more appropriate time than now. Many businesses are on the verge of going bankrupt due to the COVID-19 health crisis. New innovative insolvency reforms in many countries worldwide are being adopted as a response. These measures include new regimes for micro and small enterprises, favouring workouts and pre-insolvency proceedings, minimising the use of courts, cross-class cram-down, mitigating clawback risks, and creating new insolvency courts.

The work sets out to provide a working tool for academics, practitioners, and students who are interested in bankruptcy law in Canada. The book is a "first", as it provides a historical account of Canada's first corporate restructuring statute. The author adopts a research approach that combines legal history, socio-legal theory, political sciences, and doctrinal legal analysis. Although the book is Canadian-centric, it nevertheless compares with other jurisdictions, such as England and the United States.

The book consists of two parts and nine chapters. These chapters discuss a variety of topics such as the role of the judiciary in elaborating on provisions of the Companies' Creditors Arrangement Act (CCAA), the interaction between the CCAA and company law as well as some constitutional issues surrounding the CCAA. The book also deals with such topical issues as debtors-in-possession, going-concern reorganisation, first-day orders and arrange-ments. Overall, the author presents a proposal for the future, in which she suggests courts will continue to play a major role in advancing the CCAA and the role of the legislator will be to incorporate these advances into legislation.

The book is well-written and the research and discussion rich and detailed. It will no doubt prove to be an invaluable tool for practitioners and academics alike.

Bashar Malkawi, Professor of Commercial Law, University of Sharjah, UAE

Działalność sądów w postępowaniach restrukturyzacyjnych i upadłościowych

(The activity of courts in restructuring and bankruptcy proceedings)

Joanna Kruczalak-Jankowska, Anna Machnikowska and Monika Maśnicka (2020, University of Gdańsk Press, Gdańsk) 166 pp., PLN 33.93, ISBN 9788378659532

The latest book by the above-mentioned authors, subtitled "barieri funkcjonowania i instrumenty poprawy system upadłościowego w Polsce [operational barriers and instruments for improving the insolvency system in Poland]", was issued in connection with the scientific research conducted by the authors as part of the ACURIA Project (Assessing Courts' Undertaking of Restructuring and Insolvency Actions: best practices, blockages and ways of improvement). The main aim of the ACURIA project, funded by the European Commission, was to identify, based on theoretical and empirical research, factors improving and blocking effective bankruptcy and restructuring proceedings. The research was carried out by four European Universities, i.e. Maastricht (The Netherlands), Gdańsk (Poland), Centro de Estudos Sociais Coimbra (Portugal) and Università degli Studi di Firenze (Italy).

As part of the project, the research work was divided into four stages. Firstly, the current national and EU legislation was analysed, as well as the case law in the field of bankruptcy and restructuring law, and relevant statistical data were collected (Stage I). In addition to the theoretical research, empirical research was carried out, which consisted of a comprehensive analysis of bankruptcy and restructuring files in the districts of two district courts (Stage II), involving the District Courts in Gdańsk-Północ and Warsaw. The analysis covered a total of 243 bankruptcy and restructuring cases, which were legally closed in the period from 1 January 2012 to 31 December 2016. The remaining stages featured interviews with 32 specialists in the field of bankruptcy and restructuring law (Stage III) as well as the organisation of three focus groups and workshops as part of a scientific conference (Stage IV).

The text features an account of the research process, interviews, focus groups and findings of the project, accompanied by tables of relevant statistics. The book is a valuable and extremely interesting item, not only for academic and practising lawyers, but also for anyone dealing with legislation in the field of bankruptcy and restructuring law.

Anna Hrycaj, Director of the Institute for Bankruptcy, Restructuring Law & Insolvency Research, Lazarski University, Warsaw

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2020

30 September	INSOL Europe Academic Forum Conference *Online*
8/15/22/29 October	INSOL Europe Annual Conference - Towards A New World *Online*
3 & 10 December	Eastern European Countries' Committee Conference - Tectonic Changes in Eastern European Insolvency *Online*

2021

2 & 3 February	Joint Fraud Conference *Online*
6 & 7 October	INSOL Europe Academic Forum Conference *Dublin, Ireland*
7-10 October	INSOL Europe Annual Congress *Dublin, Ireland*

2022

5 & 6 October	INSOL Europe Academic Forum Conference *Dubrovnik, Croatia*
6-9 October	INSOL Europe Annual Congress *Dubrovnik, Croatia*

2023

11 & 12 October	INSOL Europe Academic Forum Conference *Amsterdam, The Netherlands*
12-15 October	INSOL Europe Annual Congress *Amsterdam, The Netherlands*

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