INSOL EUROPE
40 YEARS 1981-2021
#82 · Winter 2020/21

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The journal of INSOL Europe

Ipso Facto

Pushing suppliers into the insolvency abyss?

The COVID-19 pandemic: A nucleus for significant reform

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- **Lessons to be learned from Nortel**
- **Necessary reforms in Latin America**
- **Fraud, Furlough and Facemasks**
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Welcome from the Editors


EDVĪNS DRABA


CATARINA SERRA

We have just bid farewell to, perhaps, the most dramatic year of our generation. Hence, if I had to choose the keyword of this edition, it would be easy to fall into temptation and go for "extraordinary" – a word that can be found on the following pages some generous 14 times. But let us have a closer look, first.

We can perceive the current situation from two perspectives. One can argue that we have been prepared better than ever to meet the pandemic in 2020. Accessibility of broadband internet connection, advancements in mobile technology and cloud computing, development of internet-banking, ubiquity of mobile devices, gradual transfer to electronic documents and e-signatures, existing protocols of remote work in various organisations, and even progressive legislative acts providing for remote court hearings or exchange of documents via internet platforms or emails – all these have at least alleviated the impact of lockdowns, if not even made them possible in the first place. Not to say about the various services aimed at making our lockdown life easier, from webshops to food delivery and streaming services. The last, but not the least, is the adoption of the Directive on Restructuring and Insolvency with an (almost) perfect timing. Still, a sceptic might say that the last year was actually the worst time to enter the pandemic, given the various disparities and lack of understanding among groups, nations and continents, as well as the growing spread of false information.

For us this means that in these times it is more important than ever to be united and cooperative. First of all, it is vital that we are united in sharing (true) information, as well as the knowledge, tools and skills to combat the perils, be it the pandemic or the ensuing economic crisis, in Europe and beyond. On the insolvency front, an important foundation is both the transposition of the Directive across the EU and the outstanding work as regards identification of weaknesses in insolvency regimes and assisting the national legislators with removing them, conducted by the EBRD (*p.20*). At a certain stage, we might need to converge the texts of our insolvency laws even further, as the recent project by the European Commission suggests (*p.42*).

Without doubt, Eurofenix and the work of INSOL Europe in general are crucial in both uniting insolvency professionals and spreading the knowledge. In this regard, I am happy that the initial disappointment of cancellation of our live events in Sorrento (Annual Congress) and Kyiv (EECC Conference) was somehow mellowed by swift transition to online events, skilfully orchestrated at short notice (*p.22*).

In turn, a splendid article on Nortel – the most complex cross-border insolvency case of the last decade – shows that cooperation between insolvency practitioners could be paramount in achieving such remarkable results as satisfaction of creditors' claims in full (*p.34*).

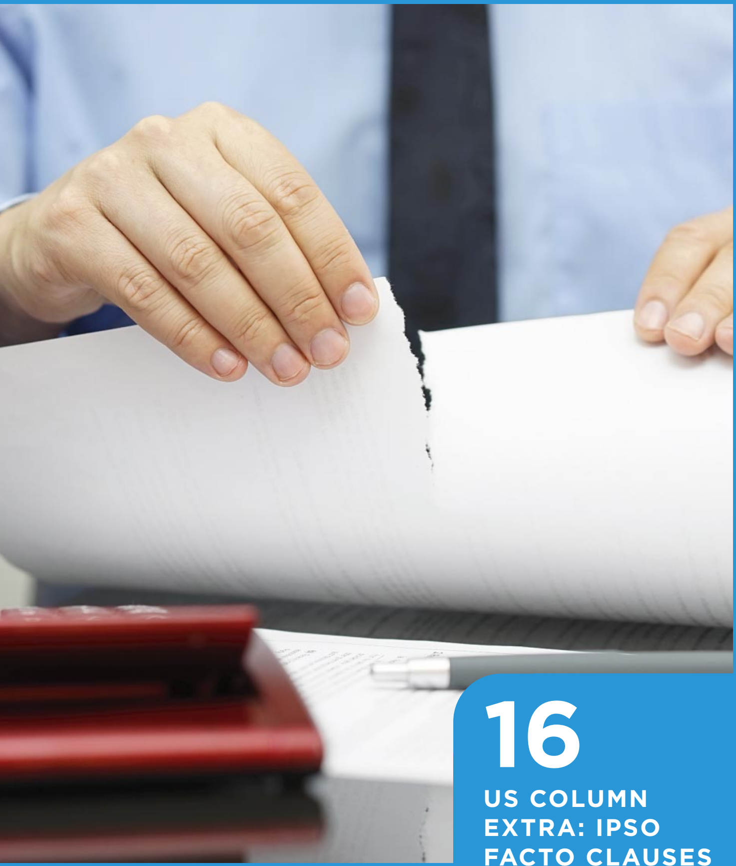
Talking about the developments and spreading the knowledge beyond Europe, the Richard Turton Award-winning article provides a rare glimpse at the developments in Latin America and proves that rapid modernisation and digitalisation of insolvency and restructuring regimes has not been limited to Europe or US (*p.27*).

In the meantime, exploring the subject of cooperation in this edition even deeper, we may come across an interesting trend towards prohibition of *ipso facto* clauses in US, UK and the Netherlands (thus, literally forcing suppliers to cooperate with the debtor) and even meet a bold theory that creditors in corporate workouts might have a duty to cooperate to curb the usual "free rider" problem (*p.16*).

Considering the abovementioned, my keywords for this edition are "unity" and "cooperation".

Let us wish each other health, luck and trust in ourselves in the New Year!

Edvīns



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LESSONS TO BE LEARNED FROM NORTEL

A digital journey from 2020 into 2021

MARCEL GROENEWEGEN
INSOL Europe President

Marcel Groenewegen looks back on his first months as President and updates us on the activities of INSOL Europe for its 40th anniversary in 2021

> *Since the start of the COVID-19 pandemic, the executive, council and staff of INSOL Europe have actively adapted to the digital world and set out on a joint digital journey for 2021*

When you will be holding this Winter Edition of Eurofenix in your hands, 2020 has ended and we have moved into 2021. INSOL Europe was established 40 years ago and 2021 is therefore a special year to celebrate this.

I hope you all had a safe and healthy transition into the new year and are keen on participating in INSOL Europe's activities in this special year.

For all of us, 2020 has been an extraordinary and very unusual year in which we had to adapt to what has become known as the "New Normal", meaning primarily staying connected digitally.

Digital journey

Since the start of the COVID-19 pandemic, the executive, council and staff of INSOL Europe have actively adapted to the digital world and set out on a joint digital journey for 2021. A number of new initiatives have been developed for 2021 and it is my pleasure to update you on these in this column. It is our intention to further expand the digital connection with our members. I do hope however that somewhere in the second or third quarter of 2021 it will again be possible to meet each other in person, especially during our Dublin Annual Congress.

New events

The new year will start off with an online webinar from our Academic Forum on 20 January 2021. Then, on 2 and 3 February 2021 an Anti-Fraud Webinar entitled "**Preparing for the New World: A Toolkit for Action**" will follow. It is a joint event by INSOL Europe, R3 and the Fraud Advisory Panel and will

provide a counter-fraud toolkit for practitioners, to help them prepare for the new world. Speakers will provide unique insights into topics related to global financial crime, including tackling rogue companies, cryptocurrency fraud and digital forensics.

Brand new is our mini online Spring 2021 conference to be held on 4 and 18 March 2021. It will be organised in the same format of our '**Towards a New World**' virtual conference in 2020, but for only two days. As I write this column, the technical programme is being put together.

Coffee Breaks update

You may recall that in 2020 we started our '**COVID Coffee Breaks**' series, which proved very successful. We have decided to continue this format for 2021 and have labelled the new series "**Coffee Breaks: Connecting Minds**". Our Country Coordinators will play an active role in these videos. The idea is to approach representatives of local National Associations of Insolvency Practitioners, National Associations of Lawyers or Chartered Accountants who specialise in insolvency or any other relevant association and invite them for an interview. In this manner we hope to be able to grant our members an in-depth insight into the developments in the various countries and, more specifically, the way in which the European Restructuring Directive will be implemented locally.

Expanding networks

In my acceptance speech as President of INSOL Europe I have expressed our intention to expand our relationship with INSOL International. This has now resulted in the intention to organize a joint online event on 15 April 2021 in which we intend to highlight insolvency and restructuring developments across the Atlantic for our respective members.

EU studies

In line with INSOL Europe's ambition to be in the forefront of developments in our field of expertise, in 2020 our EU Study Group has participated in a number of actions of the European Commission to provide input for future insolvency and restructuring legislative initiatives. The EU study group contributed to a report of the '*High Level Forum on the Capital Market Union*' (June 2020) and provided feedback for the '*Consumer Policy – the EU's new Consumer Agenda*' (October 2020). The latest initiative of the European Commission is called '*Insolvency laws: Increasing convergence of national laws to encourage cross-border investment*'. The EU Study Group provided feedback for its initiative in December 2020 and we intend to be involved in this project in the course of 2021.

Young members

On the Young Members' front, a joint INSOL Europe and AIJA event is now scheduled for 10-12 June 2021, hopefully live in Stockholm.

Dublin 2021

Finally, the two co-chairs Barry Chair and Giorgio Corno and the Technical Committee are busy putting together the technical programme for our **Dublin Annual Congress** (7-10 October 2021), to be held in the wonderful Clayton Hotel in Dublin. We hope that by that time we all will be able to travel again safely and to meet in person. Alternatively, we will make sure that the conference can go ahead as a digital event, of course, if need be.

Looking into 2021, it promises to become an exciting "digital" year indeed with a lot of interesting activities for our members. I encourage you all to regularly visit the INSOL Europe's website to stay up to date with our initiatives. Of course, we will actively keep you updated via our monthly newsletters and special email bulletins as well.

Let's celebrate INSOL Europe's 40th anniversary together and make 2021 a year to truly remember!

"Looking into 2021, it promises to become an exciting "digital" year indeed with a lot of interesting activities for our members"

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*

Retirements and Changes to the Council for 2021

INSOL Europe's Council held its bi-annual meeting on 2 October 2020 and here are all the changes for the year 2020/2021.

Piya Mukherjee passed on the baton of President to Marcel Groenewegen and stepped into Alastair Beveridge's shoes as Immediate Past President. Frank Tschentscher is now Deputy President and Barry Cahir joins the Executive as Vice President. Eammon Richardson also joins the Executive as Treasurer instead of Chris Laughton who has now retired from this role.

Florian Bruder received the most votes for the available seat on Council for Germany and Francisco Patricio had the most votes for the new vacancy for Portugal. Both new members were agreed by the Council during the meeting and in addition the Council also approved the second 3-year term on Council for Frances Coulson (UK), Rita Gismondi (Italy) and Giorgio Corno (Italy).

The Council agreed on newly appointed co-opted seats for Clarissa Nitsch (Austria) as the new Young Members Group co-chair and for Nicoleta Nastasie (Romania), as the Judicial Wing's co-chair.

The Council also agreed to re-co-opt David Rubin (UK) for his services to the sponsorship team, Radu Lotrean (Romania) for his work on the High-Level Courses and as co-chair of the Membership Development Committee, Steffen Koch (Germany) as co-chair of the Turnaround Wing and INSOL Europe representative on the board of INSOL International, and Tomas Richter (Czech Republic) as co-chair of the Academic Forum.

Practitioners on the Cusp of Change

A collaboration between the INSOL Europe Working Groups Insolvency Office-Holder (IOH) Forum and the Turnaround Wing saw the holding of a webinar on 17 December titled "PIFOR, Where Art Thou? What will the new world for Office Holders look like?", devoted to the Practitioner in the Field of Restructuring (PIFOR), a profession created by the new Directive on Restructuring and Insolvency. *Myriam Mailly and Paul Omar report.*

Speaking to a large audience under the lead of Robert Hänel (anchor rechtsanwälte, Germany), the panelists Jean Baron (CBF Associés, France), Alberto Nuñez-Lagos (Uría Menéndez Abogados, Portugal and Spain) and David Soden (Deloitte, UK) offered insights into how the transposition of the Directive by Member States (accompanied by analogous measures introduced post-Brexit into the UK) offers new tools for restructuring plans, in the shape of moratoria, (cross-class) cram-downs and the abolition of *ipso facto* clauses.

Examining the transposition process and the updated EBRD rules, the IOH Guidelines, on which INSOL Europe provided comments during a recent consultation, the panelists reported that procedural changes are not bringing universal alterations to the status of practitioners, the PIFOR not being seen in a few jurisdictions as a radically different profession. However, in some countries, a distinction is being drawn between

domestic and cross-border cases, leading to potentially different streams of practice without much cross-over. Some Member States, nonetheless, are enabling foreign practitioners to act in cross-border cases, perhaps leading to Europe-wide support for a specific PIFOR profession, particularly to allow specific sector expertise (e.g., aviation, transport, health etc) to be transportable across borders.

As Member States get to grips with the new directive regime, many are bringing previous experience with pre-insolvency processes to the transposition table, creating better conditions for acceptance of the transition to preventive restructuring. This reference back to domestic professional regulatory standards also appears to result in the emergence of certain pre-conditions, such as the need for independence, diligence, adherence to professional standards, respect for confidentiality etc. becoming common benchmarks for PIFORs across Europe.

INSOL Europe members can watch a recording of the webinar on our website: www.insol-europe.org/publications/online-conference-videos

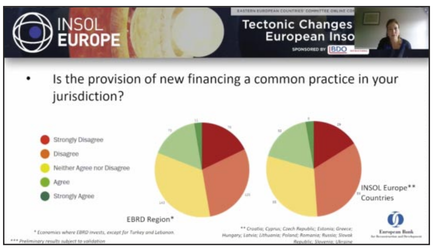
Click here

Tectonic Changes in Eastern European Insolvency

The Eastern European Countries' Committee held an online event in two parts on 3 and 10 December to focus on the evolving impact of the COVID-19 pandemic on business resilience and continuity, *report Paul Omar and Myriam Mailly.*

Part I (3 December)

Keynote speaker was Catherine Bridge Zoller (Senior Counsel, EBRD), speaking of the insolvency assessment on formal business reorganisation procedures, launched in September 2020 in partnership with international bodies, including INSOL Europe. (*See p.20 of this edition for more details of the assessment.*) A preview of interim results was given resulting from analysis of over 34K responses to the questionnaire from 57 countries. The exercise focused on three benchmarks: flexibility (importance of the rescue culture within the insolvency framework), efficiency (both economic and procedural) and effectiveness (the presence of necessary tools) with full results expected in 2021 Q1 (with individual country profiles to follow).



Financing Companies in difficulty during Coronavirus Times

Moderated by Dmitry Konstantinov (Ilyashev and Partners, Russia), panelists Tomáš Brožek (Deloitte, Czech Republic) and Edvins Draba (Sorainen, Latvia) provided an outline of measures in their respective jurisdictions. In the Czech Republic, financial expertise was key to implementing the new rules, including adjustments to the entry test, claw-back rules and moratorium etc. A new money priority will incentivise creditors to help support companies in final distress and future changes will increase the use of pre-insolvency proceedings. In Latvia, similar issues are being faced, though transposition of the Directive will help introduce welcome measures such as interim financing and aspects of avoidance actions currently missing from domestic law.

Struggling, Learning and Overcoming – COVID stories of Restructuring and Insolvency in Eastern Europe

Moderated by Irina Misca (CITR Cyprus), panelists Oleksander Plotnikov (Arzinger, Ukraine) and Adrian Cohen (Clifford Chance, UK) covered developments in the UK, Ukraine and Cyprus. UK reforms in June 2020 anticipated the Directive with the introduction of a new moratorium, avoidance of *ipso facto* clauses and a new restructuring plan with a cross-class cram down mechanism. In Ukraine, governmental measures have been introduced to support companies by limiting restraints on bank lending and support measures for employees. Out-of-court restructurings have also seen a surge in use in the wake of the recently introduced law. In Cyprus, analogous sectoral measures have been taken and their success will furnish the occasion for assessing how the new pre-insolvency frameworks have worked in practice.

Part II (10 December)

Keynote speaker Marcel Groenewegen (INSOL Europe President; CMS, The Netherlands) spoke warmly of the work of INSOL Europe in the former accession countries and the challenges facing jurisdictions still emerging and developing while reacting to the pandemic and other economic crises.

Implementing the EU Directive on Restructuring and Second Chance in Eastern Europe

Moderated by Roman Knut-Seger (BDO Restructuring, Germany), panelists enlightened the audience on the steps taken towards the implementation of the Directive in their respective jurisdictions. For Poland, Michal Barłowski (Wardynski and Partners, Poland) outlined the prospective changes to the Restructuring Law meant to boost the newly introduced "Simplified Restructuring Proceedings". Peeter Viirsalu (TGS Baltic, Estonia) noted ongoing work on a draft law, expected in March 2021, which will also introduce a legal basis for out-of-court proceedings for companies in distress. Rounding up for Germany, Roman Knut-Seger focused on the new law entering into force on 1 January 2021, which will increase the use of fast and cheap out-of-court proceedings with a moratorium, a reduced role for the court and a new role for a mediator.

AI vs Hammer

Moderated by Andreas Weinberger (NETBID, Austria), Marko Zaman (Zaman, Slovenia) and Ernst Giese (Giese & Partner, Czech Republic) described the core actions of auctioneers in (public) insolvency sales. While the necessity for a role for auctioneers was underlined, panelists suggested uncertainty and difficulties will remain for auction companies in the forthcoming months/years due to the health background impacting on the economic situation throughout Europe and beyond.

Concluding the series of online events, EECC Co-Chair Evert Verwey (Clifford Chance LLP, The Netherlands) thanked Radu Lotrean (CITR Romania) for his service as Co-Chair and, to replace him in this role, welcomed Niculina Somlea (STRIDE, Romania) who has already been the Secretary to the EECC for many years.

INSOL Europe members can watch a recording of the conference on our website: www.insol-europe.org/publications/online-conference-videos

Click here

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BDO RESTRUCTURING

New Co-Chairs for INSOL Europe's Young Members Group

To start this article with COVID-19 is not right, but we are in a transitional period of work, life and travel. In October 2020 Anne Bach and Georges-Louis Harang stepped down as Co-Chairs of the Young Members Group (YMG) not because of COVID, but because of the transition to the new Co-Chairs.

Clarissa Nitsch, attorney at law at Binder Grösswang in Vienna and Robert Peldán, counsel and Head of Restructuring at Borenius in Helsinki took over at the occasion of a virtual networking event embedded into an online wine tasting session, which was a great success. Even though it was online, the young members, of which nearly 30 participated in the webinar, interacted wonderfully and had the chance to exchange their thoughts directly. The online survey after the event showed that it was greatly appreciated by the young members to see each other and speak although the drinks reception at the Annual Congress in Sorrento would have been a highlight as usual.

Clarissa and Robert are thrilled about the kick-off event and have a bagful of ideas for the upcoming year. The Young Members Group will contribute even more to INSOL Europe and with the wonderful work of Anne and Georges-Louis, not to forget Sabina Schellenberg and Slavomir Cauder, over the last years this will not be difficult. Clarissa and Robert are already heavily involved in setting up another joint seminar with AIJA next year. The preparatory work is underway and many of the young members will have a chance to participate as a panellists or just expand their network, in the YMG events. If the crisis ends by then, the seminar will take place from 10 – 12 June 2021 in Stockholm.

Clarissa Nitsch & Robert Peldán are looking forward to their tenure as co-chairs of the Young Members Group

The YMG will also host its legendary drinks reception at the Annual Congress in Dublin and if we are lucky, there will also be a chance to get together at EECC next year. Clarissa and Robert also decided with YANIL (Young Academics in Law) to join forces and cooperate more in future years.

A toast to the young members of INSOL Europe. Stay tuned!

JCOERE Project Webinar: Corporate Rescue and Legal Supports for Businesses Post COVID19

The JCOERE Project, led by Professor Irene Lynch Fannon (University College Cork) and funded by the EU's Justice Programme 2014-2020, hosted an end-of-project webinar on 27 November 2020, *report Molly O'Connor, Research Administrator/ Project Manager and Dr Jennifer L. L. Gant, Project Researcher.*

The webinar, titled "Corporate Rescue and Legal Supports for Businesses Post-COVID-19", featured three panel sessions moderated by the UCC Team.

The first panel included Judges Michael Quinn and David Barniville from the Irish Commercial Court, discussing recent developments in Irish Examinerships and Schemes of Arrangement, particularly in light of EU legal developments and Brexit. Professors Gerard McCormack (University of Leeds) and Reinout Vriesendorp (University of Leiden; De Brauw Blackstone Westbroek) formed the second panel, giving topical presentations on legislative developments in preventive restructuring in the UK and the Netherlands, against the background of the Preventive Restructuring Directive. Presentations in the final session focused on support for SMEs post the COVID-19 pandemic. Neil McDonnel (CEO) and Barry Lyons (Solicitor) from the Irish SME Association discussed the rescue of SMEs under recent Irish legislation introduced to mitigate the economic impact of the pandemic.

The webinar attracted attendees from the legal practice, academia and business with a global audience. The Q&A sessions were lively and relevant, resulting in interesting and important discussions. It was an excellent capstone to a significant project and an important opportunity to engage in discussion about recent developments in European preventive restructuring, as well as changes to the corporate rescue culture in light of the pandemic.

Virtual Voices: The UNCITRAL 2020 Meeting in Vienna

The UNCITRAL Working Group V (Insolvency Law) met for its 57th Session on 7-10 December 2020. *Dr Jennifer L. L. Gant and Paul Omar report.*

Although there were no sugary Austrian delights on offer in the global virtual environment, over 90 delegates from across the world "gathered" via the UN online platform for four days of deliberations. The topic of discussion was a draft text on a Simplified Insolvency Regime for Micro and Small Enterprises (MSEs) in financial distress. Drafted in conjunction with Working Group I (Micro, Small and Medium Sized Enterprises), the delegates considered 63 of the 88 recommendations, offering input largely predicated on balancing the desire for simplicity and flexibility against the need to ensure that such an instrument, when implemented, would not be prone to abuse.

Careful attention was paid to issues such as the appropriate form of notice, the role of the court in approving and appealing procedural aspects, the involvement of the competent authorities, as well as issues arising from institutional differences between jurisdictions.

One topic in particular emerged during the session, that of the need perceived by major delegations for the inclusion of explicit mention of employees within the text. As a result, interventions were supplemented on the final day with the introduction of a compromise text featuring recommendations with employee-focused references, jointly drafted by the USA and the EU. Although a full discussion of this addition was stymied due to technical problems with the video-conferencing platform, it was agreed that consideration would occur at the next meeting in New York, scheduled for May 2021.

New Work for New York? The UNCITRAL-HCCH Colloquium

On 11 December 2020, immediately after the UNCITRAL Working Group V (Insolvency Law) meeting in Vienna, a Colloquium on Applicable Law was organised, jointly with the Hague Conference (HCCH) on the topic of the applicable law in insolvency proceedings.

Over four sessions held virtually, speakers addressed what has been proposed as the topic of UNCITRAL's next project, once work on the Model Law for simplified proceedings for micro- and small-enterprises has concluded, likely to occur at the New York session scheduled for May 2021.

The initiative has been championed by the European Commission, with whom INSOL Europe, the University of Zagreb and the Croatian Ministry of Justice jointly organised an event in September 2020 in Zagreb on the theme to gauge traction at the international level for such a venture.

Four sessions covered important topic areas within the scope of a possible project, the first on the nature of applicable law examining the work of UNCITRAL and the European Union in the field, while the second explored major concerns in relation to rights *in rem*, securities and financial instruments, avoidance actions and special contracts, including employment obligations.

Later in the afternoon, the third set of speakers outlined regional approaches to the concept of applicable law, covering Latin America, South-East Asia and Africa as well as the overall methodology for dealing with choice of law issues. In the final session of the day, representatives from HCCH, the European Commission and UNCITRAL discussed the possible scope of work, the shape of future plans and the nature of the text to embody the project.

Nicolas Theys

It is with great regret and sadness we announce that Nicolas Theys passed away on 29 October 2020 after a long illness.

Nicolas was a friend, an enthusiastic attendee and speaker at many of the INSOL Europe events and he will be deeply missed by many members and colleagues of the association.

As many of you know, Nicolas was a talented and highly respected lawyer, having practiced law for more than 25 years, specialising in restructuring, insolvency and bankruptcy. The legal profession has lost not only a great lawyer but a rare person who radiated warmth and humanity.

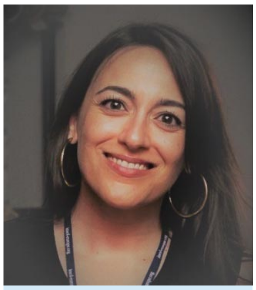
Nicolas will certainly be remembered as a man of great elegance and immense kindness, always showing respect towards those who crossed his path.

We would like to express our sincere condolences to Nicolas' wife, Laure, his children Clara and Emma, and all his family and friends at this difficult time.

Audrey Molina and all Dentons members

A closer look at...

Recognition of French preventive confidential procedures in the UK



EMMANUELLE INACIO
INSOL Europe Conference Technical and Training Course Director

> *In order to address the COVID-19 related economic and financial crisis, the French government has decided to extend the time limits of the conciliation procedure*

French preventive confidential procedures

French insolvency law has seen several reforms since 2005[1] in order to offer tools to prevent insolvency as early as possible and to increase the efficiency of its preventive restructuring framework. Thus, the future transposition of the Directive on Restructuring and Insolvency will not require significant changes.

French insolvency law provides for an insolvency test (cessation of payment) which is a cash flow test. If a company is not insolvent, it can request the opening of one of the two preventive, consensual and confidential procedures - *mandat ad hoc or conciliation* - or the preventive, collective and public procedure - *procédure de sauvegarde*.

The *mandat ad hoc* and *conciliation* preventive procedures are very successful in practice as they are confidential, voluntary and consensual. Firstly, the stakeholders are bound to a duty of confidentiality. Secondly, only the debtor is allowed to request the opening of a *mandat ad hoc* or a *conciliation* procedure before the president of the competent court who will appoint a *mandataire ad hoc* or a *conciliateur*[2], usually proposed by the debtor. Moreover, the debtor will remain in possession and the *mandataire ad hoc* or *conciliateur* will facilitate the negotiation of a confidential agreement between the debtor company and its main creditors. Finally, the negotiation cannot lead to a cram-down of a minority of dissenting creditors[3]. In return, the creditors not taking part to the negotiation cannot be bound by the agreement.

The preventive *mandat ad hoc* procedure is very flexible as it is not subject to any fixed time frame[4]. Moreover, it does not trigger a stay on compulsory enforcement as this procedure is governed by the contract law. On the contrary, the *conciliation* is opened at the request of a solvent debtor company which is facing an actual or a foreseeable legal, economic or financial difficulty, or in the case of an insolvent debtor company, provided it has not been insolvent for more than 45 days[5]. The president of the competent court appoints a *conciliator* for a period of maximum five months[6].

After the opening of the *conciliation* procedure, where any creditors (even public creditors) sent a formal notice or enforced their rights, the court may, at the debtor company's request, grant it a stay of individual enforcement actions for a time limit of maximum two years[7].

The agreement reached by the *conciliator* and concluded between the debtor and the concerned creditors may be acknowledged by the President of the court or made enforceable by the court.

The decision acknowledging the agreement is confidential, not subject to any publication. However, the judgement making the agreement enforceable is published. The terms and conditions of the conciliation agreement remain confidential[8].

The interest of having a confirmed agreement is to create a "new money" privilege for the creditors who provide the debtor with new financing/goods/services in order to ensure the continuation of the business's activity. Therefore, if collective procedures are opened subsequently against the debtor company which has benefitted from the conciliation, the "new money" creditors have the right to preferential payment of their claims[9].

These both successful proceedings, however, are not listed in Annex A of the European Insolvency Regulation n°2015/848 as they are confidential and thus do not fall in its scope. Therefore, they are not automatically recognised in another EU Member State.

French preventive confidential procedures and the COVID-19 crisis

In order to address the COVID-19 related economic and financial crisis, the French government has decided to extend the time limits of the conciliation procedure. Indeed, encouraging prevention has been identified as a tool to address the COVID-19 related crises.

The ordinance n°2020-341 of 27 March 2020[10] provided that the conciliation procedure was automatically extended until 24 August 2020. A second ordinance n°2020-596 of 20 May 2020[11] adds the possibility, until 31 December 2020, for a debtor company in *conciliation*, to request before the president of the court which opened the *conciliation*, a moratorium and a potential rescheduling of its debt up to the end of the conciliation proceedings, in case a creditor did not accept a standstill on its debt claim within the time period fixed by the conciliator. The last ordinance n°2020-1443 of 25 November 2020[12] provides that the conciliations procedures opened between the 24 August 2020 and 31 December 2021 are extended up to ten months.

It is in this context that a French group of companies hit by the COVID-19 related crisis requested the opening of conciliation procedures in August 2020 before the president of the Commercial Court of Paris[13].

During the negotiations with the creditors, one of them, whose registered office was in the England, decided to enforce its rights equally before the French and the English courts.

The French conciliator tried to negotiate a standstill. However, the English creditor did not accept a standstill on its debt claim within the time period fixed by the conciliator.

Thus, the debtors requested a stay on the basis of the ordinance n°2020-596 of 20 May 2020 before the president of the Commercial Court of Paris.

Legal basis for the recognition of French preventive confidential procedures in the UK

Moreover, the debtors requested before the English courts the recognition of the French conciliation proceedings on the basis of the "Cross-Border Insolvency Regulations 2006" (CBIR)[14], which is the legal basis for the recognition of French preventive confidential procedures in the UK.

Indeed, as the European Insolvency Regulation does not apply in this particular case, the opening of French conciliation proceedings is not automatically recognised in the UK…

However, the CBIR provides the legal basis for the recognition in the UK of foreign insolvency proceedings, as the CBIR gives force to the UNCITRAL Model Law on Cross-Border Insolvency (1997), which is designed to assist the States to equip their insolvency laws with a modern legal framework in order to more effectively address cross-border insolvency proceedings. Contrary to the UK, France has not adopted the UNCITRAL Model law. To date, the Model Law has been adopted in five EU jurisdictions only: Greece, Poland, Romania, Slovenia and United Kingdom. However, the CBIR allows the UK Courts to recognise foreign insolvency proceedings without any need for reciprocity.

In order for foreign proceedings to be recognised under the CBIR, the debtor shall have a place of business, residence or assets situated in the UK. Otherwise, the Court shall consider recognition appropriate. Once foreign main proceedings have been recognised in the UK, there is an automatic stay of certain types of creditor actions. Where a foreign non-main proceeding is recognised, the Court has a discretion to grant any appropriate relief. Upon recognition, the CBIR give certain rights to the foreign representative, for example to be heard in the English courts and in some cases to commence proceedings relying on the provisions of the English Insolvency Act 1986.

In this particular case, the English court recognised the French conciliation procedures and imposed to the creditor a moratorium to the benefit of the group of companies. A stay of individual enforcement actions was also imposed to the creditor, except express approval by the English Court or approval by the Foreign Representative.

Following Brexit, if automatic recognition of insolvency judgements between the UK and the EU became a thing of the past, the CBIR could in fact offer an interesting solution for the recognition of all EU insolvency proceedings. In return, the EU Member States should all implement the UNCITRAL Model Law. ■

Following Brexit, if automatic recognition of insolvency judgements between the UK and EU became a thing of the past, the CBIR could in fact offer an interesting solution

Footnotes:

1 Law no. 2005-845 of 26 July 2005 came into force on 1 January 2006.

2 The representative appointed by the President of the court is generally an insolvency practitioner even if this is not required by the French law. In France, two specialised and regulated professions subjected to specific rules benefit from a *quasi* monopoly situation in all insolvency proceedings, representing a sort of public service of justice. These two independent, exclusive and incompatible professions are the *administrateurs judiciaires* and *mandataires judiciaires*, with the sole exception being that the *administrateur judiciaire* can also practise as a lawyer (*avocat*). The *administrateur judiciaire* represents the debtor, whereas the *mandataire judiciaire* represents the creditors.

3 In order to cram down on dissenting minorities of financial creditors during the *conciliation*, the debtor may request the opening of an *accelerated financial safeguard* or an *accelerated safeguard procedure*. However, both procedures are opened at the request of a solvent debtor company or an insolvent one (provided it has not been insolvent for more than forty-five days) (1) whose accounts have been certified by an auditor or a chartered accountant and which employs at least 20 employees, has a minimum annual turnover ex VAT of €3m or a minimum balance sheet total of €1.5m or (2) which has drawn up certified accounts. Moreover, both procedures are opened at the request of a debtor involved in an ongoing *conciliation* procedure, justifying that the restructuring plan negotiated during the *conciliation* proceedings is already supported by a sufficient majority of its creditors. The *accelerated financial safeguard* procedure only applies to financial creditors. The plan is then submitted to the court for approval within a short time period (three months in the accelerated safeguard procedure and one month in the accelerated financial one.)

4 Commercial Code, Article L611-3.

5 Commercial Code, Article L611-4.

6 Commercial Code, Article L611-6, Paragraph 2.

7 Commercial Code, Article L611-7, Paragraph 5.

8 Commercial Code, Article L611-8.

9 Commercial Code, Article L611-11, Paragraph 1.

10 Ordonnance n°2020-341 of 27 March 2020: www.legifrance.gouv.fr/jorf/id/JORFTEXT000041762344/.

11 Ordonnance n°2020-596 of 20 May 2020: www.legifrance.gouv.fr/jorf/id/JORFTEXT000041897273/

12 Ordonnance n°2020-1443 of 25 November 2020: www.legifrance.gouv.fr/jorf/id/JORFTEXT000042565006

13 Dominique-Paul VALLEE, Délégué général à la prévention-traitement au Tribunal de commerce de Paris, 1 Quai de Corse, n° 54.

14 The Cross-Border Insolvency Regulations 2006: www.legislation.gov.uk/uksi/2006/1030/contents/made

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:

Dávid Oršula *david.orsula@bnt.eu*
José Carles *j.carles@carlescuesta.es*
Laurent Le Pajolec *lpa@exco.pl*

In the digital-tech pipeline for 2021 and beyond

José Carles, Laurent Le Pajolec and David Orsula, co-chairs of the Insolvency Tech & Digital Assets Wing, review their recent activities and introduce their plans for next year

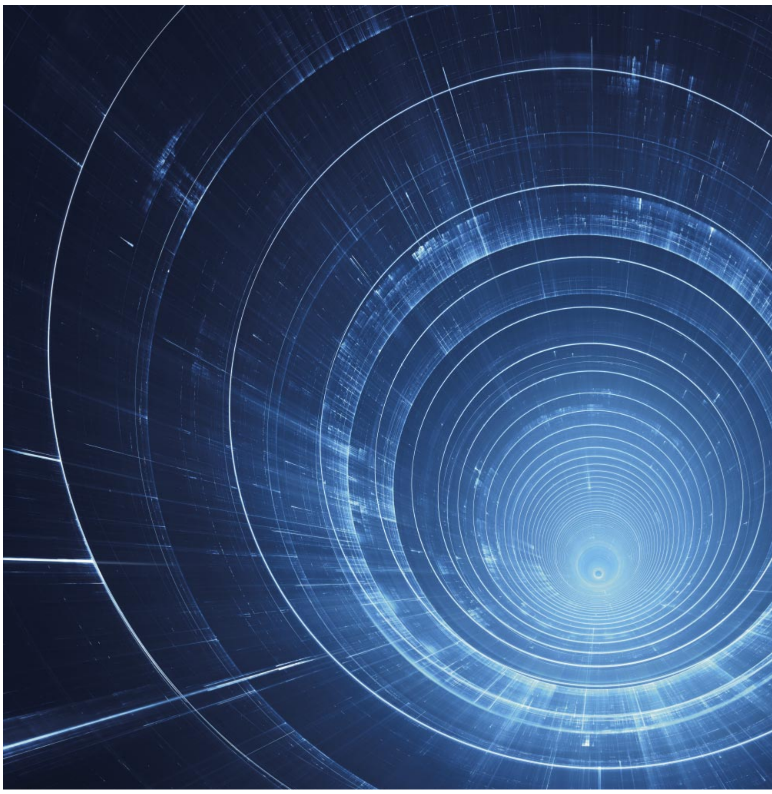
> *The IT&DA has decided that one of its main projects for the future will be to create a cross-border case register with Court decisions that involve digital assets under insolvency*

This year we all missed being able to meet personally at INSOL Europe's Annual Congress in Sorrento. However, we all made it happen, virtually.

Our Insolvency Tech & Digital Assets Wing (**IT&DA**) worked together with the Turnaround Wing and the Anti-Fraud Forum and held the panel "*Lessons learned from the Failures of the Fintech Company: Wirecard Case*" on fraud in fintech companies under distress. Wirecard's cross-border case and the implications of the nature of fintech companies regarding fraud and insolvency were duly addressed. Our co-chair Laurent Le Pajolec was one of the members of the panel. *See full report on page 22.*

Besides, the Insolvency Tech & Digital Assets Wing held its second Annual Meeting at the end of September, welcoming new members to the wing even from Australia. All the members discussed the projects that have been carried on by this working group so far and defined the next projects to be developed in the future.

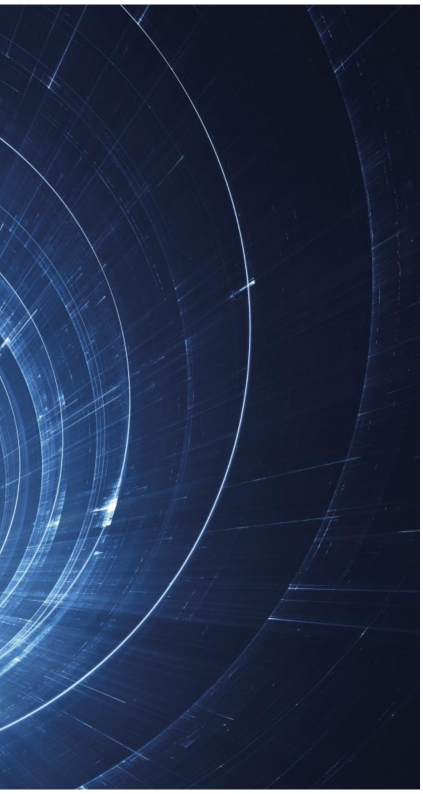
As an on-going project, our wing has contributed to all of the past issues of Eurofenix with articles related to legal tech and/or digital assets and intends to continue doing so. We are well aware that not all of us are so familiar with legal tech tools or the implications of digital assets in insolvency. Thus, it is our duty to help INSOL Europe's members to be able to deal with cases in which they



encounter crypto assets or new business models such as 100% virtual businesses (let us think of on-line platforms, for example). Some of our members have been involved in such cases, such as Pierre-Gilles Wogue in France (Viadeo case) or José Carles in Spain (Casa y Lienzo case), both in 2016. In these cases with non-tangible assets, the debtors' value is also non-tangible and therefore, the expectation of recovery of creditors could just disappear overnight.

Cross-border analysis

Our working group highlight was producing a cross-border analysis on the **Court-related technology measures adopted by European** (and even some non-European) **countries as a result of the COVID-19 pandemic**, mainly related to on-line filings and platforms and virtual hearings in insolvency-related cases. This analysis was published in the Summer 2020 edition of Eurofenix. Further articles on this matter could be published in Eurofenix if there are relevant developments on the tech-based relationship between lawyers, insolvency practitioners and Courts (i.e. virtual hearings).



Valuing digital assets

Regarding future projects, and also with a pan-European focus, the Insolvency Tech & Digital Assets Wing insisted on the need to analyse **how digital assets are valued, transferred and safeguarded** – so their value is not lost. In this respect, our members talked not only about cryptocurrencies, they also referred to certain intangible assets and to certain on-line platforms and webshops. They also discussed the **cross-border difficulties** that may arise in these cases and commented on the need of cooperation between European Courts and insolvency practitioners in cases involving digital and non-tangible assets, as well as on the advances made in the European Insolvency Regulation Recast. Rapid decisions that require cooperation are necessary in cases involving these assets.

Cross-border register

In this respect, there are already some relevant rulings at a national level (in Europe and outside), which could help Courts and insolvency professionals from other European countries face cases in which these assets are involved. The Insolvency Tech and Digital Assets Wing unanimously decided that one of its main projects for the future will be to create a **cross-border case register with Court decisions that involve digital assets under insolvency**. The case register will include rulings but also relevant reports of the liquidators or insolvency practitioners and will allow producing, in the future, a comparative study so that INSOL Europe can continue contributing to the need of harmonisation in the insolvency legislation within the European Union. This would also allow producing quick and easy check-lists in European jurisdictions on the steps to be followed when insolvency and/or restructurings involve digital and non-tangible assets. Our co-chairs will contact the European Commission in order to develop this project.

National players

The Insolvency Tech and Digital Assets Wing has also been recently working on spotting the **national players in legal tech, crypto and digital assets**. In some jurisdictions, it is bar associations or universities. In others, private entities have taken the lead. There are also European entities who deal with these issues and have representation across Europe (such as ELTA, the European LegalTech Association). In 2021, our wing will be contacting these organisations to build a network and strengthen our links with them.

As you can imagine, all these projects are possible because of the contributions and implication of the wing's members, so do not hesitate to drop a line to any of our co-chairs (José Carles, Laurent Le Pajolec and David Orsula) if you would like to be involved with any of these projects.

We are organising a new on-line meeting of the members of the wing (and those of you who are interested in being implicated in our activities) for the beginning of 2021, do not miss it! ■

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Do prohibitions against *ipso facto* clauses push suppliers into the insolvency abyss?

David H. Conaway examines the impact of *ipso facto* clauses with reference to UK and Dutch insolvency proceedings by Simeon Gilchrist and Nicolaes Tollenaar

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

Given the current global economic conditions, many companies are in severe financial distress or insolvent. There is a global emphasis on corporate rescues or restructurings, as opposed to a liquidation or traditional bankruptcy.

The US has a long-standing history of corporate rescues pursuant to Chapter 11 and its Bankruptcy Code. The UK and the Netherlands have recently modified their insolvency statutes to facilitate and expedite corporate rescues. In each case, such modifications include the unenforceability of so-called "*ipso facto*" clauses. The statutory provisions are designed to prohibit suppliers from terminating or modifying contracts, to support the corporate rescue. The question is, which stakeholders assume the risk of success or failure of the corporate rescue? The growing trend in the US is that suppliers are assuming a disproportionate amount of that risk, by virtue of the presence of *ipso facto* clauses in supplier contracts. It will be interesting to note how insolvency statutes regarding *ipso facto* clauses are intended to be addressed in UK and Dutch insolvency proceedings, and how they will actually be interpreted and enforced.

As originally conceived, Chapter 11 allowed insolvent companies to restructure their businesses, based upon a "breathing spell" from creditors and the payment of pre-Chapter 11 debt. While companies could use Chapter 11 to temporarily shelve pre-petition debt, the privilege of Chapter 11 required debtors to "pay as they go" during the Chapter 11 case. Pre-petition claims are generally unsecured claims ("GUCs") and "pay as you go," claims are deemed to be "administrative claims," which receive priority payment treatment under the Bankruptcy Code. The statutory basis or assurance for the "pay as you go" requirement is Section 1129 of the Bankruptcy Code which requires payment of administrative claims in full, as a condition to confirmation of a Plan of Reorganisation. While creditors may receive little or nothing on their GUCs, at least they would be paid for supporting the debtor customer during the Chapter 11 case to facilitate a successful restructuring.

> *There is a global emphasis on corporate rescues or restructurings, as opposed to a liquidation or traditional bankruptcy*

Times have changed

In recent years, a high percentage of Chapter 11 cases are not resolved with a Chapter 11 Plan of Reorganisation. Rather, the main event of the Chapter 11 case is a Section 363 sale of all of the debtor's assets. Sometimes there is a mop-up Plan of Liquidation, which deals only with residual, post-sale assets, usually preference claims against vendors. A Section 363 sale has no corresponding requirement that administrative claims are paid in full. Rather, payment of administrative claims is dependent on sales proceeds in excess of secured debt and professional fees, or on the Section 363 sale buyer's willingness to assume administrative claim liabilities in the asset purchase agreement.

We note three recent examples of Chapter 11 cases where the main event involved a Section 363 sale and administrative claims were not paid in full:

- Toys "R" Us (claims paid less than 20%)
- Sears/Kmart (nominally paid 75%), and
- Dean Foods (claims paid 80%).

In Sears/Kmart and Dean, the estates also pursued preference actions against vendors to recover payments received 90 days prior to the Chapter 11 filing. As a result, suppliers suffered the trifecta of business insult from their customers: (1) write-off of pre-petition accounts receivable balances, (2) non-payment of invoices for supporting the debtor *during* the Chapter 11 case, and (3) disgorgement of payments received prior to the Chapter 11 case.

The non-payment of administrative claims in Chapter 11, and the use of "administrative protocols" to compromise administrative claims is a growing trend in the US. In a number of key US industries (e.g. automotive, aviation, dairy, energy, retail, hospitality), existing market conditions and/or COVID-19 consequences have caused significant disruptions in operations, roiling EBITDA and asset values, and restricting access to financial liquidity. Chapter 11 has become the ultimate zero-sum game with intense competition over allocation of value to stakeholders.

As a result of the growing trend of non-payment of administrative claims, the premise that Chapter 11 debtors must "pay as they go" has been compromised. Yet, debtors (and perhaps their financiers behind the scenes) consistently assert that suppliers must continue to perform their end of the sales bargain unabated, which includes shipments of goods and extensions of credit terms.

This insistence is based upon Section 365(e) of the Bankruptcy Code which provides that an executory contract may not be terminated or modified, and any right or obligation under such contract … may not be terminated or modified solely based on the insolvency or financial condition of the debtor or the filing of Chapter 11. However, the foregoing does not apply if the applicable law excuses the supplier from accepting or rendering performance to the debtor.

US Bankruptcy Courts have prohibited suppliers from enforcing these "*ipso facto*" contract clauses that allow for termination or modification of a contract due to the filing of Chapter 11, the financial condition or insolvency of the debtor, or the failure to pay invoices as a result of the Chapter 11 filing. To do otherwise would, in theory, gut a debtor's rights regarding its ability to assume or reject contracts, as part of the restructuring process.

Yet, a supplier is at greater risk of non-payment of its administrative claims, especially when the financial condition of the customer is tenuous and there is uncertainty of outcome in Chapter 11.

However, the "applicable law" exception mentioned above includes Article 2 of the US's Uniform Commercial Code ("UCC"), which is functionally a "federal" law on the sale of goods, as all US states (except Louisiana) have adopted Article 2 of the model law. In particular, UCC Sections 2-609 and 2-702 regarding anticipatory breach and cash before delivery shipments, can relieve suppliers from the obligations to ship or to extend credit.

In the Dean Foods Chapter 11 case, pending in Texas, the debtors filed a number of first day motions including approval of DIP financing, that was presented as providing sufficient "runway" for Dean Foods to achieve a successful Chapter 11 reorganisation or a "successful" Section 363 sale. Dean Foods also filed a first day motion to prohibit contract counter-parties from altering their contracts, including the obligations to continue providing goods and services, on credit terms, without regard for suppliers' rights under the UCC. Thus, on day one, vendors' rights to withhold shipment or credit terms were impaired, without regard to increased risk of payment later in the Chapter 11 case.

Fast forward to July, 2020, Dean Foods filed a proposed "administrative claims protocol" offering to pay administrative claims at a 20% discount, including the post-petition invoices that Dean Foods failed to pay, and the Section 363 sale buyer refused to assume such liabilities. The administrative protocol indicates that Dean Foods is or may become administratively insolvent, meaning it does not have or may not have sufficient assets to pay Section 503(b)(9) claims and unpaid post-petition invoices in full.

Suppliers have an easy fix to this dilemma: avoid a formal sales contract and only do business on a purchase order and invoice basis. Obviously a much less committed business relationship, but the supplier is able to "cut off" the debtor immediately upon failure to pay or the filing of Chapter 11, because there is no binding contract. Which is ironic because the supplier with a formal contract has every incentive to continue supporting the debtor customer, provided the supplier is assured of payment.

Bankruptcy Courts should not expand the prohibition on *ipso facto* clauses, and protect suppliers who want to support the debtor customer by recognising that the suppliers' rights under the Uniform Commercial Code, specifically including Section 2-609 and 2-702 constitute "applicable law" that may excuse the supplier from falling into the administrative protocol abyss. Fair is fair, creditors will not be paid on their GUCs, and will likely be sued for a preference. They should not also fund the debtor's Chapter 11 case without payment.

> *As a result of the growing trend of non-payment of administrative claims, the premise that Chapter 11 debtors must "pay as they go" has been compromised*

NICOLAES TOLLENAAR
Lawyer, RESOR NV, The Netherlands

> **the Dutch bill provides for the ability of a debtor to unilaterally terminate burdensome contracts**

Dutch update

On 1 January 2021 the bill on the Dutch scheme will enter into force, also known under its Dutch acronym "WHOA" (*Wet homologatie onderhands akkoord*). The plan procedure can be implemented outside of formal insolvency and has been designed to be as efficient, fast and flexible as possible. The procedure provides for majority decision making with voting by class and cram-down of dissenting classes with reference to the applicable priority rules.

The bill contains certain supportive measures such as a generic or specific moratorium upon request, the protection of new money against claw-back risk, and the ability to continue using encumbered working capital in the ordinary course, subject to adequate protection.

The bill also contains provisions for dealing with contracts that are net-assets and should be preserved, and conversely, contracts that are net-liabilities and should be terminated and converted into an ordinary unsecured liability.

Section 373(1) of the Dutch bill provides for the ability of a debtor to unilaterally terminate burdensome contracts and convert them into an ordinary unsecured damages claim. Section 373 subsections (3) and (4) are aimed at ensuring continued performance, at least pending the procedure of those contracts, that are deemed necessary or beneficial to the business. As far as the continuation of contracts is concerned, the legislative notes make it abundantly clear that whilst liabilities that arose under the contract before the commencement of the procedure can be restructured, all liabilities that arise under a contract after the commencement of the procedure have to be paid in full in accordance with their terms ("pay as you go"). A director who allows the debtor to assume a liability pending the procedure, whilst he knew or ought to have known that the debtor would not be able to satisfy that liability in full, will be liable for the shortfall.

Section 373(3) of the Dutch bill addresses *ipso facto* clauses where the debtor has *not* defaulted under the contract. The key concept is that the sole fact that the procedure has commenced or a plan is being proposed does not constitute grounds to suspend or terminate further performance of the contract. The mere commencement of the procedure or the proposal of a plan does not necessarily lead to an increased risk of default. Indeed, a moratorium that stays pre-existing liabilities and/or a plan that de-leverages the debtor's balance sheet, can in fact *decrease* the risk of future non-performance by the debtor on its operational contracts. However, the general contract law remains in place. If the non-debtor party to the contract can demonstrate a material risk of non-performance on the debtor's part, it retains its right to suspend further performance or to terminate the contract under provisions of general contract law (anticipatory breach).

Section 373(4) addresses situations where the debtor *has* defaulted on its obligations under the contract. When a stay has been ordered, a breach of performance by the debtor *before* the stay has commenced does not constitute grounds for amending, suspending, or terminating obligations owed to the debtor, provided security is granted for the performance of new obligations arising under the contract during the stay. The security must be more than just "assurance" and must properly ensure full performance. If adequate security for future performance is not provided, the non-debtor party to the contract may suspend further performance on the basis of the pre-existing default. The result of this is that the non-debtor party cannot "hold-out" on the basis of a pre-existing default to procure preferential treatment of its pre-commencement claim. At the same time, it cannot be forced to incur further risk in supporting the debtor going forward.

UK[1] update

Set against the back-drop of the global pandemic, Royal Assent was given on 25 June 2020 to the snappily titled Corporate Insolvency and Governance Act 2020 ("**CIGA**"). The Act came into force the following day. This is a complicated piece of legislation that is home both to short term measures seeking to address the insolvency ramifications of the pandemic, and to more structural shifts in both the insolvency and corporate governance legislative frameworks: CIGA contains transitional provisions and measures with sunset dates alongside structural changes to existing legislation, principally the Companies Act 2006 and the Insolvency Act 1986. CIGA is not only complicated but it is also controversial in its use of so-called "Henry VIII powers" by which the executive is given the ability to modify certain of its provisions using only secondary legislation.

The reform to the law of contract and the supply of goods and services complements the introduction of the pre-insolvency moratorium and the new restructuring plan. Although English contract law holds sacred the ability to contract freely, this latest reform was but the latest step in the gradual curtailment of *ipso facto* clauses. Section 233 of the Insolvency Act 1986 required monopoly utility providers to continue their supply to insolvent companies whilst depriving the supplier of leverage to force settlement of unpaid accounts.

The 1986 statutory curtailment to monopoly suppliers was further developed by reforms in 2015[2] as a consequence of which "essential goods and services" could no longer be the subject of *ipso facto* clauses where the debtor had entered administration or a company voluntary arrangement ("**CVA**"), the rationale no doubt being that both processes are ostensibly rescue mechanisms. The 2020 reform can be seen as an extension to the meaning of "essential supplies and services", as opposed to a paradigm shift of itself.

CIGA's new section 233B of the Insolvency Act 1986 addresses the protection of supplies of goods and services. The expanded *ipso facto* prohibition applies to a "relevant insolvency procedure", which ranges from the new moratorium through administrative receivership, CVA, administration and the new restructuring plan to include, interestingly, provisional liquidation and liquidation itself. It does not include traditional Companies Act schemes of arrangement, which is also interesting if the prohibition was intended to support turnaround or restructuring mechanisms.

Subject to exceptions, the new section 233B works in two ways: first, there is a permanent prohibition against a supplier's termination right on the grounds of insolvency or non-payment of historic debt, or in amending payment terms to suit the supplier. Second, there is a temporary prohibition against enforcing pre-insolvency grounds of default until the relevant insolvency procedure comes to an end or the debtor progresses into a further insolvency procedure. However, there are three safeguards that enable termination: the consent of the debtor entity; upon approval of the court; or on a post-insolvency non-payment of a new supply. Approval of the court requires that the supplier establishes "hardship", an entirely novel term to the legislation that will no doubt be the subject of much jurisprudence.

The exceptions to the application of the prohibition fall broadly into two categories, both of which were foreseeable: permanently excluded from the reach of the prohibition are suppliers of insurance, banking, payment infrastructure, financial services and the financial markets on the one hand and, on a temporary basis, "small suppliers". The temporary nature of the exclusion has been extended to 30 March 2021 as a consequence of the pandemic, whereas the meaning of "small" is engaged on two of three conditions: turnover of not more than £850,000 per month in the preceding 12 months; a balance sheet of no more than £5.1M; and fewer than 50 employees.

The reform may well have far reaching consequences for the drafting of supply contracts but it is far from all-encompassing as presently enacted. Questions remain as to the scope of the prohibition in terms of what are "essential goods and services" and applicability to sole traders, who remain vulnerable to an *ipso facto* clause irrespective of the nature or size of their business. Although supposedly necessary as an adjunct to the new pre-insolvency moratorium and restructuring plan in levelling up to the ubiquitous Chapter 11, the purpose of the reform ("*the policy intention*") was said to have been to allow companies to trade through restructuring or insolvency procedure. There is an open question however as to how much value will be preserved at the expense of suppliers' prior freedom to withdraw and the actual cost to them in further lost supplies. As in all things, time will tell. ■

Footnotes:

1 The writer never tires of underlining to overseas readers that "the UK" is three separate but often co-dependent legal jurisdictions: England and Wales; Scotland (which together form Great Britain); and Northern Ireland. Although a broad brush may generally be applied, the extent of any legislative provision must be verified on a case by case basis. In the present instance, the legislation makes separate provision for Great Britain and Northern Ireland. With apologies to all Welsh, Scottish and Northern Irish friends, the writer approaches this topic from an English perspective.

2 Insolvency (Protection of Essential Supplies) Order 2015(SI 2015/989)

SIMEON GILCHRIST
Lawyer, Edwin Coe LLP, United Kingdom

> **"Questions remain as to the scope of the prohibition in terms of what are "essential goods and services" and applicability to sole traders"**

The COVID-19 pandemic: A nucleus for significant reform

Catherine Bridge Zoller, keynote speaker at our EECC conference in October, reports on the background to the recent insolvency assessment on formal business reorganisation procedures

CATHERINE BRIDGE ZOLLER
Senior Counsel, EBRD

On 1 September, the European Bank for Reconstruction and Development (EBRD) launched an insolvency assessment on formal business reorganisation procedures in partnership with UNCITRAL, the International Law Development Organisation, INSOL Europe and INSOL International and in cooperation with the European Commission.[1]

The EBRD assessment was conducted by the Legal Transition Team, a small team of lawyers who are part of the Office of the General Counsel and work on legal reform and capacity building projects that support the Bank's investments. On 8 September we had a formal event to celebrate the launch and we were delighted that INSOL Europe's President Piya Mukherjee could join our panel discussion with Francis Malige, EBRD head of Financial Institutions and Professor Rodrigo Olivares-Caminal from Queen Mary Centre for Commercial Law Studies on "Restructuring in the COVID-19 era: where do businesses need support?".

Assessments are at the centre of the EBRD's efforts to foster investor-friendly, transparent and predictable legal environments. They are regularly carried out by the EBRD Legal Transition Team in commercially important legal fields to help highlight areas where a country's legal or institutional framework needs improvement. While assessments are not transaction specific, they aim to identify the reforms that are needed to support the transactions managed by lawyers within the banking teams of the Office of the General Counsel.

> *Assessments are at the centre of the EBRD's efforts to foster investor-friendly, transparent and predictable legal environments*

In the current economic environment, the EBRD assessment is of utmost importance. Many businesses around the world have been severely affected by the coronavirus pandemic. While some businesses will be able to agree on a restructuring with their creditors, others will require formal legislative tools, including a moratorium on creditor action, to negotiate and agree a restructuring. Many will need further liquidity. 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 is also especially challenging for emerging economies with limited resources and without a developed legal infrastructure that supports business.

Online questionnaire

The EBRD assessment covered all economies where the EBRD invests and extends to countries outside the EBRD regions for benchmarking purposes.[2] The assessment included an online questionnaire, targeted at respondents with a legal background in restructuring and insolvency, to collect information on the state of business reorganisation frameworks in a given jurisdiction. The questionnaire was open to the public and was accessed on the new EBRD assessment website (www.ebrd-restructuring.com). The questionnaire was also accompanied by a short survey on non-performing loans (NPL) addressed to financial institutions and their advisors to identify potential obstacles for NPL resolution in the banking sector, which will suffer a deterioration in loan portfolios as a result of the economic crisis. We invited members of INSOL Europe and their contacts with relevant knowledge to participate in the assessment. The questionnaire remained open until November 2020 but is now closed.

The EBRD assessment on business reorganisation was expected to uncover many areas for improvement of national insolvency legislation and greater harmonisation with international standards of best practice. Many countries still have old-fashioned insolvency systems that are geared towards liquidation and closure of the business rather than to helping debtors to survive. Weaknesses in formal reorganisation procedures have a negative impact on informal, out-of-court restructuring, since there is no credible threat or majority creditor led alternative to a fully consensual deal. Even in more advanced economies within the European Union (EU), there are significant gaps in formal reorganisation frameworks that can undermine the prospects of a successful business restructuring. For example, in some countries secured creditors are not required to be part of a reorganisation procedure and can enforce their security without restriction. Alternatively, it may be impossible under national legislation to compromise secured creditor claims within a reorganisation procedure without secured creditor consent, effectively resulting in a veto by individual creditor.

Cultural change

Within the EU, the culture around business reorganisation procedures will change significantly following the Directive on Restructuring and Insolvency, published in June 2019. The Directive highlights a number of key features of any legislative framework that seeks to promote business rescue, including a requirement for there to be a procedure that allows the debtor to remain in possession, a moratorium on all creditor action (including enforcement of any security by secured creditors) to support the restructuring and protection for new financing provided in the context of a restructuring. The Directive is an ambitious effort to shift the emphasis of insolvency systems in favour of early, pre-insolvency restructuring. While the Directive is inspired by Chapter 11 of the United States Bankruptcy Code, it has certain notable differences. It is a minimum harmonisation measure and will not result in a uniformly applicable approach to restructuring across the EU. However, the flexibility of the Directive and the fact that it is based on concepts and high- level principles means that it can be useful for national authorities outside the EU, who are considering longer term reforms to their insolvency legislation to support businesses. The EBRD Legal Transition Team has been able to draw upon the Directive and its experience of transposition of the Directive in Hungary and Latvia for the purpose of the assessment. In parallel, we have updated our Core Principles of an Effective Insolvency System in consultation with INSOL Europe, the World Bank and UNCITRAL, to reflect the greater emphasis on business restructuring. These principles provide a high-level overview of the standards that insolvency systems should meet.

The COVID-19 crisis

The coronavirus pandemic has brought many challenges to society and the economy. Its effects in certain area, including work and digitalisation, may be long-lasting. For policymakers working in the field of insolvency and debt restructuring, the COVID-19 crisis offers an opportunity for significant reform. Much needs to be done in the EBRD regions to strengthen national reorganisation frameworks and to provide businesses and their creditors with the tools to achieve a successful restructuring. The EBRD assessment will help national authorities to think beyond emergency short-term legislation to the longer-term reforms necessary to help businesses return to viability and to protect jobs. ■

Update

Final country results and a cross-jurisdictional analysis will be published on the EBRD assessment website in the first quarter of 2021 at: **www.ebrd-restructuring.com**

INSOL Europe members can watch a recording of Catherine Bridge Zoller's presentation at the EECC conference in which she announced some preliminary results, on our website at: **www.insol-europe.org/publications/online-conference-videos**

Click here

> *For policymakers working in the field of insolvency and debt restructuring, the COVID-19 crisis offers an opportunity for significant reform*

Footnotes:

1 By 'reorganisation procedures' we understand any legislative procedure(s) for restoring financial stability of a business, including any early, preventive or pre-packaged reorganisation procedure or general reorganisation-type insolvency procedure, which involves the restructuring of the debtor's assets and liabilities or any other part of its capital structure.

2 The economies covered by the assessment where the EBRD invests include Albania, Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Egypt, Estonia, Georgia, Greece, Hungary, Jordan, Kazakhstan, Kosovo, Kyrgyz Republic, Latvia, Lebanon, Lithuania, Moldova, Mongolia, Montenegro, Morocco, North Macedonia, Poland, Romania, Russia, Serbia, Slovak Republic, Slovenia, Tajikistan, Tunisia, Turkey, Turkmenistan, Ukraine, Uzbekistan, West Bank and Gaza.

"Towards a New World"
A 'virtual' conference in four seasons

Paul Omar and Myriam Mailly report on the Annual Conference, taking place online for the first time

PAUL OMAR
INSOL Europe Technical Research Coordinator

MYRIAM MAILLY
INSOL Europe Technical Officer

INSOL Europe's main conference took place online in four instalments during October. Attracting a sizeable audience, events were generously sponsored by NetBid, as overall sponsor.

Individual sponsorship also came from **Alix Partners** and **Horten** (8 October), **Proskauer** and **Hoche Avocats** (15 October), **anchor** and **bnt attorneys** in CEE (22 October) as well as **Grant Thornton** and **CITR** (29 October). Acting as facilitator throughout was **Reinhard Dammann** (Dammann Avocats, France), who ably steered panellists and audience through the parts of the performance.

Session 1: 8 October 2020: "Spring"

Introduced by **Piya Mukherjee** (Immediate Past President, INSOL Europe; Horten, Denmark), **Lars Liebst** (ex-CEO, Tivoli) gave the keynote address, referring to Denmark's pandemic experience, particularly in keeping affected employees informed about future prospects, tourism having been hit hard. Beyond economic concerns, social utility helped crafted solutions to keep people active and build resilience throughout summer.

Directors in the twilight zone

Led by **Cristina Fussi** (De Berti Jacchia Franchini Forlani, Italy), this session reported a major concern in potential abuses of law, surfacing also in **Michael Thierhoff**'s (Andersen Tax & Legal, Germany) account of the German response, which has fuelled the ongoing debate on the risks for the Directive on Restructuring and Insolvency (**DRI**). Taking the relay, **Suzanne Jones** (Seddons, UK) explained how UK directors campaigned for a new insolvency regime alongside business alleviation measures, including suspension of wrongful trading, albeit it was too soon to assess likely cases of misuse. Lastly, **Anton Molchanov** (Arzinger, Ukraine) noted the lack in the Ukrainian Insolvency Code of a statement on directors' duties, leading to challenges for directors.

Implementation of the Directive on Restructuring and Insolvency (DRI)

Attention then shifted towards DRI implementation. Opening the discussion, **Adrian Thery** (Chair of the INSOL Europe Directive Project; J&A Garrigues, Spain) highlighted the major changes and key technical provisions: cross-class cram-down, value calculation mechanism, distinction between financial/trade creditors etc.). **Ondrej Vondrácek** (Civil Justice Unit, DG Justice & Consumers) recounted the state of play in national implementation processes admitting this to be a huge exercise given the main legislative changes: preventive restructurings, discharge of debts and early warning mechanisms.

Member States have not (yet) requested the optional extension, but have asked for more information, especially on the impact on existing domestic law, including proceedings outwith the Recast European Insolvency Regulation (Recast EIR). **Frank Tschentscher** (Luther, Germany) then referred to the German DRI implementation draft text published mid-September for consultation, particularly on the role of the restructuring officer.

Lastly, **Alastair Beveridge** (AlixPartners, UK) referred to the new UK 2020 Act, making possible the compromise of shareholders or secured creditors' rights, though solutions differ according to the restructuring or liquidation options for cross-class cram-downs.

Session 2: 15 October 2020: "Summer"

In this session, **Ondrej Vondrácek** (Civil Justice Unit, DG Justice & Consumers, European Commission) gave the keynote address, describing on-going work and noting the reduction in forum-shopping fears following the Recast EIR. Shortly in the news will be a new insolvency initiative on themes such as avoidance actions, asset-tracing and other practice-based issues, aiming to result in a legislative proposal by 2022. Views from INSOL Europe members will be welcome during forthcoming consultations.

Saving SMEs during the pandemic

This session, chaired by **Mark Fennessy** (Proskauer, UK), reported on SME-focused pandemic responses. For the UK, **Marcia Shekerdemian QC** (Wilberforce Chambers, UK) outlined major changes: moratorium proceedings, a new "monitor", a new restructuring plan with cram-down and suspension of commercial landlords' rights. For France, **Catherine Ottaway** (Hoche Avocats, France) mentioned the recent financial support plan, State loan-guarantees, solidarity funds and sector-specific initiatives. Lastly, **Ivo-Meinert Willrodt** (Pluta, Germany) recounted Germany's preparedness due to the lessons of previous crises, adopting social and

"INSOL Europe's main conference took place online in four instalments during October"

financial measures, compensation for short-term losses, liquidity-focused loan programmes and sector-specific measures.

Stick or carrot? The (new) role of the practitioner in the field of restructuring

Attention then shifted towards the (new) role of the practitioner in the field of restructuring, led by **Robert Hänel** (Co-chair, Insolvency Office Holder (IOH) Forum; Anchor, Germany). **Jean Baron** (Co-chair, IOH Forum; CBF Associés, France) recounted the French pre-insolvency experience, the relevant procedures having three main pillars: confidentiality, IOH independence and light-touch court involvement. Continuing the theme, **Stela Ivanova** (bnt attorneys in CEE, Bulgaria) explained the different options of IOHs and trustees for insolvency procedures. Bulgaria has seen few pre-insolvency proceedings, given the lack of a settlement culture, a major concern also being possible pressure from dominant creditors on IOHs and trustees.

Session 3: 22 October 2020: "Autumn"

The keynote speech was delivered by **Elisabetta Pagnini** (Group General Counsel, Banca Intesa Sanpaolo, Italy), describing successful examples of partnership between the Italian Government and the private banking sector, the positive results of which have led to the rescue of households, businesses in financial distress as well as jobs. Other partnerships have been developed to face the COVID-19 pandemic, which have benefited the whole economy and are to be encouraged.

Voluntary arrangements with creditors in the time of COVID-19: Has legislation helped?

The first panel discussion, led by **John Briggs** (South Square, UK), outlined scenarios where deals are necessary for survival and the use of voluntary arrangements crucial. **Judge Catarina Serra** (Supreme Court, Portugal) noted the successful Portuguese experience since 2012, which was extended to consumer insolvencies in 2017. Continuing the debate, **Paolo Vitale** (Studio Legale Vitale, Italy) then spoke about concordato preventivo as a DIP-type procedure. The panel discussion noted the key differences between procedures, court control and/or court approval and supervision approaches being among those mentioned.

Battle of schemes: UK vs The Netherlands

Attention then shifted towards the (forthcoming) Anglo-Dutch "*Battle of Schemes*". Competing for the audience's favours were **Simeon Gilchrist** (Co-Chair of the Technical Committee; Edwin Coe, UK) and **Marcel Groenewegen** (President, INSOL Europe; CMS, The Netherlands), who each outlined the merits of their procedures and some of the key points, including post-Brexit recognition issues, court involvement, transparency, particularly with the differences between confidential and public schemes. Both agreed upon the similarities between the outlook of the competing schemes, but suggested that sufficient differences (and separate advantages) remained for creditors to evaluate the choice between them.

Session 4: 29 October 2020: "Winter"

Opening the final session in the series, **Professor Christoph Paulus** (Humboldt University, Berlin; of Counsel, White & Case, Germany) offered a few views on the desirability of progress in insolvency and restructuring practice and highlighted the great steps that had been taken thus far with instruments such as the Recast EIR and DRI.

Lessons learned from the failures of the fintech company: Wirecard case

The first panel discussion, led by **Laurent Le Pajolec** (Co-Chair, Insolvency Tech & Digital Assets Wing; Exco, Poland), was the result of the combined efforts of three INSOL Europe working groups. **Frank Tschentscher** (Luther, Germany) shared a quick overview of the case and a mention of the Financial Times campaign leading to the mid-2020 insolvency filing. Continuing the analysis, **Bart Heynickx** (Co-Chair, Anti-Fraud Forum; Altius, Belgium) mentioned the fraudulent sums of money involved (€1.9 billion) and the issues of the role of management, whether there was proper supervision and whether national market regulation authorities are capable of ensuring confidence.

Finally, **Pierre-Gilles Wogue** (Altana, France) reassured the audience that the Fintech sector was still booming, but that risks remained in the sector at both national and EU levels, particularly with cross-border companies.

Judges faced with a COVID-19 world

The final session featured an exchange of judicial experiences, led by **Judge Nicoleta Mirela Nastasie** (Co-Chair, Judicial Wing; Bucharest Tribunal - VII Section, Romania) who enquired how judges were coping with digital issues. **Judge Eberhard Nietzer** (Co-Chair, Judicial Wing; Amtsgericht Heilbronn, Germany) replied that fundamental changes had not yet occurred, particularly as virtual hearings were not contemplated by the law, but that online hearings could pose challenges for choice of compatible e-platforms. For Ireland, **Judge Michael Quinn** (Co-Chair, Judicial Wing; High Court, Ireland) explained virtual corporate hearings were common, following a pre-pandemic digitalisation plan, but that substantial questions could require physical hearings to hear evidence/examine witnesses. Choice of platform is also an issue, particularly in recording virtual hearings. Similar digital changes to Romania's infrastructure were outlined by Judge Nastasie.

*Ending the final session, **Marcel Groenewegen** (President, INSOL Europe) thanked those contributing to the success of the events, in particular the sponsors who extended their generosity. With the expression of hope that delegates can meet at Dublin 2021 in person, the conference was closed.* ■

> "This was the first-ever INSOL Europe Annual Conference held online so it was difficult from the beginning to compare it to any experience from previous years. I was impressed with the approach of the organisers of setting four different online conferences. In this way, as a viewer, I had enough time between each session to really enjoy and appreciate the topics.
>
> It was clear to everyone that the main topic would be the pandemic and everything that concerns our line of business and the way it has been affected. Each panel had well-documented topics, which I found insightful and refreshing, especially when listening to different perspectives and ways of dealing with the current problem from experts all around Europe. To sum up, while not ideal, this year's event has certainly lived up to the expectation of finding a way to share great knowledge."
>
> *Cristina Ienciu, CITR*

A more detailed report of the conference can be downloaded from the News page of our website: www.insol-europe.org/news/from_insol

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"Virtually" in Sorrento: Autumn dreams of insolvency

Paul Omar and Myriam Mailly round-up the Academic Forum's first online conference

ACADEMIC FORUM
INSOL Europe

PAUL OMAR
INSOL Europe Technical Research Coordinator

MYRIAM MAILLY
INSOL Europe Technical Officer

The presentation slides, a link to the conference recording and a transcript of the Q&A are all available via the Academic Forum website at: www.insol-europe.org/academic-forum-events.

Click here

With thanks to the Academic Forum Sponsor for their continued support:

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The Academic Forum hosted a Webinar on 30 September 2020, attracting over 80 participants.

Beginning with an introduction and explanation of the Zoom protocol by Professor Tomáš Richter (IEAF Chair; Charles University Prague), appreciation was also expressed for the continued support of sponsors Edwin Coe LLP.

The technical programme contained two presentations, the first by **Professors Horst Eidenmüller** and **Kristin van Zwieten** (Oxford) on creditor cooperation duties in out-of-court restructurings/workouts, while the second by **Lydia Tsioli** (King's College London), looked at models and filtering mechanisms in the US Chapter 11 and the European Union Preventive Restructuring Directive (Directive) relating to "viability assessment".

Creditor cooperation duties: The strategy

Professor van Zwieten began by outlining the project and making the point that workouts were particularly important as the COVID-19 crisis causes particular difficulties for businesses through loss of revenue and operational capacity. An increase of global insolvencies of 35% in 2021 is widely expected. As a result, finding a solution has been regarded as imperative. Of the possibilities, these include applying ordinary insolvency law, promoting bail-outs, i.e. state-funded support for struggling businesses or curing defaults by requiring debt-forgiveness or bail-ins. Recent research by the authors suggests that bail-outs and bail-ins are both desirable to "stop the clock" on the stresses businesses face, although thus far, full bail-ins or bail-outs have not been seen. Partial solutions have appeared, though, such as preventing proceedings from being initiated, the imposition of moratoria, the encouragement of write-downs etc.

Taking the relay, **Professor Eidenmüller** posited the assumption that corporate workouts are more effective because of lower costs, thus making the case for out-of-court restructurings. Nonetheless, there is a major "free rider" problem: if everyone does it, workouts will collapse. This is a well-known dynamic of the process, but to which no solutions have thus far been found in hard law, while soft-law approaches previously used have become dysfunctional, especially within the international creditor community. As such, should the law step in? The imposition of a creditor cooperation duty could replicate the contours of a hypothetical inter-creditor agreement, subject to the need to apply normative principles, such as fairness, proportionality or good faith. Although creditors might cooperate without any coercion, where a workout is necessary and feasible, a duty encapsulating these principles might be useful.

On whether there are any legal bases for such a duty, the project has found thus far that there is typically no doctrinal basis in the case-law of major jurisdictions (the American, British and German positions being similar). Routes that could be considered could include the interpretation of any existing duties (owed to the debtor perhaps) to include a good faith element, the extension of negligence principles to include a duty to other creditors or the invocation of partnership law (which would be a bold move), the rationale being that creditors *inter se* could be regarded as being in a fiduciary relationship akin to partners. Overall, the view is taken that "in these extraordinary times", where the pandemic still continues to cause financial distress for firms on an unprecedented scale, "we need extraordinarily creative legal thinking".

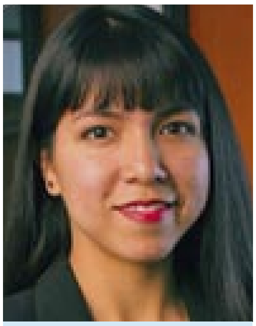
The viability of "Viability Assessments"

Lydia Tsioli began with definitions of the difference between financial viability (on the issue of solvency) and economic viability (the contrast between going concern and liquidation values). In this light, critical issues arise as to *when* the assessment of viability is made and *who* will assess viability, whether IPs and/or creditors. In the texts studied, there are differences in the structure and timing of assessments. In the US Chapter 11, these include when an application to dismiss or convert the case is made and when relief from a stay is requested. The Directive is noticeably different in its approach, notably in Article 7(3) allowing for conversion between restructuring and liquidation. More research is necessary to identify an optimal approach for the Directive. However, a future for rescues across Europe could only result from a closer reflection on the notion of viability, especially on a comparative basis. This would enable suggestions to be put forward for better interpretation of the concept and/or potential reform of the provisions in the Directive.

Ending the session, Professor Richter thanked the speakers for their thought-provoking presentations and also expressed the hope that the scheduled Dublin 2021 conference will permit participants to gather in person for a fuller programme. ■

Necessary reforms: Adaptation of insolvency regimes in Latin America

Carla Cervantes identifies how Latin American countries have attempted to remedy deficiencies in the laws in response to the COVID-19 pandemic



CARLA CERVANTES
Legal assistant, Estudio Martinot Abogados, Peru

This article is a summary of the full paper written by the 2020 Richard Turton Award winner, Carla Cervantes from Peru.

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

You can read the full version (also available in Spanish) of Ms Cervantes' award-winning paper on our website: www.insol-europe.org/richard-turton-award

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In the context of systemic crisis caused by the COVID-19 pandemic, insolvency regulation not only has to face the increase in the number of applications, but it also has to innovate and provide specific alternatives to the urgent refinancing needs of companies, such as modernising the proceedings in accordance with the limitations imposed by governments to stop contagion.

In response to this challenging scenario, governments have implemented different legal measures and Latin America has not been oblivious to these changes.

This article seeks to identify the main changes in insolvency matters in Latin American countries and how these have tried to remedy the deficiencies that existed before the COVID-19 pandemic.

Use of digital platforms

In Latin America, while there had been many previous attempts to introduce electronic procedures, the use of paper was by far the rule. As a reaction to the crisis, most countries in the region nowadays provide the option to follow the status of insolvency proceedings through online portals of their judiciaries, including Brazil, Colombia, Ecuador, Chile, and Mexico, among others. Despite the fact that not all countries have access to electronic files, the creation of virtual channels for the submissions of applications and communication is now the general practice.

As an interesting case, it should be noted that Colombia has recently implemented online platforms, artificial intelligence and electronic forms created specifically to handle the large number of applications related to insolvency proceedings.[1]

Regarding creditors' meetings, initially these were suspended during the COVID-19 lockdowns. However, most Latin

> **Colombia has recently implemented online platforms, artificial intelligence and electronic forms created specifically to handle the large number of applications related to insolvency proceedings**

American jurisdictions now permit these meetings to be held through virtual platforms.

As for Brazil, there is no binding norm for the courts on this matter, but a series of recommendations were approved in connection with insolvency matters, including that virtual meetings shall be authorised when these are necessary to maintain the business activities of companies in reorganisation or for the beginning of payment to the creditors.[2] At this time, certain virtual meetings have been performed normally, but there has also been a case in which a virtual meeting was deemed unacceptable to creditors[3].

Moreover, in Peru, virtual creditors' meetings and all the formalities for carrying them out within the framework of insolvency proceedings are regulated by a directive[4].

Accelerated access to the insolvency proceedings

One of the specific problems in the countries of the region in insolvency matters is the delay to commence insolvency proceedings, as well as the effects of this upon debtor protection and in the approval of the reorganisation plan, problems that are exacerbated for the COVID-19 context. In such regard, the following changes have been adopted:

Changes in the ordinary proceedings

In Colombia, one amendment incorporated into the general insolvency regime is the relaxation of tests for the admission into a reorganisation procedure. As a consequence of this change, the judge will not seek to establish the content or accuracy of the financial documents provided by the debtor. On the admission resolution, the judge may also order the extension or updating of the information provided. This measure is temporary and streamlines the stages of the application process that previously took several months.[5]

Creation of fast-track insolvency process

The creation of special insolvency procedures has also been chosen as an exceptional solution for companies. These procedures are mainly characterised by their short-term, transitory nature and can only be submitted by those who have been affected by the emergency caused by the COVID-19 crisis.

In Latin American, Colombia and Peru are the countries that have special insolvency procedures in force to date. In Peru we have:

- The "**Expedited Insolvency Refinancing Procedure**"[6] (PARC, for its initials in Spanish), it can only be initiated by debtors. The approval of the refinancing plan by the creditors' meeting generates its automatic application to all the creditors of the company, and never results in the partners or shareholders losing the administration of the debtor. Furthermore, the disapproval of the refinancing plan only generates the culmination of the procedure.
  In contrast to the ordinary regime where the approval of the refinancing plan can take between one to two years in the best of cases, in the PARC, once the request is admitted by the insolvency authority, the creditors' meeting is held within 55 business days. It should be noted that the burden of the insolvency authority to recognise labour and consumer debts has been removed in order to alleviate the great burden that the review of these applications represents and to meet the deadlines.[7]

In Colombia two fast-track insolvency procedures were created:

- **"Emergency negotiation of reorganisation agreements"**[8] In this process, parties can reach an agreement in three months instead of six. It starts with a notice of the debtor's intention to negotiate with the creditors and, based on this, the authority makes a formal review of the documentation submitted, admits the request and initiates the negotiation process. In this period, negotiations with groups of particularly vulnerable creditors are exceptionally allowed. The resulting agreement and the claims of dissidents are reviewed and in a single hearing the agreement is confirmed or not. Failure in negotiating the agreement does not produce the liquidation of the debtor, but rather the opportunity to process a reorganisation under the ordinary regime.

- **"Business recovery procedure"**[9] This is a quasi-judicial procedure in which debtors can choose to file for this form of reorganisation at the Chambers of Commerce, where the mediator assumes the functions of the judge and has powers to verify the qualification and graduation of credits and determination of voting rights. The procedure lasts three months in order to enable the debtor and the creditors to reach the reorganisation agreement. With the conclusion of the payment agreement presented by the debtor, it may be submitted to the insolvency judge for validation in order to extend the effects of the agreement and decide on the objections and comments of the creditors.

Besides that, the pandemic makes micro, small and medium enterprises (MSMEs) especially vulnerable, and the use of insolvency mechanisms can be particularly costly for these companies.[10] In view of this, in Colombia other expedited procedures were also incorporated, applicable only to companies whose assets are equal to or less than 5,000 monthly legal minimum wages in force:

- **"Abbreviated reorganisation process"**[11] From the beginning of this process, a date is set for a hearing that must be held within three months in order to reconcile objections to voting rights and the graduation of credits, and to present the agreement to the judge. Then there will be another hearing to resolve the unconciliated objections and confirm the agreement.
- **"Simplified judicial liquidation proceedings"**[12] In this procedure, the time within which creditors must submit their claims is reduced from 20 to 10 days, after which the liquidator has two months to sell the assets to third parties or to the creditors who may make offers. If not all the assets are sold, an adjudication project is submitted to the Judge for allocating them to the creditors.

Mechanisms to help debtors in insolvency proceedings

Certain interesting measures were included to help and protect debtors in insolvency proceedings. Especially in Colombia, within the legislative package in insolvency matters[3], some of these are the following:

- **Rescuing companies in imminent liquidation status:** In the event that the end of the reorganisation process has been declared and the start of the liquidation process has been ordered, any creditor may prevent the liquidation by providing new funds that cover at least all payable credits, as long as the patrimony of the debtor is negative and the creditor deposits the total cost of the operation.
- **Tax benefits:** Companies that are in reorganisation processes can access exemption benefits on different taxes. Likewise, there is the possibility that the Colombian tax authority negotiates and cancels debts such as penalties, interests and even principal.
- **Incentives for DIP financing:** The obligations resulting from new financing provided between the beginning of the reorganisation process and the confirmation of the reorganisation agreement shall be preferred over the creditors' claims in the restructuring process and the authorisation from the judge will not be required.
- **Extension of payment terms:** Quotas of the reorganisation agreements in execution corresponding to the months of April, May and June 2020 were not considered due until July 2020.
- **Breach of the reorganisation agreement:** The reorganisation agreement will not terminate if an event of default of the obligations of the agreement occurs unless the breach extends for more than three months and is not remedied by the hearing.

Regarding the obligations of the reorganisation plans, the following recommendations have also been adopted in Brazil[14]:

- **Impossibility of executing the debtor's assets:** The judge must evaluate with exceptional caution granting measures of eviction due to lack of payment and enforcement acts of an equity nature in claims that demand the fulfilment of defaulted obligations during the state of emergency.
- **Modifications to the reorganisation plan:** The judge must authorise the presentation of any modification of the reorganisation plan, when the decrease in the capacity to fulfil obligations due to the COVID-19 pandemic is proven and if the current plan was being complied with by 20 March 2020.

Closing remarks

With the arrival of the crisis generated by COVID-19, insolvency regimes had to face new problems such as the increase in insolvency applications, urgent refinancing needs of companies and the limits of the provisions issued to stop the expansion of the virus.

Thus, the laws have had to adapt to these new times and some governments have taken the opportunity to implement extraordinary measures for corporate rescue and make their procedures more flexible. Brazil, Chile and Mexico are some of the countries that are already working on reform projects.

Some of these measures are here to stay and, in any case, the implementation of these new formulas will provide the necessary knowledge to establish whether these allow to solve both temporary and systemic problems in the regulation. ■

"The laws have had to adapt to these new times and some governments have taken the opportunity to implement extraordinary measures for corporate rescue and make their procedures more flexible"

Footnotes:

1 Article 3 of Legislative Decree No. 772 of June 3, 2020. Likewise, recently the Superintendent of Companies created a digital tool called Insolvency Module (MI), which incorporates the technological tools indicated by de Legislative Decree for insolvency proceedings.

2 Article 3 of Recommendation No. 63 of March 31, 2020.

3 In the case of Cultura (Process No. 1110406-38.2018.8.26.0100) the virtual meeting was rejected by the court on the ground that it would cause difficulties for labor creditors to attend or to be represented in the meeting.

4 Directive N° 001-2020-DIR-COD-INDECOPI of May 24, 2020.

5 Article 2 of Decree No. 560 of April 15, 2020 and Decree No. 772 of June 3, 2020. In Colombia, insolvency proceedings can be initiated before a judge or before an administrative authority that exercises jurisdictional functions: the Superintendent of Companies. In this country, virtual procedures were already operating prior to the COVD-19 pandemic, mainly for procedures carried out by the Superintendent of Companies.

6 Legislative Decree No. 1511 of May 11, 2020 and its regulations Supreme Decree No. 102-2020-PCM of June 7, 2020. Debtor companies may only request acceptance to this procedure until December 31, 2020.

7 Article 8 of Legislative Decree No. 1511 of May 11, 2020. In compensation, the decree provides that at least 40% of the funds or moneys allocated annually for the payment of claims must be allocated to labor claims and 10% to consumer loans.

8 Article 8 of Decree No. 560 of April 15, 2020.

9 Article 9 of Decree No. 560 of April 15, 2020.

10 For more detail about the impact of the COVID-19 crisis on MSMEs, including MSME insolvency, see: http://pubdocs.worldbank.org/en/879461586478617078/COVID-19-Outbreak-Support-to-Firms.pdf

11 Article 11 of Decree No. 772 of June 3, 2020.

12 Article 12 of Decree No. 772 of June 3, 2020.

13 Decree No. 560 of April 15, 2020, Decree No. 772 of June 3, 2020 and Decree No. 842 of June 13, 2020

14 Recommendation N° 63 of March 31, 2020.

Fraud, Furlough and Facemasks

Carmel King reports on the opportunities and challenges in the current working environment

CARMEL KING
Co-Chair of INSOL Europe Anti-Fraud Forum; Director, Grant Thornton UK LLP

The global pandemic has forced change at breakneck speed, mostly without a blueprint. As ever, fraudsters are operating at the vanguard, operating free of the shackles of the law or ethics, identifying and exploiting the gaps.

In December 2020, the FATF published its Update on COVID-19 related Money Laundering and Terrorist Financing. The FATF analysis found that "*criminals are continuing to exploit the opportunities created by the pandemic across the globe, with mounting cases of the counterfeiting of medical goods, investment fraud, adapted cyber-crime scams, and exploitation of economic stimulus measures put in place by governments.*"

Furlough

Like its European counterparts, the UK government's coronavirus job retention scheme, also known as the furlough scheme, was an essential, albeit blunt, instrument to support employers and workers in response to the pandemic. Devised on the hoof and implemented on an urgent basis, the system was obviously open to exploitation. At the time of writing, the UK government has provided £43 billion of support of 9.6 million jobs, across 1.2 million employers. In August 2020, The Times reported that 30,000 applications for the scheme were rejected by HM Revenue & Customs, variously because the applicant had no employees on their payrolls or could not evidence any trading activities. HMRC estimates that 10% of the furlough scheme support may have been paid out to incorrect or fraudulent claims. This is a staggering figure for such a short period of time, and as the scheme winds down, HMRC is refocussing its attention on tackling this abuse.

The government has taken steps to counter furlough fraud. An online whistle-blower reporting facility was established at the outset. In six months, the hotline received 8,000 calls. The 2020 Finance Bill included a 90-day amnesty for companies to repay funds if they discovered an error in their claim. It also provides HMRC with powers to investigate furlough abuse and levy fines. HMRC has reported that it is investigating 27,000 'high-risk' claims. In July 2020, a 57-year old was arrested as part of an investigation into a suspected £495,000 furlough fraud. The man's computers and digital devices were seized, and funds in a business bank account frozen. The man was also arrested in connection with a multi-million-pound tax fraud and alleged money laundering offences.

What can insolvency practitioners expect to see as a result of the furlough scheme? Governments are no different from businesses in their concerns about recession, and cash is king in circumstances where the costs of the pandemic have been astronomical. Currently, the anticipated wind-down of the furlough scheme is April 2021. I expect HMRC to push heavily for firms to take up the opportunity to return funds under the amnesty without threat of penalty or sanction. The imposition of fines should enable HMRC to take enforcement action against companies under the Insolvency Act and investigations may also result in further arrests and enforcements under the Proceed of Crime Act. Where the fraudsters are sophisticated, there is a very good argument for the asset tracing and recovery activities to be passed to liquidators and receivers to enable HMRC to continue working its way through what is likely to be a very long list.

> Recessions can leave little room for manoeuvre where behaviours in a bullish market may have gone unnoticed and fraud has gone under the radar

Recession

These are (to use what is now such a cliché) uncertain times. At the time of writing, we are facing a potential third lockdown, however the position remains changeable on a local and national level, and who can predict what the landscape will be as you read this? One certainty however is a recession. A record 20.4% fall in GDP marked the UK's entry into recession in mid-2020, and the eurozone reported a 12.1% drop in GDP in the second quarter of 2020. The shape of this recession is yet to reveal itself, and we hope for something 'U' or 'V' shaped rather than anything more complicated. What reveals itself at the depths of the dip will be of interest to insolvency practitioners and fraud specialists.

Recessions can leave little room for manoeuvre where behaviours in a bullish market may have gone unnoticed and fraud has gone under the radar. Frauds perpetrated by individuals for their own personal gain, such as double invoicing, will be coming to light where company performance is being scrutinized more closely and more regularly, or where additional checks and balances are being introduced. Other frauds perpetrated with the aim of facilitating the growth of the company are likely to be laid bare where investors are more careful with their due diligence. In the good times it is easier to be a bit more creative with accounting, to 'enhance' an earnings figure here to attract some capital investment there.

Recession will also impact the behaviour of employees. Working conditions now can give rise to motive, opportunity, and justification, the three factors of the fraud triangle framework which describes an individual's decision to commit fraud. Motive: I have received a pay cut, or I perceive an impending risk of redundancy. Opportunity: Sudden lockdowns put a strain on compliance departments, previously segregated duties have been desegregated due to furloughed staff. Justification: Nobody will miss it, I don't get paid what I'm worth anyway, I'm working five days on four days' pay!

These behaviours are not limited to the corporate world. Our practice has seen an increase in recent months in matrimonial disputes and disputes over deceased's estates, in particular when there is a suspicion that assets have been hidden or dissipated to the detriment of rightful beneficiaries.

Investigators and forensic specialists should be busy with the identification of schemes and introduction of rigorous processes and systems to detect and prevent fraud. Restructuring specialists will be looking at whether failing limbs of organisations can be isolated to save the remainder, if indeed anything worth saving remains. Asset recovery specialists will be busy across the board.

Working from home

Employees now working from home may engage in behaviours they may not have previously considered acceptable. The formality around work has suddenly been dramatically reduced, if not removed entirely, and the associated risk amounts to more than just inadvertently displaying your pyjamas to your colleagues when having a stand and a stretch during the morning Zoom call. Home Wi-Fi and remote login systems may be more vulnerable to cyber-attack than offices with hard-wired network connections. Technical support may be delayed or indeed non-existent in smaller organisations. Working from home can introduce complications for technical updates, patches and rollouts or delay them entirely. Couple an understandably heightened level of health-related anxiety with an unscrupulous fraudster and you get people clicking on links in emails, social media messages and text messages where otherwise they would never dream of it. The fraudsters are using sophisticated means to exploit people for personal and financial information. We have seen financial support scams involving fake government emails. Health scams around track and trace systems or PPE and hand sanitiser are particularly cynical. Lockdown scams around TV licensing and subscription services, online dating and fake investment opportunities have been on the rise.

Losses to individuals on a reasonably small scale are perhaps not something practitioners will immediately see in their pipeline.

When those losses tip over into bankruptcy, where prosecution authorities actively pursue the fraudsters (and they are), and where companies suffer losses as a result of a relaxation in employees' attitude to risk, there is potential for us to assist.

This is just a brief summary of what my practice is seeing, and what we might expect to see in the next twelve months or so. My fellow Anti-Fraud Forum Co-Chair Bart Heynickx and I are delighted to be working with R3 and London's Fraud Advisory Panel on a virtual conference to take place in February 2021, during which our distinguished speakers will consider global financial crime, innovations in cross-border asset tracing and recovery, rogue companies, cryptocurrency fraud, digital forensics and much more.

I hope readers can join us for what promises to be a most engaging overview of the counter-fraud practitioner's toolkit in this new world. ■

> *Employees now working from home may engage in behaviours they may not have previously considered acceptable*

Reflections on the impact of the COVID-19 crisis in Germany, Poland and Italy

Representatives from the same firm in three jurisdictions compare and contrast their experiences in the current crisis in respect of help available from local governments

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In this article we reflect on how the COVID-19 crisis has affected local economies and businesses in Germany, Poland and Italy considering whether support from governments has helped protect against business failure, which sectors have been hardest hit and which have prospered, as well as the impact of a second wave and what the future might hold.

What impact has the COVID-19 crisis had on the economy?

In **Germany**, the pandemic caused a historic decline in economic output seeing an unprecedented drop of 10.1% in gross domestic product (GDP) during Q2 of 2020. It is not surprising that both Polish and Italian economies were also heavily impacted, with public debt growing by 8% in Poland and the Italian ministry of economics predicting that GDP will drop by 10.5% in 2020. It is expected that the public sector deficit in Poland in 2020 will peak at 12% of GDP, equivalent to PLN 267 billion!

Italy, one of the countries hardest hit by lockdown measures during the first wave, reported that GDP in the first half of the year, was 12% lower than in the same period in 2019 and that by April industrial production was more than 40% lower than at the beginning of the year.

However, all three countries saw signs of recovery when restrictions were eased, with GDP rising in Germany by 8.2% in the Q3 of 2020 (although 4.2% lower than the last quarter of 2019). Italy also saw signs of partial recovery. In the third quarter, the return to growth was more robust than expected, driven largely by recovery in the industrial sector which, in August, returned to levels of activity comparable to those before the pandemic.

Have businesses managed to weather the first wave storm?

Largely yes, but perhaps the full impact is yet to be seen. The resilience of **German** businesses to the challenges posed by the COVID-19 crisis was possible thanks, in part, to the unprecedented €130 billion aid package offered by the German government seeking to prevent insolvencies, mass layoffs and a rise in poverty. Low-interest loans to companies, an expansion of wage subsidies for furloughed workers and state aid for large corporates have all lessened the financial impact. There is perhaps more optimism than expected among companies, but a certain level of pessimism as to what the future might hold still persists.

The **Italian** experience is similar. The government's anti-crisis measures and guaranteed financing helped mitigate the impact of the lockdown. However, recourse to new loans, also thanks to public guarantees, has increased indebtedness. As a consequence, Italy is likely to see increasing numbers of insolvencies.

In **Poland**, although almost all businesses were affected, most have managed to weather the storm. Surprisingly, like Germany and Italy, there has not been a record number of bankruptcies, probably due to the unprecedented government support packages.

Has government support helped protect against failure?

As already noted, the support from all governments seems to have helped most businesses weather the storm of the first wave.

The **Polish** government is said to have spent PLN 300 billion (approx. EUR 67 billion) to counteract the pandemic, including providing direct support of PLN 150 billion (approx. €33.5 billion) in the midst of the crisis. The financial support, coupled with new legislation introducing a moratorium in April 2020 (effectively suspending the obligation to file for bankruptcy) and further legislation in June 2020, giving businesses the option to use a simplified ['insolvency'] process allowing for out-of-court arrangements initiated by the debtor, have seemingly helped prevent significant business failures.

The **German** government also took decisive, vigorous and targeted action to protect the country, offering the largest financial assistance in the history of the Federal Republic. The €130 billion package in particular offered support to employees, the self-employed and businesses. Notably, the furlough scheme, known as Kurzarbeit, (extended until December 2021) is helping companies avoid layoffs, keeping staff on standby until the economy picks up again.

Support measures adopted by the **Italian** government between March and August 2020, included increases in public expenditure, tax reductions and credit support measures costing approximately Euro 100 billion (6.1% of GDP). The Central Bank of Italy ('CBI') has estimated that the main support measures implemented by the government have strongly mitigated the effects on liquidity and the capital of companies, based on an analysis of 270,000 joint-stock companies. According to that analysis, government measures have reduced, albeit not eliminated, the major liquidity deficit and the worsening of financial conditions.

Which sectors have been hardest hit or seen an uptick in profitability?

The automotive sector and machinery and plant engineering - two of **Germany's** key industries – were hardest hit by the pandemic. The German Automotive Industry Association warned already in June that around 100,000 jobs were at risk due to enduring low demand. However, the sector did see an output rise by 10.0% in September after a decline of 10.3% in August. In addition, the travel industry remains devastated, with 88% of travel and tour operators, as well as 71% of hotels, on Kurzarbeit.

Many manufacturers and suppliers in Germany have had to close down their plants at least partially and stop their supply chains. The long-term effects of these measures are unpredictable. A vast majority of German experts expect particularly high defaults in corporate loans in the coming months. The willingness of banks to provide new loans for restructuring cases is also likely to decline further.

Not all sectors of the **Polish** economy have been equally affected. The highest increase in insolvency occurred in services (+42%), agriculture (+28%), transportation services (+10%) and manufacturing (+7%). However, commerce and trade held fast, as well as construction. Whereas in **Italy**, the sectors most impacted, during both the first and second waves of the pandemic, have been catering, culture (museums, cinemas, theatres), tourism (travel agencies, hotel, resorts) and the sport sector (amateur sports associations and clubs).

Not unsurprisingly, all countries have seen an up-tick in profitability for businesses operating in e-commerce, pharmaceuticals, hygienic products and food-delivery sectors.

Has there been, or is there expected to be an increase in insolvencies?

While some observers in **Germany** forecast an increase in 2020 and a decrease next year, others, (pointing to the fact that the requirement to file for insolvency has been temporarily waived until end of 2020), expect a decline at the end of this year and the emergence of a sizeable number of zombie enterprises next year. However, the German Bundesbank (ignoring the waiver) projects a rise both this year and the next, with a quarterly peak of 6,400 insolvencies to be reached in Q2 2021.

Regardless of the surprisingly small number of bankruptcies in **Poland** to date, experts forecast an increase in Q4 of 2020 and further into 2021 unless demand for goods and services is restored or the government will support the economy at the same level. A second lockdown that is still possible may completely change things, seeing, instead of the relatively low numbers now, a sharp increase in insolvencies.

According to the CBI, by the end of 2020 **Italy** is likely to see an exponential increase in the number of companies in

undercapitalisation conditions, the situation most likely to be a precursor to bankruptcy. The CBI estimates that at the end of 2020 there will be 12.4% of undercapitalised companies at a national level, compared to a pre-pandemic level of only 7.2% of undercapitalised companies – although much lower than may have been the case without government support.

> *While all countries saw signs of economic recovery when restrictions were lifted, it is clear that economies have not bounced back as initially hoped*

What does the future hold?

The current global economic crisis is unique in its kind because the crisis consists of at least two kinds of economic problems: a reduction in production due to the disrupted global supply chains and an unprecedented demand shortfall as a result of lockdown.

While all countries saw signs of economic recovery when restrictions were lifted, it is clear that economies have not bounced back as initially hoped. The impact of a second wave of the pandemic and the possibility that a vaccine might be available in the foreseeable future make it difficult to predict the shape of economies and how quickly they might recover, but for the short term the position remains challenging for most businesses and sectors. ■

Lessons to be learned from the Nortel Case

Reinhard Dammann asks what are the lessons to be learnt from the recent case with main and secondary proceedings in the UK and France

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The multibillion-dollar insolvency of Nortel, which started in 2009, is the most complex cross-border insolvency case of the last decade, involving proceedings opened in Canada, the US and in Europe.

Pursuant to Article 3 of the EIR 1346/2000, the High Court in London found that the COMI of all Nortel's European subsidiaries was located in the UK. Hence, main insolvency proceedings were opened in London for all 17 Nortel European entities, and notably for its French entity Nortel Networks SA (**NNSA**). At the request of NNSA's UK Joint administrators, in May 2009, the Commercial Court of Versailles opened secondary proceedings, adding an additional layer of complexity to the process. NNSA's insolvency proceedings are about to be closed with an extraordinary result: the payment of 100% of all claims plus interests.

At a time when legislators are competing in Europe to establish the most efficient insolvency and restructuring framework, the Nortel case provides a unique case study. What are the lessons to be learned?

> *At a time when legislators are competing in Europe to establish the most efficient insolvency and restructuring framework, the Nortel case provides a unique case study*

Protocol for success

The first stage of the Nortel case was a real success story. The insolvency practitioners of all the involved estates agreed on a protocol to optimise the value generated under the supervision of the US insolvency court, acting in perfect cooperation with their Canadian colleagues. The Chapter 11 stalking-horse bidding procedure achieved an extraordinary $7.7 billion price for Nortel's IP rights which was placed in a lockbox with JP Morgan in New York.

All European proceedings were centralised in London, where the same joint administrators were appointed for all proceedings in order to facilitate the international cooperation and coordination.

However, serious disagreements arose with respect to the distribution of the proceeds in the lockbox. As the distribution key had not been agreed upon before the auction process, the allocation of the sums became the subject of litigation among the office holders of the American, Canadian, British main proceedings and French secondary proceedings. It also involved US bondholders and the UK pension fund. These disputes lasted nearly for a decade, creating a lot of frustration among unsatisfied creditors. The cross-border implications made it extremely difficult to reach a final, mutually acceptable settlement. The intervention of mediators and independent conflict administrators proved to be very helpful to cut the Gordian knot.

Hence, the first lesson from the Nortel case is very clear: In a cross-border case, the protocol needs to address not only an efficient auction procedure but also the distribution of the amounts generated.

UK and French interaction

The second interesting subject matter of the Nortel saga is the interaction between UK main and French secondary insolvency proceedings.

Initially, in January 2009, the NNSA's UK joint administrators wanted to avoid the opening of secondary proceedings in France in order to include the assets of NNSA, located in France, into the global auction process.

However, in May 2009, UK joint administrators were confronted with the challenge to coordinate laying off 500 employees working in the R&D department near Versailles in the context of main insolvency proceedings governed by UK law. This was an impossible mission and the UK joint administrators filed for the opening of secondary proceedings in order to benefit from French insolvency law and the intervention of the French employee insurance fund, the AGS, that would bear the redundancy costs. In addition, prior to the opening of proceedings, the liquidity that was generated by the ongoing business of NNSA in France was centralised with RBS in London.

A protocol between the practitioners of the main and secondary proceedings was designed and concluded to solve all pending problems. The UK joint administrators agreed to transfer back to France all liquidities. The French liquidator agreed to assume all administration expenses incurred by the main proceedings with respect to the ongoing activities of NNSA in France before the opening of secondary proceedings, as well as those incurred by the joint administrators representing the interests of the French secondary proceedings of NNSA in the framework of the global auction process in the US.

The French liquidator settled the claims of NNSA's employees providing for the payment of an extraordinary indemnity claim of €100.000 in favour of each employee. The settlement agreement contained a waterfall for the payment of privileged workers' claims, administration expenses and the other unsecured claims.

Main or secondary proceedings?

Following the US auction proceedings, the question arose as to whether the claim of NNSA against JP Morgan, as holder of the lockbox, belonged to the main or secondary proceedings. Under the rules of EIR, such claim was part of the main proceedings, since the debtor of the claim was located in the US, outside the territory of the secondary proceedings. However, the French employees took the position that, at the date of the opening of secondary proceedings, all assets of NNSA were located in France. Any subsequent transfer of assets to another State should therefore be irrelevant. The question also occurred as to whether the Court of Versailles had jurisdiction to determine the assets belonging to the secondary proceedings. The joint administrators pleaded that the courts of the main proceedings had exclusive jurisdiction.

The Court of Versailles referred these questions to the European Court of Justice (**ECJ**) which handed down its decision on 11 June 2015. The ECJ confirmed the (non-exclusive) jurisdiction of the Court of Versailles and held that the picture of the assets belonging to the secondary proceedings must be taken at the date of the opening of proceedings. Any subsequent transfer to another State should be disregarded. The question as to whether NNSA's share in the IP rights, that were subject to a Canadian trust, were located in France at the date of the opening of secondary proceedings, as suggested in the opinion of the Avocat General, was not decided by the ECJ, which referred this question back to the Commercial Court of Versailles.

This lawsuit was finally settled thanks to the intervention of the conflict administrator, who was appointed within the main proceedings. The practitioner of the secondary proceedings adopted a very pragmatic approach, considering that its pro-rata share of the lockbox under the settlement was sufficient to close the proceedings with an excess of cash. Indeed, secondary proceedings were just closed, and the French liquidator transferred a liquidation bonus of more than €20 million to the main proceedings.

What are the lessons to be learned?

First, the determination of the scope of the assets and liabilities of secondary proceedings could give rise to rather complex questions. Recital 46 of the recast EIR 2015/848 prohibits any abusive transfer, by the insolvency practitioner of the main proceedings, of assets located in a Member State, where an establishment is located, with the purpose of frustrating the interests of subsequently opened secondary proceedings. Hence, this recital supplements the ECJ ruling in Nortel pursuant to which the scope of assets shall be determined at the date of the opening of secondary proceedings.

Indeed, and in particular in the case of centralised cash pooling, if the opening of secondary proceedings is likely to occur, the office holders of main proceedings should not transfer any assets of the establishment, before the opening of secondary proceedings, to another Member State, outside the ordinary course of business. Protocols among insolvency practitioners of main and secondary proceedings are best designed to resolve this topic and settlements have proven more efficient than lengthy litigations.

The comparison of the efficiency of French liquidation proceedings versus UK insolvency proceedings provided an unexpected outcome. French liquidation proceedings have the reputation of being quite lengthy and inefficient. The Nortel case proved quite the contrary. The NNSA secondary proceedings have been handled by the French liquidator in a pragmatic cost-efficient manner. The rulings handed down by the Commercial Court of Versailles were a model of efficiency and predictability. The amount of all fees and costs were reasonable. Conversely, while English law proved very efficient in valuing the assets during the first stage of the Nortel case, the distribution phase turned out to be lengthy, rigid and extremely costly. ■

"The comparison of the efficiency of French liquidation proceedings versus UK insolvency proceedings provided an unexpected outcome"

Portugal's *Extraordinary Business Viability Process*

Catarina Guedes de Carvalho writes on the new extraordinary process for company viability in response to the COVID-19 crisis in Portugal

CATARINA GUEDES DE CARVALHO
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> ***The entire business sector has been affected and even viable companies are generally facing an enormous difficulty: a lack of liquidity***

Following the international public health emergency, many Member States of the European Union declared national states of emergency. Portugal was among them and the declared state of emergency led to the necessary confinement of citizens and, consequently, to the paralysis of a number of activities.

These circumstances created a situation of financial constraint for businesses due to a lack of liquidity and, in many cases, this has prevented them from fulfilling their obligations.

As an initial reply in terms of implementing new measures to face this COVID-19 pandemic, the only direct, exceptional and temporary measure regarding the legal framework of insolvency and restructuring approved by the Portuguese authorities was to suspend the time limit for the debtor company itself to petition for insolvency[1], with effect from 7 April 2020.

As the economic crisis worsened, it quickly became clear that a further legislative response was needed in this area too. The COVID-19 pandemic is not going to disappear as quickly as expected and its effects are worsening and tending to last much longer than the worst initial estimates. The entire business sector has been affected and even viable companies are generally facing an enormous difficulty: a lack of liquidity.

The **Extraordinary Business Viability Process** (*Processo Extraordinário de Viabilização de Empresas* or "**PEVE**") is one of the measures

provided for in the Economic and Social Stabilisation Programme, which is a plan devised by the Portuguese Government in order to respond to the economic and social difficulties caused by the pandemic.

The Portuguese government could have chosen to adapt the arrangements that already existed: the PER (*Special Revitalisation Process*) and the RERE (*Out-of-court Business Recovery Scheme*), which are the key pre-insolvency measures for companies, respectively of a judicial and out-of-court nature. Or it could have taken advantage of this moment to implement Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 – which was not done, admittedly because this could have led to an accelerated and, as such, poorly considered implementation. However, the Portuguese Government decided to go ahead and create a new extraordinary legal framework, aimed exclusively at companies that are in a difficult economic situation or an insolvency situation, whether imminent or current, due to the COVID-19 pandemic, but are viable: the PEVE.

The aim of the PEVE is to obtain judicial approval of a debt restructuring agreement ("Viabilisation Agreement") established out of court between the company and its creditors[3], so we therefore admit it is a hybrid procedure in nature and it falls into the set of instruments typically called "fast-track-court-approval-procedures"[4]. The approval decision binds the company, the creditors signing the Viabilisation Agreement and the creditors listed by the company in the report of creditors[5], even if they have not participated in the out-of-court negotiations.

At the time the application is submitted, the company should not have any PER pending. In addition, it must meet and prove the conditions necessary for its viability. It must also provide proof that on 31 December 2019 the company's liabilities were less important than its assets[6]. That is, in practice, it must provide evidence that its difficulties stem from the pandemic situation[7]. However, the law does provide for two exceptions:

(i) micro and small businesses, where the liabilities may exceed the assets provided certain additional conditions are met; and
(ii) businesses which, although not in a positive net position on 31 December 2019, have managed to regularise their financial situation under the transitional provisions allowing the use of the RERE by businesses in a situation of insolvency, provided they have deposited the restructuring agreement in due time.

The judge is responsible for checking that all the preconditions and requirements are met by issuing the order granting or opening the PEVE appointing the interim judicial receiver (*administrador judicial provisório* or "AJP"). The AJP plays a very important role (and this is not the case in the PER): to give an opinion on whether the agreement offers reasonable prospects of ensuring the viability of the company, and the judge will then use this opinion as a basis for the decision on whether to approve it.

In order to ensure that it is processed particularly quickly, in addition to shortened time limits and eliminated phase of presenting claims by the creditors, this extraordinary procedure enjoys priority to over other urgent procedures (insolvency proceedings and the PER).

Without prejudice to the general principle of intangibility of tax and social security claims, which remains untouched, express provision is made for the possibility to reduce the rate of interest on arrears, as well as prescribe other tax benefits (identical to those of the PER and RERE) in the restructuring agreement, in order to achieve the financial consolidation of the company.

Initiation of the PEVE also has the effect of suspending any debt recovery proceedings and insolvency petitioned with respect to the company, as long as the insolvency has not yet been declared (procedural effects). The PEVE also prevents the suspension of the provision of essential public services to the company (substantive effects, because they affect creditors as party to a contractual relationship).

One of the main virtues of the PEVE is the fact that it promotes both financing and self-financing, especially by the shareholders, to make the company effectively viable. The PEVE safeguards the guarantees agreed between the company and its creditors, provided they are established to provide the company with the financial means necessary to operate. It also gives the shareholders, or any other persons in a special relationship with the debtor, who finance the company's activity, a general moveable credit privilege. Furthermore, any legal transactions provided for in the Viabilisation Agreement that included the effective provision to the company of new financial credits cannot be clawed back for the benefit of the insolvent estate.

This is a solution we welcome because we consider it not only to be of elementary justice, but also absolutely fundamental for the recommended recovery of a company that is viable but in difficulty[8].

In addition, the Government has decided to make one-off changes to provide the existing judicial instruments for recovery with mechanisms for adapting to the COVID-19 pandemic[9]:

(i) the possibility to grant additional time for the conclusion of the negotiations within the framework of the PER and for the proponent of an insolvency plan to adapt it;
(ii) the application of the RERE to companies that are currently insolvent[10] as a result of the COVID-19 pandemic but which are still likely to become viable and which can demonstrate that on 31 December 2019 their assets exceeded their liabilities or, although not in a positive net position on 31 December 2019, have managed to regularise their financial situation under the transitional provision allowing the use of the RERE by companies in a situation of insolvency, on condition that they have deposited the restructuring agreement in due time; and
(iii) in cases where non-compliance with the approved insolvency plan is based on events occurring after 7 April 2020, the 15-day period to regularise the situation – failing which the moratoriums and forgiveness set out in it will be extinguished – will only begin to run after the law now approved ceases to be in force.

There are also two other measures that are easy to implement[10], with the sole aim of responding immediately to the problem of the lack of liquidity of companies – namely, they involve the distribution to the creditors, as soon as possible, of large sums deposited in PER and insolvency proceedings (i.e., amounts due to the creditors but in the hands of the State). ■

> *One of the main virtues of the PEVE is the fact that it promotes both financing and self-financing, especially by the shareholders, to make the company effectively viable*

Footnotes:

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

2 The creation of the PEVE was announced by the Government at the beginning of June and it is provided for in Law 75/2020 of 27 November. It entered into force on 28 November 2020 and it will remain in force until 31 December 2021, with the possibility of extension by government decree.

3 Creditors representing at least the majority of votes provided for the PER (majorities provided for in article 17-F(5) of the CIRE).

4 The PEVE is inspired to a great extent by the abbreviated PER (article 17-I of CIRE) and the RERE.

5 This report is presented by the company but can be challenged by any creditor.

6 The fact the liabilities are greater than the assets is one of the criteria for establishing insolvency (under article 3(2) and (3) of CIRE), but it does not trigger the above-mentioned duty of directors to petition for the insolvency of the company.

7 The Portuguese legislature includes a presumption already adopted by other jurisdictions. It can now, in fact, be presumed that, when companies were not insolvent on a certain date before the COVID-19 pandemic (in this case, 31 December 2019) and their insolvency occurred after the COVID-19 pandemic hit, this is a direct consequence of the extraordinary crisis, which, in turn, indicates a temporary insolvency that is, therefore, surmountable.

8 We highlight here the approach of professor and supreme court judge Catarina Serra, namely "A função (alternativa) do RERE como programa extraordinário para o apoio e a reanimação de empresas" in Revista de Direito Comercial, page 981 and following www.revistadedireitocomercial.com/a-funcao-alternativa-do-rere).

9 Measures included in the same Law 75/2020 of 27 November.

10 Under the current rules, only a company in a difficult economic situation or in a situation of imminent insolvency can turn to the RERE.

Future EU Regulation: Legal uncertainties and challenges to insolvency

Jean-Luc Vallens comments on a proposal of the EC for a new EU Regulation for assignments of claims

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The European Commission legislative proposal on conflicts of laws for assignments of claims chose the law of the assignor's habitual residence as the law that should apply to the third-party effects of the assignment of claims, allowing at the same time the possibility for the parties to derogate from it.

This proposition could generate conflicts with the principles established by the European Insolvency Regulations, which give jurisdiction to the Law of the assignor's habitual residence when it comes to locating the right *in rem* resulting from a debt assignment.

The European Insolvency Regulation of 20th May 2015 (Reg. (EU) 2015/848)_

The EIR is supposed to provide for rules defining the law applicable to assets and rights of insolvent debtors during insolvency proceedings, and to detrimental acts prior to such proceedings.

Among a debtor's assets, insolvency practitioners have to deal with financial claims toward third debtors to the extent as they still belong to the insolvency estate: such claims may have been sold to any third party, granting rights to third debtors in spite of the insolvency proceedings opened in the meantime.

Regarding these claims, the EIR provides for some specific rules:

i) a financial claim is deemed to be located either in the country where the third debtor is located or in the country in which a bank account is held for claims and cash registered in such an account (EIR art. 2(9));

ii) a transferred financial claim grants to the assignee a right *in rem* that remains enforceable to the debtors' estate (EIR art. 8); and

iii) avoidance actions are currently regulated by the law of the opening State (EIR, art. 7(2) m): if an insolvency practitioner commences an avoidance action against such a transfer he has to take into account the applicable foreign law, because this law may not allow any means of challenging that act (EIR art. 16).

The Proposal for a Regulation on the law applicable to the third-party effects of assignments of claims of 12 March 2018 (COM (2018) 96 final)

A proposal for a new Regulation has been adopted by the European Commission in order to amend and complete the "Rome I" Regulation of 17 June 2008 on conflicts of laws. It focuses on assignments of claims and securitisation (as Rome I Regulation did not address these issues).

The purpose of the draft regulation seems relevant and useful, as it clarifies rules on validity and opposability of such assignments in situations where there is only a likelihood of insolvency or where insolvency proceedings are opened.

It actually could improve predictability for creditors, especially in cross-border assignments: such contracts will be valid and enforceable towards the third debtor, the creditors of the assignor and the appointed insolvency practitioner in case of insolvency of the latter.

The main purpose of the proposal is to solve the conflict of laws in favour of the law of the habitual residence of the debtor. Such a rule seems clear and convenient for third parties, and generally corresponds to the *lex fori concursus,* on which rights and duties of debtors and creditors depend. It grants legal certainty to third parties. According to the authors of the Proposal, it is fully consistent with EIR.

> *The main purpose of the proposal is to solve the conflict of laws in favour of the law of the habitual residence of the debtor*

Risk of conflict by the combined application of those two texts

Parties will be authorised by the proposed Regulation to choose another law for regulating the validity and opposability of such assignments. Indeed, if the law of the assignor's habitual residence applies as a general rule, certain assignments could be subject, as an exception, to the law of the assigned claim and with a free choice of law possibility for securitisation.

If the assignor becomes insolvent, such rules will deprive the estate of valuable assets, such as claims on third parties, for the benefit of one creditor, possibly located out of a Member State, under foreign laws. The assignment of a claim will therefore be enforceable against

the insolvency practitioner and other creditors.

It is true that the EC Proposal however establishes a general principle providing that its rules "*shall not prejudice the application of provisions of Union law which, in relation to particular matters, lay down conflict of laws rules relating to the third-party effects of assignments of claims*" (art. 10): it should be therefore compliant in principle with the EIR.

However, the rule contained in Article 16 of the EIR could create an obstacle to any actions against the assignment of claims during the period of time where the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to the general body of creditors apply, at the disadvantage of the debtor's estate and of all the creditors.

Moreover, the proposal is not clear with respect to the applicable law: to which extent could the applicable law, that should be the law of the third debtor in case of insolvency, be replaced by the law chosen by the parties in favour of the assignee?

Valuable assets could be put out of the debtor's estate by the way of opposable assignments of claims before the assignor becomes insolvent, depriving European companies and their creditors of a relevant part of assets.

It could finally appear to be in opposition with the objectives set by the Capital Markets Union New Action Plan of 24 September 2020. The EU Commission focuses on specific actions for the next years "to review the current regulatory framework for securitisation to enhance banks' credit provision to EU companies, in particular SME" (Action 6) and "*to make the outcomes of insolvency proceedings more predictable and to allow for a regular assessment of the effectiveness of national loan enforcement regimes (Action 11)...*"

Let's take the concrete example that a financial claim belonging to a debtor is assigned to a third party. The insolvency practitioner appointed by the court begins an avoidance action to get the value of the claim back for the collective interests of the debtor: the courts of the opening State have jurisdiction, but the applicable law may hinder such an action. In such a situation, the proposal of the Commission to regulate assignments would facilitate, thanks to a free choice, any foreign law granting a right that can be opposed to the action of the practitioner.

A similar disadvantage could occur, if an insolvent debtor, who remains in possession, transfers a claim belonging to the estate after the court has opened insolvency proceedings. The EU proposal does not raise any exception as to the applicable law for such an assignment: the value of the assigned claims will thus be out of the reach of insolvency practitioners.

Insolvency practitioners and law makers of Member States should be aware of risks created by rules relating to conflicts of laws provided by the EU legislative proposal, the consequences of which maybe have been underestimated. ■

> *Insolvency practitioners and law makers of Member States should be aware of risks created by rules relating to conflicts of laws provided by the EU legislative proposal*

In this section 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*

Italian state returns to the steel sector with Arcelor-Mittal

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After the elimination of the so called "Criminal shield" introduced by the Italian government in the autumn of 2019, described in our previous article in the Spring 2020 edition of eurofenix, Arcelor-Mittal, left without protection from the judicial point of view, started a long battle with the Italian government trying in every way to return the keys of the Taranto steel plant, even going so far as to start the shutdown of the blast furnaces, running the risk of irreparable damages to the system.

On 4 March 2020, a laborious compromise was reached between the Italian government and the French-Indian multinational, aimed at curbing the latter's farewell, foreseeing the entrance of the Italian state as a financial partner and the transformation, at least partially, of production, by using electric oven technology.

For Arcelor-Mittal, however, one last way out remained: should the details of the Italian state's entrance not be defined by November 2020, the company could still have left, paying a penalty of €500 million, which is a pittance for a group that invoices €70 billion.

Waiting for the finalisation of the agreement, Arcelor Mittal resorted in a massive way to payroll subsidies, did not make any structural improvement interventions and after almost a decade of disputes, Taranto's steel plant moved to produce less than four billion tons of steel during 2020.

After the elimination of the "Criminal shield", the economic crisis triggered by the COVID-19 pandemic became the perfect new justification for the company to present a new hard plan to reduce the number of employees: 5000 employees were due to be fired, this also being a consequence of the extraordinary administration.

But finally, after weeks of meetings with Arcelor Mittal which, as a conciliatory sign, has paid the arrears rent for the plant, on 10 December, after a hectic day, the announcement arrived: the agreement has been signed and the Italian state is ready to invest €1 billion entering as Arcelor Mittal's financial partner. After 25 years the Italian state returns to the steel sector.

For the Franco-Indian group, remaining in Taranto is a convenient option, also in order not to give an asset to competitors. The industrial plan signed with the Italian government last March, supported by the European Union, interested in an ecologic revolution of the Taranto steel plant, foresaw to gradually bring back production to 8 million tons per year, while now they are at around 25% of this potential, converting two furnaces to electric and, in the future, safeguarding employment levels. This suggested project, however, requires at least two years and €2 billion of investments.

In addition to the complete restructuring of the plant and the scrupulous implementation of the environmental plan, the Italian state has guaranteed the maintenance of employment levels, promising an extraordinary care on the theme of maintenance and safety of the plant. The group now employs 10,700 staff, of which 8,200 work in Taranto, but about 3,000 are currently under payroll subsidies. This social safety net will continue to be used in the transition until 2025.

The trade unions, meanwhile, complain to be never involved in negotiations and pretend the respect of the agreement of September 2018, aimed at limiting the layoff of employees.

A new important step is the opening of negotiations with the trade unions which demand clear answers on the maintenance of employment, environmental clean-up and the productive and industrial relaunch of the group.

After years of uncertainty, the Italian State finally undertakes to ensure a future to the Taranto steel plant. ■

Luxembourg: Law of 10 July 2020 on professional payment guarantees

Last summer, Luxembourg saw the enactment of the law of 10 July 2020 on professional payment guarantees (the "PPG Law"), introducing the professional payment guarantee ("PPG"), a completely new type of personal guarantee, whose efficacy and flexibility are by no means insignificant for lenders wishing to sail safe in somewhat troubled waters.

Although the Luxembourg banking industry had already expressed the wish to have a legal tool in Luxembourg akin to the PPG a while before the outbreak of the COVID-19 pandemic, the current worldwide crisis has certainly contributed to expediting the passing and enactment of the PPG Law.

Behind the PPG Law lies the desire to create a type of personal guarantee previously unknown to Luxembourg law, whose features and functioning are left almost entirely to be fully shaped by the parties. Accordingly, it is possible for a PPG to adopt traits in common with the two traditional types of personal guarantees in Luxembourg (i.e. the ancillary guarantees (*cautionnements*) and first-demand guarantees (*guaranties à première demande*)). In such a case, the PPG does not run the risk of being re-characterised as an ancillary guarantee, which is the default type of personal guarantee under Luxembourg law. The absence of such a consequence is even expressly confirmed in the PPG Law itself, which specifies that unless otherwise agreed in the PPG, the fallback rules of the Luxembourg Civil Code on ancillary guarantees (which are generally rather more favourable to guarantors) will not prevent the enforcement of the PPG according to the terms agreed therein.

The PPG Law also allows the parties to expressly give up any personal or subrogatory right of recourse that the guarantor would otherwise have against the guaranteed debtor following the enforcement of the PPG.

A noteworthy topic covered by the PPG law, which will certainly pique the interest of insolvency practitioners, is the fate of the PGG when the debtor under the guaranteed obligations is subject to domestic or foreign "reorganisation measures", "winding-up proceedings" or similar proceedings. According to Article 4(6) of the PPG Law, the occurrence of such measures or proceedings has no disruptive effect on the obligations of the guarantor vis-à-vis the beneficiary under the PPG, who remains bound by his payment obligation thereunder.

Whilst the legal definitions of "*reorganisation measures*" and "*winding-up proceedings*" necessarily require the involvement of administrative or judicial authorities, the PPG Law also encompasses more generally all national or foreign measures affecting the rights of the creditors of the guaranteed debtor, as well as situations where the debts of the guaranteed debtors are rescheduled, reduced or converted into equity or similar instruments. The only exception provided by the PPG Law relates to the Luxembourg Law of 8 January 2013 concerning over-indebtedness, which applies to non-professional debts of private individuals.

This innovative rule can be likened to the level of protection afforded to the beneficiaries of financial collateral arrangements ("**FCAs**") under the law of 5 August 2005 on financial collateral arrangements, as amended (the "**2005 Law**"). In particular, enforcement events and netting agreements falling within the scope of the 2005 Law and the valuation and enforcement measures agreed between the parties are binding on third parties, including trustees-in-bankruptcy and other types of insolvency receivers. Moreover, domestic or foreign insolvency proceedings (except for the Luxembourg proceedings for over-indebtedness) have no bearing on the validity of Luxembourg FCAs or netting agreements, or their enforcement, such a rule being extended to similar foreign FCAs and foreign netting agreements.

Since the sole requirement imposed by the PPG Law to benefit from its provisions is to expressly elect for its application in the PPG itself, it is expected that the use of this new type of guarantee will blossom in the coming years, and to the delight or dismay of insolvency practitioners, may even supplant other types of domestic and foreign personal guarantee. ■

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> *It is expected that the use of this new type of guarantee will blossom in the coming years*

Technical Update Winter 2020/21: Get involved!

Myriam Mailly writes about the latest information made available to INSOL Europe members on the INSOL Europe website

MYRIAM MAILLY
INSOL Europe Technical Officer

Insolvency laws: increasing convergence of national laws to encourage cross-border investment

On Wednesday 11 November 2020, the European Commission began its work to improve convergence between national frameworks for corporate insolvency by publishing an inception impact assessment for an initiative that is expected in the second quarter of 2022. According to the EU Commission '*Efficient insolvency laws are one of the key criteria for investors to decide on whether to invest across borders. Increasing confidence in cross-border financing will boost the Union's capital markets*'.

The initiative which will take the form either of a **Recommendation** or a **Directive** (to be determined in the impact assessment process) proposes to address '*the main discrepancies in national corporate (non-bank) insolvency laws, which have been recognised as obstacles to a well-functioning Capital Markets Union. It will (also) consider the legitimate interests of all creditor groups, from investors and the public purse to employees and consumers.*'

In more detail, the European Commission aims at harmonising insolvency laws in a targeted manner and could consider aligning some features of insolvency regimes from the following non-exhaustive list, with the view of maximising value preservation of insolvent businesses:

(i) prerequisites for when insolvency proceedings should be commenced (including a *definition of insolvency* and provisions on *who is entitled to file for insolvency*);
(ii) conditions for determining *avoidance actions* and effects of ***claw-back rights***;
(iii) *directors' duties* related to handling imminent/actual insolvency proceedings;
(iv) *position of secured creditors* in insolvency taking into account specific needs for the protection of other creditors (e.g. employees, suppliers);
(v) *court capacity* when it comes to expertise and necessary *training of judges*; and
(vi) *asset tracing* which would be relevant, in particular in the context of avoidance actions.

The roadmap was open for feedback between 11 November 2020 and 9 December 2020 and INSOL Europe members were encouraged to share their views by using the opportunity to give feedback on an individual basis. That was an important first step as feedback is taken into account by the European Commission staff for further development and fine tuning of the initiative. Input received by the European Commission in that context is also summarised in a synopsis report explaining how the input is taken on board and, if applicable, why certain suggestions cannot be taken up.

The INSOL Europe feedback is available at *www.insol-europe.org/eu-study-group-news*

This initiative under the leadership of DG Justice A1 is also the result of the call for feedback on the final report of the High Level Forum on Capital Markets Union (EU Survey for which INSOL Europe has sent its contribution and which is still available at *www.insol-europe.org/eu-study-group-news*

This consultation was followed by the CMU Action Plan which was published on 24 September 2020 by the European Commission at: *https://ec.europa.eu/info/publications/200924-capital-markets-union-action-plan_en*

Of course, INSOL Europe members will be also informed in due course of the next steps of this (non/-) legislative adoption process including the launch of an Impact assessment (in 2021), the views from the existing Insolvency Expert Group and the potential launch of a further study (to complete the Leeds study available from our website at *www.insol-europe.org/technical-content/eu-draft-directive*) in order to shed light on aspects on which the evidence base has not yet been developed sufficiently, such as on asset tracing and the role of data for increased market-based finance during all the phases of insolvency proceedings (pre-insolvency) and following insolvency proceedings.

A consultation of stakeholders through a public consultation or roundtables may also be issued on the desirability of convergence of insolvency laws and on important pre-insolvency or insolvency concepts and actions such as avoidance actions, the definition of insolvency tests or the ranking of claims.

> *INSOL Europe expressed the opinion that the EU cannot ignore any longer the issue of consumer insolvencies*

INSOL Europe's contribution to the EU call for feedback on the 'New Consumer Agenda'

As the large numbers of individual debtors with limited assets and income throughout the European Union cannot be ignored, INSOL Europe has answered to the call for feedback in relation with the '**New Consumer Agenda**', for which the European Commission has issued a public consultation on 30 June and which ended on 6 October 2020.

In its contribution still available at *https://www.insol-europe.org/eu-study-group-news*, INSOL Europe expressed the opinion that the EU cannot ignore any longer the issue of consumer insolvencies, in particular because in parallel, the European Commission has adopted a new CMU Action Plan which contain provisions or recommendations on business insolvency. Indeed, acting in that area may also serve the CMU New Action Plan objectives as a proper (minimum) harmonised personal insolvency regime in the EU may be of benefit to honest individual debtors and their families, which may in turn contribute to sustainable economic growth. In short, consumer over-indebtedness with appropriate control mechanisms in place to combat fraud and bad faith is a matter of great economic and social concern and is closely related to the reduction of the debt overhang.

In addition, with the current implementation of the EU Directive on Restructuring and Insolvency in the Member States and the various international initiatives in that field, INSOL Europe reminded the need for the EU institutions 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 honest individual debtors in order to complete and make coherent the EU insolvency framework that is already in place.

At the very least, INSOL Europe was of the opinion that a constructive discussion of these issues might signal the desirability of some potential dangers of other approaches in view of producing durable solutions in the not-too-distant future, including relevant education and efficient communication strategies regarding available options and the accessibility of freely available and cost efficient independent debt advice and guidance.

EU Commission's revised notice to stakeholders in the field of civil justice and private international law in view of UK's withdrawal from the EU

The European Commission has published a revised "*Notice to stakeholders concerning the withdrawal of the United Kingdom and EU rules in the field of civil justice and private international law*".

The new document replaces the notice to stakeholders, published on 18 January 2019, and the Q&A document, published on 11 April 2019.

You can consult the new document here: *https://ec.europa.eu/info/publications/civil-justice-judicial-cooperation-civil-and-commercial-matters*

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 revised principles as at 1st September 2020 are available from our website at *https://www.insol-europe.org/eu-study-group-links* ■

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

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

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

> 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

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**

Books

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

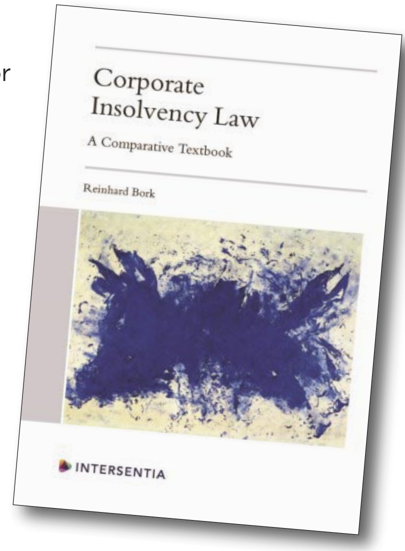
If you would like to suggest a book for a future edition, please contact our book editor **Paul Omar** (khaemwaset@yahoo.co.uk)

Corporate Insolvency Law: A Comparative Textbook

PROFESSOR CATARINA SERRA
Judge, Supreme Court of Portugal

Reinhard Bork (1st edition) (2020, Intersentia, Antwerp) 244 pp., €69 (student price EUR 35), ISBN 978-1780-68983-8

According to its subtitle, this book is a textbook. Indeed, it presents the core features of a textbook. It was designed to work as a standard source of information on corporate insolvency law and it certainly contains all the information necessary for the study of this branch of law. Yet, it is considerably more. The book opens with an example scenario, one more complex than could be expected in the first pages of any textbook. The situation will, then, unwrap into multiple questions and will serve as a pretext to engage the reader in an enlightening conversation. As we later discover, this is the method used by the author to make us grasp the fundamental principles and concepts on which corporate insolvency law is based.



As we read the chapters, we understand that there can be a principle-based approach to the key issues of corporate insolvency. In this light, after an introductory chapter, we learn about the main players, the commencement of proceedings, the estate, the effects of the opening of insolvency proceedings, transaction-avoidance, the rights and ranking of creditors, restructuring proceedings, discharge and consumer proceedings as well as cross-border insolvency.

One of the most interesting features of this book – what makes it singular and quite remarkable – is that it deals with it all in a comparative perspective. It introduces the relevant rules from four paradigmatic jurisdictions: England and Wales, France, Germany and the USA. At a time when legislative measures towards convergence are being taken in every EU Member State, by reason of the Preventive Restructuring Directive having been adopted, the comparison between the normative models accommodated in these countries (together with awareness of their strengths and weaknesses) is of utmost importance.

One of the most interesting features of this book – what makes it singular and quite remarkable – is that it deals with it all in a comparative perspective

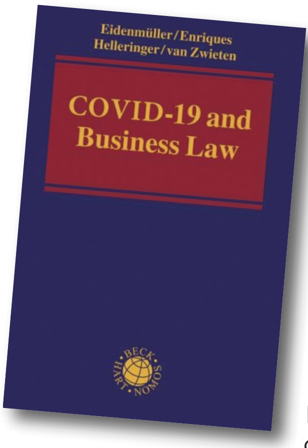
The high scientific and pedagogical quality of this book is not surprising. The author, Prof. Dr. Reinhard Bork, is an internationally renowned expert of insolvency law. Among others, he is the co-editor of the Commentary on the European Insolvency Regulation (OUP, 2016), the author of Principles of Cross-Border Insolvency Law (Intersentia, 2017) and, of course, of Einführung in das Insolvenzrecht (Mohr Siebeck, 2019), now in its 9th edition, a reference work for all insolvency law academics and students, whether in Germany or abroad. In this light, this work can be commended to anyone interested in the workings of comparative insolvency law.

COVID-19 and Business Law

Horst Eidenmüller, Luca Enriques, Geneviève Helleringer and Kristin van Zwieten (eds), (2020, Beck-Hart-Nomos, Munich/Oxford/Baden-Baden) 97 pp., GBP 20, ISBN 978-15099-447-36

This book, published just after the dawn of the COVID-19 crisis, is composed of a series of short essays grouped around five broad business law themes, of which insolvency law is one. Based on the features in the very reputable Oxford Business Law Blog, these pieces, extended and updated, attempt to provide a road-map to the considerations policy-makers, legislators and those active in insolvency law reform might have to grapple with when embarking on what will undoubtedly be a busy era of legal changes caused by the need to adapt to pandemic conditions and what may come after, as far as it is possible to predict.

Insofar as insolvency law is concerned, the six essays in the relevant part of the work tackle issues such as the durability of a moratorium for corporate bonds, wrongful trading and directors' liability, suspending the obligation to file for insolvency, the tension between recapitalisation and liquidation options as well as an interesting argument in favour of imposing a cooperation duty on creditors acting in the course of a workout. These are not the only essays that touch on insolvency, the general duty to promote success (which has a bearing on corporate survival) and the rescue of start-ups featuring in pieces in the corporate and financial markets sections, respectively.



Overall, this work has the flavour of a collection of thought-pieces assembled at the start of an outbreak, whose progress is as yet uncertain. Though the ideas may yet undergo mutation as the pandemic evolves and conditions for the next few years become clearer, what is important in this book is that the authors, drawn from academics and practitioners worldwide, pose the questions that will need answering. In doing so, they are at the forefront of what is likely to be an ongoing debate for some years to come.

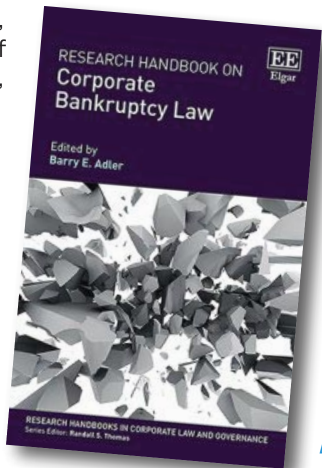
Paul Omar, Technical Research Coordinator, INSOL Europe

Research Handbook on Corporate Bankruptcy Law

Barry Adler (ed), (2020, Edward Elgar Publishing, Cheltenham) 456 pp., GBP 155, ISBN 978-1-78100-787-7

In this Handbook, experts address a range of contemporary bankruptcy issues through the lens of law, economics and finance. The experts involved in the authoring of chapters (in the order they appear) include: Douglas Baird, Thomas Jackson, Robert Rasmussen, Melissa Jacoby, Edward Janger, David Skeel, Mark Roe, Richard Squire, Kenneth Ayotte, George Triantis, Anthony Casey, Edward Morrison, Michelle White, Michael Simkovic, Stephen Lubben, Todd Zywicki, John Pottow and Alan Schwartz. Overall, the contributions by these very eminent scholars chronicle the history of corporate bankruptcy in the United States and offer predictions for its future while building upon the concept of the creditors' bargain that was first championed by Thomas Jackson nearly four decades ago.

The Handbook covers a wide range of topics in the field of insolvency law including treatment of contracts in bankruptcy, debtor-in-possession financing, treatment of creditors and efficiency, and the agency costs of insolvency. Additionally, complex and emerging issues including the treatment of derivative contracts and repos and the role of options, among others, are examined through the cross-disciplinary lens of law and economics. One chapter focuses on the costs of corporate insolvency in the US, an area which warrants increased attention and which the author asserts is "arguably overdue for a comprehensive re-evaluation".



The Handbook delivers a deep and up to date exploration of contemporary issues in the field of corporate bankruptcy in the United States, many of these issues being of international concern. The level of analysis and blend of economic and legal considerations make the Handbook a significant contribution to the existing literature on corporate insolvency and an important resource for scholars, practitioners and others in the field.

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2021

20 January	INSOL Europe Academic Forum Webinar *Online*
2 & 3 February	INSOL Europe, Fraud Advisory Panel and R3 Joint Fraud Conference *Online*
4 & 18 March	INSOL Europe Spring Conference *Online*

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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