INSOL EUROPE

YEARS 1981-2021

#83 · Spring 2021

eurofenix®

The journal of INSOL Europe

Then & Now: 40 Years of INSOL Europe

YEARS 1981-2021

The EU Directive in Germany: A new star in the firmament

Also in this edition:

- Unlocking ill-gotten assets
- New year, new online events
- Black Swan event in the US
- Country Reports *...and more*

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Welcome from the Editors


EDVĪNS DRABA


CATARINA SERRA

It is with high hopes that I write this editorial for the Spring issue of Eurofenix.

It is a common place that springtime is the season of rebirth, rejuvenation, renewal. Maybe for this reason I find myself thinking that now is the time when we will be given back our future, that is, we will finally be allowed to resume the right to walk, move, interact, live in freedom.

Highly effective COVID-19 vaccines are rolling out around the world and the vaccination process is moving forward. The UK is leading the rest of Europe and has recently reached the major milestone of giving more than 50 per cent of the adult population their first dose. As to the EU, it is no secret that the pace of vaccinations in the Member States has been slow. There have indeed been some problems (mainly supply shortages), but they are now, hopefully, overcome.

It is true that this will also be the time when all hell breaks loose. Due to the sanitary crisis, businesses everywhere were submitted to intermittent lockdowns. The unavoidable consequence is the "other" crisis – the economic crisis. It will take an extremely long time to recover and – please take note – all our best efforts and knowledge. In other words: it is up to each one and all of us to handle the singular cases with the uttermost care, for this is the only way to restore the general confidence and thus re-establish stability and balance in the economic situation.

As if guessing the scenario which has been installed since early 2020, the European legislator had provided the Directive on restructuring and insolvency just the year before. The fact may be envisaged as a strike of luck (the Directive provides guidance and a variety of tools) or as a hindrance (the Directive is complex and the deadline puts pressure on national legislators). That is why there are those Member States which have already implemented the Directive, like Germany, and those which have notified the Commission of their need for an extension of the implementation period. Do find out which are which with the new tracker available on the INSOL Europe website (see pp. 42-43) and get acquainted with the novelties brought by the pioneer implementation law adopted in Germany – the *StaRUG* (see pp. 18-19).

Speaking of what is new, the centrefold of this edition is dedicated to the 40th anniversary of INSOL Europe (see pp. 22-25). The gallery of former presidents is impressive and leads to the understanding that, whomever may be in charge, the entity has a route of its own and will always outlive its constituencies.

It is impracticable to mention all the remaining points of interests of the present issue of Eurofenix. With a variety of pieces (feature articles, technical insight and update, country and conference reports, news, book reviews, you name it) which is intended to match that of reality (chameleonic as never), we are again before a remarkable edition of Eurofenix.

With high hopes, I close with the first words of a poem by the 2020 Nobel Prize of Literature awardee, Louise Glück, "The Wild Iris":

"At the end of my suffering
there was a door".

Até à vista!

See you around!

Catarina

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EU DIRECTIVE IN GERMANY

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Still moving digitally towards the light at the end of the tunnel

Marcel Groenewegen writes on the continuous digital journey of INSOL Europe and updates us on the activities of INSOL Europe in 2021, its 40th anniversary year

MARCEL GROENEWEGEN
INSOL Europe President

> *"We have grown accustomed to staying connected with each other digitally and have all become experts at participating in Zoom and MS Teams meetings"*

I am glad and proud to introduce this Spring Edition of Eurofenix to you, chock full of interesting contributions from all over Europe and an overview of INSOL Europe's recent and upcoming activities.

As you know and as clearly highlighted on the front cover of this edition, we are now well into INSOL Europe's 40th anniversary year, at this time still fully online and digital. Appropriately, you will find in this edition contributions on 40 years' history of INSOL Europe, key dates and events from our past and even a picture gallery of past and present Presidents.

We have grown accustomed to staying connected with each other digitally and have all become experts at participating in Zoom and MS Teams meetings. However, we are all longing for a real live event, to be able to really connect and meet each other again. Whatever may be possible in this respect, be assured the Executive and the entire staff of INSOL Europe will try to accomplish it. In any event, our next Annual Congress will be a live event from 3-6 March 2022 in Dublin.

Online presence

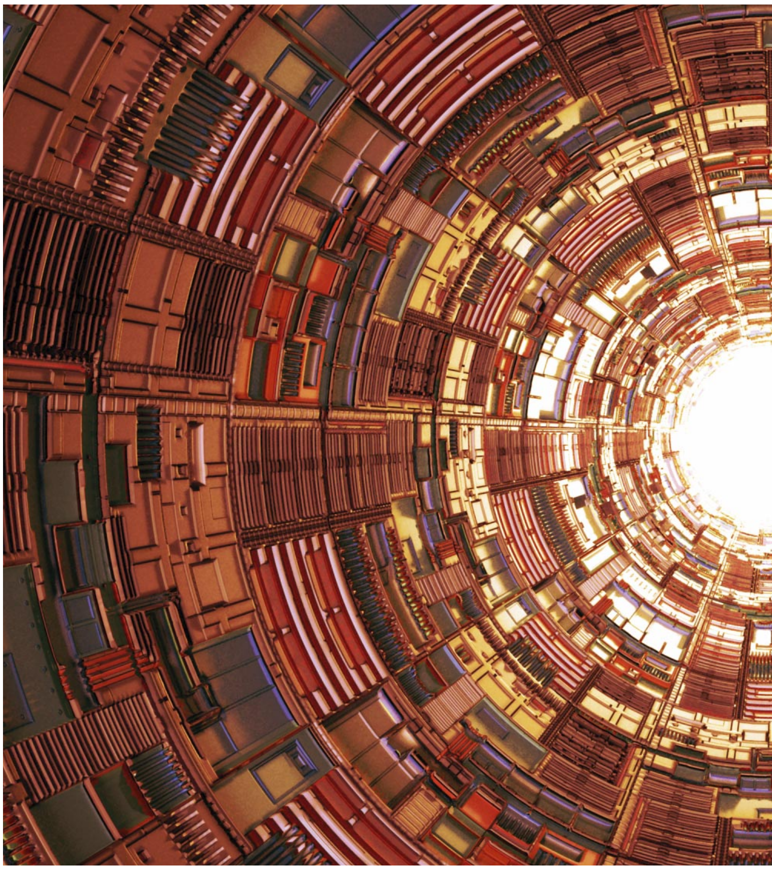
Until then we will expand our online presence again, by holding our first joint online seminar with INSOL International on 15 April 2021 to "bridge the Atlantic". The online seminar will be held in the early morning and at the end of the day, allowing professionals from all over the world to participate. Please check this edition for more details and do register.

I am also proud to announce that after our successful Spring online conference of 4 and 18 March, INSOL Europe will organise an Autumn conference on 7 and 21 October in the same format, so please make a placeholder entry in your calendar. The two co-chairs and technical committee who are responsible for the technical programme of the Dublin Congress will also prepare the programme for the Autumn conference.

New legislation

2021 has seen the launch of new legislation in various jurisdictions, aiming at enhancing restructuring facilities outside formal bankruptcy proceedings and thereby also (partially) implementing the EU Directive on Restructuring and Insolvency.

In the Netherlands the new WHOA rules (the 'Dutch scheme') took a speedy lift off on 4 January 2021 (i.e. the first business day in the new year), when the first case was brought



before court. In the meantime, a substantial number of cases have been launched and already two schemes have been granted court approval. It seems that Dutch courts take a sensible and practical approach towards the new legislation, whilst at the same time keeping a close eye on legal topics, a number of which will need to be further considered and tested as more case law will become available.

You will also find in this edition a contribution on the new German StaRUG legislation, which became effective on 1 January 2021 as well, highlighting its main features.

Meanwhile, in the UK, the Restructuring Plan has been successfully used (by e.g. Virgin Atlantic) and court decisions on the position of this instrument in European cross-border restructurings (like the Gategroup restructuring) have also been rendered. No doubt, there is more to come in this respect so please do read the update on the UK insolvency and restructuring policy landscape by R3 in this edition.

Since many of you are or will be working in your jurisdictions with new legislation and rules of law related to the implementation of the EU Directive on Restructuring and Insolvency, INSOL Europe has launched a tracker on its website to allow you all to keep track on the progress of the implementation in the various jurisdictions. Please see p. 42 of this edition for more information and how to access the tracker.

Connecting minds

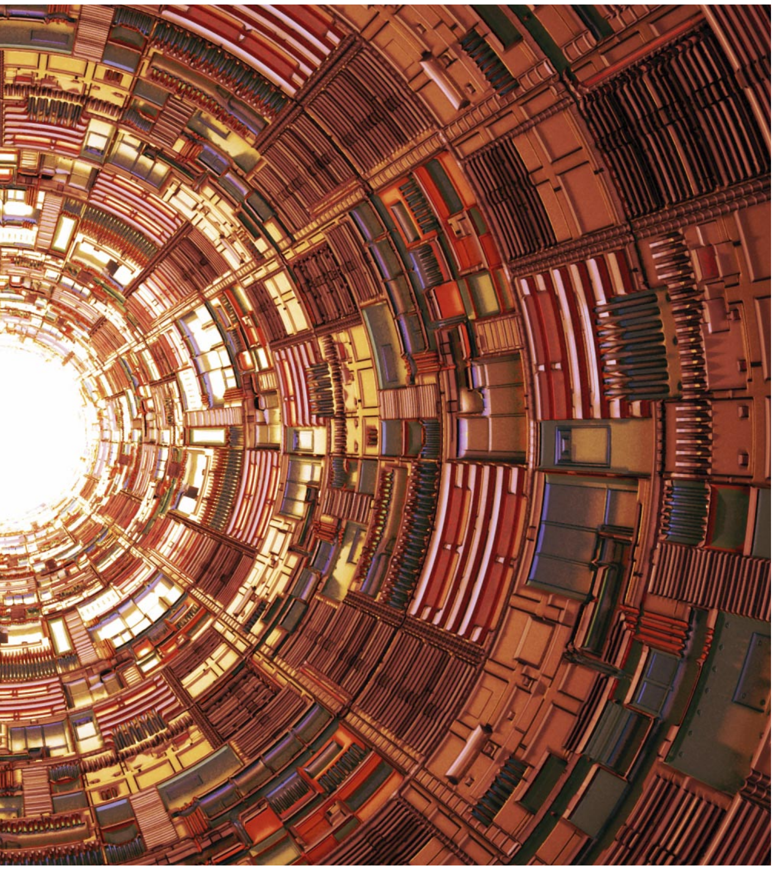
The INSOL Europe Coffee Breaks series "Connecting Minds" have seen a successful start and large online attendance for each of the video interviews. Our Country Coordinators have played, and will continue to play, an active role in this respect and more interviews will come your way this year.

Please stay tuned into all of INSOL Europe activities and do regularly visit INSOL Europe's website to stay up to date with our initiatives. Of course, we will actively keep you updated via our monthly e-newsletters and special email bulletins as well.

As this Eurofenix finds its way towards you, daylight saving time has started and I hope this and the Spring Season together will make a little difference for us all as we seem to approach the end of the COVID-19 tunnel.

I hope you will find this Eurofenix edition an interesting read and wish you and your beloved ones Happy Easter Holidays and a wonderful, but foremost safe and healthy, Spring 2021. Please hold on, better times are ahead indeed. ■

> *Daylight saving time has started and I hope this and the Spring Season together will make a little difference for us all as we seem to approach the end of the COVID-19 tunnel*



The question of recovering ill-gotten assets from an insolvent State…

In this guest editorial, Guy Lepage asks if ill-gotten assets are attractive for a creditor of a State unsuccessful in the collection of its claim

GUY LEPAGE
C.E.O., GLP Strategy

First of all, it is worth being aware that there are no insolvency proceedings for an insolvent State and even when a State is not in a position to pay its debts, especially in foreign currencies, such a State still appears to be solvent or "*in bonis*".

There are two different kinds of potential creditors of a State:

1. Domestic creditors, either individuals, citizens of the State, or companies registered in the same State, and
2. Foreign creditors.

As regards the domestic creditors, their situation is specific, because any claim due by the State could be paid in the local currency in force in the country.

For the foreign creditors, their claims result most of the time from a contract signed between a company registered in another country and the State, or an entity like a ministry, incurring responsibility of the State. An example could be that of a foreign investor having invested for the exploitation of a mine in a country, whose investment has been nationalised without a fair compensation by the respective State. Another kind of foreign creditor could be the subscribers of bonds issued by a State in different currencies, which are not paid at the due date. In both cases the claims are most of the time in foreign currencies and the indebted State must pay its debts in the same currency and not in local currency.

When a foreign creditor succeeds in obtaining a final judgment or an award against a sovereign State, it is often the start of a new enforcement process. This is not easy when the State debtor does not want to pay its debts voluntarily (e.g. Argentina). The main difficulty springs from the fact that the assets belonging to a State are protected against attachment by an enforcement immunity, as defined by the Vienna Convention signed on 18 April 1961 and the UNO Convention signed on 17 January 2005.

The creditor has no other possibility than to trace assets belonging to the State debtor or its alter egos in different countries and to check carefully if these assets are covered or not by an enforcement immunity. This is the reason why some creditors have an interest in ill-gotten assets belonging to a State debtor and identified in different countries. The creditor must keep in mind that all the enforcement judicial proceedings on assets identified in a country are governed only by the enforcement law and case law of the country where the assets are located.

With the international fight against money laundering and corruption supported by international institutions like the World Bank (which published a detailed guide lines on the subject less than ten years ago) and the IMF, so-called ill-gotten assets are more and more numerous now. The purpose of this article is to describe in practice if it could be an appropriate avenue for the collection of a claim against a State debtor.

> "Some creditors have an interest in ill-gotten assets belonging to a State debtor and identified in different countries"

Different treatments of ill-gotten assets

Criminal acts

The fight against ill-gotten assets coming from a criminal act (narcotic drugs or exploitation of human beings) has been improved in recent years, especially due to the pressure and the implementation of the procedure called "know your client" in the banks, offices of public notaries and law firms. When such an asset is garnished, the country where it is located keeps the value of the asset in compensation of the violation of its laws against money laundering.

Property of a former ruler

For the ill-gotten assets which are the property of a former ruler of a country or of a member of his family, two countries have more experience than the others: Switzerland and the USA. We will see below if it could be attractive for the creditors.

Corrupt businessmen

For ill-gotten assets obtained by corruption by a businessman or woman close to the ruler of a country, the trend is more recent and it will be interesting to watch the evolution in the near future.

Differences between the USA and European countries

The **US** is certainly the leader on this question and it is worth noting that in December 2017 a Presidential decree has garnished all the assets in the USA belonging to a foreign businessman and has prohibited all transactions with any company controlled by the same businessman. The businessman was close to a ruler of a foreign state. An example of his practices was the nationalisation of all the properties of a large company by the government. The factories and properties were given to the businessman less than two years after the nationalisation, for a discounted price, with a resale by him with huge profit (more than $1 billion).

In the US, injured third parties can respectfully request the US government to render them the proceeds of those assets if they have suffered certain kinds of harm during certain time periods and maybe the Justice Department will choose to do so. Otherwise, the assets are either kept by the US government or, if stolen from another country by corrupt politicians, ultimately rendered to the citizens of that country.

The biggest example of repatriation of funds remains the repatriation by the US government of $2 billion to the people of Iraq.

In **China** and **Hong Kong** the matter is not relevant, because the case law of the supreme court does not authorise any creditor to attach the assets belonging to a foreign State.

In European countries, **Switzerland** is the most experienced country with the following examples of repatriation of:

- $658 million to the Philippines government after 17 years of judicial proceedings (Markos funds);
- $2.4 million to the Mali government (Moussa Traore funds);
- $594 millions to the Nigeria government (Abacha funds);
- $80 million to the Peru government (Fujimori funds);
- $21 million to the Angola government; and
- Agreement achieved at the end of 2020 with the Uzbekistan government for assets belonging to the daughter of the former President ($800 million plus assets attached).

In most of the other European countries, usually the assets attached are kept by the governments; in some countries no mechanism of repatriation of funds exists.

Nevertheless, it is worth mentioning a repatriation from the **UK** government (in fact **Jersey**) of $160 million to the Nigeria government (Abacha funds).

In **France** several cases of ill-gotten assets are well known: Haïti, Gabon, Equatorial Guinea, Republic of Congo, and Uzbekistan.

One additional difficulty is shown by the story of the Congolese ill-gotten assets in **Belgium**, belonging to the members of the family of the former ruler Mobutu: the Democratic Republic of Congo government initiated a demand of repatriation in 1997, but there was no follow up of the demand and obviously no interest from the government until now to repatriate the assets (valued in Belgium by some NGOs to around $6 billion, equivalent to the state budget). This example contradicts the popular saying "ill-gotten gains are short lived".

Recommendations for creditors of a State

In order not to spend good money after bad, for the time being, it is not careful for a creditor of a State to try to attach some ill-gotten assets duly identified in a country, maybe allowing the exception of ill-gotten assets localised in the USA.

In Switzerland, due to an old case law, it is not sufficient to localise assets belonging to the debtor in Switzerland in order to give jurisdiction to the Swiss courts; the creditor must also demonstrate a link between either the creditor or the debtor and Switzerland (in the case of a State debtor, the presence of an embassy in Switzerland is not sufficient to establish such a link).

For any attachment of ill-gotten assets in a country, a creditor of a State has to implement the following actions:

a. To obtain a criminal judgment in the State debtor country, or
b. To launch civil judicial proceedings in the country where some ill-gotten assets have been localized, or in the country where ill-gotten assets have passed through, or in the country where embezzlement occurred. In the case of ill-gotten assets in cash in US dollars, it could give jurisdiction to US courts.

For the future, it will be of essence to watch the evolution of the trend for ill-gotten assets obtained by corruption by a businessman close to the ruler of a country, because this example does not seem rare.

For a creditor of a State, the biggest problem is not to arrive too late (after others creditors), but also not to be in advance of anticipated laws or case law.

As the business saying goes: it is a mistake to be right before others. ■

Usually the assets attached are kept by the governments; in some countries, no mechanism of repatriation of funds exists

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*

COFFEE BREAKS 2021

The 'Coffee Breaks: Connecting Minds 2021' series continues with our popular video conversation format established in 2020.

This year, the **INSOL Europe Country Coordinators** will share their experiences with representatives from their local associations, highlighting the reforms and challenges of the national insolvency framework created to address the current crisis and other key issues in their jurisdiction.

'Coffee Breaks: Connecting Minds 2021' videos are brought to you in partnership **with the European Bank for Reconstruction and Development (EBRD)** and its **Legal Transition Programme (LTP)**.

The LTP is the EBRD's initiative to contribute to the improvement of the investment climate in the bank's countries of operations by helping create an investor-friendly, transparent and predictable legal environment. This objective is implemented by the Legal Transition Team, a dedicated team of specialised lawyers working across the 38 economies where the EBRD invests.

Niculina Somlea appointed Co-Chair of the Eastern European Countries Committee

From November 2020, Niculina Somlea has succeeded Radu Lotrean, EECC Co-chair and Past President of INSOL Europe, as the Eastern European Countries Committee's co-chair.

First as Co-secretary (2017-2018) with Florica Sincu and then as the full secretary/coordinator from 2018 after Florica's retirement, she has been actively involved with the EECC, supporting the co-chairs in organising the group's annual conferences, keeping contact with the national professional associations, developing the groups' network and institutional relationship with the EBRD and creating the first EECC Insolvency Report.

Together with Evert Verwey, she is currently working on organising the online EECC Conference for late November 2021 and the joint INSOL Europe/Romanian Institute of Commercial Law online Conference, "*Experiences, Evolutions and Perspectives in Business Law in the Post-Pandemic Era*" to take place on 13-15 May 2021.

A graduate of Babes Bolyai Law University (Romania) and Master at the Université Paris II Panthéon-Assas Droit des Affaires (France), with 10 years of experience in the restructuring/insolvency field, she opened her own boutique insolvency firm in 2020.

New tracker on the Implementation of the EU Directive on Restructuring and Insolvency published

A new tracker on the implementation of the EU Directive on Restructuring and Insolvency is now available on the INSOL Europe website at: www.insol-europe.org/tracker-eu-directive-on-restructuring-and-insolvency

For full details, find out more on p. 42 of this edition.

'Must-have' guidelines for judicial cooperation

New guidelines have been published aiming to provide some substantial and procedural guidance to those professionals under the duty to communicate and coordinate insolvency proceedings in the context of the EU Regulation 2015/848 of 20 May 2015.

In particular, these guidelines promote non-binding best practices in terms of cooperation and coordination between courts themselves and between courts and insolvency practitioners appointed in main and/or secondary insolvency proceedings, including in case of corporate groups.

The guidelines also retain the objectives and the main provisions of the European Insolvency Regulation Recast, taking into account other recently formulated standards in this area, including INSOL Europe's European Communication and Cooperation Guidelines for Cross-Border Insolvency (2007) and other International Principles or Guidelines, including those adopted by UNCITRAL or the International Insolvency Institute and the American Law Institute.

These guidelines were prepared by the Ecole Nationale de la Magistrature (ENM, France), in partnership with the Institut de Formation Judiciaire-Institut voor Gerechtelijke Opleiding (Belgium), the Consejo General del Poder Judicial-Escuela Judicial (CGPJ-EJ, Spain) and the Krajowa Szkoła Sądownictwa i Prokuratury (KSSIP, Poland) during the professional training which took place in February and December 2020 with the support of the French Conseil National des Administrateurs judiciaires et Mandataires judiciaires and funded by the Justice Programme of the European Union (2014-2020).

A must-have product for any professionals involved in EU Cross-border insolvency proceedings!

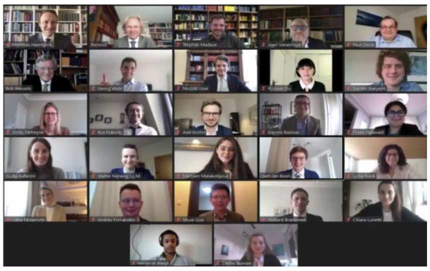
The guidelines are available in English, French, Polish and Spanish from our website at: www.insol-europe.org/eu-study-group-links

Click here

Virtual Law Workshop gathers PhD Researchers from Europe and beyond

From 4 to 5 March 2021, the Stichting (Foundation) Bob Wessels Insolvency Law Collection (BWILC) organised the third edition of the PhD Workshop on European and International Insolvency Law. The participants had the chance to be part of an inspiring and interactive two-day virtual workshop.

PhD candidates were selected from applications from around the globe to present their ongoing research. The eight successful PhD candidates included Preeti Nalavadi (Adelaide University), Maryam Malakotipour (Amsterdam University), Sander Baeyens (KU Leuven University), Andrey Esmanskiy (Saint-Petersburg University), Vilija Mogenytė (Mykolas Romeris University), Emily Defreyne (Ghent University), Niccolò Usai (Florence University) and Richard Bradstreet



(Cape Town University). The presentations covered a broad spectrum of topics, including insolvency and bitcoins, subordination of (affiliated) claims, executory contracts, public policy and the role of the insolvency law practitioner, employee protection in insolvency, as well as discussions about insolvency law from an economics perspective.

The BWILC board, composed of Professors Matthias Haentjens, Reinout Vriesendorp, Stephan Madaus, Joeri Vananroye and Dr. Paul Omar, along with Professor Bob Wessels (patron) and alumni from previous workshops were present. Each presentation was followed by an extensive Q&A session, raising questions and providing insightful feedback to further the research.

At the end of the PhD Workshop, three prizes were awarded by the BWILC board to Niccolò Usai (1st place), Maryam Malakotipour (2nd place) and Sander Baeyens (3rd place) as a recognition of the most original presentations. Emily Defreyne received an honourable mention for her presentation. In 2022, the board hopes to organise a fourth edition of this BWILC PhD Workshop live in Leiden.

Maryam Malakotipour and Niccolò Usai

First Virtual Fraud Conference attracts more than 150 delegates

The First Virtual Fraud Conference took place on 2 and 3 February 2021, attracting more than 150 participants from jurisdictions all over the EU, report Carmel King and Bart Heynickx, co-chairs of INSOL Europe's Anti-Fraud Forum.

The Fraud Conference was co-organised by R3, the UK Fraud Advisory Panel and INSOL Europe's Anti-Fraud Forum.

Over two days, the conference provided over 15 live and on-demand sessions, presenting more than 30 highly renowned speakers from a wide variety of institutions including the Cabinet Office, UNODC, HMRC, NCA, BBC, the House of Lords, Transparency International, the SFO, the EPPO and a range of chambers, legal and professional advisory firms. INSOL Europe's own Marcel Groenewegen, Stephane Bonifassi and Hector Sbert kindly contributed their expertise.

Day one kicked off with a lively debate on the '*Changing Nature of Financial Crime in a Post-Covid world*', chaired by Frances Coulson and discussing the challenges and new fraud schemes developed or further expanded during the current pandemic.

Also in relation to the pandemic, Carmel King brought together a panel to talk about '*Deepfakes and Misinformation*', a problem that, unfortunately, keeps on growing. A third session, scheduled just prior to some (online) networking and exhibitions, considered how to '*Make Fraudsters Pay: The Counter-Fraud Practitioner's Toolkit*', where an international panel reviewed the best and most efficient tools to block fraudsters and seize their assets, from a public sector point of view as well as from the private sector, with Bart Heynickx as a moderator. The first day closed with a session on '*Tackling Rogue Companies*', presided over by Frances Coulson. During the evening, some participants enjoyed an online wine-tasting session.

The second day opened with the biggest fraud of the century (so far), OneCoin, and assembled, under Carmel King's guidance, both the BBC-reporter that uncovered the heist (Jamie Bartlett), a OneCoin-victim and a crypto-currency specialist that had been approached to work for OneCoin and set-up their block-chain. A fascinating story unravelled.

The next panel covered the future on '*Tackling Economic Crime*.' The final two live sessions, focused on the digital point of view with Frances Coulson chairing a session on '*Secret Agents, Smart Contracts and Crypto-Assets*' and Bart Heynickx on '*Digital Forensics*'. The digital world provides for more tools and opportunities, but also for more related fraud. The Digital Forensics session talked about technical and legally acceptable tools to unravel such fraud and bring criminals to justice.

During breaks and after the conference, participants could also enjoy a number of pre-recorded sessions, going into the related topics in more detail and providing further valuable input.

Christina Fitzgerald joins Edwin Coe

Edwin Coe LLP is delighted to announce that corporate and personal insolvency specialist Christina Fitzgerald has joined the firm as a Partner. She joins the firm from Moon Beever, having previously been a Partner at Kennedys, Matthew Arnold & Baldwin and Shakespeare Martineau.

Christina is a Licensed Insolvency Practitioner advising insolvency practitioners, accountants, banks, asset-based lenders and other commercial organisations on corporate and personal insolvency. She has particular expertise in advising troubled professional practices and distressed charities, not-for-profit organisations and corporate simplification. She also acts for clients in a wide variety of disputes including corporate, shareholder and partnership litigation, complex contractual disputes and professional negligence.

Christina is the current Vice President of R3 (the trade association for the UK's insolvency and restructuring professionals), becoming President in April 2021, and is also a member of INSOL Europe.

Christina commented: "*I am delighted to be joining Edwin Coe. I am looking forward to working with the team and using my experience to help the firm's clients navigate the challenges they face.*"

Edwin Coe LLP generously supports INSOL Europe's Academic Forum.

New European Insolvency and Restructuring Journal launched online

A new online open access journal dedicated to insolvency and restructuring law in Europe has been launched.

EIRJ is an initiative of professors Michael Veder and Ben Schuijling of the Radboud Business Law Institute of the Faculty of Law at Radboud University (Nijmegen, the Netherlands) and has been set up in cooperation with INSOL Europe and the Academic Forum of INSOL Europe. EIRJ is published by LexIQ B.V.

Insolvency and restructuring are of great practical and academic importance globally, and in Europe specifically. Over the last decades, a body of law has gradually been shaped that may be called a European law of restructuring and insolvency. The adoption of the European Insolvency Regulation (1346/2000) in May 2000, followed by the recast thereof (2015/848) in June 2015, marked important steps in that development, particularly with respect to the rising number of insolvencies with cross-border elements. The adoption of the Directive on Restructuring and Insolvency (2019/1023) in June 2019 marked a further step in the development of a common European approach to insolvency and restructuring. Recently, the European Commission launched a public consultation aimed at identifying areas where further harmonisation of insolvency laws in the European Union could potentially lead to more efficient and predictable insolvency frameworks and enhanced confidence in cross-border financing and would help strengthen capital markets in the Union.

The increasing convergence of laws in the area of insolvency and restructuring requires practitioners and academics to have a thorough understanding of the insolvency and restructuring regimes and the development thereof in Europe. This need is further intensified by the automatic recognition of insolvency and restructuring proceedings throughout the European Union and the duty and necessity to cooperate and communicate with insolvency practitioners and courts from all EU Member States.

The European Insolvency and Restructuring Journal aims to provide a solid and authoritative forum for in-depth (comparative and empirical) articles on the development of insolvency and restructuring laws and practice in Europe. The publishers strongly believe in the benefits of cross-fertilisation between practice and academia and therefore strive to publish content that is relevant to all.

EIRJ welcomes the online submission of articles and case notes to be considered for publication. All case notes and articles that are published in EIRJ are subject to a rigorous evaluation by the Editorial Board (and, where appropriate, other specialists in the field) by means of double-blind peer review. Each of the members of the Editorial Board of EIRJ is a distinguished academic or practitioner with an established international reputation in the field of cross-border insolvency and restructuring. The Editorial Board consists of Reinhard Bork (Universität Hamburg/Radboud University), Sarah Paterson (London School of Economics), Tomáš Richter (Clifford Chance), Ben Schuijling (Radboud University), Lorenzo Stanghellini (Università degli studi Firenze), Adrian Thery (Garrigues), Melissa Vanmeenen (Universiteit Antwerpen) and Michael Veder (Radboud University/RESOR, chair). The Editorial Board is assisted by Michelle van Haren (Radboud University) as editorial secretary.

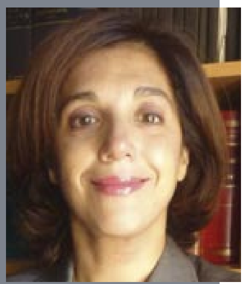
Visit the journal and contact the editors at: https://eirjournal.com

Click here

Date for your diary:

Academic Forum Online Lecture

20 May 2021



INSOL Europe's Academic Forum is excited to announce an online lecture by esteemed Professor N. Bermejo, on the topic of "Public Creditors in Preventive Restructuring Frameworks: Considerations in the light of the Pandemic Crisis", to be held on 20 May 2021.

Nuria Bermejo is Professor on Commercial Law ("Profesora Titular") at Universidad Autónoma de Madrid (Spain) since 2008. From March 2008 to October 2015, she was Legal Secretary ("Référendaire") at the EU General Court (Luxembourg). She has lectured in other Spanish universities, as well as in European higher education institutions and South-American universities.

Further details about the event and Professor N. Bermejo can be found on our website at **www.insol-europe.org/academic-forum-events**.

A closer look at...
Digital Players: The winners of the COVID-19 crisis

EMMANUELLE INACIO
INSOL Europe Conference Technical and Training Course Director

> *GAFAM (Google, Apple, Facebook, Amazon & Microsoft), the providers of core platform services, are dominating the digital market*

Each crisis has its losers and winners. In 2020, an unprecedented and unforeseen growth occurred in the digital sectors, which have boomed all along the COVID-19 crisis.

GAFAM (Google, Apple, Facebook, Amazon & Microsoft), the providers of core platform services, are dominating the digital market. In other words, globally, almost all digital services depend on GAFAM. This phenomenon was stressed by the COVID-19 pandemic with the massive move of our daily life to virtual life. Indeed, GAFAM built their power on an unregulated market and are accused of unfair competition, lack of transparency in the collection of personal data, threatening democracy by spreading false information or breaching the freedom of speech[1].

In order to regulate digital players in the internal market which became out of control, the European Commission (EC) published a new draft digital legislative package on 15 December 2020: on the one hand, a Proposal for a Regulation on Digital Services Act (DSA)[2] and on the other hand, a Proposal for a Regulation on Digital Markets Act (DMA)[3]. The DSA improves and completes the provisions of the outdated E-Commerce Directive on the regulation of illegal content of all digital services intermediary providers whereas the DMA regulates providers of core platforms services acting as "gatekeepers", i.e. controlling access to the digital market (GAFAM are the target of this text), to supplement EU antitrust rules.

This ambitious new framework will regulate all digital players operating in the internal market with a particular attention to core platforms (1), creating new strict obligations (2) as well as a heavy sanction regime for them (3).

1. A flexible scope for Digital Players with a particular attention to core platforms

The DMA is applicable to the largest digital players operating in the internal market to address the systemic risk similar to the bank regulation on systemic risk in response to the 2008 subprime crisis.

The DMA is meant to regulate core platform services provided or offered by gatekeepers to business users established in the EU or end users established or located in the EU.

To be qualified as a "gatekeeper", such a provider of core platform services shall meet three cumulative conditions. Firstly, such a provider shall have a significant impact on the internal market. Secondly, it shall operate a core platform service which serves as an important gateway for business users to reach end users. Thirdly, it shall enjoy an entrenched and durable position in its operations, or it is foreseeable that it will enjoy such a position in the near future.

However, the DMA is flexible regarding the quantitative conditions set. Indeed, the EC is free to identify as a gatekeeper any provider of core platform services.

On the contrary, **the DSA has a larger scope as it is applicable to all providers of intermediary services and very large online platforms.** The DSA is meant to regulate all providers of intermediary services, whatever their size in the internal market and irrespective of the place of establishment.

2. New strict obligations for Digital Players

The DMA is designed for the digital players who consider themselves as "*too big to care*" as explained the Commissioner for Internal Market, Thierry Breton. The purpose of the DSA is summed by Margrethe Vestager, Executive Vice-President for a Europe fit for the Digital Age: "*[…] what is illegal offline is equally illegal online*"[4]. Thus, the DMA introduces obligations for the gatekeepers whereas, under the DSA, general and specific obligations apply following the size and impact of the digital service providers.

Obligations for gatekeepers

The DMA introduces obligations for gatekeepers, in the form of a list of dos and don'ts to identify and exclude aggressive and monopolistic behaviours, which are also subject to investigative procedures meant to establish he infringement of the EU competition law.

In the Internal Market, the European competition authorities regularly sanction GAFAM for breaching EU antitrust rules. The problem is that antitrust sanctions come after years of investigations and that the fines are not dissuasive for GAFAM.

Thus, gatekeepers will *inter alia* be prohibited from combining personal data from their core platform services with personal data from any other services and will have the obligation to allow business users to offer their products or services to end users through other online intermediation services, at different prices or conditions.

Some prohibitions and obligations imposed to gatekeepers will be subject to further clarification by the EC, such as the obligation to uninstall pre-installed applications without service restrictions and to ensure interoperability of ancillary applications.

Liability and obligations of providers of intermediary services

The DSA maintains the key principles of the E-Commerce Directive. On the one hand, the providers of digital services are not liable for illegal content as long as they do not have knowledge of the content. On the other hand, the providers of digital services have no general obligation to monitor the information they transmit or store.

The DSA introduces new obligations for providers of digital services. They are required to establish and communicate a single point of contact and mention the restrictions they impose on the use of their services within their terms and conditions. Finally, a new duty to report on any content moderation they engaged is also created.

Further obligations are introduced for all hosting providers, including online platforms. They will have to put in place mechanisms to request the removal of illegal content, including a statement of reasons for the removal.

Obligations that apply only to online platforms are also added and include the creation of internal complaint-handling systems to manage the removal of illegal content and/or the suspension or termination of the services and/or of users' accounts, transparency on online advertisements and on algorithms used to display them.

Finally, the "very large online platforms" shall assess the systemic risks stemming from the functioning and use of their service, as well as by potential misuses by the recipients of the service, and take appropriate mitigating measures.

3. A heavy sanctions regime applicable to digital players

In order to create an effective framework, the DMA and DSA create very dissuasive fines and give important powers to EU regulators.

If the gatekeeper does not comply with the obligations set in the DMA, the EC may impose on the gatekeepers fines not exceeding 10% of the gatekeepers' total turnover in the previous financial year. Periodic penalty payments not exceeding 5% of the average daily turnover in the preceding financial year may be added. In case of systematic infringement, the EC may impose any behavioural or structural remedies such as separation, including the divestiture of a business, or parts of it.

Under the DSA, the EC proposes the appointment of a Digital Services Coordinator in each Member State to assess the compliance of the providers of intermediary services with their obligations and impose fines, if relevant. The EC may impose fines on the very large online platforms, not exceeding 6% of their total turnover in the preceding financial year. Periodic penalty payments not exceeding 5% of the average daily turnover in the preceding financial year may be added.

The European Parliament and the Member States will discuss both EC's proposals in the ordinary legislative procedure in the light of the news. If adopted, the final text of the EU regulations will be directly applicable in all the Member States. ■

Footnotes:

1 Daniel FASQUELLE, Emmanuelle INACIO, The EU Commission publishes a draft on a legislative package promoting a single market for digital services, 15 décembre 2020, e-Competitions January 2021, Art. N° 98751

2 Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC, COM/2020/825 final.

3 Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM/2020/842 final.

4. https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2347

> *"The Digital Markets Act is designed for the digital players who consider themselves as "too big to care""*

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*
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Digital finance and crypto assets news from Brussels

Innovations and opportunities of the digital revolution resulting from the coronavirus pandemic

The European Commission has expedited its efforts and proposed a digital finance strategy for the European Union

The overall use of financial applications in Europe has increased by almost a double in one week when the pandemic started.

Digital finance tools have helped across all sectors to tackle the crisis created by the pandemic. Moreover, you can open a bank account without visiting the physical branch and payments for purchases have moved to the digital spheres or became wireless.

The decision-makers in Brussels at the European Commission have understood that the impacts of the lockdowns and the various restrictions are boosting the courage of business and consumers to use digital versions of almost every aspect of daily life. As a consequence, the European Commission has expedited its efforts and proposed a digital finance strategy for the European Union. The wrap up of the key points is the aim of this article.

Trendy innovations in the digital world push for changes

Digital data and IT infrastructure have become key factors for development in digital finance. Data and infrastructure exist in the cloud, thus being flexible and available, but vulnerable to data protection leaks or attacks at the same time.

Speed of innovation in digital finance has become even more a factor. Life cycles of products and solutions get shorter and shorter. Sometimes, at the moment we finally adjust to the most recent version of the internet banking app, a major update of the same app with a new usability concept is being released.

Embrace, drive, make available and promote…

The EU Commission envisages to embrace the trendy innovations and the opportunities of the digital revolution, to drive the digital finance with strong European market leaders, to make its benefits available to customers and businesses and to promote it in line with EU values and under proper risks regulation.

Embracing digital finance will boost financial products innovation and development, thus making funding to businesses more available. Another positive impact of embracing digital finance is the support of the post-pandemic economic recovery, mobilising funding in connection with the EU's Green Deal and the New Industrial Strategy. An open strategic autonomy in financial services will be reinforced by a strong and dynamic digital financial sector. Lastly, the EU's Economic and Monetary Union will benefit from an enhanced financial markets integration in the Banking and Capital Markets Union.

It comes to four priorities

Based on the positive voice collected in the public consultation for the discussed digital transformation strategy, the EU will pursue four priorities:

1. Financial services Digital Single Market must undergo de-fragmentation. In this way consumers will access cross-border services more easily. Another important point under the first priority is to simplify cross-border scale-up of the financial businesses' digital operations.

In order to achieve the mentioned targets, the EU committed itself to implement a legal framework for an **interoperable digital identity** offering new customers a non-complicated access to financial services by 2024. It goes without saying the AML and counter-terrorism financing rules need to be more harmonised, while the new rules will benefit from an updated e-IDAS regulation. Three steps need to be accomplished in order to succeed.

Firstly, the manner and extent to which financial service providers may rely on "*know your client*" (KYC) procedures carried out by third parties must be evaluated. The European Banking Authority and other European Supervisory Authorities will introduce guidelines on this topic. The European Data Protection Board will be involved in reviewing those guidelines for data protection aspects.

Secondly, the Commission will define and harmonise KYC requirements thus removing different processes and compliance obligations across different Member States. A part of the new rules will define which ID documents will be necessary and which technology can be used for a person's identity verification purposes to achieve seamless cross-border operation.

Thirdly, the e-IDAS regulation's application should be extended to the private sector and promote trusted digital identity's for all EU citizens. (*Finally!!*)

The so called **'passporting'**, which should be introduced also by 2024, will enable consumers and businesses to have access to cross-border services provided by another Member State's established and supervised digital finance firms. As an example, under the Crowdfunding Regulation, passporting will be introduced for various crowdfunding services, while the crypto-assets rules currently proposed by the Commission should enable passporting for crypto-assets issuers and service providers.

2. A corresponding regulatory framework should facilitate distributed ledger technology or artificial intelligence innovations for consumers and businesses.

The upsides of crypto-assets and blockchains are obvious: cheap and fast payments in cross-border and international transactions, new funding possibilities, more efficient capital markets. Therefore, the Commission has presented a legislative proposal for a **Regulation on Markets in Crypto-assets** and a **Regulation on a Pilot Regime for market infrastructures based on distributed ledger technology**. If everything goes as planned, by 2024 these new laws will be effective.

The Commission is proposing an oversight framework for critical third party ICT providers to the financial sector, such as cloud service providers, and the launch of a European cloud services marketplace which will facilitate access to alternative cloud service providers, including the financial sector. In the future cloud services could be certified by the EU cybersecurity agency in line with the Cybersecurity act, in order to increase trust in cloud use not only by financial services and regulators.

Another challenge is the use of artificial intelligence applications in finance. The Commission in cooperation with the European supervisory authorities and the European Central Bank will explore options of developing regulatory and supervisory guidance on the use of AI in the digital finance sector. The ultimate aim will be ensuring clarity on supervisory expectations and mitigation of risks, so that AI-based solutions can be applied in the EU safely, soundly and ethically.

3. Open data and data sharing across and within sectors while observing data protection compliance and competition rules are behind the priority to create a common European financial data space. Enhanced data sharing rules within the financial sector cause financial firms publish comprehensive financial and non-financial information on their operations and products.

A new strategy for reporting and supervision should soon impose rules on supervisory reporting requirements including definitions, formats and processes, which will be not vague, but aligned, harmonised and automated-reporting suitable. The structure of the reports will be in machine-readable electronic formats and easy to process and combine.

"Open finance", the use and sharing of customer data by banks and third party providers to create new services, which has been enabled under the revised Payment Services Directive, supports better financial products, better targeted advice, and greater efficiency in B2B transactions. Next year the Commission will come up with a legislation proposal on a more open finance framework.

4. Priority number four is about addressing new risks and challenges coming along with digital transformation. The "same activity, same risk, same rules" principle of the Commission will maintain the rules amongst new market participants and existing financial institutions.

Stakeholders expect that by bundling and scaling up solutions, large technology companies will become a part of the financial services ecosystem. Naturally, risks will evolve, affecting the global financial stability, the competition in financial services markets, and customers. As a consequence, the Payment Services Directive[1] and the E-Money Directive[2] will be reviewed and further legislative initiatives will be introduced in order to address potential risks stemming from large financial services operations. Consumers will benefit from improved protection under the revised legislative framework.

Conclusion

To conclude, the reader may have the impression that within three years, the driving force of innovation and legislative update triggered by the corona virus crisis will create a more modern, flexible, and safer world of digital finance. We hope that the positive approach and enthusiasm of the Brussels officials will persist, even if they will have to work from home offices for several more months and maybe years. Who knows? ■

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Footnotes:

1 Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32015L2366)

2 Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC (https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32009L011)

The implementation of the EU Directive on Restructuring and Insolvency in Germany: A new star in the firmament

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On 22 November 2016, the European Commission presented a proposal for a directive to transform the restructuring and reorganisation laws within the European Union, which was supposed to help finally deal with the consequences of the 2008/2009 financial crisis.

After extensive discussion surrounding the topic, a compromise was reached between the Council, the Commission and the Parliament in December 2018, leading to Directive (EU) 2019/1023 or the "*Directive on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132*" entering into force in July 2019.

Implementation in Germany

The implementation of the Directive has now been finalised in Germany with the adoption of the Stabilisation and Restructuring Framework for the Enterprises Act (*Unter-nehmensstabilisierungs-und restrukturierungsgesetz/StaRUG*) by the Bundestag on 17 December 2020. The StaRUG is intended to create the basis for the enforcement and implementation of corporate restructurings against the resistance of creditor minorities while avoiding insolvency proceedings.

In German law, the possibility of intervening in the rights of the collective creditors outside of insolvency proceedings by way of a majority decision of the creditors has so far only been known in the case of bonds that fall within the scope of the German Bond Act (*Schuldver-schreibungsgesetz/SchVG*). The StaRUG adds a long-awaited instrument to the restructuring toolbox, closing the gap between out-of-court restructuring, which requires unanimity within the creditors, and restructuring by majority decision in insolvency plan proceedings, which is inextricably linked to the classic disadvantages of insolvency proceedings (e.g., publicity, low flexibility, extensive costs).

Henceforth, restructuring measures can also be implemented outside of insolvency proceedings against the will of individual creditors. This will increase the incentive for companies in crisis to take measures to overcome economic difficulties at an early stage. In addition to companies, entrepreneurially active natural persons also have access to the StaRUG (section 30 paragraph 1 of the StaRUG).

> *The implementation of the Directive has now been finalised in Germany with the adoption of the Stabilisation and Restructuring Framework for Enterprises Act*

Key points of the new legislation

Some of the key points introduced by the StaRUG legislation are outlined below.

Application only to companies in the early stages of crisis

The instruments of the StaRUG can only be used by companies where insolvency is imminent but has not yet occurred. According to section 18 paragraph 1 of the German Insolvency Code (*Insolvenzordnung/InsO*), "imminent insolvency" means that the debtor is expected to become insolvent within the next two years. The existence of imminent insolvency within the meaning of section 18 paragraph 1 of the InsO is therefore the earliest point in time at which the instruments of the StaRUG can be used.

On the other side of the spectrum, the point in time that marks the end of the period until which the instruments of the StaRUG can be utilised, is the moment at which the mandatory reasons to file for insolvency arise. In Germany, these reasons are insolvency (*Zahlungsunfähigkeit*) within the meaning of section 17 of the InsO and over-indebtedness (*Überschuldung*) within the meaning of section 19 of the InsO. In the event of one of these two reasons arising, there is no longer any room for restructuring measures under the StaRUG; instead, a request for the opening of insolvency proceedings must be filed and insolvency proceedings initiated.

In the event that a mandatory reason to file for insolvency arises after the restructuring case is already pending with the restructuring court, sections 32 *et seq.* of the StaRUG state that the debtor is obliged to notify the restructuring court of this circumstance. In this case, however, there is no automatic transition to insolvency proceedings. Rather, the restructuring court weighs up the situation and need not dismiss the restructuring case as long as it thinks that insolvency proceedings are not in the interest of the creditors as a whole (section 33 paragraph 2 no. 1 of the StaRUG).

The restructuring plan

The most important restructuring instrument of the StaRUG is the restructuring plan, which can be seen as an overall settlement with the creditors. The plan determines which measures are necessary for successful restructuring. The creditors that are supposed to make concessions in the course of a restructuring are divided into groups based on reasonable criteria. The restructuring plan is then voted on group by group. The restructuring plan is accepted if 75% of the creditors in each group agree to it. Under certain conditions, individual groups can be outvoted if the majority of the groups approve the plan (cross-class cram-down).

The arrangement and negotiation of the restructuring plan can, in principle, be managed by the debtor company itself and without the involvement of a court. The involvement of the court is only necessary if the debtor intends to interfere with the creditors' rights against the opposition of a minority of creditors. This is already the case if there is no unanimous consent to the plan. Court decisions, however, are only made available to those affected by the plan.

Variation of legal relationships under a plan

The restructuring plan is not limited to financial creditors and can therefore cover all types of claims and collateral rights. The only exceptions are employee claims, including occupational pension claims, and claims arising from intentional torts and state sanctions. The plan may also restructure share and membership rights within the debtor company. The plan can stipulate, for example, that creditors who waive part or all of their claims receive shares in the debtor company as a return (debt-to-equity swap). In addition, the plan may – subject to appropriate compensation – intervene in intra-group collateral provided by an affiliated company of the debtor, e.g., parent, subsidiary or sister company. The originally envisaged – and from many sides criticised – provision according to which the court can terminate ongoing contracts upon application by the debtor was not included in the law.

Stabilisation order

In order to provide stability until the restructuring plan is confirmed by the restructuring court and thus increase the chances of success of the restructuring project, the debtor company can apply to the restructuring court for a temporary stabilisation order (*Stabilisierungsanordnung*) according to sections 49 *et seq.* of the StaRUG. The restructuring court can then prohibit the debtor's creditors from taking enforcement measures (*Vollstreckungssperre*) and enforcing segregation and separate satisfaction rights in respect of movable property (*Verwertungssperre*).

This moratorium may be imposed for up to three months. Exceptionally, it may be extended by one month to a total of four months by a subsequent or new order if the plan offer has already been submitted to the creditors and acceptance of the plan is expected within that month. A further extension to a maximum of eight months in total is permissible if a plan accepted by the creditors has been submitted to the court for confirmation. The moratorium can in principle cover all claims. The only exceptions are claims from financial services contracts and claims that generally cannot be adjusted by the restructuring plan (i.e., employee claims, occupational pension claims, claims arising from intentional torts and state sanctions).

The concept of early crisis detection

Section 1 of the StaRUG requires the members of the management body of a company to continuously monitor financial developments that may jeopardise the existence of the company. If the management identifies such developments, they must take appropriate countermeasures and report these developments to the company's supervisory body (e.g., the supervisory board) without undue delay. Since such obligations already exist under the duty system of the current German company law, this is actually only a clarificatory provision and does not represent anything new to German business leaders.

What would have been genuinely new and revolutionary would have been the regulations on management liability and duties, which were originally envisaged in the first draft of the law. According to these provisions, as of the moment of imminent insolvency, the management of the company would have been obliged to give priority to the interests of the creditors and to act in accordance with these interests. Thus, there would have been a "shift of fiduciary duties" away from the general interests of the company and the shareholders towards the interests of the creditors. This "shift of fiduciary duties" was widely criticised by experts and the professional world and was therefore deleted from the final version of the StaRUG by the legislator.

Whether the remaining regulation in § 1 StaRUG is sufficient to meet the requirements of the Directive is currently disputed. Article 19 of the Directive provides that "Member States shall ensure that, where there is a likelihood of insolvency, directors, have due regard, as a minimum, to […] the interests of creditors, equity holders and other stakeholders". Whether the current wording of the StaRUG satisfies this requirement will have to be clarified by experts and the courts. In any case, the wording of the Directive does not indicate that priority treatment of creditors' interests, as provided for in the original version of the StaRUG, is necessary. ■

> *"What would have been genuinely new and revolutionary would have been the regulations on management liability and duties, which were originally envisaged in the first draft of the law"*

Spring Online Conference: "Don't Worry, Restructure!"

Paul Omar and Myriam Mailly report on INSOL Europe's springtime event

PAUL OMAR
INSOL Europe Technical Research Coordinator

MYRIAM MAILLY
INSOL Europe Technical Officer

> *There is a worry that pragmatism will not return because of Brexiter hostility, despite major problems with exports*

On the theme of restructuring, the springtime event, also marking the 40th anniversary of INSOL Europe, took place across 4 and 18 March 2021. Averaging over 80 participants and facilitated by Chris Laughton (Mercer & Hole, UK), the event's sponsors were Moon Beever and Abreu Advogados.

Part 1: 4 March 2021

With the session opened by Marcel Groenewegen (INSOL Europe President), co-chair John Briggs (3/4 South Square, UK) introduced financial journalist and author **William Keegan** (Senior Economics Commentator, Observer, UK), responding to questions on the latest of his recently published "Nine Crises": *Austerity and the Referendum*.

To the question of whether the UK was likely to be tempted back into austerity, there is a danger, given the obsession with the deficit and the need to balance an under-performing economy during COVID-19. The current risk is that tax increases by manipulating tax allowances could cause a blow to confidence and further reductions in public spending likely to cause harm. As to how the EU-UK relationship will develop in the future, the reduction of output through COVID-19 (c. 10%) and the Brexit effect (c. 6%) is of grave concern. There is a worry that pragmatism will not return because of Brexiter hostility, despite major problems with exports. To the thought of *quid* restructuring, if the Government believes in "Global Britain", there should be some sympathy for industry, including the sectors harmed because of the current economic policies.

Implementation of the Directive on Restructuring and Insolvency

In the chair of this panel, **Gottfried Gassner** (Binder Grösswang Rechtsanwälte, Austria), introduced updates on the implementation of the Directive. **Andreas Dimmling** (GSK Stockman, Germany) focused on the German legislation commencing in January as a possible game-changer, though overall likely take-up is still not known. However, a significant impact is possible for companies with complex debt structures or where cram-downs are needed. **Aroen Kuitenbrower** (Allen & Overy, The Netherlands) outlined the recent introduction of the Dutch WHOA, not purely an implementation of the Directive, but arising from an ongoing project to provide an out-of-court restructuring tool. A follow-up (WHOA-II) will fill the implementation gap in respect of the Directive. A few cases thus far have been seen, mostly for restructuring balance sheets and as a bankruptcy avoidance technique.

Aviation in Crisis: Emergency Exit

João Vacas (Abreu Advogados, Portugal) and **Andrew O'Leary** (KPMG, Ireland) analysed the pandemic's disastrous impact on the airline industry. Both report that, despite the pandemic, many restructurings have occurred over the last year (e.g., Norwegian, TAP, LATAM, EVA Air etc.), so no major bankruptcies have been experienced, except those occasioned by pre-pandemic stresses (e.g., CityJet, Thomas Cook). Plans seen so far have included renegotiating leases, embedding state aid and rationalising costs, pending possible recovery in late 2021/early 2022. Caution is expressed though that, if recovery is too slow, companies on "forbearance agreements" could be pushed into procedures.

Part 2: 18 March 2021

Chris Laughton having opened the session, co-chair **Clarissa Nitsch** (Co-Chair of the Young Members Group / Binder Grösswang Rechtsanwälte, Austria) introduced the keynote speaker: **Professor Georg Kodek** (Vienna University of Economics and Business; Judge, Supreme Court). Recounting history both professional and personal, Judge Kodek noted Austria's early foray into bilateralism coinciding with the publication of Jabez Henry's treatise on insolvency cooperation. Referring to the European Insolvency Convention and the diversity of European procedures, Austria's approach has been quite modern with its introduction of amicable composition in 1934. By the time the European Insolvency Regulation text is finalised, the globalisation phenomenon is real with cross-border contacts increasing with effect across frontiers. Tension arises between objectives, but cooperation overall has resurged with many conferences devoted to the theme. Current challenges, Judge Kodek suggests, include the focus on restructuring, opening up insolvency for consumer over-indebtedness and recognition of proceedings and their consequences, such as discharge.

Jurisdiction, Recognition and Enforcement post-Brexit

In a two-header, **Mark Arnold** QC (3/4 South Square, UK) began with an outline of the post-Brexit position, essentially a hard Brexit on recognition and enforcement in the insolvency context. The big concern is not jurisdiction, but post-sanction recognition. So far, experiences, through the UNCITRAL Model Law, could be seen as a viable alternative owing to its light-touch formalities for recognition and automatic and extended assistance.

In response, **Christoph Paulus** (White & Case, Germany) sounded a note of caution: as UK procedures will be treated at the level of autonomous domestic law, many EU judges might have to resort to rules that are unfamiliar to effect recognition and, perhaps, more contentiously, may re-examine UK insolvency to ensure "compliance" with European insolvency principles. Canvassing examples from Germany and Spain, Professor Paulus is confident schemes will be recognised under the Rome I framework. In fact, if the Model Law connection increases in importance, certain Member States may become important restructuring links.

Experiences on the Front Line – Insolvency Practice in the Pandemic

David Rubin (David Rubin & Partners, UK) outlined the Café Concerto CVA proposal. Given Covid measures (rate relief, furlough, extension of tax return dates, bounce back loans, prohibition on forfeiture, suspension of proceedings, etc.), most landlords have taken the commercially sensible option of cooperation, especially if debtors had been previously good payers. It was surprising that a minority refused to engage, with one even effecting forcible entry (now being investigated for breach of lockdown and non-enforcement rules). Despite this, a CVA was recently approved in February 2021, a good move overall.

Offering a German perspective, **Frank Tschentscher** (Luther, Germany) noted the major impact on retail, department stores and major chains under siege. Despite this, there seems to be relative calm, with insolvency figures still quite low: Q4 2020 statistics are similar to Q4 2019 with a downward trajectory in cases. The reason seems to be strong government intervention (funds, state guarantees, furlough, short time work, suspension of filing requirements). Could this be the calm before the storm? Matters appear quite complex, especially with repayment concerns over crisis loans in the medium-term and visible impact for companies not covered by the loans criteria. Fatalities are likely with a substantial hit in the property sector.

Ending the final session, **Chris Laughton** thanked all those contributing to the success of the spring event. With many practical perspectives offered by speakers, issues like landlords, zombie companies etc. will undoubtedly form challenges for future practice. With a final expression of hope that delegates can meet at Dublin 2022 in person, the conference was closed. ■

INSOL Europe at 40: Then and now

Paul Newson, INSOL Europe Communications Manager, provides a brief background of the organisation and a timeline of key events in its history

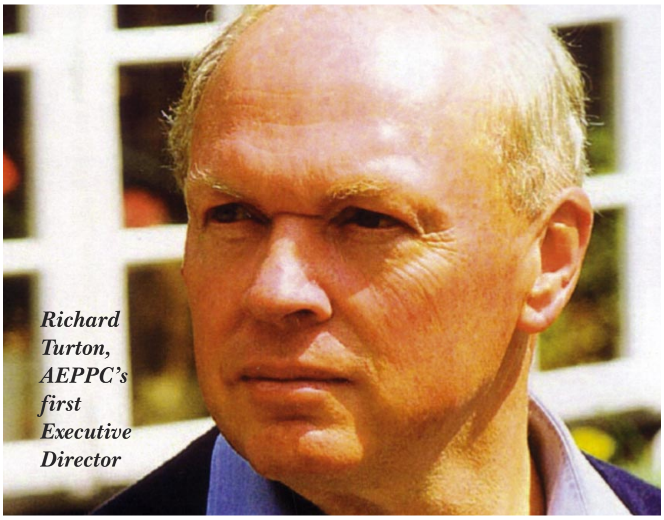
> *INSOL Europe has grown in stature as we have grown in members and this is a very exciting period in our evolution*

Where it all began

When a French association then headed by Yannick Pavec organised a conference in Vienna in 1980, to which Yannick had invited speakers from at least six other European countries, some of those present thought that this gathering of practitioners was too successful an occasion not to be repeated.

Sir Kenneth Cork, who had then just completed his term of office as Lord Mayor of London, together with his firm, therefore organised a meeting in London for the following year (1981) and in the meantime, arranged for the incorporation of AEPPC (*Association Européenne des Praticiens des Procédures Collectives*) in France with many of the people who had come to Vienna forming its first Council.

During the following year (1982) a similar development occurred, when the British practitioners celebrated the 21st birthday of their Association, the IPA, with a conference in Cape Cod, USA, to which it invited North American practitioners. As a result of that success, Richard Turton (UK) and Ian Strang (Canada) founded INSOL International.



Richard Turton, AEPPC's first Executive Director

AEPPC joined INSOL International two years later (1984) as a member association and thereafter, conferences continued to be held every year in different locations. The themes of the business sessions slowly developed, firstly by concentrating on a different specialist subject each year with comparative papers from different countries. At the same time, the breakout sessions which were also started, gave more opportunities for cross-border comparisons as well as for networking, which was also becoming an increasingly valuable feature of the meetings.

During these first 10 years, the administration of AEPPC was conducted out of the offices of Sir Kenneth Cork's firm, Cork Gully. Sir Kenneth retired as the first President in 1990, after which later Presidents had first a two year and later a one year term of office.

As more people assumed the leadership, the emphasis changed and this became particularly notable when Richard Turton retired from professional practice and became AEPPC's first Executive Director. The annual conferences ceased to be the only activity known to the general membership which was made possible by the establishment of a number of committees to widen participation – committees for publications, future plans, financial support, membership, constitution and technical matters.

INSOL Europe today

INSOL Europe has undergone great changes with a combination of globalisation, the development of the insolvency professions in both Western and Eastern Europe, the continually increasing emphasis on effective reorganisation of ailing businesses, and the development of global models such as the European Insolvency Regulation and the UNCITRAL Model Law on Cross Border Insolvency. INSOL Europe has risen to these challenges and continues to grow and thrive.

Both the financial crisis and the more recent COVID-19 pandemic have shown what a significant force the insolvency industry is and the events of the past few years have now given us much to think about in terms of lessons learned, in procedures and compliance. For INSOL Europe, this means that we have grown in stature as we have grown in members and this is a very exciting period in our evolution.

INSOL Europe is at the forefront of key milestones in the insolvency world and we are well positioned to canvass and convey our industry's views to the decision-makers across Europe.

New opportunities also present new challenges, which is why the law has to evolve to take account of such changes. We must also be flexible and agile in our approach – be practical, thoughtful and original, maintaining the high standards that have always been the hallmarks of the insolvency industry as we navigate through uncharted territory together. ■

INSOL 40 YEARS 1981-2021 EUROPE

KEY DATES

1981:	AEPPC (*Association Européenne des Praticiens des Procédures Collectives*) founded
1984:	AEPPC joined INSOL International
1992:	Richard Turton appointed Director
1992:	'Insolvency in Europe', the newsletter of the AEPPC first published, in English and French
2000:	AEPPC became INSOL Europe
2002:	Marc Udink appointed Secretary General
2004:	Eastern European Countries' Committee formed
2004:	Academic Forum formed
2006:	Judicial Wing formed
2008:	Lenders Group formed (now the Financiers Group)
2008:	Turnaround Wing formed
2010:	"*Harmonisation of insolvency law at EU level*" report prepared at the request of the European Parliament completed
2010:	Young Academics Network formed
2011:	EIR Review Committee formed
2012:	Anti-Fraud Forum formed
2013:	Young Members Group formed
2014:	EIR Case Register moved to Lexis Nexis platform
2014:	Principles & Best Practices Report for European Insolvency Office Holders completed
2014:	Study commissioned by the EC published on *"A new approach to business failure & insolvency – comparative legal analysis of the Member States' relevant provisions & practices"*
2015:	Turnaround Wing Guidelines for Restructuring and Turnaround Professionals completed
2016:	Survey and summary on the state of affairs of European insolvency office holders and recommendations for minimum standards presented to the EC
2017:	High-Level Course on Insolvency started
2018:	Strategic Task Force 2025 plan approved
2019:	Insolvency Tech & Digital Assets Wing formed
2019:	Membership Development Committee formed
2020:	New branding, COVID Coffee Breaks web-series, Annual Online Conference, EECC Online Conference and IOH/TW Joint Live Webinars

Marc Udink, INSOL Europe Secretary General from 2002-2012, was a regular speaker at our events

> *INSOL Europe is at the forefront of key milestones in the insolvency world*

Keynote Speaker at the Annual Congress, Vienna 2010: Niki Lauda, former Formula One racing driver and three-time F1 World Champion.

PRE


Sir Kenneth Cork
(UK) 1981–1990


Yannick Pavec
(FR) 1990–92


Bruno Kubler
(DE) 1992–1994


Frits Hamminga
(NL) 1994–1995


Isabelle Didier
(FR) 1999–2000


Jane Marshall
(IRE) 2000–2001


Giorgio Cherubini
(IT) 2001–2002


Marc André
(FR) 2002–2003


Rutger Schimmelpenninck
(NL) 2007-2008


Carlos Mack
(DE) 2008-2009


Patricia Godfrey
(UK) 2009-2010


Chris Laughton
(UK) 2010-2011


Alberto Núñez-Lagos
(ES) 2015-16


Steffen Koch
(DE) 2016-2017


Radu Lotrean
(RO) 2017-2018

SIDENTS 1981-2021


Gerry Weiss
(UK) 1995-1996


Horst Johlke
(DE) 1996-1997


Neil Cooper
(UK) 1997-1998


Willem Byvanck
(NL) 1998-99


Eberhard Braun
(DE) 2003-2004


Alan Perry
(UK) 2004-2005


Michael Quinn
(IRE) 2005-2006


Michael Thierhoff
(DE) 2006-2007


Jim Luby
(IRE) 2011-2012


Daniel Staehelin
(CH) 2012-2013


Catherine Ottaway
(FR) 2013-2014


Robert van Galen
(NL) 2014-2015


Alastair Beveridge
(UK) 2018-19


Piya Mukherjee
(DK) 2019-20


Marcel Groenewegen
(NL) 2020-21

The inauguration of a new year in insolvency

Paul Omar and Myriam Mailly report on the second online Academic Forum conference

ACADEMIC FORUM
INSOL Europe

PAUL OMAR
INSOL Europe Technical Research Coordinator

MYRIAM MAILLY
INSOL Europe Technical Officer

The detailed (and yet sketchy) structure of the Directive offers considerable scope for variation

The second Academic Forum Webinar took place on 20 January 2021, attracting 55 participants from 23 different jurisdictions.

Following a welcome by Marcel Groenewegen (INSOL Europe President), Professor Tomáš Richter (IEAF Chair; Charles University Prague) then began proceedings with an introduction to the papers and explanation of Zoom protocol. Appreciation was also forthcoming for the continued support by Edwin Coe LLP. The technical programme contained two presentations, the first by Professor Gerard McCormack (Leeds), speaking on stays under the Directive, with the second by Professor Antonio Leandro (Bari) focusing on the harmonisation of insolvency regimes in light of investment imperatives.

Directive stays and the Covid-19 effect

CIGA 2020, the new UK legislation, received attention at the outset for its blend of temporary and permanent elements, arguably and despite Brexit, "implementing" the Directive, the latter's stay structure being very similar to the new Part 26A enhanced scheme. The UK text is viewed as at the forefront of international insolvency developments, as is also the intention for the Directive.

In turn, both texts (Directive and CIGA 2020) can be said to be inspired by the US Chapter 11, heralded by commentators (in particular Senator Warren and Professor Westbrook) as the "punchmark" of the US corporate insolvency system.

Dealing with the framework set out in the Directive Articles 6 and 7 and Recitals 32-41, the observation can be made that there is a great deal of optionality in the text, more pathways than potentially enacting states. Pursuant to the Article 6, the stay on individual enforcement is only to the extent necessary to support negotiations (thus not automatic/ comprehensive, but also applicable potentially to secured/ preferential creditors). Its duration is extendable and it is possible to lift it. There is an unfair prejudice element offering a challenge to a stay, redolent of UK wording in an analogous procedure.

The rationale for the Directive framework can clearly be seen from the common pool/prisoner's dilemma/ anticommons problem, its utility being to offer a free space and protection from creditor threats to block business continuity through taking action. In fact, the Directive can be viewed as building on a restructuring strategy which is founded upon the premise that the interests of a few may need to suffer in the service of the needs of the many.

International parallels can be drawn with the Chapter 11 equivalent (sections 361-362) and Recommendation 50 in the UNCITRAL Legislative Guide suggesting a secured creditor should have relief if encumbered assets are not necessary for proceedings. The US stay is automatic and comprehensive, while the UK scheme without a stay is an exemplar of opposing practice. The US worldwide effect is interesting, but potentially creating conflict between courts because of its "extra-territorial" effect. Examining the Directive Recital 35 outlining the need for a fair balance between the debtor and creditors, the question can be posed as to what should be the impact on non-debtor parties: e.g., guarantors? Given the Directive Article 6 limitations, should all legal and enforcement actions be included?

Moreover, what is a desirable impact on collateral? Should secured assets be released to creditors? What about compensation for a decline in the value of security, which the Directive Recital 37 suggests should not occur for foreseeable decreases because of the stay? Referring to unfair prejudice, can this be employed here as a method for challenging the impact of the stay? In conclusion, the detailed (and yet sketchy) structure of the Directive offers considerable scope for variation. Is this desirable? Given the imminency of the July 2021 deadline, it is likely that extensions will be sought to resolve this and other outstanding questions.

Insolvency harmonisation

Describing the interconnection between harmonising insolvency law and investment law in Europe, reference was made to a Commission Communication of 2018 stressing how primary/secondary rules offer protection for cross-border investors, while protecting other legitimate interests. The freedom of movement of capital within

EU law, though protected, has witnessed the current trend seeing a shift from exclusive protection of investment through arbitration to justiciability before national courts. In this light, what might be the impact of insolvency proceedings on investment decisions (including investors from outside the EU/3rd countries)? Arguably, there is a need to harmonise the "normative space", in which investment happens, to ensure attractiveness to investors (whether from Member States or from external sources).

The advent of the Directive offers the context for a harmonisation initiative, which would enhance the Capital Markets Union (CMU), thus improving access to credit, creating predictable outcomes and ensuring compliance with "fair and equitable treatment" standard. A CMU Communication of 2020 points out that divergence between insolvency law regimes constitutes a "longstanding structural barrier" to investment. A harmonisation initiative could transform current competition between Member States into the creation of a "Unique European Space of Investments" enabling the EU to become a common host entity for third country investors.

Nonetheless, problems exist with harmonisation: how should Member State laws be revised, if action at that level is contemplated; how can divergent member state policies with respect to investment and insolvency be reconciled; and, if action at the EU level is preferred, would it be politically acceptable. A side issue comes from forum shopping in insolvency, which could be seen as inimical to the formation of an EU-wide unique investment space for third countries.

In summary, many questions need to be resolved before an initiative could be contemplated. One novelty which could arise is whether insolvency practitioners will need, in the near future, to act in a way to protect investments or, alternatively, recover assets, which could consist of claims against a member state for infringement of investment standards.

Envoi

Ending the session, following questions from the audience, Professor Richter thanked the speakers for their thought-provoking presentations and also invited further expressions of interest for future webinars being planned. ■

The presentation slides and a link to the conference recording are available via the Academic Forum page at: www.insol-europe.org/academic-forum-events.

Click here

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Demystifying offshore: Injunctions in aid of foreign proceedings

The authors run through the relevant principles governing freestanding injunctions

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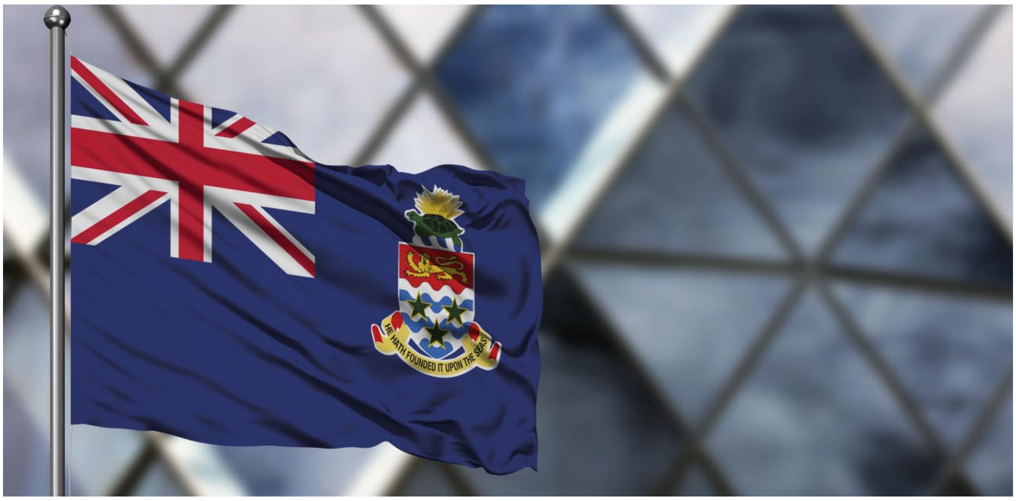


As every insolvency professional knows, injunctions (in particular freezing injunctions) remain a powerful tool in the armoury. The ability to ensure that assets are not dissipated whilst litigation is pursued can often make the difference between successful liquidations that gather and distribute recoveries and those that do not.

Professionals can take comfort from the fact that, in each of the British Virgin Islands (**BVI**), Cayman Islands, Guernsey and Jersey (the **CDOTs**)[1], injunctions in aid of foreign proceedings are widely available in appropriate cases, including freezing injunctions[2].

There have been some interesting recent developments in this area. In the BVI, the famous longstanding *Black Swan*[3] jurisdiction to grant freestanding freezing injunctions in aid of foreign proceedings was overturned by the Court of Appeal, has subsequently been considered by the Privy Council (whose decision is awaited), and put on a solid statutory footing for all future cases[4]. In Jersey, the court has recently considered and approved the appointment of receivers as part of its armoury to ensure that its judgments are enforced and executed[5].

In light of these developments, it seems timely to remind ourselves of the relevant principles governing such injunctions and when they are commonly available.

Jurisdiction

Along with the BVI, Cayman and Guernsey also have statutory jurisdiction[6] to grant interim relief in aid of foreign proceedings, whilst the Jersey courts have inherent jurisdiction to do so[7].

A freestanding freezing injunction may be obtained in any of the CDOTs pending determination of substantive proceedings which have been or are to be commenced in a foreign jurisdiction. One relevant factor will be whether those foreign proceedings are capable of giving rise to a judgment which could be enforced in the CDOT in question. This is a strict requirement in the BVI and Cayman, and a relevant factor in Guernsey and Jersey.

The test in all CDOTs is whether the applicant has a good arguable case in the substantive proceedings and whether it would be just and convenient to grant such an injunction (including whether, in the absence of an injunction, any ultimate award is likely to go unsatisfied). In addition, the Guernsey courts may grant an injunction in support of foreign proceedings only in 'exceptional' circumstances[8]. It was noted in a Guernsey Court of Appeal decision that this means that the court must exercise appropriate caution before granting such an order[9].

Generally, there will be assets

within the jurisdiction that need to be protected, and it must be shown that an injunction is necessary to prevent asset dissipation. The courts in the CDOTs will consider the adequacy of the assets located within their respective jurisdictions when determining the utility of granting the order. An applicant may also be able to obtain a worldwide freezing order against assets outside of the jurisdiction if there are insufficient assets in the CDOT itself to satisfy a freezing order made there.

Obtaining a freestanding injunction

The procedure to obtain an injunction in each of the CDOTs is fairly straightforward. An applicant is typically required to file an application and supporting affidavit evidence, together with a draft order. In all CDOTs, an application may be made *ex parte* where giving notice to the intended respondent would likely lead to the dissipation of the assets in advance of the application. There is the normal obligation of "full and frank" disclosure. An applicant is also required to give an undertaking as to damages, which may have to be fortified by way of a payment into court, so it is normally helpful for the applicant to provide evidence as to its ability to meet that undertaking.

Enforcing a freestanding injunction

Once an order granting an injunction has been served on a defendant, if he fails to comply with that order he could be found guilty of contempt of court and may have further proceedings issued against him.

In cases where there may be a high risk of dissipation and non-compliance with a court order (or when an injunction is not effective), the courts of the CDOTs also have the power to appoint interim receivers in support of an injunction in order to ensure the proper management and preservation of the respondent's assets.

Considerations for third parties

In all of the CDOTs, a litigant may also seek a freestanding injunction against a "non-cause of action defendant" (**NCAD**), including professional service providers or companies owned by the defendant[10]. To obtain an injunction against an NCAD in the BVI, there must be substantive proceedings against a primary defendant and it must be shown that the NCAD is holding assets for the defendant which must be amenable to enforcement in the BVI in the event of judgment against the defendant in the foreign proceedings. The applicant must also show that there is a real risk of dissipation of those assets.

Similarly, in Cayman and Jersey, it must be shown that there is a good arguable case that the NCAD is in possession of assets that actually belong to the defendant against whom the cause of action is being brought, or which would otherwise be amenable to eventual enforcement action against that defendant. Whilst it does not appear that Guernsey has specifically considered the issue, we expect Guernsey to also follow the English line of authority, the Chabra[11] jurisdiction, to find that the courts have the power to make such an order.

Responding to the order

A defendant should comply with the terms of any injunction order and obtain legal advice as soon as possible. The order will often be subject to an exception that the defendant can dispose of assets in the normal course of business, or for normal living expenses, and other terms that may allow the defendant to continue some dealings with the assets or that the order will come to an end if the defendant provides adequate security to the beneficiary of the order. Legal advice should explain what may or may not be done in compliance with the order, as well as identify any grounds to discharge, vary or set aside the order, including whether the duty of "full and frank" disclosure was complied with by the applicant when the freezing order was made *ex parte*.

A defendant will ordinarily have an opportunity to be heard by the court at the *inter partes* return date of the application granting the injunction. If it is ultimately found that the order should not have been granted, the defendant is likely to be able to recover both its costs and also to enforce the undertaking in damages provided by the applicant upon application for the injunction.

Conclusion

Depending on the complexity of the dispute, decisions in substantive proceedings may take months, if not years, to be resolved. The CDOTs have long understood that in order to remain competitive financial centres it is necessary to meet the increasing complexity of corporate dealings and commercial relationships and litigation. For this reason, they continue to be very open, flexible and pragmatic when it comes to meeting the needs of overseas litigants, including in relation to interim injunctions. ■

> "CDOTs continue to be very open, flexible and pragmatic when it comes to meeting the needs of overseas litigants, including in relation to interim injunctions"

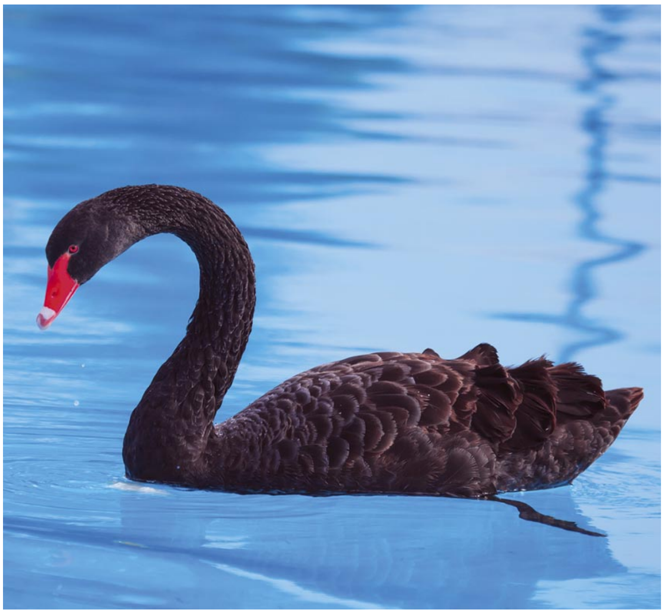
Footnotes:

1 Crown Dependencies and Overseas Territories
2 Including proprietary injunctions, mandatory and prohibitory injunctions, and search orders. Norwich Pharmacal, Bankers Trust and Anton Pillar orders are also available.
3 See *Black Swan Investment I.S.A v Harvest View Limited and Sablewood Real Estate Limited* Claim No. BVIHCV 2009/399.
4 s.24A, Eastern Caribbean Supreme Court (Virgin Islands) Act.
5 *Representation of Roberts & Ors* [2021] JRC 008
6 s.11A, Grand Court Act (2015 Revision); s.1(7) Law Reform (Miscellaneous Provisions) (Guernsey) Law, 1987.
7 *Solvalub Ltd v Match Investments* [1996 JLR 361].
8 s.1(7), 1987 Law Reform (Miscellaneous Provisions) (Guernsey) Law, 1987.
9 *Garnet Investments Ltd v BNP Paribus and the Government of the Republic of Indonesia* (Court of Appeal, 2/2009).
10 See *TSB Private Bank International SA v Chabra* [1992] 1 WLR 231.
11 *Ibid*

US Column: A "Black Swan" event

David Conaway reports on the recent New York Federal Court ruling that lenders are entitled to keep $500 million mistakenly paid by Citibank

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



> Due to "human error"...in addition to the interest payments... the principal amount owed was mistakenly transferred to the lenders, not to the "Wash" account

In the context of a series of complex re-financings and roll-up transactions by Revlon in May and June, 2020, human error caused a $500 million loss for Citibank.

On 16 February 2021, in the case of *In re Citibank August 11, 2020 Wire Transfers*, a New York Federal District Court ruled that Revlon lenders who mistakenly received approximately $500 million in payments from Citibank do not have to return the funds. Revlon authorised Citibank to make interest payments to the lenders totalling $7.8 million. Instead, Citibank made wire transfers that paid the loans (which were due in 2023) in full in the amount of about $894 million. Some of the lenders returned about $393 million, upon demand by Citibank. However, 10 lenders, which were investment advisory firms, refused to return $500 million that was paid to them.

In 2016, Revlon entered into a seven-year term loan agreement for $1.8 billion with a maturity date of 7 September 2023 (the "2016 Term Loan"). Citibank is the administrative agent for the loan. Pursuant to the loan agreement, Citibank's duties included receiving funds from Revlon and making payments to the lenders.

In May and June, 2020, Revlon's liquidity was "extremely tight", precipitating Revlon securing $800 million of "new financing". The May/June, 2020 debt facility was for $1.7 billion. Also, the 2016 Term Loan was modified to move certain collateral from the 2016 Term Loan to the 2020 debt facility. The "non-returning lenders" opposed this "siphoning" of collateral.

As a result of the new debt facility and the amendments to the 2016 Term Loan, Revlon authorised Citibank to pay interest to all of the 2016 Term Loan lenders in the amount of $7.8 million. Citibank contracted with Wipro Limited, an entity based in India, who used the Flexcube software application and loan product processing program to initiate and execute wire transfers for Citibank.

The easiest and perhaps only way to make the contemplated interest only payments was to enter the transaction as a loan payoff thereby triggering the accrued interest payment amount. There would be two kinds of transfers, one for the interest payments and a dummy principal payment, sent by wire transfer to a "Wash" account owned by Citibank. The funds for the principal payment were to never leave Citibank. This transaction was subject to Citibank's "six-eye" approval procedure requiring three people to approve a transaction before the wire transfers would be initiated and executed.

Human error

Due to "human error" in "checking" and "unchecking" the appropriate boxes in the Flexcube software application, in addition to the interest payments, on 11 August 2020, the principal amount owed was mistakenly transferred to the lenders, not to the "Wash" account.

Beginning on 12 August 2020, Citibank sent numerous "Recall Notices" to the lenders demanding return of the mistakenly paid funds. Some lenders complied. The "non-returning lenders" did not. On 17 August 2020, Citibank filed a lawsuit against such lenders alleging unjust enrichment, conversion (taking of another's property) and payment by mistake.

The New York court ruled in favour of the "non-returning lenders" based upon the "discharge-for-value" exception to restitution claims, which provides that a creditor has no duty to make restitution for a mistaken payment if the creditor made no misrepresentation and did not have notice of the transferor's mistake (The Restatement (First) of Restitution, American Law Institute 1937). The court concluded that the evidence was clear that the "non-returning lenders" did not know the payments were a mistake, noting particularly that the payoffs were to the penny.

The Restatement (First) of Restitution, adopted by the American Law Institute in 1937, sets forth the classic formulation of the discharge-for-value defense. To the extent relevant here, Section 14 of the *Restatement* explains the defense as follows:

> *"A creditor of another or one having a lien on another's property who has received from a third person any benefit in discharge of the debt or lien, is under no duty to make restitution therefore, although the discharge was given by mistake of the transferor as to his interests or duties, if the transferee made no misrepresentation and did not have notice of the transferor's mistake."*

Disputed issues

In the Citibank litigation, there were three disputed issues regarding the discharge-for-value defence:

(1) Whether the obligation paid must be "due" or "owed",
(2) Whether the defendants' lack of knowledge of the mistaken payment occurs when the payment is made, or when it is credited, and
(3) Whether an actual or constructive notice is required.

Citibank argued that the discharge-for-value exception only applies to debts that are due, not including the 2016 Term Loan with a 2023 maturity.

The Court sided with the lenders that the obligation must only be owed, not due, based on the language of the *Restatement* defense. The Court further concluded that the relevant point in time of the defendants' knowledge of the mistaken payment was at the time of payment, which was prior to the time of the Recall Notices by Citibank. Finally, the Court concluded the constructive notice is the only sensible notice standard for the discharge-for-value defense.

Witness testimony

Based on witness testimony by representatives of each of the defendants, the Court concluded that all the defendants believed that the payments were an intentional full pay-down of the outstanding principal and interest of the 2016 Term Loan. The Court was persuaded by the facts that the pay-downs were to the penny, that a sophisticated bank such as Citibank would have effective internal controls to avoid Black Swan significant mistakes, and that payments of interest before it is due implies a loan pay-off.

The Court found that the defendants' belief that the payments were intentional loan pay-offs was corroborated by Citibank's witness testimony and by the documentary evidence. Interestingly, the Court's opinion included the "quite colourful" Bloomberg chat among the defendants' employees:

"I feel really bad for the person that fat fingered a $900mm erroneous payment. Not a great career move"

"certainly looks like they'll be looking for new people for their Ops group"

"How was work today honey? It was ok, except I accidentally sent $900mm out to people who weren't supposed to have it"

"Downside of work from home. maybe the dog hit the keyboard"

(the song "Had a Bad Day" playing the background)

The Court noted importantly that there was no such communications among the defendants' employees *before* the Recall Notices were delivered, which supports the defendants' lack of any knowledge that the payments were mistaken under the discharge-for-value defense.

> **The defendants' belief that the payments were intentional loan pay-offs was corroborated by Citibank's witness testimony and by the documentary evidence**

Black Swan event

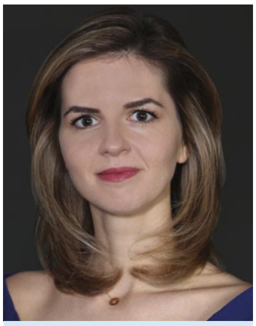
The court also noted that a mistaken payment of this magnitude (and under Revlon's financial circumstances) was so improbable that it was a "Black Swan" event, citing Nassim Nicholas Taleb's "*The Black Swan: The Impact of the Highly Improbable*", a 36-week New York Times best-seller (and worth the read).

Citibank filed a Notice of Appeal on 26 February 2021.

It will be interesting to see if Citibank steps into the shoes of the "non-returning lenders" under the doctrine of equitable subrogation, or may assert claims for recovery against Revlon for unjust enrichment or various contract claims including for indemnification under the 2016 Term Loan agreement. Citibank recently filed its 10-K with the SEC, indicating as a result of the Court ruling, it now has "rights as a creditor related to the Revlon loan". For sure, administrative agent fees will increase, loan agreements will be modified and more insurance will be purchased to hedge against future "Black Swans". ■

Calm before the storm: Why insolvency trends do not follow NPL trends

Irina Misca looks at trends in the insolvency and NPL market with some background history and first-hand experience



IRINA MISCA
Licensed Insolvency Practitioner, Managing Partner, CITR, Cyprus

Here are the statistics before COVID-19: 600 European companies go into liquidation every day; one in every two new companies survives less than five years.

Not surprising at all, the number of insolvencies was lower in 2020 than in 2019 and below all projections and estimations. What we are living now can be called the calm before the storm.

There are a few factors that are causing this apparent decrease of insolvent companies in almost all countries Europe wide:

The lockdown. This had a direct impact on the less digitally advanced courts and created a direct delay in officially registering new insolvencies that were already in the pipeline.

The governmental help packages. These came in order to prevent an immediate liquidity crisis for companies: tax deferrals, wage subsidies, debts or interest moratoriums.

The changes in the insolvency codes. Some countries drafted and enacted temporary changes in their insolvency codes. One of the main changes was the suspension of the obligation of the companies to file for insolvency even though conditions for these actions were normally met and the suspension of the creditor's right to place their debtors in insolvency.

Therefore, when comparing with the same figures from 2019, in the first half of 2020 there has been a general decrease in the number of new insolvencies in most countries (Western Europe the registered difference was of approx. 15%). However, short-term measures can only have a short-term impact. What will happen next?

NPL investors will have a massive market available to them in 2021. The challenge will come in assessing the viability of all opportunities in the new landscape that is covered with uncertainty. There are different estimations, some say that the number of global corporate insolvencies will increase by 25% this year (2021), while others estimate that the increase will exceed 35%. The one certain thing is that the volume of Non-performing loans will follow an upward trend.

The link between insolvency trends and NPL trends

There is no direct connection between the volume of NPLs and the number of insolvencies because of the obvious explanation that the volume of NPLs and the actual number of insolvencies are always related to the legal system of each country. Even though an economy may be extremely affected by a crisis, which will of course lead to the appearance of over-leverage borrowers and a high level of NPLs, that does not always translate into a high number of insolvencies as well.

A very good example in this respect is the situation of Greece. Even before the Covid-19 situation, Greece was holding the largest volume of NPL in Europe (more than 41%) but Greece is also the only country with a cumulative decrease in insolvencies in the last years.

> *The legal infrastructure is very important in the way the organic reduction of NPLs is being ran by every country*

The legal infrastructure is very important in the way the organic reduction of NPLs is being ran by every country:

- The insolvency and restructuring professionals play a key role in the insolvency process.
- Crisis managers can maximise the recovery rate.
- The specialised courts are an extremely important part of a healthy insolvency system.
- The involvement of the courts in the process, which can expedite or slow down the process.
- Protection for the debtor, incentive for creditors, new financing, use of electronic means.

When these elements are missing from a country's system, the insolvency proceedings cannot stand as a proper tool for recovery. And distressed companies and creditors are in the position to find alternative ways of recovery, that comes with no protection for any of them, no guarantees, no formal picture.

Therefore, they are taking many risks, that at the end of the day, will lead to a really low rate of recovery and a risky market for NPL investors. This is the current situation in Cyprus.

What does the Directive for Restructuring and Insolvency bring to NPL investors?

The Directive aims at bringing more uniformity in the European NPL market, by reducing this risks and differences between the legal frameworks in insolvency in the different EU Member States. Here is what the Directive can bring to NPL investors.

Firstly, recovery rates should increase once the mechanisms to detect financial difficulties and to restructure at an early stage are in place.

Here I would like to mention a study that CITR carried out in Romania. The study was performed on a number of 150 trading companies from our portfolio of 350 companies. What we tried to understand was in how much time after the first signs of distress does a company actually decide to take restructuring measures. So we went back in history with our analysis and we realised that almost 60% of these companies waited for three years after they started having financial problems before taking recovery measures. Only 25% asked for help and approached a crisis manager in less than one year since the first signs of distress appeared. The differences between the two categories was huge:

- in the first category the turnover dropped by 50% in three years, with the problems going spiral, compared to only 5% for the companies in the second category,
- the level of debts differed – 30% vs 8% – with the first category of companies almost always started financing their activity by selling important assets at discounted prices.

In conclusion, by putting into practice the idea of early warning tools and the use of preventive restructuring measures, the overall recovery rate in the NPL market should increase.

Secondly, and not less important, by regulating the same set of principles in all insolvency frameworks across Europe, the risk of buying an NPL portfolio will be easier to assess.

Finally, the reduction of the length of procedures will increase predictability for investors.

Case study

In many cases the creditors and the debtors in distress leave aside important sources of income that would contribute to recovery.

Once appointed as liquidator of one of the former biggest insurance companies in Romania, we started assessing all sources and resources of the case and we realised that the company was sitting on a high number of unrecovered amounts (around €30 million).

Therefore, one of the first measures we took was to restructure their legal department running the recovery process. We brought in new people, we implemented clear management routines, budgets, KPIs for each person; basically we ensured a clear team leadership. As a result, compared to the year before our appointment when the company recovered only €300,000, we managed to recover €2,565,217 and we continued on this trend the next year as well.

The recovery rate is always influenced by the existence of a crisis manager who is involved in the process.

In 20 years of experience we understood that the mission of a crisis managers is to find the value in every insolvency and restructuring case and to save it or increase it where that is possible.

Sometimes that means saving a company, some other times it means saving value as we managed to find in that company: maybe the brand, maybe the product, the share market, or the core assets. All in all, it translates to a higher recovery rate and this is what counts in the end. ■

> *By putting into practice the idea of early warning tools and the use of preventive restructuring measures, the overall recovery rate in the NPL market should increase*

Legislative changes in Belgium

Louis Verstraeten provides an update on the legislative changes recently adopted in Belgium and those changes yet to become law later this calendar year

LOUIS VERSTRAETEN
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Belgian insolvency law was freshly codified in 2018 but will undergo several changes in 2020-2021. This article gives you an update on the legislative changes recently adopted and those changes yet to become law later this calendar year.

A second corona-moratorium

In December 2020, the Belgian legislator has adopted a law installing a second moratorium for a short period from 24 December 2020 until 31 January 2021, to shield Belgian business undertakings from being declared bankrupt. Contrary to the first moratorium (spring 2020), this one did not provide a general "stay" for all companies. Only companies affected by the governmental closure measures were automatically granted a stay, protecting them, among others, from being summoned in bankruptcy or from their assets being attached by creditors. The retail sector and shops have stayed open throughout the winter season and could therefore not benefit from this moratorium, but the entertainment and hospitality sector did certainly benefit from it, as well as from the fact that the government has muzzled the tax collector.

> *Only companies affected by the governmental closure measures were automatically granted a stay*

Changes to the judicial reorganisation

Instead of extending the duration of the second moratorium, on 21 March 2021 the legislator has adopted a modification to the Judicial Reorganisation Procedure.

This judicial reorganisation was first adopted in Belgian law in 1997, was revamped in 2009 via the Law on Continuation of Business Undertakings and was codified in 2018 in the Belgian Insolvency Code, Book XX of the Code of Economic Law. It is a stable insolvency instrument which has benefited from solid case-law developed in the past decade.

Three changes have now been adopted, aiming to lower the threshold and increase the success of the procedure. On the one side, this should be to the benefit of small and midsize companies of which many are expected to be threatened in their continuity or virtually insolvent. On the other side of the spectrum also larger companies with strongly positioned creditors should benefit from these changes.

A silent pre-pack reorganisation

First, a "pre-pack-reorganisation" is facilitated by creating a discrete phase to reach a "preparatory agreement". The debtor files a petition with the court to have a judicial trustee appointed who will assist in the negotiations with key-creditors, or with all creditors when appropriate. Once appointed, the trustee can intervene with the court to impose terms and conditions "adapted to the needs of the debtor" on the creditor. This court injunction can have a duration of maximum of four months and the court can at any time revoke these terms and conditions.

Once the required amicable agreement or reorganisation plan has been agreed with the creditors, the silent preparatory phase passes into a public reorganisation procedure to obtain the homologation from the court under the usual rules of the judicial reorganisation. This is a very welcome novelty in the Belgian insolvency code, after a previous attempt failed in 2018.

Easier access to the judicial reorganisation procedure

Secondly, the access to the judicial reorganisation procedure has been made easier. Absence of some of the required documents, bookkeeping documents and statements from accountants or auditors, is no longer sanctioned by inadmissibility. Missing documents can be filed at a later stage and the court can even pardon the absence of certain (non-essential) exhibits. This is a welcome relaxation of the existing formal approach of the judicial reorganisation, but it opens the door to courts applying the rules in an unfair variety of severity.

Tax inequalities eliminated

Thirdly, the legislator eliminates an existing inequality in the tax effects of the debt reduction obtained under the judicial reorganisation. Now, all depreciations and provisions on claims and receivables shall be treated equally, be it they result from amicable agreements, collective agreements (such as a reorganisation plan) or through a transfer of the business under judicial supervision.

Temporary effect of the new law

The aforementioned important changes to the Belgian judicial reorganisation entered into effect on 26 March 2021 when the law was published in the official state gazette. Surprisingly, these changes have a temporary duration and shall cease to have effect on 30 June 2021. At that date, the EU Directive on Restructuring and Insolvency must be implemented in Belgian law, whereby it is expected that the pre-pack reorganisation and the easier access to the procedure shall become permanent features of the Belgian insolvency legislation. A legislative proposal to implement the Directive should currently be under construction.

A legislative proposal to repair the effects of the "Plessers" case

An older legislative proposal is waiting for a vote in the Chamber of Belgian parliament in view of reinforcing and repairing the possibility to transfer an undertaking in distress via the judicial reorganisation procedure. Two years ago, the Court of Justice of the European Union (ECJ) ruled in the Plessers Case (C-509/17,ECLI:EU:C:2019:424, dd 16 May 2019) that the Belgian transfer of an undertaking via judicial reorganisation infringed the rights of employees when not all employees are involved in the transfer.

If the proposal would be accepted, a text will be included in the law to emphasize that the transfer of an undertaking via judicial reorganisation is really a "liquidation procedure". The acquirer of the undertaking will from then on have to justify properly why certain employees will be excluded from the transfer. The transfer clears the undertaking from any previous debts, which remain in the insolvent entity. The court, when approving the transfer, will decide upon request to open judicial liquidation or bankruptcy proceedings for the insolvent entity.

It remains to be seen whether the law, when modified, will pass the severe test of the ECJ, which has previously brushed a Dutch reorganisation via bankruptcy off the table for the benefit of the employees in the infamous Estro Case.

Zombie companies and empty boxes

A second subject in the legislative proposal is to expedite the treatment of bankrupt companies with no apparent estate or assets. Zombie companies have always been a problem and the COVID-19 crisis will only exacerbate this phenomenon. This proposal wants to address this issue, but first needs to be voted in Parliament.

To save the courts time and resources and the Belgian state some budget, the courts could soon order the "turbo-liquidation" of the undertaking summoned in bankruptcy, instead of declaring it bankrupt and appointing an IP. "Turbo-liquidation" means that a judicial liquidation of the undertaking is ordered, but that at the same time the immediate closure of the liquidation is pronounced, meaning an "over and out" for the company.

Apart from the obvious short term financial and organisational advantages for courts and the Belgian state, this proposal shall likely have adverse effects. Already, some consider the existing examples of "turbo-liquidation" of sleeping companies as an easy and costless way to liquidate an undertaking.

> *Zombie companies have always been a problem and the COVID-19 crisis will only exacerbate this phenomenon*

Conclusion

The rescue culture should drastically improve with the adopted changes to the Belgian insolvency code and the legislative proposals in the pipeline should further enhance the possibilities to restructure companies, both large and small, whether through a silent pre-pack reorganisation or through a public procedure and whether amicably, via a collective cram-down or through an auctioned transfer. All this should culminate in a new law implementing the Directive. The Spring of 2021 is a fertile period for legislative changes in Belgium and before the sun will be at the zenith this summer, our insolvency law will have become more diverse, more flexible and more efficient. ■

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*

Russia: Significant amendments to the Russian insolvency law

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Under the new bill, insolvency practitioners are to be elected for the procedures randomly; at the same time, a ranking of IPs is introduced

In March 2020 the Russian Ministry of Economic Development announced a bill which contains significant amendments to the Russian Insolvency Law of 2002. After one year of intense discussions around the new law, there is still no consensus.

Probably, the most significant changes will be seen in the system of insolvency procedures existing in Russia. Under the bill, the procedure of supervision – наблюдение - which is used now as the first insolvency procedure in the vast majority of cases (the court starting supervision if it finds possible grounds for restructuring or liquidation), shall be abandoned, being widely criticised for its uselessness. Instead, restructuring of debt or liquidation shall be applied. Those who criticise this novel idea, believe that a preliminary procedure is crucial for the effective insolvency. However, apparently, the majority of experts are highly skeptical about the supervision procedure which rarely ends in recovery of the debt, but always increases the length of the whole procedure.

The debtor in possession is to be introduced. In Russia, as well as in many other countries, shareholders very often keep control over businesses after the formal insolvency; however, now it is obviously illegal. The new version of the Insolvency Law is expected to recognise the legal right of the shareholder to continue controlling the debtor company.

Prepacked insolvencies shall also be an option. At the moment we do not have such opportunity, but the new law allows creditors to make a restructuring plan before the formal insolvency procedure.

Auctions are expected to be quicker and less formalised – new rules for price formations are introduced, and the number of mandatory publications is reduced. On the other hand, there is no change in the form of publication made in the hardcopy version of the newspaper authorised by the government. Ironically, even the courts make publications in digital form primarily. Obligatory paper publications are not just old-fashioned, but also expensive and factually restrict the access of the public to information on insolvency.

But the fiercest battle is over another issue. Under the new bill, insolvency practitioners are to be elected for the procedures randomly; at the same time, a ranking of IPs is introduced. The last amendment appeared to be the most controversial – IPs criticise the new rules severely, being threatened with the potential loss of the current business model. Other insolvency experts insist on the random choice of IPs as the key element of the fight against corruption in the field of insolvency.

Overall, the Russian insolvency law is expected to be changed dramatically. Along with the new system of insolvency procedures, restructuring should be used more frequently and IPs will have to be more independent and objective. Nevertheless, a part of the insolvency society (mainly, insolvency practitioners) criticise the new bill claiming that it harms the economic basis of their work. At the moment the bill is discussed, but has not been brought to the parliament; however, as the new law has been prepared by a governmental body and has been supported by the highest officials, we expect that the bill will become the law, possible with some alterations. ■

Czech Republic: Second wave of changes to insolvency law

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With the numbers of active cases of coronavirus SARS CoV-2 rising in the Czech Republic, a new law aiming once again to further mitigate the impact of the measures in combating the coronavirus SARS CoV-2 epidemic was adopted on 11 November 2020 (the Covid Act II).

The Covid Act II concerns three main areas: (a) extending the time of the suspension of the debtor's duty to file for insolvency; (b) renewing the time period for debtors to apply for an extraordinary moratorium protecting them from certain creditor actions; and (c) removing the condition to obtain creditors' approval of an extension of an already declared extraordinary moratorium.

Duty to file insolvency petitions suspended

The debtor's obligation to file for insolvency if statutory conditions have been met had been suspended for the duration of the relevant measures taken by the Czech government, as well as for six months following their expiry. The Covid Act II amends this rule by extending the maximum time period for which the debtor's duty to file for insolvency is suspended until 30 June 2021.

During this period, directors of an affected debtor company would not be liable for a failure to file for insolvency. However, their other duties and related liabilities under the Corporations Act would remain unaffected by the Covid Act II. A condition for application of this rule is that it applies only to those companies whose insolvency was caused mostly by the epidemic. Creditors will, however, still be able to file insolvency petitions against debtors, as the protection that lasted until 31 August 2020 has not been renewed.

Extraordinary moratorium

Any debtor company with its centre of main interests in the Czech Republic and which was solvent as of 12 March 2020 had the opportunity, until the end of August 2020, to file for an extraordinary moratorium which could have lasted for up to three months, but could be extended by an additional three months with the consent of a majority of its creditors.

The Covid Act II sets out that debtor companies are again entitled to file for an extraordinary moratorium until 30 June 2021, provided that they were not insolvent on 5 October 2020 and had not used this safe harbour previously. The Covid Act II also, quite surprisingly, stipulates that if an extraordinary moratorium was declared before the end of August 2020, the condition requiring the approval of creditors for an extension of the extraordinary moratorium will not apply and the court may extend the duration of the extraordinary moratorium by no more than an additional three months solely upon the company's request. Though it has been enacted, this particular change is the subject of discussion between relevant stakeholders.

The effects of the extraordinary moratorium remain the same. In particular, while the extraordinary moratorium is in place:

- the debtor company can be sued although judgments cannot be enforced against it;
- it would not be possible to create new security over the assets or to enforce existing security;
- the court will not be in a position, for the period of the extraordinary moratorium, to declare the company insolvent, even after a creditor files an insolvency petition;
- set-offs would generally be permitted;
- the debtor company should generally refrain from undertaking any substantial transactions, unless they are within the ordinary course of the business; and
- counterparties would not be entitled to terminate or refuse to perform certain essential pre-existing contracts as long as the company continues to pay at least its claims arising during the moratorium.

Close-out Netting and Financial Collateral

The protection enjoyed by close-out netting and financial collateral arrangements under the Czech insolvency law by close-out netting and financial collateral arrangements would remain unaffected by the proposed changes. ■

> *A condition for application of this rule is that it applies only to those companies whose insolvency was caused mostly by the epidemic*

Lithuania: Transposing the Restructuring Directive

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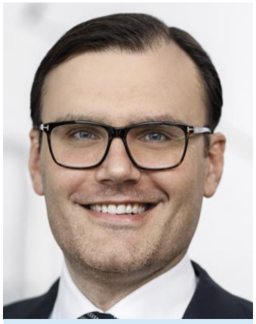

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The conditions for insolvencies and restructurings have been identified as one of the main areas, in which the legal framework in Lithuania needs modernisation.[1]

After the recent introduction of a new insolvency law for legal entities ("Insolvency Law"),[2] further improvements are expected by the transposition of the Directive. The Lithuanian Parliament is expected to pass soon into law a Bill which foresees amendments to the Insolvency Law and to other laws.[3] The understanding underlying the Bill and its proposed amendments is that with its new Insolvency Law, Lithuanian laws are to a large extent already compliant with the Directive. Some of the proposed major amendments include the following:

Introduction of the concept of "likelihood of insolvency" for legal persons

The definition for this is not new but derived from the definition of "financial difficulties" in the Insolvency Law. It covers situations where it is probable that the legal person will become insolvent within the next three months. The amendments would impose additional obligations on managers in the "likelihood of insolvency" to immediately inform the creditors about the probability of insolvency, propose solutions for the financial difficulties, and refrain from any actions which could negatively affect the viability of the business.

> *The proposed changes offer a toolkit that might motivate debtors to start a rescuing process earlier*

Mandatory appointment of an administrator in restructuring cases in certain situations

The current law leaves the appointment of an administrator fully at the discretion of the court. In line with the Directive's requirements, the amendments would define the situations, in which the appointment of an administrator would become mandatory.

Introduction of the possibility of a cross-class cram down

The amendments would allow cramming down a dissenting creditor class and dissenting owners. A cram down on dissenting creditors would require a majority of more than 50% of all votes of creditors in the approving group in addition to the other requirements for a cross class cram down as laid down in the Directive. A cram down on dissenting creditors would require a qualified majority of two thirds of all votes in each of the creditor groups. It would, however, still not be possible to force them to accept a debt-for-equity swap by way of cram down.

Regulation on "essential executory contracts"

The amendments would introduce this concept and thus enable debtors, during a stay, to seek protection against these contracts being terminated or otherwise modified by creditors to whom the stay applies.

Additional protection of employees' interests

The current Insolvency Law does not explicitly regulate employment relations during restructurings. With the proposed amendments debtors undergoing restructuring would have to provide information to and consult with their employees in accordance with the procedures in the Labour Code. Also, the restructuring plan would have to be supplemented with information about the plan's effects on the employees: description of the situation of the employees, consequences of restructuring, the number of redundancies expected, etc. Another novelty would be that employees of companies undergoing restructuring would be entitled to participate in the wage protection scheme of the Guarantee Fund.

In-court restructuring proceedings under the Insolvency Law are ineffective, not least because their initiation often takes two to three months, which is way too long to rescue companies in financial difficulties.

The proposed changes offer a toolkit that might motivate debtors to start a rescuing process earlier and that would allow, at least in certain cases, to restructure without having to go through a lengthy court process. ■

Footnotes:

1 Cf. e.g. World Bank "Doing Business 2020"

2 Law on the Insolvency of Legal Persons, in effect since 1 January 2020, see *Heemann/ Žabulionytė*, Eurofenix, #77, p 39.

3 Law on Bankruptcies of Natural Persons, the Labour Code and the Civil Code.

Poland: Impact of COVID-19 on insolvency proceedings

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The Polish economy has only just begun to recover after the first lockdown caused by the COVID-19 pandemic, and another wave of illnesses and further restrictions have already come.

In order to mitigate the effects of the first lockdown, many legal solutions were introduced, including the suspension of the obligation to file for bankruptcy and the introduction of a new type of restructuring procedure, the so-called simplified restructuring (hereinafter "UPR"). The entrepreneurs were also supported with public funds.

Suspension of the obligation to file for bankruptcy

Due to the expected wave of bankruptcies, the obligation to file bankruptcy petitions resulting from the COVID-19 pandemic has been suspended. Despite the assumed increase, the number of declared bankruptcies remains stable, i.e. 587 declared in 2020 compared to 586 in 2019.

The above figures result not only from the suspension of the obligation to file an application for bankruptcy, but also from the fact that the entrepreneurs have used the solutions provided by the anti-crisis shield in order to obtain subsidies for employee salaries. Moreover, the number of submitted bankruptcy petitions was also influenced by the possibility to use the UPR.

Simplified restructuring

Due to the economic problems of the entrepreneurs, the Polish legislator introduced a new type of restructuring procedure, the so-called simplified restructuring. Its main goal is to help entrepreneurs who are not able to repay their debts due to a drop in revenue caused by the COVID-19 crisis.

Despite the short duration of the regulations (24 June 2020 – 24 March 2021), already 400 entrepreneurs decided to take advantage of this form of restructuring. The interest appeared only a few days after the regulations came into force, and with the passing of time, it systematically grew. In December almost five times more applications were filed than in July.

The new solution is most willingly used by entrepreneurs conducting a business activity in the form of sole proprietorship (43%) and by companies with limited activity (32%), these being the most frequently chosen forms of conducting a business activity in Poland.

The above solution is used not only by small entrepreneurs, but also by well-known and large companies. At the beginning of September, RAFAKO S.A., a company with 70 years of experience in providing specialist solutions for the energy, heating and oil and gas sectors in Poland and abroad, announced its intention to open a simplified restructuring procedure. Only in 2019 RAFAKO S.A. recorded a loss of 473 million PLN. Its current situation results mainly from the execution of unprofitable contracts and making revaluation write-offs.

The greatest interest in the UPR was shown by business entities operating in the sectors related to wholesale and retail trade, industrial processing, transport and warehouse management and construction. The total number of applications submitted by enterprises from the indicated industries constituted 60%.

Entrepreneurs choose UPR because of the relatively short duration of the proceedings (up to 6 months) and the protection against initiation of enforcement proceedings and termination of contracts, including financing agreements and lease or rental agreements. They also choose UPR because of the possibility to cover creditors who have established material security on their assets.

The Polish government is currently working on a proposal to introduce a permanent solution of similar nature to take effect from 1 July 2021.

State aid for restructuring

The Act of 16 July 2020 on granting public aid for rescuing or restructuring entrepreneurs introduced the New Opportunity Policy, which is an aid instrument offered to entrepreneurs by the Industrial Development Agency. The prepared programme provides entrepreneurs with the opportunity to benefit from public support in order to be saved by developing and implementing restructuring measures.

Within the framework of the New Opportunity Policy programme, the Industrial Development Agency prepared three forms of support for entrepreneurs:

1. Rescue aid: provide the company with financial liquidity in the period necessary to develop the restructuring plan,
2. Temporary restructuring support: provide financial support to the company to take corrective action based on a simplified restructuring plan,
3. Restructuring aid for companies that have developed a restructuring plan: Bear the costs of its implementation.

The budget of the project is maximum 120 million PLN per year for 10 years, which gives a maximum of 1.2 billion PLN and funds from the COVID-19 Counteraction Fund in the years 2020-2021, min. 600 million PLN in 2020.

Predictions

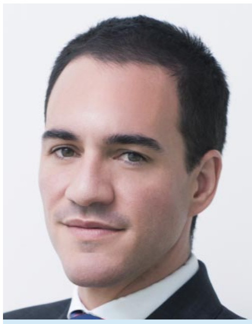
Despite the introduction of the above solutions, it is expected that the number of insolvency proceedings due to the COVID-19 pandemic will gradually increase. Industries, especially those related to tourism and transport, even with state support, will not be able to withstand the introduced restrictions due to fixed costs and low revenues.

This is already pointed out by owners of travel agencies, airlines and airports, who have suffered significant losses due to the decisions of individual countries to close their borders. The situation was not improved by the "holiday" unfreezing of the economy, because recently the restrictions have been reintroduced.

In addition, the funds earmarked for aid will run out one day and the economic situation of a given entrepreneur may prevent him/her from taking advantage of further programs. This may translate into a wave of insolvency proceedings which will overflow the courts. The question is only when. ■

Welcome to Spain, prepacks!

JOSÉ CARLES
Founding partner
CARLES | CUESTA Abogados



CARLOS CUESTA
Founding partner
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José Carles and Carlos Cuesta comment on the recent ruling of a Commercial Court of Barcelona approving the first pre-packaged sale in Spain as well as on the brand-new guidelines for prepacks issued by the Commercial Courts of Barcelona

Until October 2020, prepacks were not part of the Spanish Insolvency landscape. However, the Commercial Courts of Barcelona have creatively introduced pre-packaged sales in order to allow the viability of Spanish businesses, while also preserving the formalities of sales under insolvency and duly protecting creditors.

The earliest solution available until now in Spain was to attach a binding offer to the insolvency petition. However, the sale procedure within the formal insolvency proceedings were not agile and took too much time. Thus, the binding offers expired and the value of the company severely decreased.

In July 2020, in *In re Crail Linguistics, S.L. and Linguistics Systems Institute, S.L.*, the Commercial Courts of Barcelona had to rule on an unprecedented request. In this case, the reputation (and consequent value) of the business unit (three language schools) was going to decrease rapidly because of negative comments on social media and saving the business required an agile solution. Waiting until the insolvency petition was approved, therefore, was not an option.

In such cases, Commercial Courts nr. 7 and 9 of Barcelona allowed the Spanish pre-insolvency procedure to assume a new use that was neither expressly regulated, nor forbidden under the Spanish Insolvency Law[1]: to prepare a **pre-packaged sale** during the four-month pre-insolvency period under the supervision of a Court-appointed *silent trustee*.

This first prepack has been the quickest sale of a productive unit under insolvency proceedings in Spain

Spanish Law does not provide for the appointment of a trustee or an insolvency receiver during this pre-insolvency period (not even for monitoring purposes) and therefore this solution was considered very disruptive. The Barcelona Courts creatively appointed an independent expert economist as a silent trustee to (i) help prepare the sale of the business **during the four months of the pre-insolvency period** and to (ii) make sure that the procedure replicates, when possible, the principles of the sale procedure within insolvency proceedings.

During the pre-insolvency period, the companies prepared the sale of the productive unit complying with certain relevant formalities. Then, they requested the opening of formal insolvency proceedings.

The *silent trustee* (who became the insolvency receiver upon the opening of the *concurso de acreedores* on 6 October 2020) filed a final report on how the sale preparation had been conducted and included a proposal of sale. After granting a term for creditors to file their allegations, the Commercial Court no.7 of Barcelona authorised the sale, on 30 October 2020, only 24 days after the insolvency opening.

This first prepack has been the quickest sale of a productive unit under insolvency proceedings in Spain.

A couple of months later, on 20 January 2021, the Commercial Courts of Barcelona agreed on a set of standard guidelines to be applied to prepacks in Barcelona, which mainly systematise the criteria of the referred rulings.

Although these guidelines do not bind the Commercial Courts in other Spanish provinces, we expect the Spanish legislator to consider them when transposing the Directive on Restructuring and Insolvency (EU) 2019/1023. ■

Footnote:

1 Pre-insolvency proceeding in Spain are mainly initiated by a formal communication filed before the Commercial Court and grant an extra three-month period to negotiate an anticipated arrangement with creditors or a refinancing agreement.

The view from the United Kingdom

Duncan Swift, Chair of the Policy Group at insolvency and restructuring trade body R3, provides an update on the insolvency and restructuring policy landscape in the United Kingdom

Like many countries, the UK's policy agenda has been largely dictated by the need to manage and mitigate the pandemic – from a health and an economic perspective.

And the insolvency-related policies which have been introduced have been a mixture of the long-called for (corporate insolvency framework reform) and the long-opposed (the return of HMRC's preferential creditor status), as well as a range of policy proposals which could potentially help the profession – albeit with some refining.

The future of the COVID support measures

The Government's COVID support measures have been a vital lifeline for many companies and many individuals, and have also delayed the rise in insolvencies we would typically expect to see in this kind of economic climate.

However, the support packages and bans on creditor enforcement actions can't last forever, and Chancellor Rishi Sunak's decision to extend a number of measures until September 2021, which was announced in his Budget on 3 March 2021, provides an opportunity for businesses to plan for their eventual withdrawal.

Lack of clarity in this area has made it difficult for directors to know when to seek advice, so the six months' notice Sunak has provided will hopefully encourage directors to plan ahead and consider their options.

The business climate will continue to be challenging, and another measure we'd like to see the Government introduce is a cross-departmental policy approach on support for restructuring proposals.

Such a policy would remove inconsistencies to give companies which would be viable but for Covid the support they need, and provide time to deal with the liabilities they have accrued during the pandemic.

We'd also like to see a far more engaged and consistent approach from HMRC to make business rescue an easier process. Given the toll the pandemic has taken on businesses and the economy, we consider a step-change in the support for viable companies' restructuring proposals is very much needed.

Movement on pre-pack reform

The Government has been looking at reforming how pre-pack administrations are regulated, and has proposed new measures which will require mandatory independent scrutiny of pre-pack administration sales where connected parties are involved in the purchase – either by creditors or by a new 'independent Evaluator'.

Given the crucial role the Evaluator will play in determining whether sales to connected parties are fair and appropriate, the qualifying criteria for this role will be crucial. We would like to see the criteria strengthened to ensure that only those with the appropriate experience are able to carry out this role. Updated legislation published as this column was being written will at least require an Evaluator to have Professional Indemnity insurance. This was something R3 proposed – but we did so as a minimum criterion for taking up the role.

In an ideal world, the Government would maintain a list of approved Evaluators. While this might be a burden, it would help to boost stakeholder confidence in pre-packs – the very reason these reforms are being introduced.

Changes at Companies House

The Government is also seeking to reform the powers of Companies House and has published a series of further consultations on these reforms as part of a follow up to its 2019 'Corporate Transparency and Register Reform' consultation.

There are two key points we would like to see included in the reforms. The first is recognition of the role of the insolvency profession as an extensive user of Companies House and a key component in the UK's anti-fraud toolkit, and that this fact is reflected as this policy area is developed.

The second is that IPs are included in the category of those persons able to access the proposed new range of additional 'back office' information collected by Companies House. This will allow the profession to carry out investigations into companies' corporate affairs and director conduct more effectively, and identify and disrupt more frauds, which will benefit stakeholders, creditors and UK plc.

The future of cross-border work

Now that the Withdrawal Agreement has expired, cross-border insolvency work in EU Member States is set to change – and likely to become more costly and complex.

However, despite the fact we've left the EU, we're well aware the profession is still part of the European insolvency and restructuring network.

Given their previously supportive position on this issue, we're hopeful the Government will explore the options to restoring it in the future, and R3 will be working closely with officials to support this work. ■

DUNCAN SWIFT
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Technical Update Spring 2021: Latest EU developments on prevention, restructuring and insolvency matters

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

MYRIAM MAILLY
INSOL Europe Technical Officer

EU public consultation on 'Insolvency laws: increasing convergence of national laws to encourage cross-border investment'

In the previous technical column, INSOL Europe members were informed about the wish of the European Commission to begin consultations on a new EU initiative to be adopted for the second quarter of 2022 and aiming at improving convergence between national frameworks for corporate insolvencies.

Following the first phase of consultation in November 2020, in which feedback on an Inception Assessment was sought by DG Justice about the desirability of the initiative (INSOL Europe contributions still available at: www.insol-europe.org/eu-study-group-news), a second phase in the consultation process has now been opened.

Indeed, the European Commission has published a Survey in order to consult until 26 March 2021 all stakeholders with an interest in insolvency law: creditors of all kinds (including employees), debtors, insolvency practitioners or judges and also legal professionals, public authorities, the representatives of the judiciary, research and academia (other related information remain available at: www.insol-europe.org/eu-study-group-links).

In addition to INSOL Europe's members being invited to participate to the survey on an individual basis through our membership newsletter, we would like to inform you that INSOL Europe has also decided to contribute on behalf of its members (the INSOL Europe contribution will be available in due course at: www.insol-europe.org/eu-study-group-news) as the consultation targets important issues that were not addressed in the EU Directive on Restructuring and Insolvency (n°2019/1023), including the liability and duties of directors of companies on the brink of insolvency, the status and duties of insolvency practitioners, the ranking of claims, the avoidance actions and the identification and preservation of assets belonging to the insolvency estate, as well as core procedural notions.

> *The tracker aims to identify the different steps in the process of the implementation of the Restructuring and Insolvency Directive in all EU Member States*

New tracker on the Implementation of the EU Directive on Restructuring and Insolvency

A tracker on the implementation of the EU Directive on Restructuring and Insolvency is now available on the INSOL Europe website at: www.insol-europe.org/tracker-eu-directive-on-restructuring-and-insolvency

The tracker aims to identify the different steps in the process of the implementation of the

Directive in all EU Member States, for example the work in progress (if any) of different groups, the official drafts publicly available, the use (or not) of the extension option by national policy makers and the final texts adopted by the national legislators with relevant links when available.

The tracker will be regularly updated in the months to come (until July 2022 which will be the ultimate deadline for Member States having used the extension option provided for by Article 34(2) of the Directive) and will include the publication of the list of the vast majority of Member States which have finally made use of the extension option provided for by Article 34(2) of the Directive.

In the meantime, relevant information regarding the EU Directive on Restructuring and Insolvency of 20 June 2019 remains available from: www.insol-europe.org/technical-content/eu-directive-on-restructuring-and-insolvency

Lexis®PSL

Launch of the INSOL Europe/Lexis®PSL Joint Project on 'How EU Member States recognise insolvency and restructuring proceedings of a third country'

I am pleased to share the LexisPSL R&I's latest collaboration with INSOL Europe in which the INSOL Europe's country coordinators have provided answers to three key questions on recognition by EU Member States of insolvency or restructuring proceedings commenced in a third country, such as the UK (post Brexit).

The first question considers whether the UNCITRAL Model law on Insolvency has been adopted in that particular country and, if not, whether there are any plans to consider its adoption. Application of the UNCITRAL Model law by a country will greatly improve visibility on the process and likelihood of the third country gaining recognition of its relevant insolvency/restructuring proceedings.

The second question considers how each country will recognise insolvency/restructuring proceedings commenced in a third country (ie a country which is not an EU Member State, such as the UK (post-Brexit), the US, Japan, Australia or Canada), which may be through the Lugano Convention, the Hague Convention, Rome I or other private international law rules.

The third question looks at how this approach would apply specifically to the example of seeking recognition of proceedings commenced in a third country (the UK) in respect of an English Part 26 scheme of arrangement or Part 26A restructuring plan.

A consolidated table including the replies from INSOL Europe and the articles accredited to INSOL Europe are available on the INSOL Europe website at: www.insol-europe.org/technical-content/recognition-in-third-states

Recognition and enforcement of cross-border insolvencies in EU Member States from 1 January 2021

As the legal framework provided by the EU Insolvency Regulation (EU 2015/848) no longer applies to main insolvency proceedings opened in the UK after 31 December 2020, the UK Insolvency Service has published a *Guide on the Recognition and Enforcement of Cross-border Insolvencies in EU Member States*, which is available on our website at: www.insol-europe.org/eu-study-group-links

Relevant information published by the European Commission on the EU-UK Trade and Cooperation Agreement (31 December 2020) also remains available on our website. ■

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**

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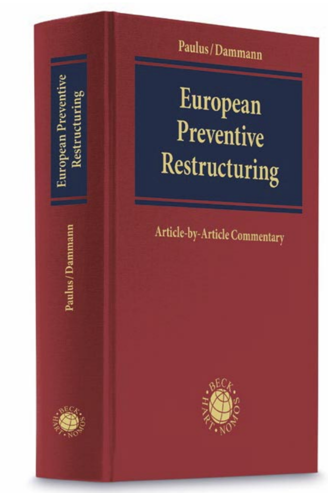
European Preventive Restructuring: Article-by-Article Commentary

PROFESSOR CATARINA SERRA
Judge, Supreme Court of Portugal



Paulus/Dammann [C.H.Beck-Hart-Nomos, München-Oxford-Baden-Baden, 2021, 297 pages, ISBN 978340675350 (C.H.Beck) / ISBN 9781509938810 (Hart) / ISBN 9783848769551 (Nomos), €180.00]

It is a true privilege to be one of the first readers of the long awaited book edited by Paulus and Dammann on the Directive (EU) 2019/1023 (Directive on Restructuring and Insolvency).

The title of the book says what is necessary to begin with: it is an article-by-article commentary, where, apart from a brief introduction, the articles of the Directive on Restructuring and Insolvency succeed one another, each followed by the respective commentary.

The opportunity for a book of this kind is unquestionable. The Directive is a complex instrument. The deadline for the implementation of the Directive is approaching and, apart from (irreproachable) Germany, most Member States still struggle to comply or, worse, have admitted the need for an extension of the implementation period. As if it were not enough, it all unfolds against the background of the COVID-19 crisis .

As it happens, this is not just any book, it is a precious book. This is firstly due to the personal qualities of the commentators, Giorgo Corno (IT), Reinhard Dammann (FR), Francisco Garcimartin (ES), Irene Lynch Fannon (IE), Christoph G. Paulus (DE), Ulrik Rammeskow Bang-Pedersen (DK), Tomáš Richter (CZ) and Michael Veder (NL): all eminent experts, each from another Member State. As pointed out in the Preface, this really makes it a pan-European commentary.

Regarding the book's content, as the commentaries have different authors, one could imagine that there would be no uniformity. Nothing more untrue.

Besides being written in an elegant, restrained style, the commentaries reflect, with variations, a common methodology. The path comprises, usually, three stages: identifying the norm's purpose / the norm's rationale, determining the norm´s scope / the norm's ambit of application and, finally, inferring standards / parameters or disclosing the best practices for the transposition.

Just to illustrate the importance of the above mentioned discipline, it is possible to find, here and there, references to certain tests: best-interest-of creditors' test (pp.68, 172), likelihood of insolvency test (p.89), viability test (pp.92), unfair discrimination test (p.171), viability and insolvency tests (p.175), minimum support test (p.183), fairness test (p.184). While some of the tests may be taken for granted, other result from the recent or present doctrinal efforts to order the legal provisions and to coordinate them to abstract rules and principles. To put it simply, this is of the utmost utility to the interpreter, be it the national legislator or the insolvency professional.

Two final words, to argue that the interest of this book also lies in the details. The first: irony, when, e.g., it is noted that the recitals appear to have occupied the place of binding law (p.3). The second: irreverence, when, e.g., out of the blue, the question arises whether early warning tools should also apply to consumers, etc. (p.79). It is amazing how exclamations and questions like these give life to the provisions under consideration and, hence, lead to (more) enlightened interpretations.

European Banking and Financial Law

Matthias Haentjens and Pierre de Gioia Carabellese (2nd edition) (2020, Routledge, Abingdon) 328pp., £26.99, ISBN 9781315173764 (ebk)

Exploring three key themes (financial markets, financial institutions and financial transactions), the book provides a very succinct overview of the entire universe of banking and finance in the EU. It is an invaluable tool for the student or practitioner who quickly needs to gain a basic understanding of both the regulatory framework and the relevant commercial law. Following the extensive regulatory reforms in the aftermath of the Global Financial Crisis (CRD IV, MiFID II, BRRD/SRM), the second edition covers regulatory developments and case law since 2016 (in particular the EU's 2019 Banking Package) up until January 2020. The relaxation of certain micro-prudential requirements as a result of the COVID-19 crisis came too late to be taken into account.

The book can easily be read cover to cover over the course of a few days. Inevitably, succinctness comes at a cost. Ideal for beginners to gain a broad overview, the advanced student or practitioner will look in vain for the detail necessary to address more specific issues. However, criticism can be made that the book's reliance on the notion that banks collect deposits from the general public at one end, to hand out loans to businesses and households, at the other, is outdated. Empirical evidence exists to the contrary that, as the Bank of England explains, through lending, commercial banks create credit money in the form of deposits as the prevalent medium of exchange. It is regrettable that this important function does not feature in the book at all. Nonetheless, the view may be taken that the book forms an extremely useful tool as an introductory text on a very complex and technical area of law.

Michael Schillig, Professor of Law, King's College London

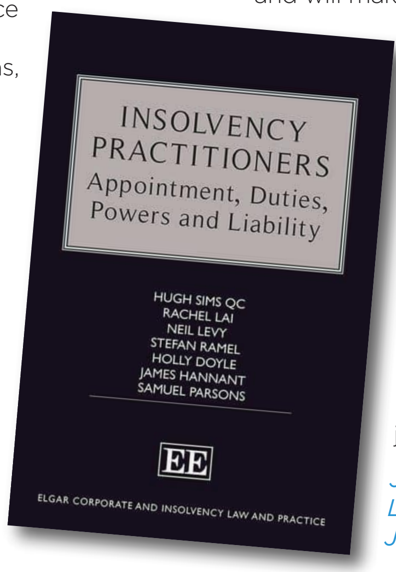
Insolvency Practitioners: Appointment, Duties, Powers and Liability

Hugh Sims QC and others (1st edition) (2020, Edward Elgar Publishing, Cheltenham) 360pp., £145 (e-book £20), ISBN 9781788973977; 9781788973984 (ebk)

The latest book in the Elgar Corporate and Insolvency Law and Practice series is *Insolvency Practitioners: Appointment, Duties, Powers and Liability*. Written by leading practitioners in the area of commercial and insolvency law, the book examines the insolvency practitioner from a practitioner's perspective. The benefit of this is twofold. First, it provides coverage of a topic that is under-represented in the existing range of insolvency texts and, second, it is written by those who interpret and apply the law, which allows for the content to be written in a manner that is both direct and concise.

The book consists of three parts, commencing with qualification and appointment, then moving onto duties and powers in office, before finishing with office-holder liability. Each section is carefully examined with reference to up-to-date case law and statutory provisions, and includes the likely implications of the Corporate Insolvency and Governance Act 2020 and its new moratorium and restructuring process. Further, recent case law such as *Lehman Brothers International (Europe) (in administration)* [2020] EWCA Civ 321; *Lehman Brothers Australia* [2020] EWCA Civ 321; *Re Debenhams Retail Ltd* [2020] EWHC 721 (Ch); and *Re Carluccio's Ltd* [2020] EWHC 886 (Ch) are considered.

This book is a real accomplishment and will make a significant contribution to the existing literature in insolvency law. Given the practical nature of the work it will make invaluable contributions to all those who operate before the Business and Property Courts, assisting IPs, lawyers and judges.



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