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Welcome from the Editors


EDVĪNS DRABA


CATARINA SERRA

The arrival of Autumn is an appropriate moment to carry out changes, we all know that. The time has been gloomy these last couple of years, needless to say why. Yet, there is a lot going on now and a lot to think about.

For one, there is the transposition of the Directive on Restructuring and Insolvency, which should be definitely carried out until the middle of 2022 in all Member States. Earlier this year, we came across the International Monetary Fund Staff Discussion Note ("*Insolvency Prospects Among Small and Medium Sized Enterprises in Advanced Economies: Assessment and Policy Options*"), the 2021 World Bank Principles ("*Principles for Effective Insolvency and Creditor/Debtor Regimes*"), and the UNCITRAL Working Group V Draft Text on a Simplified Insolvency Regime ("*Draft Simplified Insolvency Regime for Micro and Small Enterprises*"), all pointing to the need to refocus legal frameworks on smaller businesses (covering all SME, or just MSE, it is debated). For sure, it is definitely an occasion to look ahead and to look forward. Let us seize the opportunity to make it different this time. I rest my case.

Moving on, I would like to point out how ***eurofenix*** has been softening the pain of us being apart and keeping connecting people and minds. Quarterly providing a panoply of articles on insolvency coming from all over the world, it feeds brainstorming and guides insolvency specialists towards deeper knowledge. In short: everything that is important is in ***eurofenix***. And so it happens once more, in our Autumn edition.

In this issue, apart from the regular columns, we offer updated reports and the latest news from France (p.21, p.38), Norway (p.26), Portugal (p.28), UK (p.31), Finland (p.32), USA (p.34), Italy (p.36), Estonia (p.37), Latvia (p.40), and Ireland (p.41).

On the verge of new developments in the context of the EU initiative "*Increasing the convergence of insolvency laws*", Professor Reinhard Bork discloses the proposal of a new Model Law on transactions avoidance (p.18), which was designed by an international working group chaired by himself and Professor Veder, and was just presented to the European Commission. Modesty aside, being a member of this working group myself, I dare say this is a most remarkable work, which will immensely facilitate the path towards further (substantive) harmonisation of European insolvency laws.

Finally, let me praise the splash of colour offered by Professor Bob Wessels – a brushstroke of a master (p.24). He introduces us to his (forthcoming) book, "*Rembrandt's money*", where he narrates the troubled life of the Dutch painter, his transition from "*a stubborn, self-confident and quite headstrong man*" (Wessel's words), to a man in utter bankruptcy, struggling to make ends meet. Even then, or even more so, Rembrandt showed no signs of weakening. In 1665 he painted "*The Jewish Bride*", making Van Gogh exclaim exactly 200 years later: "*what an intimate, what an infinitely sympathetic painting*".

And the world keeps turning and renewing. As I step down as co-editor-in-chief of ***eurofenix***, I warmly welcome José Carles, the new one, for the coming issues. With José, Edvīns, and the remaining editorial board members – Florica, Paul and Emma – I am absolutely certain that eurofenix will continue to outdo itself, for the benefit of us all.

All the best! See you around!

Catarina

18
HARMONISATION OF TRANSACTIONS AVOIDANCE LAWS

24
REMBRANDT: ARTIST AND TROUBLEMAKER?

eurofenix

Edition 85 • Autumn 2021

eurofenix

Edition 85 • Autumn 2021

28
PORTUGAL: GREAT ILLS, GREAT REMEDIES

32
RESTRUCTURING STOCKMANN

Back to the future and connected as ever

Marcel Groenewegen looks back on his "digital" Presidency and predicts a healthy and wonderful future for INSOL Europe

MARCEL GROENEWEGEN
INSOL Europe President

> *Encouraging our younger members to become active within INSOL Europe resulted in a number of highly successful online speed networking events*

On the brink of my resignation as President of INSOL Europe, I am proud to introduce this Autumn Edition of Eurofenix to you with a large number of interesting contributions from all over Europe and an overview of INSOL Europe's recent and upcoming activities.

I also take the opportunity to look back on what has proven to be a truly challenging 40th anniversary year for INSOL Europe, but which saw INSOL Europe emerge as a resilient and strong organization, ready to take on the post COVID-19 future confidently.

Keeping in touch

Staying in touch and increasing INSOL Europe's visibility and presence in the restructuring and insolvency profession in general is one of the long-term objectives of the Executive.

In my earlier columns I already paid ample attention to the digital 'skills' that INSOL Europe has developed to weather the COVID-19 pandemic related challenges. I will not repeat my words; suffice to say that INSOL Europe, with the help of its wonderful staff and secretariat, has truly become a well-versed digital organization.

Despite being forced to cancel the Sorrento Annual Congress and having to communicate largely via Teams and Zoom – therefore "cruising the internet" extensively – the enthusiastic and positive feedback that INSOL Europe has received since Spring 2020 is living proof that we have done well in staying connected with our members, other professional organizations, governmental and legislative institutions and the outer world in general.

Member participation

Another main objective for 2020-2021 was (and remains) the increase of membership participation via the introduction of Country Coordinators. I am glad to be able to report that under Alice van der Schee's inspiring leadership we have seen a very prominent contribution from our Country Coordinators to our activities. In particular, our successful Coffee Break Series resulted in no less than eleven videos in the first nine months of 2021. This success is, to a very large extent, to be contributed to our various Country Coordinators' efforts and commitment.

Strengthened relations

As regards the strengthening of INSOL Europe's relations with other professional organizations, our joint Anti-Fraud webinar with R3 and the Fraud Advisory Panel, and the 'cross Atlantic' joint webinar with INSOL International deserve to be mentioned here. We had a record high number of participants for both events.

Turning to our activities of a more technical and academic nature, our EU Study Group was very active in providing input to and participating in calls for feedback from the European Union. It also participated with Paul Omar as observer in five calls of the Group of Experts on Restructuring and Insolvency Law, which has as its main task to examine the future convergence or harmonization of EU insolvency and restructuring laws and which has already produced recommendations for the European Commission.

We launched our online tracker on the implementation of the EU Restructuring Directive which provides our members with online information on the progress of the implementation process, which was updated in Summer 2021. As a brand-new initiative and as joint project with LexisNexis, in August 2021 we also started the project on the recognition of insolvency and restructuring proceedings of third countries.

You can find links to all these activities via the INSOL Europe website and I encourage you to use these sources actively in our daily practice.

New members

On Council we have now welcomed Bart de Moor as Belgium's new representative, since Belgium now has 30 members. An equal warm welcome to Damien Murran as our new representative for Ireland.

Encouraging our younger members to become active within INSOL Europe resulted in a number of highly successful online speed networking events, which were also open to potential new members. This year and despite (or perhaps rather thanks to) our digital-only connections and paying tribute to our Young Members Group's Co-chairs Clarissa Nitsch and Robert

Peldán, we have welcomed an all-time high number of new young members to our association. The youth has the future indeed!

Turning more to our 'back office': we have finalized a total revamp of our secretariat and staff, providing long-term and stable support for INSOL Europe in all its ongoing and upcoming activities.

Back to the Future

Our Autumn conference – titled 'Back to the Future' – is being held online on 7 and 21 October, but our next big event will be held live in Dublin on 3-6 March 2022 – our Annual Congress, titled 'Back to the Future 2'.
I encourage you all to register and look forward to seeing you in Dublin and share a glass of Irish beer.

Please stay tuned into all of INSOL Europe's activities and do regularly visit the INSOL Europe website to stay up to date with our initiatives.

Last words

Finally, and as I write my last words for this column as your President, I would like to express my gratitude to my fellow Executive members, members of the Council, the entire INSOL Europe secretariat and staff and all others that have made my Presidency so 'eventful' and exciting. Together and in joining our forces we climbed and conquered the COVID-19 mountain and are descending safely.

At this time it is also befitting to pay tribute to one of our longest staff members, Malcolm Cork, who retired from his activities for INSOL Europe at the end of August. For those of you who have been regular attendees at our Annual Congress and EECC conferences over the years, you will no doubt have seen Malcolm steering the event team as a guiding light towards making each one a huge success. However, apart from that, Malcolm has also played a huge role in the lead up to each of these occasions, a role he began for INSOL Europe back in 2006 for our Bucharest Annual Congress. A retired insolvency practitioner himself, his continued interest in the profession together with his event planning skills made him an invaluable member of our team for which his vast experience and dedication will certainly be missed. Malcolm (Corky to his friends), hands over the baton to Hannah Denney and Harriet Taylor who, along with the Executive and Council of INSOL Europe, look forward to seeing you all at our future events.

"Back to the future" is now and INSOL Europe is ready to take on new challenges and is well poised to tackle these with Frank Tschentscher as your new President and his new team for 2021/2022. Please give them all the support they need and deserve.

It has been my great honor and pleasure to be your President during the last year. Thank you all for your continuous commitment to our wonderful INSOL Europe family. Let's stay connected! ■

> ***Together and in joining our forces we climbed and conquered the COVID-19 mountain and descended safely***

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*

Ready for a time travel? *Part 1*

INSOL Europe Autumn Online Conference 2021 "Back to the Future" preview

After the success of our 2020 Annual Online Conference and 2021 Spring Online Conference, we are delighted to invite you to time travel "Back to the Future" for our 2021 Autumn Online Conference, writes Emmanuelle Inacio, INSOL Europe's Chief Technical Officer.

Our 2021 Autumn Online Conference will consist of two weekly sessions of one-hour and a half each on Thursdays 7 and 21 of October. In total, two keynote speakers and four panel debates on hot topics of high relevance to all professionals in the field of insolvency and restructuring will take place in no longer than a nice lunchbreak.

Our Technical Committee Co-Chairs **Barry Cahir** (Beauchamps, Ireland) and **Giorgio Corno** (Studio Corno Avvocati, Italy) have prepared a fascinating technical programme which is not to be missed.

Carmel King (Grant Thornton, UK / Co-Chair of the INSOL Europe Anti-Fraud Forum) will be our facilitator and guide us in this time travel which would not have been possible without our generous main sponsor NetBid.

First Session: Thursday 7 October 2021

Our first session will start with a keynote interview of **Miha Žebre** by **Barry Cahir** (Beauchamps, Ireland / Chair of the INSOL Europe EU Study Group)). Miha Žebre is the Legal and Policy Officer in DG Justice and Consumers at the European Commission and will update the audience with the transposition of the Directive (EU) 2019/1023 on Restructuring and Insolvency in the Member States in the context of the COVID-19 pandemic. He will present the ambitious project "*Enhancing the convergence of insolvency laws*" and share the first findings of the Group of experts on restructuring and insolvency law (E03362).

The experts **Chris Laughton** (Mercer & Hole, UK) and **Dan Lewis** (Wilberforce Chambers, UK) will then provide the audience with an overview of the rules and procedure and practical guidance relating to the recognition and enforcement of foreign judgments in England and Wales.

Finally, the brilliant fellows **Giorgio Corno** (Studio Corno Avvocati, Italy), **Frances Coulson** (Wedlake Bell, UK), **Stathis Potamitis** (Potamitisvekris, Greece) and **José Carles** (Carles Cuesta, Spain / Co-Chair of the Insolvency Tech & Digital Assets Wing) will analyse how the coronavirus is affecting commercial and consumer lease agreements in Greece, Italy, Spain and UK.

Second Session: Thursday 21 October 2021

Our second session will be opened by a keynote interview of **Austin Hughes** by **Frank Tschentscher** (Deloitte, Germany). Austin Hughes is Chief Economist and has worked as an Economist for KBC for more than 25 years, having previously worked in the Department of Finance, Central Bank and Bord Fáilte. Austin will discuss what might be the temporary and what might be the persistent changes to the economic and financial landscape in Europe in the wake of the pandemic.

The fantastic **Jason Schiess** (NetBid, Germany), **Patrizia Riva** (Studio Patrizia Riva, Italy) and **Michael Weaver** (Duff & Phelps, UK) will then share with the audience their business valuation insights in the post pandemic economy.

Last but not least, our INSOL Europe talented Young Members will hold a panel. **Robert Peldán** (Borenius, Finland / Co-Chair of the INSOL Europe Young Members Group), **Georges-Louis Harang** (Hoche Avocats, France / Co-Chair of the INSOL Europe EECC), **Stéphanie Oneyser** (Walder Wyss, Switzerland) and **Incoronata Cruciano** (Schiebe und Collegen, Germany) will explore the future of restructuring proceedings and professions.

Please book your place and join us "back to the future" where you will have the possibility to interact with our keynote speakers and panellists!

Time travel continues on pages 14 & 15...

With thanks to our Conference Sponsor:

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EECC Online Conference:
A wake-up call for sleepy companies?

Set your alarm for our next EECC Online Conference: 16:25 CET, Thursday 25 November 2021.

Many articles and experts forecast a rising tide of insolvencies in Europe given all we have been through in the past year and, it's more than understandable. We were used to seeing insolvency following somewhat regular patterns, and following 2009, we learned to spot a crisis.

Just imagine having the ability to send a message to yourself from January 2020 – but nothing too specific as to not disturb the axis of time – what would you even say? Buy stock in pharma companies? That would be too obvious and most surely go against time travel regulation.

Where to even begin? More has changed in the last 18 months than in the previous ten years put together. We have a pandemic, with its ever-changing variant, fleeting state aid, whole industries on the brink of collapsing while others flourish unexpectedly, and a restructuring Directive being dragged through parliaments for transposition.

Once, we had the luxury of certainty. Given the same data set, we persisted in the belief that everyone would draw the same conclusion and, moreover, that we could see the future, as though reason operated according to an obligatory physics, like the optics of an eye. At the beginning of that year, we were once certain that we could see, in broad strokes, how it was going to play out. Now, uncertainty is all we have, and it freed us; it made room for possibilities and new strategies – for growth, pushing us forward. Now, all we have are plans a, b, c, and so on.

This is the painful beginning of the new restructuring. We invite you to discuss together scenarios and plans on **Thursday, 25 November from 16:25 CET for a two-hour EECC session** - A wake-up call for sleepy companies?

Will there be a growing army of zombie companies? Questions have been raised whether our relief measures also support or create zombie firms – companies that cannot sustain their business over time and are artificially kept alive through loans. Many experts have stated these zombie firms need to fail to encourage a faster economic recovery. On the other hand, smaller businesses (more likely to be classified as zombie companies) are the ones that spend the largest percentage of their revenue on capital expenditure. Without these smaller companies, we're going to see slower job creation, wage stagnation and unemployment, as well as lower levels of innovation in product markets. Is the economy ready for this? Are we, as professionals, prepared for an increasing number of zombie companies that need to be liquidated?

Despite the financial aid, the outlook for airlines is not encouraging either. The first and the fourth quarters are the hardest because most of the revenue is generated in the second and third quarters. Many airline failures typically occur in the final few months of the year. Is the industry ready for these months? Have they stored enough from March to September to resist the harsh COVID winter? Have airlines reached a survival point at any cost? Is the COVID crisis solely to blame for the airline failure, or is it a structural problem? The COVID crisis certainly tipped the scales, but what about Air Berlin, Monarch, Primera Air, Germania, Flybmi, Wow Air, Thomas Cook, Aigle Azur and Adria Airways, all from 2017 to 2019?

Are the tides of insolvency changing? The trends show decreasing corporate insolvencies in Europe, despite contrary predictions. What about Poland, The Czech Republic and Bulgaria?

So join us online from the comfort of your home/office in this journey to embrace uncertainty in these new exciting times! We will discuss insolvency from A to Z, Airlines and zombies, that is.

Further information

The latest updates will be posted on our website when available at: ***www.insol-europe.org/events***

If you have any queries in the meantime, please contact the EECC Co-Chairs, Evert Verwey or Niculina Somlea. Details at: *www.insol-europe.org/eastern-european-countries-committee-introduction-and-members*

Searching for harmonisation potential: The latest work of the Experts' Group

Myriam Mailly (INSOL Europe Technical Officer) and Paul Omar (INSOL Europe Technical Research Coordinator)

The European Commission's Experts' Group in Restructuring and Insolvency (ECEG) has now been working away for nearly six months. Five meetings have now taken place: 12 April, 10 May, 22 June, 14 July and, after a summer pause, recently on 15 September.

Across the totality of these meetings, the work has proceeded on two levels, firstly identifying, among the many topics put forward for debate, those which are possible targets identified during the prior impact assessment, including some substantive topics, some procedural issues and some capacity building elements (including court and IOH capacity), those proposals that could command broad support within the group itself.

Second, thinking more strategically to the likely adoption process, the experts are conscious of the need to anticipate what measures Member States would accept as being sufficiently imperative to warrant convergence of the rules across the Single Market. A final consideration shaping the outcomes and product of the deliberations is the form that the measures might take, some perhaps more suitable for (or more acceptable in the guise of) a recommendation, with others perhaps requiring a Directive-like structure, for which the ECEG members have been invited to propose draft texts for consideration.

Overall, the debate has been genuinely lively and the work of the many clusters into which the group has been divided has produced thought-provoking suggestions for possible ways forward. This is perhaps unsurprising, given the make-up of the ECEG, as first constituted, to which new faces have been added representing the widest possible number of constituencies, disciplines within the broad insolvency and restructuring fields and areas of expertise, judicial, academic and practice-based.

The experts on the ECEG are acutely aware of the sensitive nature of restructuring and insolvency laws (being not just legal tools, but ones with economic and social consequences, and which interface with many other key aspects of domestic law). In terms of their approach, though, the experts remain aware of the push that the Preventive Restructuring Directive 2019 has given to developments in this field and of the need to make progress whilst the topic remains top of the agenda, not least because of concerns about the security and resilience of businesses and the economic activity in a post-pandemic world.

Over the remainder of 2021, the plan is for the ECEG to meet a further three times monthly from October to December with the possibility of one or more meetings in the New Year to finish off the presentation of the texts that will be heading for the end of the first stage of deliberations, before becoming the subject of the decision on further progress that is scheduled for March 2022.

ACADEMIC FORUM
INSOL Europe

Call for Papers - Annual Conference Dublin 2022

The Academic Forum of INSOL Europe will be hosting its Annual Conference at the Clayton Hotel Burlington Road, 2-3 March 2022, immediately prior to INSOL Europe's Annual Congress taking place in Dublin from 3-6 March 2022.

Expressions of interest are invited for the delivery of papers within the overall conference theme, which will be: "The Emerging New Landscape of European Restructuring and Insolvency."

Submissions should be sent by email on or before 6 December 2021 to Line Langkjaer, the Academic Forum's Secretary, at: linehl@law.au.dk.

A paper submission form relating to this call is available on the INSOL Europe website at www.insol-europe.org/academic-forum-events

Proposals for papers will then be reviewed by the Academic Forum's Board and, on or around 10 January 2022, the Board will contact authors of those papers that will have been selected for presentation at the conference.

Rescue of Business in Europe: The debtor-in-possession and small enterprises in distress

Report by Gert-Jan Boon, Stephan Madaus and Bob Wessels

On the occasion of the 10th anniversary of the European Law Institute (ELI), on 15 July 2021, a webinar was hosted on 'Rescue of Business in Europe – the Impacts of ELI's Work.'

Bob Wessels (Chair, Emeritus Professor of Law, Reporter of the ELI project; Honorary member of INSOL Europe) opened the webinar and briefly presented the output of the ELI Rescue of Business in Insolvency Law project, which he led together with **Stephan Madaus** (Professor, Martin Luther University Halle-Wittenberg) and with the assistance of **Gert-Jan Boon** (Researcher and Lecturer, Leiden Law School and INSOL Europe's YANIL-chair). He explained that the Report[1] covers a variety of themes on the rescue of financially distressed businesses, including matters of contract law, corporate law, procedural law and, evidently restructuring and insolvency law. The report, unanimously adopted by ELI in 2017, includes 115 recommendations and has served as an inspiration not only to EU legislators, but also to national ones, steering the debate in the academic literature while being translated into different languages, including Russian.

Two particular topics formed the basis of the discussion during the webinar, namely the role and function of the debtor-in-possession (DIP) and a special treatment for small enterprises.

Gert-Jan Boon, as the co-moderator, explained the ELI report's recommendations to formulate clearly the duties and liabilities of the debtor in order to take adequate measures to prevent the financial distress, and enhance the trust between the involved parties.

Hélène Bourbouloux (Judicial Administrator, Fhb, Paris) presented the French perspective on the DIP principle. In France, several reorganisation proceedings exist: amicable, pre-insolvency and safeguard or rescue proceedings. In a nutshell, the loss of control of the debtor over its business is proportional to the level of difficulties and coercion of the procedure. The EU Preventive Restructuring Directive 2019/1023 (Directive) prescribes that the debtor should maintain total or partial control of the assets and day-to-day operation of its business in a preventive restructuring procedure. A practitioner in the field of restructuring can be appointed to assist the debtors and creditors in negotiating and drafting the plan. In France, both of these crucial measures have already been in place before the adoption of this Directive.

Alexander Zadorozhny (Attorney at Law, SynumADV, Moscow) presented an outward-looking perspective, the Russian legislation on DIP. Among the most common insolvency procedures in Russia is a so-called 'observation' procedure that enables the debtor to remain in possession. Only in exceptional cases of, for instance, violation of obligations to provide information or conducting certain transactions, the management can be removed and an interim insolvency practitioner can be appointed within the said procedure. Using the output of the ELI report, he emphasised two routes toward a DIP regime in Russia: having a debtor-in-possession as an autonomous party in the restructuring process and introducing special means to control its activity (e.g. by a court).

The small enterprise panel was introduced by the co-moderator **Stephan Madaus**. He explained that the traditional approach of insolvency law has been focussed on a standardised medium-sized firm and has widely missed the peculiarities of small firms, even though they form more than 95% of all businesses in all jurisdictions. Only in recent years, the attention has gradually shifted towards micro, and small-sized business insolvencies, primarily through academic research and remarkable initiatives from standard-setting organisations such as the World Bank or the UNCITRAL Working Group V, to name but a few. Still, legislative reforms are yet to follow in many countries.

Irit Mevorach (Professor of International Commercial Law, University of Nottingham, UK) presented and explained the idea of a modular – country- and case-specific – approach, which is being developed by the UNCITRAL Working Group V in the forthcoming guide on simplified regimes for the micro and small entities. It aims to limit insolvency instruments for small entities to those needed in each case and jurisdiction, and includes features to address rational creditor apathy.

Andres F. Martinez (Senior Financial Sector Specialist, World Bank, Washington D.C.) outlined the World Bank's approach on the treatment of micro and small enterprises in insolvency in the recently updated principles. From the perspective of the World Bank, small businesses play a critical role in poverty reduction. In financial distress, they face a specific set of challenges including the lack of incentives to access insolvency proceedings, the passivity of their creditors, limited information and advice, problems accessing finance during insolvencies, and insufficient assets to fund insolvency processes.

A lively Q&A ended the webinar, the recording of which is available online.[2]

1 The Report and further information on the project is available here: https://europeanlawinstitute.eu/projects-publications/completed-projects-old/insolvency/.

2 The recording is available here: https://youtu.be/DXPPYUWoF2M.


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Annual Congress 2022: Ready for a time travel? *Part 2*

Emmanuelle Inacio takes a closer look at the themes informing the technical content of our next Annual Congress in Dublin 2022

EMMANUELLE INACIO
INSOL Europe Conference Technical and Training Course Director

> *The idea that the pandemic will change everything about our future is only partly true*

At the time of writing, Our 2022 Technical Committee co-chaired by Barry Cahir (Beauchamps, Ireland) and Giorgio Corno (Studio Corno Avvocati, Italy) are working tirelessly to produce an exceptional programme for its forthcoming events.

Since the start of the COVID-19 pandemic, technology has made it possible for a lot of our work to be done remotely. Zoom started off as a video-conferencing platform and has evolved into a part of everyday life for us. Therefore, the INSOL Europe Autumn Conference of 7 & 21 October 2021 titled "**Back to the future**" will be held online (*see page 8*).

But now that the vaccination programme is progressing well in Europe, most of us are back to offices, travel again or want to do so… We are a herd species. We delight in the company of other people, and we delight in shared experiences. Thus, our INSOL Europe Annual Congress in Dublin will continue to explore "in real life" this time travel on 4 & 5 March 2022. The main theme of our 2022 Congress will be "**Back to the future 2**"!

INSOL Europe 2022 Dublin Congress

The idea that the pandemic will change everything about our future is only partly true. Indeed, what will our world look like post-pandemic? To reference the title of a classic 1980s science-fiction film, it will take us back to the future! However, emerging from the pandemic can also lead to build back a better future...

Indeed, the EU Member States were required to implement the Directive (EU) 2019/1023 on Restructuring and Insolvency – which was adopted on 20 June 2019 – by 17 July 2021 in their national legislation at the latest, with an extension up to 17 July 2022 if they encounter particular difficulties in transposing it.

The Directive contains several key measures, the most important being that debtors will have access to a preventive restructuring framework that enables them to restructure, with a view to preventing insolvency and ensuring their viability, thereby protecting jobs and business activity. However, the pandemic disrupted the transposition race. Indeed, very few Member States have already transposed the EU Directive to use it as a tool to prevent insolvency related to the pandemic and most of them have already notified the European Commission that they will make use of the extension option. The national choices will necessarily impact the harmonisation of a rescue culture in the EU, the Annex A of the European Insolvency Regulation and hence, the use of prevention in cross-border restructuring.

Our 2022 Dublin Congress will be the opportunity to discuss and assess the practical consequences of the national choices made.

Post-Brexit era

Although the UK has exited the EU before the implementation deadline of the EU Directive on Restructuring and Insolvency, the UK undoubtfully remains in the race with the reforms on its restructuring and insolvency regime in line with the EU Directive and the need to maintain the attractiveness of its cross-border restructuring in the post-Brexit era. Our 2022 Congress will *inter alia* question how to deal with extra-EU cross-border restructuring and insolvency processes.

Airline restructuring

The pandemic has devastated the airline sector but has not stopped it. If the traffic won't return to 2019 levels before some time, the Irish examinership already showed that it can, in certain circumstances, be used to restructure airline groups provided that one or more group companies is registered in and has its centre of main interests in Ireland.

Recent restructuring cases using the examinership, which in the current format complies with many requirements under the Directive, will be explored during our 2022 Dublin Congress.

Harmonisation

While the majority of EU Member States still have to implement the EU Directive on Restructuring and Insolvency, the European Commission intends to submit a proposal for the harmonisation of insolvency law whose issues will be analysed in depth!

Data protection

We should warn our delegates that some horror is coming their

> *Dublin has been ranked among the friendliest cities in Europe and the world. What better setting to host our 2022 Congress than Dublin after two years without meeting one another in person?*

way… Indeed, a "Little Shop of Horrors" will be presented since insolvency practitioners cannot escape the European General Data Protection Regulation which is applicable to them as of 25 May 2018, creating new duties and responsibilities...

As our future is also digital, the insolvency practice will be necessary challenged with the question of protecting and recovering digital assets. The INSOL Europe Insolvency Tech & Digital Assets Group and the INSOL Europe Anti-Fraud Forum will join their forces and welcome two experts to present an update on crypto assets and fraud – what the insolvency practitioner needs to know!

Cross-border issues

The 2022 Dublin Congress will also examine the myriad of issues of the cross-border real estate industry, duties of directors where there is a likelihood of insolvency, consumer debt discharge and new financing trends for businesses in distress.

Dublin awaits you

Dublin has been ranked among the friendliest cities in Europe and the world. What better setting to host our 2022 Congress than Dublin after two years without meeting one another in person? So, expect a very warm welcome upon your arrival!

We look forward to welcoming old and new friends in person in Dublin on 4 & 5 March 2022 for what will be the second part of a truly memorable time travel! Book your place! ■

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This new section of eurofenix will bring you the most relevant news in the field of insolvency tech and digital assets. To contribute an article to a future edition, please send your proposal to: *insolvencytech@insol-europe.org* or the individual Chairs:
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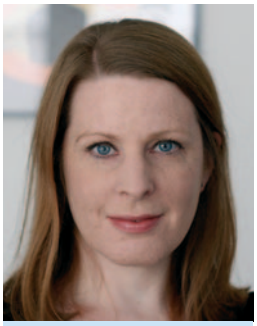
Cryptocurrency fraud: The English Court considers

Carmel King reports on recent case law in England which could provide the beginnings of a legal route to asset recovery in cases of cryptocurrency fraud



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

> *This decision is the latest in a short series shaping the status of cryptoassets in law*

Case law in England is leading the charge in providing the beginnings of a legal route to asset recovery in cases of cryptocurrency fraud. With regulation, moves towards central bank digital currencies and mainstream take-up, blockchain-based assets are something to which insolvency practitioners need to pay attention.

This is a rapidly-moving space: this article considers a decision which at the time of writing was the latest in a short series shaping the status of cryptoassets in law. By the time of publication it had been superseded by further decisions bolstering the message that fraudsters are not as anonymous as they assume when operating in this space, and furthermore, exchanges have a responsibility to know with whom they are dealing.

Background

In *Ion Science Ltd and Duncan Johns v Persons Unknown, Binance Holdings Limited and Payward Limited*, the applicants pleaded that they had been defrauded of around £580,000

across two transactions. Ion Science Ltd and its owner Mr Johns were persuaded by Neo Capital to invest in two initial coin offerings (ICO) for new cryptocurrencies called Uvexo and Oileum. An ICO is a fundraising exercise like an IPO, however instead of shares the company offers tokens or new cryptocurrency. Mr Johns believed that the investment had made a significant profit (approximately $15 million), however the profit was not paid over and Mr Johns learned that the investment had in fact been converted into bitcoin and dissipated through two cryptocurrency exchanges. Neo Capital could not be traced.

Asset tracing and recovery

The applicants required the assistance of the Court at an early stage of the investigation and asset recovery exercise. They sought a worldwide freezing order and a disclosure order against Persons Unknown and disclosure orders against the second and third

respondents, which were the two exchanges through which the bitcoin had been dissipated, on an urgent *ex parte* basis. Freezing orders against Persons Unknown are an innovative but established approach. In *AA v Persons Unknown*, the judgement confirmed that bitcoin is intangible property capable of being subject to a freezing order.

Significance of judgement

This case is believed to be the first of its kind, concerned with a fraudulent ICO. Further elements of the judgement could potentially provide a roadmap for insolvency practitioners and asset recovery professionals:

- The Court granted permission to serve a Bankers Trust order out of jurisdiction against the cryptocurrency exchanges. This order compels the recipients to disclose certain information about account holders and is key in the pursuit of unknown or anonymous fraudsters.
- The Court also considered the *lex situs* of bitcoin. It is necessary to consider whether the English Court is the appropriate forum for the hearing of these proceedings, and whether the Court has jurisdiction. This is a difficult consideration, given the very nature and philosophy of bitcoin. The Court was satisfied that the lex situs of a cryptoasset is where its owner is domiciled, and the facts of a case arise out of the acts committed within the jurisdiction (in this case the fraud) or related to assets within that jurisdiction (the bitcoin). Straightforward and sensible one might think, but prior to this there was no guiding case law and so it brings clarity to the relief of many.

A subsequent (unrelated) judgement *Fetch AI Limited, Fetch AI Foundation PTE v Persons Unknown, Binance Holdings and Binance Markets*, considers a completely different type of fraud, and ordered that Binance disclose the information they held on the hackers and freeze their accounts.

Conclusion

Ion Science is a first-instance decision, and the judgement made clear that it was not to be considered a binding authority. Having said that, it is a very significant addition to the canon on cryptoasset fraud and asset recovery, as is *Fetch AI*. The Courts are providing clarification around the legal status of cryptoassets which is sympathetic to the mainstream direction of travel we are seeing globally. As confidence in the asset increases, so will investment, rapid evolution of the form (such as smart contracts and NFTs) and opportunities for fraud. It is reassuring that the insolvency practitioner and asset recovery specialist's toolbox is also evolving. ■

> *This case is believed to be the first of its kind, concerned with a fraudulent ICO*

Towards harmonisation of transactions avoidance laws

Reinhard Bork outlines a proposal for a new Model Law and discusses the most important regulations

PROF. REINHARD BORK
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> *The central feature of the research project is its methodological approach*

The EU strives for the harmonisation of transactions avoidance laws. Based on the new Capital Markets Union Action Plan of 24 September 2020,[1] on 11 November 2020, the European Commission (EC) published the initiative "Increasing the convergence of insolvency laws", addressing (*inter alia*) the "conditions for determining avoidance actions and effects of claw-back rights".[2]

It is generally agreed that this is, in principle, a laudable endeavour. However, as early as October 2018, a proposal was presented to the academic conference of INSOL Europe in Athens to launch a research project on the harmonisation of transactions avoidance laws.[3] This proposal met with great approval from both academics and practitioners. It led to the formation of a working group composed of leading avoidance law experts from all EU Member States and the UK. The research project was massively supported by the German Research Foundation (*Deutsche Forschungsgemeinschaft*), the University of Hamburg/DE and the Radboud Business Law Institute of Radboud University Nijmegen/NL. The group was chaired by professors Reinhard Bork (Hamburg/Nijmegen) and Michael Veder (Nijmegen) – both INSOL Europe members – and has now finished its work by presenting to the European Commission a proposal for a Model Law comprising nine sections on transactions avoidance, intensively reasoned in the final report which will be published by the end of this year.[4]

The project aimed at elaborating a proposal for harmonising transactions avoidance laws in the EU Member States by presenting rules which should be implemented in all national insolvency laws in order to ensure legal certainty as to which transactions should (or should not) be challengeable in all Member States under the same conditions. It was drafted as an independent exercise, rather academic than driven by a political or interest group. That is why a Model Law and not a Directive was elaborated. Above all, the project was not concerned with identifying advantages or disadvantages of national laws but was rather aimed at finding recommendable solutions in the field of transactions avoidance law. The scope of the study was restricted to this special field of law, leaving aside other important topics (e.g. the definition of insolvency or the ranking of claims), although they are in interplay with the transactions avoidance law. Most importantly, the proposed Model Law is based on a "minimum harmonisation" approach. It seeks to unify the conditions for challenging typical cases with relevance for the internal market, such as payments or the establishment of security rights for creditors in the run up to insolvency, leaving stricter (i.e. more avoidance-friendly) rules to the discretion of the national legislators.

Principles

The central feature of the research project is its methodological approach. Although the members of the working group drafted extensive reports on their national avoidance rules, the analysis did not start with the national laws but approached the subject from a principle-based perspective.[5] For this reason, the principles – where "principles" are understood as fundamental and basic standards, i.e. as tenets rather than important topics or major issues – which support and shape the transactions avoidance laws were elaborated, the topics to be addressed from a principle-based

perspective were identified, and adequate solutions for every single topic were found by weighing and balancing the relevant principles involved.

The principles of transactions avoidance law can be identified in nearly all jurisdictions and can be grouped as *supporting* and as *restricting* transactions avoidance. Transactions avoidance is *supported* by the principle of best possible satisfaction of creditors' claims, the principle of equal treatment of creditors, the principle of collectivity, the fixation principle and the principle of efficiency. It is *restricted* by the principle of protection of trust, the principle of predictability (legal certainty), and the principle of proportionality.

How these principles operate can be illustrated with two examples. First, when dealing with the question as to whether the debtor's substantive insolvency at the point in time when a creditor is paid is a necessary prerequisite for challenging preferences, one should consider that the underlying principle for challenging preferences is the principle of equal treatment of creditors. This is a principle of insolvency law and cannot be enforced where the debtor is not substantively insolvent. Second, it follows from the principles of proportionality and protection of trust that a claim which was satisfied in a challengeable way must revive upon the return of the received, since the creditor must not be put in a worse position than he or she would be in without the voidable transaction.

Challenges

The working group met with some major challenges. The first was to get involved with the methodological approach, i.e. to take the principles of transactions avoidance law as yardsticks. This method was new territory for most members of the working group. Initially, it was met with scepticism, but in the end it was generally agreed that this approach was quite helpful for avoiding a battle of nationalisms and for agreeing on solutions based on common values rather than political compromises. Nevertheless, it was a second challenge not to discuss national laws and to "take off the national glasses". The third was to focus on the intended Model Law and thus on the main issues, leaving aside peculiarities of national laws such as the German rule on repayments to silent partners (§ 136 *Insolvenzordnung*) or the Polish rule on blatantly excessive contractual penalties (Art. 130a *Prawo upadło ciowe*). Finally, and this was the fourth challenge, discussing the proposed rules requires intensive examination of the rationale for every single norm. The explanatory notes need to be read in order to fully understand and appreciate the proposed Model Law.

The scope of this Model Law comprises classical insolvency proceedings. However, the rules may also be applied to restructuring proceedings provided they require the debtor's substantive insolvency (i.e. at least imminent inability to pay debts): transactions avoidance is a specific tool of insolvency law and cannot be applied without the debtor's insolvency.

As regards systematics, it was supported by the principle of legal certainty to distinguish general prerequisites from typical avoidance grounds and from the legal consequences. Transactions avoidance should only be possible where a legal act which was perfected prior to the opening of insolvency proceedings caused a disadvantage for the general body of creditors. Typical avoidance grounds are preferences, transactions at an undervalue, and transactions intentionally disadvantaging creditors. Regarding the legal consequences, not only the content of the avoidance claim needs clarification but also the corresponding rights of the opponent and third parties to which the opponent has transferred the received.

> ***The principles of transactions avoidance law can be identified in nearly all jurisdictions***

> *It is not possible here to describe the Model Law in its entirety and to explain the reasons for the solutions*

Solutions

It is not possible here to describe the Model Law in its entirety and to explain the reasons for the solutions favoured by the authors. But three examples for controversially discussed topics may suffice.

First, concerning the term "transaction" (or "legal act" respectively), there has been intense debate in the working group regarding a restriction to transactions performed by the debtor exclusively as opposed to the inclusion of transactions performed by the opponent or a third party. A wide understanding, which would include satisfaction by individual enforcement, is supported by the principle of equal treatment of creditors, since it makes no difference – neither for the creditor nor for the estate – whether the benefitted creditor is satisfied by the debtor's payment or by individual enforcement.

Second, similar deliberations speak in favour of the inclusion of forbearance (omission). Again, it makes no significant difference whether a debtor (e.g.) actively waives a claim against his or her obligor or whether he or she remains passive and accepts the claim to become time-barred. The detriment to the general body of creditors and the advantage for the opponent is the same, since in both cases the value of the debtor's claim against the obligor cannot be realised. Hence, there is no justification, particularly not under the principle of protection of trust, to treat opponents who benefitted from the debtor's passivity better than those who benefitted from the debtor's active performance.

Third, it follows from the principle of collectivity that the main legal consequence is the opponent's duty to compensate the estate for the detriment caused by the voidable transaction. Under the principle of efficiency, the legal consequences must be shaped in a way that this objective can be reached as simply as possible. At the same time, the principle of legal certainty must be taken into account. This requires the legal consequences to be as predictable and clear as possible, which speaks against a rule that leaves the consequences to the discretion of the court or that provides for automatic nullity of the transaction ex lege. The principle of proportionality also has an impact, since the consequence should not put more burden on the opponent than necessary for compensating the estate for the disadvantage suffered. This compensation can be done in various ways: by returning an asset transferred by the debtor, by paying the amount of money the estate is lacking, by surrendering surrogates and emoluments, by waiving a right acquired from the debtor, or by simply ignoring the legal position which resulted from the challengeable transaction.

Next move

What happens next? Our proposal has been submitted to, and discussed by, the EC's Group of experts on restructuring and insolvency law (E03362).[6] They will probably give a recommendation to the Commission by March 2022. The Commission has scheduled a decision for the end of June 2022. They have the choice to propose a Regulation, a Directive, a Recommendation, or no action at all to the legislative bodies of the EU. In this context, it might be helpful that the research project comprises impact assessments regarding the consequences for national insolvency laws in case the Model Law should become the blue print for a Directive. These impact assessments would prove the feasibility of efforts to harmonise the transactions avoidance laws, based on the Model Law described here. However, the way to harmonisation is a bumpy road. Once the subject is out of the hands of academics and experts, other influences will gain weight. *On verra!* ■

Footnotes:

1 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A Capital Markets Union for people and businesses-new action plan, Brussels, 24.9.2020, COM/2020/590 final, p. 13.

2 European Commission, Inception Impact Assessment Initiative "Increasing the convergence of insolvency laws", available at https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12592-Insolvency-laws-increasing-convergence-of-national-laws-to-encourage-cross-border-investment_en (last accessed 4 August 2021), at B.

3 See Reinhard Bork, *Clash of Principles: A New Approach to Harmonisation of Transactions Avoidance Laws?*, in: Jennifer L. L. Gant (ed.), Party Autonomy and Third-Party Protection in Insolvency Law (INSOL Europe 2019), p. 179-192.

4 Reinhard Bork/Michael Veder, *Harmonisation of Transactions Avoidance Law*, Cambridge/Antwerp/Chicago (Intersentia), 2021. The text of the Model Law is already available at https://www.intersentiaonline.com/

5 This method has been developed by Reinhard Bork, *Principles of Cross-Border Insolvency Law*, Cambridge/Antwerp/Portland (Intersentia) 2017, para. 1.1 et seq., 1.28 et seq., 1.35 et seq. and passim.

6 For this expert group, see https://ec.europa.eu/transparency/expert-groups-register/screen/expert-groups/consult?do=groupDetail.groupDetail&groupID=3362 (last accessed 4 August 2021).

French pre-insolvency proceedings: A before and after the COVID period?

Georges-Louis Harang and Gaël Couturier write on how the new measures have been used

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Pre-insolvency proceedings have existed in the French legal system since 1985. The COVID period, even before the transposition of the EU Directive[1], has given a new role to these pre-insolvency proceedings, especially to Conciliation, by aiming to protect the insolvent company at the early stages of its financial difficulties.

To deal with all of the economic difficulties linked to quarantines, curfews or all sorts of restrictive measures, the French government has used the pre-insolvency proceedings as a weapon of… massive negotiations.

As a continuation of the objectives of the Directive, pre-insolvency proceedings are more than ever the useful tools which help prevent companies from having to file for insolvency and open formal insolvency proceedings, by finding negotiated solutions on a mid- / long-terms basis, while maintaining the CEO in charge of the management; all this in order to solidify the financial health of the company and to perpetuate the confidence of suppliers and creditors.

French pre-insolvency proceedings: Focus on conciliation

With the aim of preventing insolvency, the law provides for two types of consensual and confidential pre-insolvency proceedings for companies experiencing financial difficulties or anticipating foreseeable financial difficulties: "*Mandat Ad Hoc*" (Ad Hoc mandate) and *Conciliation*. The "mandat ad hoc" is not subject to any fixed time frame and will apply if the debtor is not insolvent yet.

Conciliation is also flexible and confidential and is available to companies experiencing financial, economic and/or legal difficulties, or likely to experience such difficulties in the future and which have been in cessation of payments for fewer than 45 days. Only legal representatives may file for this procedure.

The conciliator (a French insolvency practitioner or "IP") is appointed by the president of the commercial court for 4 months, with a possible 1-month extension.

After this period, it is not possible to open another conciliation procedure, until three months have passed. In conciliation, there is no automatic stay, but only an individual stay. If a creditor who is not included in the conciliation sues the debtor, the latter may ask the president of the court who ordered the conciliation to grant more time for repayments, of up to a maximum of two years.

The mission of such a conciliator will be fixed by the president of the commercial court in his decision, and this will normally be: to assist the debtor company in its negotiations, seeking to put an end to its difficulties, by promoting and encouraging it to enter into an amicable agreement with its main creditors and, if possible, its usual commercial partners.

This agreement mainly sets out any loans extended by

> ***During the pandemic, the French government has adopted legal measures to reinforce the use of pre-insolvency proceedings, especially Conciliation***

creditors or shareholders and any consents by creditors to grant waivers, to reschedule and/or cancel existing debts, propose debt write-offs, accept new financings and/or restructuring of the company. It interrupts and prohibits any judicial actions. Finally, the conciliator has to report back to the president of the commercial court.

Pursuant to article L 611-11 of the Commercial code, lenders that extended credit to a company as part of an amicable agreement during Conciliation will benefit from protection for this new financing, by being ranked ahead of all pre-petition and post-petition claims, in case of insolvency proceedings at a later stage. In a way, this is what Article 17 of the Directive promotes.

It is important to note that, during the consensual and confidential "mandate ad hoc" and conciliation proceedings (which are not insolvency proceedings), creditors may open individual judicial proceedings against the debtor, enforcement proceedings included.

Conciliation used as a weapon of mass negotiations during the pandemic

During the pandemic, the French government has adopted legal measures to reinforce the use of pre-insolvency proceedings, especially Conciliation, and has decided to adopt coercive measures in order to constrain reluctant creditors to accept negotiated solutions and thus prevent foreseeable financial difficulties for the companies. Due to its flexibility, the "*mandat ad hoc*" has not been amended since the COVID pandemic.

First, the duration of Conciliation may be extended, once or several times, at the request of the Conciliator, by a reasoned decision of the president of the commercial court, but it cannot exceed ten months, which is twice as long as the ordinary period.

By several Decrees and an Act[2], Conciliation tools have been reinforced to the benefit of the insolvent companies in order to paralyse reluctant creditors' rights (by constraining creditors to stay in a prolonged waiting situation without the possibility to undertake judicial actions), notably by ordering:

- the interruption or the prohibition of judicial actions brought with a view to having the insolvent company ordered to pay further sums and/or to terminate the contracts, because of the interruption of payments;
- the interruption or the prohibition of any enforcement proceedings implemented by creditors towards both movable and immovable property; and
- the possibility, before any formal notice or judicial actions, to ask the president of the commercial court to postpone or spread-out payments due to creditors for a period of up to two years. Basically, this measure will apply if creditors refuse to grant a standstill, regardless of whether they have attempted to enforce their rights.

These measures are:

- not automatically implemented, meaning that the claims must be brought before the president of the commercial court;
- individual, because they will only take effect against one creditor, not the community of creditors; and
- applicable only until 31 December 2021.

These measures will only take effect at the end of the conciliation proceedings for those opened before 31 December 2021. Nevertheless, the recent transposition of the Directive (Decree n° 2021-1193 of 15 September 2021) into the French legal system maintains part of these measures as article L 611-7 of the Commercial code (in its new drafting entering into force on 1st October 2021), which enables the debtor to ask the Judge for postponing or spreading-out payments due to creditors for a period of up to two years.

Practical examples and statistics

At first sight, insolvency proceedings are mostly used in France to deal with distressed companies. For instance, in 2020, 9980 safeguard (*sauvegarde*) or judicial reorganization (*redressement judiciaire*) proceedings were opened, compared to 3460 *ad hoc* and conciliation proceedings.

However, insolvency proceedings mostly concern small companies, rarely medium-sized ones (in 2020, 39 companies with a turnover of over €50m or more than 300 employees), and very exceptionally, large companies (in 2020, 6 companies with more than 1,000 employees).

Although they can also be used by small and medium-sized companies, large companies and their creditors prefer the *mandat ad hoc* and conciliation proceedings to deal with their difficulties because of the flexibility and the confidentiality of these proceedings. This trend was strongly reinforced following the 2008 financial crisis, because these proceedings were increasingly used to restructure LBO financing, which had become unsustainable due to the real post-crisis profitability of operating companies. They are currently being used intensively in the current context of the covid crisis.

For example, in the airline sector, which is particularly impacted by the crisis, a foreign airline used conciliation proceedings to seek a settlement with an Irish aircraft leasing company. The contracts had been concluded with several French SPVs (turnover of €400m) which were subleasing aircraft to various companies in the group. Unlike other leasers, this leaser had taken a very hard line.

As the latter refused the standstill proposed by the conciliator, the president of the court:

(i) ordered a standstill for the duration of the conciliation proceedings (up to 10 months),

(ii) forbade the leaser from taking any enforcement action on the arline's assets during the conciliation proceedings, and

(iii) granted a grace period for the payment of the debts that the guarantors were able to avail themselves of.

This order has not only been effective in France but also in the United Kingdom, thanks to the recognition by the High Court of Justice of the conciliation proceedings on the basis of the cross-border insolvency regulations (CBIR). This decision helped to readjust the balance of power between the parties and led the leaser to negotiate.

In a very different field of activity, conciliation proceedings were used by a holding company of a large group with a turnover of almost €4 billion, listed in France and the United States, with more than 13,000 employees. While it had initiated a capital increase, its completion was jeopardized by the closure of the film studios in the United States, on which one of the group's major business segments depended. As part of the conciliation proceedings, the group managed to achieve a very complex restructuring of its debt (€1.7bn) involving a new money injection of more than €400m, a conversion of part of its debt into capital and the rearrangement of the terms and conditions of the remaining debt. Under the aegis of the conciliators, an agreement was reached with more than 300 lenders, mainly British and American, in just one month. Supported by a very large majority of creditors, it was implemented under an accelerated financial safeguard procedure. The whole transaction took two months.

Conclusion

The *mandat ad hoc* and the conciliation proceedings are highly effective and meet the needs of companies and their creditors. They already meet the objectives and purposes of the Directive. Therefore, these preventive proceedings are not modified by the transposition of the Directive.

A report from French Deputies, filed on 21 July 2021[3], had promoted a reform of the pre-insolvency proceedings / Conciliation by maintaining some of the coercive and derogative measures adopted during the pandemic period, notably a Conciliation period permanently extended up to ten months and the interruption/prohibition of judicial actions under the supervision of the Judge (to avoid any windfall effects).

To date, the French lawmaker has only maintained the temporary suspension of the right for creditors to obtain payment of their claims; conciliation stays a weapon of negotiation with creditors after the COVID period. ■

Although they can also be used by small and medium-sized companies, large companies and their creditors prefer the mandat ad hoc and conciliation proceeding

Footnotes:

1 EU Directive 2019/1023 of 20 June 2019 on Restructuring and Insolvency.

2 Decree n° 2020-341 of 27 March 2020 / Decree n° 2020-596 of 20 May 2020 / Decree n° 2020-1443 of 25 November 2020 and Article 124 of the Act n° 2020-1525 dated 7 December 2020

3 Report n° 4390 related to companies in financial difficulties due to the health crisis filed on 21 July 2021 before the National Assembly (see pages 72 and 151).

Rembrandt: Excellent artist, but also a structural troublemaker?

Bob Wessels provides some background on his most recent book 'Rembrandt's Money, The legal and financial life of an artist-entrepreneur in the 17th century Holland.'

BOB WESSELS
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Summer 1991: 'What are you going to do this weekend?' a Dutch lawyer, working in Manhattan, asked me. I was in New York, lecturing for ten days, to some fifteen lawyers, all from Dutch law firms working in New York. 'I can recommend the Frick' he said. Indeed, it's a beautiful museum, and there I saw, for the first time, Rembrandt's exceptional selfportrait of 1658. Interesting also, there I learned, for the first time, that Rembrandt (1606-1669) went bankrupt in 1656!

Nearly three decades later, gradually finalising my commercial advisory work (my law degree from Amsterdam dates from 1974), I found time to dive into the case of Rembrandt, seen as one of the greatest Dutch Golden Age painters. Many will have seen his paintings, prints and drawings in a wide range of styles and subjects, from the time he was the young inspired artist from Leiden sketching 'tronies' in the 1620s, to his masterpieces, like the "Night Watch" (1642), the "Syndics of the Drapers Guildé " ('De Staalmeesters') (1662), and "The Jewish Bride" ('Het Joodse bruidje') and selfportraits from the second half of the 1660s. With 2019 marking Rembrandt's 350th celebration of his death, exhibitions and literature have been overwhelming.[1]

> *One can easily assemble a cupboard full of books related to the artistic work of the world-renowned master we know today*

Master in conflicts

Indeed, one can easily assemble a cupboard full of books related to the artistic work of the world-renowned master we know today. What is much less known is his

troublesome, discordant nature. Rembrandt was a party in many contracts and notarial deeds, but also in disputes and conflicts during nearly all of his Amsterdam period (from around 1632 till 1669).

Strikingly, Rembrandt was engaged (in several legal capacities) in legal conflicts or battles of all kinds with opponents of several sorts: (foreign) patrons (delivery on time; quality of work; sharp business practices/fees), neighbours (regarding costs of reconstruction of the house/studio/workshop at the Breestraat in Amsterdam[2]), personnel (in his house), lenders ('panic' loans in 1653) and other creditors (e.g. related to not paying rent for an auction room and rent arrears for his last house where he lived during the last ten years of his life, at the Rozengracht in Amsterdam). In all, there is an abundance of questions, and my recent book offers a comprehensive overview of the legal and financial aspects of the life and work of Rembrandt.[3] These aspects concern his private life but also his work as an artist – from a young master in Leiden in the mid-1620s, to a celebrated entrepreneur in the third and fourth decades in 17th century Amsterdam – culminating in financial distress in the latter part of his life.

Along the way, my new book sheds light on the socio-economic, cultural and historical context of the period in Amsterdam and the development of the Republic of the Seven United Netherlands. Providing an overview of the applicable laws and rules in those days – family law, marriage law, inheritance law, contract law, the law of obligations, procedural law, company law, insolvency law, and

private international law – the book covers, I think, a topic that up to now has not been the subject of systematic legal-historical research: the legal and financial life of the most famous artist in 17th century Holland.

Bankruptcy in Amsterdam in the 17th century

As to the legal and financial aspects of his life, Rembrandt's insolvency and all the surrounding facts and backgrounds are rather well-known. It is the main theme in art-historic research, in Crenshaw's standard book, 'Rembrandt's Bankruptcy' of 2006.[4] Two years ago, the subject has been covered in quite some detail by the Dutch historian Bosman, providing new interpretations.[5] Evidently, it is also the object of my research.

In July 1656 Rembrandt requests a court to grant '*cessio bonorum*'. The historic roots and the 17th century meaning of *cessio bonorum* (or: assignment of an estate; in Dutch 'boedelafstand'), the proceedings themselves and their legal consequences are explained. What is the goal of such proceedings? *Cessio bonorum*, having its roots in Roman law, was essentially a legal means to avoid being imprisoned for outstanding debts, a rather common practice in medieval and early modern North-West Europe. Among the questions I address are: what is the position of an unsecured creditor? Did the surrender of the estate lead to debt relief (most likely not) and did Amsterdam apply a rule for the debtor to publicly and loudly stand up and show remorse (Amsterdam did not, but Leiden and Rotterdam did).[6]

In quite some detail the causes mentioned by Rembrandt in the application for *cessio bonorum* are addressed. He has come into financial difficulties '… *due to losses suffered in business, as well as damages and losses at sea*' and he is threatened by his creditors to be captured. Were these just legal boiler-plate formulations, standard reasons in such an application? Was he threatened by his former lover (whom he promised to marry), who obtained a judgment allowing her to take legal action? Note that insolvency law in Holland in the 17th century was a legal melting pot, which included canon law and Roman law, legislative collections such as the Great Placard books, jurisprudence collections, collections with legal authors' opinions and the publications of e.g. Hugo de Groot (Grotius).

Concerning insolvency matters, in the city of Amsterdam an Ordinance of 1643 applied. This mixed legal system of Holland's law, the result of a diversified development of an uncoordinated set of rules and principles, is called Roman-Dutch law, a term still used in South-Africa.[7] In this area of law there was a specific role for the Amsterdam Chamber of Abandoned and Insolvent Estates ('Desolate Boedelskamer'), in terms of today, a partly administrative, partly legal institution, which I describe.[8]

Creditors

In finalising the commencement of the *cessio bonorum* proceedings, an overview is given of the creditors mentioned by Rembrandt in the application (names; amount; interest-provisions). Other persons and their backgrounds are also mentioned as questionable creditors. Evidently, I give an outline of Rembrandt's inventory, a fantastic treasure-trove for art historians, present in some thirteen rooms and other spaces in the house/art studio.

We may wonder if the inventory contained all his assets, but first this needs an answer to the question about the scope of the jurisdiction of the Chamber of Abandoned and Insolvent Estates. Thus, the question is posed whether all assets, securities and outstanding debts are included, as well as whether the inventory has a level of completeness. Would it not have to also contain printing plates, painter's tools and etching materials, and why not, clothing? Would there be only twenty-two books? Were goods withheld from the eyes of the Chamber?

Overall

Rembrandt is a unique artist. With over twenty legal conflicts and disputes, in all areas of life and business, Rembrandt led a turbulent legal and financial life. He comes out of it as a stubborn, selfconfident and quite headstrong man.

It is gratifying to learn that young (doctoral) researchers, gathered in INSOL Europe's Younger Academics Network of Insolvency Law (YANIL) are open to understand more about Amsterdam's insolvency law from some four centuries back. On 13 October 2021, Maurits den Hollander and myself will be happy to discuss our results with them.[9] ■

> *In quite some detail the causes mentioned by Rembrandt in the application for cessio bonorum are addressed*

Footnotes:

1 For his latest biography, see Jonathan Bikker, Rembrandt. Biography of a rebel, Amsterdam; Rijksmuseum 2019.

2 Presently Rembrandt House Museum, see https://www.rembrandthuis.nl/en/.

3 'Rembrandt's Money, The legal and financial life of an artist-entrepreneur in 17th century Holland'. Published by Wolters Kluwer (Deventer). ISBN 9789013164893 (forthcoming Autumn 2021).

4 See Paul Crenshaw, Rembrandt's bankruptcy. The artist, his patrons and the art market in seventeenth-century Netherlands, Cambridge University Press 2006.

5 Machiel Bosman, Rembrandts plan. De ware geschiedenis van zijn faillissement, Amsterdam: Athenaeum-Polak & Van Gennep 2019.

6 See the interesting study of Wouter Druwé, Dignity and Cessio Bonorum in Early-Modern Dutch Learned Legal Literature, Research Paper Series Max Planck Institute for European Legal History, No. 2016-06 (http://ssrn.com/abstract=2838877).

7 See the studies of Melanie Roestoff, N kritiese evaluasie van skuldverlichtingsmaatreëls vir individue in die Suid-Afrikaanse insolventiereg, PhD Universiteit van Pretoria 2002, and Roger Evans, A critical analysis of problem areas in respect of assets of insolvent estates of individuals, PhD University of Pretoria 2008.

8 Interestingly, just before Summer 2021, when my manuscript was at the printer, at the University of Tilburg, Maurits den Hollander defended his Doctoral thesis (written in English) 'Stay of execution: Institutions and insolvency legislation in Amsterdam, 1578-1700', explaining the social-economical position of this Chamber. See (in open access) https://research.tilburguniversity.edu/en/persons/maurits-den-hollander.

9 For more information on this online seminar, see: https://www.insol-europe.org/yanil-events.

The Examinership of Norwegian Air Group

Ruairi Rynn and Rebecca Martyn report on the first case where an Irish examinership was used to restructure the obligations of a non-EU company

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On 26 May 2021 Norwegian Air Shuttle ASA (NAS), together with four Irish companies (Norwegian Air), successfully exited the Irish examinership process which was used for the first time to restructure the obligations of a non-EU company and which had many key and innovative features in terms of cross-border issues linked to the aviation sector.

Through the restructuring the Norwegian Air group notably succeeded to:

- raise NOK 6 billion (€590 million) in new capital through share and hybrid debt offerings;
- reduce its total debt since the end of 2019 by approximately NOK 63-65 billion (€6 billion-€6.2billion) to approximately NOK 16-18 billion (€1.57 to €1.77 billion);
- discontinue its long haul operations;
- reduce its fleet from 156 aircraft to 51 aircraft and secured competitive leasing arrangements on its retained fleet, including "Power by the Hour" agreements through Q1 2022.
- terminate aircraft purchased orders representing CAPEX commitments of approximately NOK 85 billion(€8.19 billion) in aggregated value; and
- pivot to a short-haul network primarily operating in Norway and the Nordics or from Norway/the Nordics to Continental Europe.

Jurisdiction

A central aspect of the restructuring was dealing with NAS, the Norwegian incorporated parent of the group, the main operating company, whose shares were listed on the Oslo Stock Exchange.

Mr Justice Michael Quinn in the Irish High Court (the **Court**), who delivered four written judgments over the course of the examinership, held that it was possible for the Court to appoint an examiner to a non-Irish incorporated company that did not have its centre of main interests (**COMI**) in Ireland, or any other EU country, but which was related to another company (e.g. a parent, subsidiary or sister company) that

(i) had its COMI in Ireland,
(ii) was in examinership and
(iii) where the debtor had a "*sufficient connection*" to Ireland.

In considering whether the Court should exercise that jurisdiction, Mr Justice Quinn was satisfied that the restructuring implemented through the examinership would be effective in other key jurisdictions including Norway, England and Wales. Mr Justice Quinn appointed Kieran Wallace of KPMG Ireland as Examiner of the companies.

Parallel Norwegian reconstruction

The Irish examinership was the main restructuring process for NAS and the only possible process for the Irish incorporated companies. It was supplemented in Norway through a Norwegian law reconstruction (restructuring) process for NAS. Mr Havard Wiker of Ro Sommernes law firm was appointed as the reconstructor and he proposed a reconstruction plan for NAS that replicated and implemented in full the terms of the Examiner's scheme (**Norwegian Plan**).

The scheme adopted certain necessary elements of Norwegian law in order to ensure that the Norwegian Plan could work. A novel element of the NAS scheme was that it authorised the Examiner to vote on behalf of all the creditors of NAS in favour of the Norwegian Restructuring Plan (even on behalf of those who voted against the Irish scheme) to be sure of the approval and implementation of the examinership scheme through the Norwegian Plan.

The examinership scheme and the Norwegian Plan were ultimately subject to recognition under Chapter 15 of the US Bankruptcy Code.

Fleet reduction - repudiation of aircraft leasing arrangements and the Cape Town Convention

A significant feature of the restructuring was the reduction of the group's aircraft fleet and the restructuring of NAS's guarantee obligations on the leasing arrangements. The companies sought to repudiate the leasing arrangements related to practically the group's entire fleet and secured a reduction in the fleet size and the leasing terms through a combination of the court applications and negotiations.

Mr Justice Quinn was satisfied that the Irish Court had jurisdiction to repudiate foreign law contracts, including the English law on leasing arrangements, for any company that was subject to the examinership process.

The Judge was also satisfied that the Cape Town Convention did not prohibit the Court from approving the repudiation of the aircraft leasing arrangements and associated guarantees and also held that the companies' liabilities linked to terminations could be written down by the examinership scheme on the basis that they were not "*modifications*" that required creditor consent.

Conditional investment

A unique feature of the examinership was the structure and timing of the proposed investment (which had a minimum target amount of NOK 4.5 billion (€433.6 million). There were three components to the proposed investment:

- Rights offering to existing shareholders of up to NOK 395 million (€38.06 million) – this was ultimately oversubscribed and raised the full amount.
- Private placement of new shares with key investors - this ultimately raised gross proceeds of NOK 3.73 billion (€359.4 million).
- A hybrid debt instrument paying cash and payment in kind interest with an equity conversion right: this was only available to creditors and raised NOK 1.875 billion (€180.7 million).

The nature and scale of the investment required meant that it was impractical to undertake the type of public offerings necessary to secure the investment until the restructuring was approved. Consequently, and in a significant departure from established practice, the Examiner presented the examinership scheme for approval to the creditors and to the Court *before* binding investment commitments were in place. In order to protect creditors, the examinership scheme and the Norwegian Plan were structured so that the terms of the restructuring, in particular the write-downs of the obligations to creditors, would not take effect *unless and until* the minimum capital investment of NOK 4.5 billion (€433.6 million) was raised.

The Court approved the examinership schemes on 26 March 2021 and fixed the effective date under the schemes as 26 May 2021 in order to facilitate the completion of the capital raising process by NAS. The capital raise was completed on 21 May 2021 and the restructuring became effective on 26 May 2021. In approving this aspect of the examinership, the Court demonstrated a willingness to deviate from established practice and provide the necessary flexibility to facilitate the complex capital raise required to secure the airline's survival.

Blended dividend

In addition to the novel approach to securing the investment, the examinership scheme for NAS provided for a "*blended dividend*" to go to unsecured creditors, representing 5% of their claims, comprising a proportionate share of a cash pot of NOK 500 million with the balance of the 5% blended dividend being converted into a debt instrument, titled a Dividend Claim.

The Dividend Claims could be held as debt instruments by the creditors or converted into equity in NAS that could be held or sold pursuant to a structured sale in the Autumn of 2021.

Treatment of existing equity

Before the examinership, NAS had undergone a previous debt to equity conversion which led to many leasing creditors taking significant equity positions in the company. The examinership required further dilution of NAS's existing equity, but not the complete extinguishment of the position. Rather, and excluding any new investment, existing shareholders were diluted to 4.6% (subject to certain assumptions).

The Court was satisfied that the significant, but not complete, dilution of existing equity holders was appropriate where the retention of a small portion of the equity preserved value and liquidity in the shares which, through the Dividend Claims, were a key part of the dividend to creditors of NAS.

Concluding remarks

The said examinership schemes were some of the most complex and innovative such schemes of arrangement approved by the Irish courts since the introduction of the process in 1990.

Through the examinership Norwegian Air has been able to transform its business into a flexible, Nordic-focused airline with a strong balance sheet. In doing so, it has shed significant legacy obligations under aircraft purchase contracts and leasing arrangements, its entire long-haul fleet and associated service arrangements.

The complexities and success of the restructuring underline the effectiveness of the examinership process (in addition to the separate Irish law schemes of arrangement) to implement complex international restructurings in Ireland. The innovative and novel features in the schemes formulated by the Examiner and ultimately approved by the Court's judgments demonstrate the fundamental strengths of the examinership process that also provide companies with automatic and effective protection against creditor actions, the ability to achieve cross-class cram-downs and to terminate legacy contracts.

William Fry LLP advised Kieran Wallace of KPMG Ireland, the Examiner, on the formulation and ultimate approval of the schemes of arrangement to implement the restructuring. ■

> ***A unique feature of the examinership was the structure and timing of the proposed investment***

For great ills, great remedies!

Catarina Serra reports on the new extraordinary proceedings for the economic sustainability of businesses in Portugal

CATARINA SERRA
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> *The new extraordinary proceedings [are] designed to allow the swift restructuring of businesses affected by the COVID-19 crisis*

Since the early days of the pandemic, the Portuguese legislator has taken several extraordinary measures to help businesses: the deferral of specific obligations, namely tax obligations and social security contributions, bank loans, performance in lease contracts; a furlough scheme for employees; the opening of lines of credit, just to name a few.

As far as insolvency law is concerned, the only measure for a long time has been the suspension of the duty to file for insolvency. The usefulness of such a measure is, however, limited, given the fact that, to begin with, the creditors and the debtor itself retain the right to request the opening of the insolvency proceedings.[1]

More recently, Law No. 75/2020 of 27 November 2020 introduced additional measures, from which the new extraordinary proceedings designed to allow the swift restructuring of businesses affected by the COVID-19 crisis stand out (Articles 6 to 15).[2] The national legislator has put into practice the old saying "for great ills, great remedies" and created extraordinary proceedings for an extraordinary crisis. But are these proceedings the (most) appropriate tool to meet the actual needs of the businesses (companies and entrepreneurs)?

Extraordinary proceedings?

Despite being extraordinary, the new proceedings – "the extraordinary proceedings for the economic sustainability of businesses", as they are called[3] – are very similar to other proceedings available in Portuguese law since 2012 called "Special Revitalisation Proceedings".[4] They both fall into the category of the proceedings known as "fast-track-court-approval-procedures" (accelerated procedures aimed at the judicial confirmation of a restructuring plan) and serve to overcome the limits of contractual relativity, to enable out-of-court agreements to become binding on all creditors, including the dissenting creditors and the creditors who have not even participated in the negotiations.

Naturally, there are differences. First of all, the new proceedings are temporary, meaning the tool is in force for a limited period (until 31 December 2021, although with the possibility of extension) (Article 18, 1/2). Then, they are more urgent than the other proceedings that are also insolvency and pre-insolvency related (Article 6, 6). They are free of costs for the debtor (Article 15) and lastly, they are usable only once (Article 9, 15).

It is, however, on the substantive level that the real differences (and, consequently, the peculiarities of the new proceedings) unveil. While the other are typical pre-insolvency proceedings, the new proceedings are applicable both when there is a likelihood of insolvency[5] and where there is actual insolvency. In either case, this happens if the situation is caused by the COVID-19 crisis (Article 6, 1). In accordance with Article 6, 3, it is necessary to demonstrate that, by 31 December 2019, the business had a positive balance sheet, i.e., the value of the assets exceeded the liabilities.

Supposedly, a positive balance sheet at that point demonstrates the causal link between the current situation of the business and the COVID-19 crisis. As a matter of fact, this is not completely true: according to Portuguese law, actual insolvency is the inability to pay debts as they fall due (Article 3, 1, of the Insolvency Act), therefore it is possible that the business is insolvent, even though the assets exceed the liabilities and vice-versa. The bottom line is: the new proceedings are accessible to businesses whose insolvency is not COVID-19-related and may be prohibited to others which are not and have never been insolvent.

Another – a second – relevant difference between the new proceedings and the others is the total absence, in the former, of a procedural stage for the lodging of claims. The new proceedings are, naturally, opened at the request of the debtor. This request is instructed with multiple documents, namely the restructuring plan, which must have been adopted by the legally required majority (Article 7, 1, d), and the alphabetical list of creditors, drawn up by the debtor (Article 7, 1, c). It is this list which, at first, serves as the basis for the court to verify the adoption of the plan for the purpose of opening the proceedings.

At a later stage, this list is challenged by the creditors and becomes final. It will then serve as the basis for the court to confirm, for the second time, the adoption of the plan for the purpose of its judicial confirmation. This is to

say: it all revolves around the list of creditors submitted by the debtor, contrary to what usually happens (the list is submitted to the court by the insolvency practitioner after the spontaneous lodging of the claims by the creditors). This certainly undermines or, in the least, reduces the possibility to determine with precision the definitive universe of creditors, but it is what allows the proceedings to be (more) accelerated.

An ultimate difference lies in the fact that, in the new proceedings, the court has the power/the duty to analyse the plan with a view to verify that it presents a reasonable prospect of ensuring the restructuring of the business (Article 9, 4, (b) (*ii*)). This means that the court has the power/the duty to refuse the confirmation of the restructuring plan if it lacks a reasonable prospect of ensuring the (economic) viability of the business.[6] Let us have a closer look at this feature and the difficulties that may arise.

Verifying viability and plan feasibility

In this regard, it should be said that it is the first time that the Portuguese law gives the court powers/duties to verify the feasibility of the plan.[7] The legislator was certainly trying to introduce something new in the proceedings or, more than that, something that evokes the Preventive Restructuring Directive.[8] As a matter of fact, Article 10(3) of the Directive provides that "Member States shall ensure that judicial or administrative authorities are able to refuse/to confirm a restructuring plan where that plan would not have a reasonable prospect of preventing the insolvency of the debtor or ensuring the viability of the business."

The desire to anticipate the accommodation of some of the measures laid down in the Directive is quite understandable, considering that Portugal will not, contrary to what was expected, have implemented it by the end of the deadline (17 July 2021).[9] Still, it may not have been the smartest move since the application of this particular measure faces several difficulties.[10]

To cut a long story short, the control of the feasibility of the restructuring plan is confronted with three fundamental obstacles. The first is the alleged lack of legitimacy of the judicial authority to replace the creditors or, more precisely, to substitute their will with its own.[11] Put in other words: every plan implies a certain degree of risk which the creditors assume whenever the plan is adopted by the required majority; on what grounds might the judge ultimately contradict the

> ***The desire to anticipate the accommodation of some of the measures laid down in the Directive is quite understandable***

> *A legislative review aimed at introducing amendments where needed appears as a reasonable solution and is a better attitude than just to sit and wait for the proceedings to fall out of use*

will of the majority of the creditors?

The two other objections are of a practical nature and concern the costs (time and money) that such a control of the plan entails. To be sure, neither the judge nor the insolvency practitioner is adequately equipped to make a prognosis about the future viability of the business. In order to have a rigorous assessment, the task must be assigned to external experts/independent professionals.[12] When this is not the case (when it is not possible to spend enough time and money), it is inevitable that the results are very modest, hence deprived of utility.[13]

Coming back to the Portuguese law, despite the above-mentioned difficulties, the court is required to verify that the restructuring plan presents a reasonable prospect for ensuring the viability of the business for the purpose of confirming or refusing the plan (Article 9, 4, (b) (*ii*)).[14] Bearing in mind that the new proceedings are (superlatively) urgent as well as free of costs for the debtor, it is understandable that such an assessment must be performed in the same time frame as the assessment of the other prerequisites for the confirmation of the plan (i.e., ten days) and on the sole basis of the opinion of the insolvency practitioner (Article 9, 3). Still, it is possible to wonder if such an assessment (i.e., obtained in such a way) is of any worth.

Potential structural weaknesses

In addition to the points already mentioned, it may be argued that the new proceedings suffer from two congenital and structural weaknesses. In the first place, being a procedural tool as they are, they do not contribute to alleviating the burden on the courts (the number of lawsuits pending). Furthermore: given that the new proceedings are more urgent than the other pre-insolvency and insolvency proceedings, they inevitably imply the delay of the latter.

In the second place, and more importantly, the new proceedings are not aimed at promoting negotiations between the debtor and his creditors. In the aftermath of the COVID-19 crisis, it is possible to argue that the most pressing need of the debtor company is to be granted a breathing space so that it can negotiate more easily with its creditors and persuade the majority to accept the debt restructuring. Yet, this is precisely what the new proceedings do not ensure since the adoption of the restructuring plan by the required majority is a prerequisite/a premise for the opening of the proceedings.

If the mentioned shortcomings actually hinder or prevent the success of the new proceedings or not, one thing is certain: the number of proceedings opened so far is completely insignificant. All things considered, it may just be the case that the new proceedings are not appealing, as designed, to companies and entrepreneurs, and therefore will not be used.

Summary

A legislative review aimed at introducing amendments where needed appears as a reasonable solution and, for certain, is a better attitude than just to sit and wait for the proceedings to fall out of use. For sure, the work is not stimulating since the proceedings are supposed to be in force only until the end of the year. Then again, *for great ills, great remedies…* ■

Footnotes:

1 See on the topic Catarina Serra, "Directors' duties under COVID-19 legislation – A comparative perspective", in: *Eurofenix – The Journal of INSOL Europe*, 2020, 80, 20 ff.

2 Unless otherwise stated, references to articles are to those of Law no. 75/2020 of 27 November 2020.

3 The proceedings are called, in Portuguese, "Processo Extraordinário de Viabilização de Empresas" (acronym: "PEVE". For a first look at them, see Catarina Guedes De Carvalho, "Portugal's Extraordinary Business Viability Process", in: *Eurofenix – The Journal of INSOL Europe*, 2020-2021, 82, 36 ff.

4 They are called, in Portuguese, "Processo Especial de Revitalização" (acronym: "PER"). For a quick look at them, see Catarina Serra, "Reforms in Adverse Economic Climates: How Reforms Take Place in the Eurozone – Part I: Portugal", in: Paul Omar/Jennifer Gant (editors), *Research Handbook on Corporate Restructuring*, Cheltenham, Edward Elgar Publishing, 2021 (forthcoming).

5 The Portuguese doctrine speaks rather of pre-insolvency, while the Insolvency Act refers to two different, despite close, situations: the situation of economic difficulties and the imminent insolvency.

6 "In economic terms, viability implies the ability of the business to provide an appropriate projected return on capital after having covered the operation costs". See Francisco Garcimartin, in: Paulus/Dammann (editors), European Preventive Restructuring – *Article-by-Article Commentary*, Munich/Oxford/Baden-Baden, Beck/Hart/Nomos, 2021, 92.

7 It is interesting to know that, according to the tenth guiding principle of out-of-court restructuring ("princípios orientadores da recuperação extrajudicial de devedores", approved by the Resolution of the Council of Ministers No. 43 of 25 October 2011), the proposals for debt restructuring shall be based on a feasible and credible business plan. Feasibility and credibility imply that the plan contains, firstly, information on all the steps that the business must take in order to overcome its financial problems, secondly, the demonstration of the debtor's ability to generate the financial flows necessary for debt restructuring and, thirdly, proof that the plan is not simply a means of delaying the opening of insolvency proceedings (i.e., delaying tactics).

8 On the foreseeable effects of the Directive on the Portuguese restructuring framework, see Catarina Serra, "The Directive on restructuring and insolvency from a Portuguese Perspective – A brief approach to preventive restructuring frameworks", in: María Isabel Candelario Macías/Stefania Pacchi (Dir.), *La Directiva de la UE 1023/2019 sobre insolvencia (Estudios desde diferentes ordenamientos)*, Valencia, Tirant Lo Blanch, 2021 (forthcoming).

9 As provided in Article 34(2) of the Directive, Portugal has notified to the Commission the need to make use of the option to extend the implementation period.

10 See on the topic Catarina Serra, "The new extraordinary proceedings for the economic sustainability of businesses: the viability or feasibility test", in: *PoLaR – Portuguese Law Review*, 2021, vol. 5, 1, 1 ff.

11 See Lorenzo Stanghellini/Riz Mokal/Christoph Paulus/Ignacio Tirado (editors), *Best Practices in European Restructuring – Contractualised Distress Resolution in the Shadow of the Law*, Milano, Wolters Kluwer / CEDAM, 2018, 202.

12 See Francisco Garcimartin, In: Paulus/Dammann (editors), *European Preventive Restructuring – Article-by-Article Commentary*, cit., 175.

13 See Nicolaes Tollenaar, *Pre-insolvency Proceedings – A Normative Foundation and Framework*, Oxford, Oxford University Press, 2019, 229-230.

14 There are other examples among European jurisdictions, such as the Italian, in which, for the purpose of confirming a *concordato preventivo* or an *accordo di ristrutturazione dei debiti*, the court shall verify the economic feasibility of the plan (Article 48, 3, *Codice della Crisi d'Impresa e dell'Insolvenza)*.

View from the UK: A busy Autumn

Duncan Swift looks at the latest legislative and policy developments in the UK

While last year's parliamentary agenda was, for the profession at least, dominated by the Corporate Insolvency and Governance Act and the return of Crown Preference, 2021's has contained a number of different policy proposals that could affect the profession.

In the run up to the Summer recess, three of them progressed, with one continuing its journey to the Statute Book.

Strengthening trust in corporate governance

The Government is reviewing responses to its 'restoring trust in audit and corporate governance' consultation, that aims to strengthen the framework for how major companies are run and audited in the UK, and build on recommendations made by three independent reviews from 2018.

The outcomes from this policy development could make significant changes to how the largest businesses in the UK are run, so while it is less critical for insolvency and restructuring, it's an important one for the UK and its reputation as a good place to do business.

With the incoming Audit, Reporting and Governance Authority (ARGA) set to be given powers to investigate and sanction directors of public interest entities, effective cooperation with the Insolvency Service, which will retain its director disqualification responsibilities, will be critical to prevent a fragmented approach to the monitoring and enforcement of directors' adherence to their duties and responsibilities.

Of equal importance will be collaboration between these two organisations and the profession – so directors understand the importance of seeking advice as early as possible, and are aware of their roles and responsibilities.

Reviewing the rules

Another area the Government has recently consulted on is its review of the Insolvency Rules. The landscape has changed significantly since these were introduced in 2017, and there are several modifications we'd like to see made to reflect changing demands on the profession.

For instance, simplifying the requirements of what insolvency practitioners are required to include in progress reports would make it easier for creditors to identify what work has been carried out and whether the reports made are accurate.

In addition to this, introducing discretionary powers for insolvency practitioners to call physical meetings where necessary would save creditors time and money by reducing the need for postal communications, and enable IPs to better carry out their duties.

And, clarifying the rules around the involvement of secured creditors once they've been paid would bring these rules into line with the approach for engaging with unsecured ones, and further improve overall creditor engagement.

Alongside these modifications, the introduction of additional guidance to help new professionals, creditors, or those less familiar with the Rules to navigate them would be helpful, particularly since the "common parts" have been expanded.

Increasing scrutiny of company dissolution

The Rating (Coronavirus) and Directors Disqualification (Dissolved Companies) Bill, published in June, contained proposals to close the loophole preventing directors of dissolved companies from facing the same level of scrutiny as those directors whose firms are closed through a solvent or insolvent liquidation.

This is positive news and should help to deter directors from using dissolutions to avoid scrutiny and liabilities. However, the Government has yet to clarify how the investigation and prosecution of these directors will be funded, and how insolvent dissolution returns to the wider body of creditors – not just the Exchequer – will be secured.

We have also reiterated our calls for the Government to reduce the cost and improve the ease with which dissolved companies can be returned to the companies register, as this will be crucial in enabling their assets to be realised for their creditors.

The next step in the Bill's legislative journey is the report stage in the House of Commons in September. It will be interesting to see how the Government will address these and other issues with the proposed legislation, any suggested amendments to it – and to see how it responds to the submissions to the other consultations which closed in the summer. ■

DUNCAN SWIFT
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> ***Simplifying the requirements of what insolvency practitioners are required to include in progress reports would make it easier for creditors to identify what work has been carried out***

Restructuring Stockmann, the iconic department store operator

Jyrki Tạhtinen and Robert Peldán report on the most significant restructuring in Finland since the 1990s

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> *The scale of this restructuring was vast and challenging with some 2,000 foreign and domestic creditors*

Stockmann Oyj Abp ("Stockmann"), founded in 1862, is the largest department store operator in Northern Europe. Stockmann's group consolidated revenue in 2019 was €960.4 million and the number of employees was 7,000.

Stockmann is one of the most iconic brands in Finland and the only top-tier luxury department store operator in the Finnish retail market; some even call it the Harrods of Finland. Stockmann operates six department stores in Finland and one in Tallinn and Riga each. Stockmann owns a Swedish company Lindex AB that operates more than 460 stores selling lingerie and women's and children's clothing globally.

The restructuring of Stockmann is the most significant restructuring case in Finland since the economic depression of the 1990's, and one of the largest restructuring proceedings to occur in Finland in the recent years. It is very rarely that companies listed on a stock exchange like Stockmann commence restructuring proceedings. Stockmann found itself in financial difficulties due to unsuccessful expansions, long-term decrease of footfall in the department stores and last but not least, an e-commerce platform that was not able to compete with its competitors.

The striking blow for Stockmann, as for many other brick-and-mortar stores, that ultimately put the company on its knees, was the COVID-19 pandemic. Unlike in many other restructurings, Stockmann wasted no time to file for restructuring and as a result, Stockmann had sufficient amount of liquidity at hand once the restructuring proceedings were commenced.

Complex finance structure and unresolved legal issues

The company's financing structure was complex: bank loans and bonds sharing the same security (the flagship real estates in Helsinki, Riga and Tallinn), commercial paper and hybrid loans. It was widely feared that the case would have substantial negative systemic effects on the loan markets (especially commercial paper and hybrid loans). The scale of this restructuring was vast and challenging with some 2,000 foreign and domestic creditors involved in the proceedings.

The case involved many cross-border-related issues and a number of department store lease agreements had to be renegotiated in connection with the proceedings. The proceedings have put the current Finnish Restructuring Act to the test on several legal questions, and the restructuring administration as well as creditors and contracting parties have sought expert opinions from university professors on various legal issues.

The restructuring proceedings of Stockmann involved the use of various financial advisers to support the administration in:

(i) valuating the company's real estate and business assets (including the wholly-owned subsidiary Lindex AB);
(ii) evaluating the group's business operations, forecasting the cash flow and the future strategy; and
(iii) putting together a plan to strengthen the company's operations and its balance sheet.

The administration has solved and handled a notable number of legal questions related to the debtor's agreements. The active creditors committee consisted mostly of senior financiers (instead of insolvency lawyers). Most of the senior financiers involved noted that the case is quite significant to the Finnish market as a whole, with an expectation that solutions adopted here would be followed in other cases for years to come.

More than 10 legal opinions have been acquired from Finnish insolvency law professors during the process. Most of them were related to matters such as what the reasonable amount of compensation can be for the premature termination of lease agreements, the extent of set-off rights of the tax authorities and pension insurance creditors, and the expenses of the creditors participating in the restructuring proceedings that should be paid by the debtor. There are still several ongoing disputes that are awaiting court proceedings in arbitration tribunals as well as in ordinary courts. The value of these disputes is close to €100 million.

Swift execution and new tools

The Finnish Restructuring Act does not provide for a debt-to-equity conversion, yet it was extremely crucial for the creditors' overall position and operation of

the relevant markets that a conversion could take place. Many innovative solutions were introduced into the restructuring programme, including a partial debt-to-equity swap for the hybrid and unsecured *pari passu* debt, combining different share classes and sale and lease back of the real estate (Helsinki, Tallinn and Riga department store properties) to provide a payment of approximately €400 million to settle the first rank secured debt (bank loans and bonds) in order to deleverage the balance sheet. A "game changer" is a novel option for the unsecured creditors to convert their 8-year restructuring plan payments (80% of their receivables) into 5-year bonds secured by shares in Lindex AB, thereby making the plan payments liquid and allowing for the company to access the financing market and come out of the restructuring in an expedited manner if its business succeeds.

By implementing the restructuring programme, Stockmann is paying off the abovementioned first rank secured debt, converting 20% of its unsecured debt (including commercial papers and suppliers) and 50% of hybrid loans into its shares, and is combining its A and B share classes into one share class. The remaining 80% of the unsecured debt is subject to the 8-year payment plan with the abovementioned conversion option into a secured 5-year bullet bond at each creditor's discretion. A prospectus respecting both securities and restructuring laws was published relating to both the equity and the bond offerings.

The unsecured creditors were entitled to convert their receivables under the payment programme of the restructuring programme, by way of set-off, to senior secured bonds on a euro-for-euro basis. The terms of the bonds are quite novel as they had to combine features of the restructuring law with the terms usually found in the bond market. The aggregate principal amount of the bonds subscribed for by the unsecured creditors was EUR 66 million. Following the share and bond conversions, the remaining unsecured restructuring debt amounts to approximately EUR 21.8 million. The result: save for a haircut of the (subordinated) hybrid debt (partially offset by a price increase of the shares received in conversion), the creditors and the shareholders have suffered very little loss and the feared systemic effects on the markets have been avoided.

The District Court of Helsinki approved the restructuring application on 8 April 2020, only two days after the restructuring application had been filed. Borenius' Attorney Jyrki Tähtinen acted as the restructuring administrator of Stockmann, with the restructuring plan filed to the District Court on 14 December 2020. The restructuring programme received nearly unanimous support of the creditors that provided their opinions on the programme.

Due to this overwhelming support, the restructuring programme was approved by the District Court of Helsinki in an expedited procedure on 9 February 2021 and an administrator was appointed to oversee the implementation of the restructuring programme. Stockmann's restructuring proceedings spanned ten months. This is a remarkable achievement, taking into consideration Stockmann's status as a large listed company and knowing that on average restructuring proceedings take longer. The quick conclusion of Stockmann's restructuring proceedings required considerable legal engineering and process management. It did not go unnoticed that the District Court acted without any delays during the whole term of the restructuring proceedings, which was very much appreciated by all of the parties involved.

Post-restructuring era

Partly due to the restructuring measures and partly to the COVID-19 situation easing, Stockmann's operations for Q2/2021 were profitable and the stock price for Stockmann's shares increased for over 20 percent. Both Stockmann and Lindex improved their results, thus, Stockmann group adjusted operating profit improved from EUR 0.8 million to EUR 26.7 million whereas the liquidity increased and amounted to EUR 155 million at the end of June. During the first six months of 2021, lease liabilities decreased and net gearing improved. The conversion of the debt to equity and new bonds, in accordance with the restructuring programme, was successfully completed in July. ■

Photo by Kenneth Luoto

> ***The quick conclusion of Stockmann's restructuring proceedings required considerable legal engineering and process management***

Footnote:
The restructuring programme, which is in English, can be found under the following link: www.stockmanngroup.com/documents/10157/1446412/Draft+restructuring+programme+Stockmann+plc+Unofficial+Translation+EN%2815225971.1%29.pdf/2881006a-93e5-99df-3ee8-187666bc8ff4

Chapter 11 under fire: U.S. Congress seeks to end forum shopping

David H. Conaway reports on the recent testimony by Professor Adam Levitin which brings to light new abuses of the Chapter 11 system

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> ***Despite its "success" as a strategic business tool, Chapter 11 has come under scrutiny lately as corrupted by intense "judge shopping"***

Since its beginning in 1978, Chapter 11 has been the primary tool for financially distressed U.S. and foreign companies to efficiently restructure their balance sheets and business operations.

Successful Chapter 11 cases have allowed prominent financially distressed companies to reorganize or pursue going concern asset sales, adding economic value to the global economy. This includes Lehman Brothers, General Motors, Enron, MF Global, Chrysler, Texaco, US Steel, American Airlines, Delta, United, and the list goes on.

Chapter 11 has become an integral part of the U.S. and global economy and become highly regarded and often a guide for other countries' insolvency laws.

Despite its "success" as a strategic business tool, Chapter 11 has come under scrutiny lately as corrupted by intense "judge shopping". Since its inception, a significant number of Chapter 11 cases, especially mega cases, have been filed in the federal Southern District of New York (SDNY) and Delaware, given those jurisdictions' respective "financial center" expertise and the corporate domicile for corporations. Recently Texas, particularly Houston, has also become a Chapter 11 "hotspot" as well.

On 28 July 2021, Georgetown Law School Professor Adam Levitin testified before the Committee on the Judiciary Subcommittee on Antitrust, Commercial, and Administrative Law United States House of Representatives. The topic was: "*Oversight of the Bankruptcy Code, Part I: Confronting Abuses of the Chapter 11 System.*"

Professor Levitin notes that 57% of large public company Chapter 11 cases in 2020 were heard by 3 out of 375 U.S. bankruptcy judges, Judge Robert Drain of the Southern District of New York (SDNY), and Judges David Jones and Marvin Isgur both of the Southern District of Texas. Judge Jones presided over 39% of all U.S. mega cases in 2020. In fact, Shumaker has been involved in several significant Chapter 11 cases in 2020/2021 in the Southern District of Texas, including Neiman Marcus, McDermott International (Chicago Bridge & Iron), Technicolor and Dean Foods (25+ household name dairy brands). In essence, Professor Levitin's thesis is that judge shopping has allowed debtors to game the system to the disadvantage of the Chapter 11 process and creditors.

Judge shopping is clearly intentional, based upon case assignment procedures in various bankruptcy courts. In the SDNY, there are eight judges in Manhattan and one in White Plains, Judge Robert Drain, who presided over the Purdue Pharma (manufacturer of OxyContin, a highly addictive opioid) Chapter 11 case. Purdue Pharma did not file Chapter 11 in Connecticut where it is headquartered, or in Delaware where it is incorporated. Rather, Purdue Pharma changed its service of process address to be assigned to the White Plains division of the SDNY. Why did Purdue Pharma want Judge Drain as its judge? According to Professor Levitin's testimony, it is because of the belief that Judge Drain would be inclined to approve a Plan of Reorganization that included broad releases imposed on creditors of non-debtor related parties, including the Sackler family who controlled Purdue Pharma.

Professor Levitin's written testimony included the following excerpts about the Purdue Pharma case:

> *Purdue is a closely held company owned by the immensely wealthy Sackler family, whose names grace major museums. The Sacklers functioned, according to the Department of Justice, as Purdue's "de facto CEO." The Sacklers also received as much as $13 billion in dividends and other payments from Purdue over the years, including after Purdue's contribution to the opioid crisis became clear.*
>
> *Purdue has proposed funding its plan primarily through a $4.275 billion contribution from the Sackler family, to be paid out over ten years. The Sacklers agreed to this contribution in exchange for a release not only of Purdue's claims against them, but also for a release of any claims Purdue's creditors – that is, the opioid victims – have against them.*
>
> *If Purdue's plan is approved, the Sacklers – who have never filed for bankruptcy – will get the equivalent of a discharge of their liabilities related to the opioid crisis. What's more, the release of the Sacklers bind all of Purdue's creditors, regardless of their consent.*
>
> *In short, the Sacklers will get the benefits of bankruptcy without having to go through the bankruptcy crucible. They*

will not have to make public disclosure of the finances under penalty of criminal law. They will not have to surrender control of their assets to an independent trustee. And they will not have to surrender all of their wealth to their creditors, other than the minimal assets exempted by the Bankruptcy Code.

To the contrary, the Sacklers will walk away from Purdue – and the misery of the opioid crisis – billionaires several times over... And, the Sacklers will likely seek to take a $4.275 billion tax deduction for their contribution to the Purdue bankruptcy plan. In other words, the Sacklers will emerge from their Purdue bankruptcy settlement even richer than when they went into it.

Professor Levitin further posits that there are a handful of U.S. bankruptcy judges who are "eager" to attract Chapter 11 mega cases, and must compete to get them.

Lest this sound abstract, consider the relationship between bankruptcy powerhouse "BigLaw" (actual name deleted for this article) and the Delaware bankruptcy court. In the years prior to 2017, BigLaw had previously regularly filed 3-4 large cases in Delaware annually, never going more than a few months without filing a case. Delaware got over have (sic) of BigLaw filings in these years. BigLaw, however, ran into trouble in its representation of (particular Chapter 11 debtors, names deleted) in Delaware.

After these incidents, BigLaw withdrew its business from Delaware: 327 days elapsed before BigLaw's next Delaware filing, resulting in an unprecedented gap of 616 days between BigLaw filings in Delaware. During this time, BigLaw filed 14 megacases in other venues, particularly Houston, New York, and Richmond. The message was clear – give us grief, and we'll take our business elsewhere.

What are the other advantages of having the "right" Judge?

Evasion of the plan confirmation process

Frequently in Chapter 11 cases, in the first few days or weeks of filing, the Bankruptcy Court approves motions for post-petition financing, restructuring support agreements (RSAs), Section 363 sales of all assets free and clear of liens or assumption of "consulting agreements" for all-out liquidation sales.

Transactions that aim to end-run safeguards of the plan process are considered "sub rosa plans" which effectively determine the outcome for all creditor constituents within the first few days or weeks of the case. The early court approval evades the requirements and safeguards for the creditor constituencies imbedded in the Chapter 11 plan of reorganization process including the right to vote on a plan.

"Payday before Mayday"

Those who control companies that file Chapter 11 frequently seek extraordinary compensation as incentive to retain them. In 2005, the U.S. Congress amended the Bankruptcy Code to limit this practice, but left a loophole for payment. Professor Levitin's written testimony on this issue:

The Bankruptcy Code . . . makes it exceedingly difficult to offer retention bonuses to "insiders," a group that includes the debtor's officers and directors. While the term "officer" is not defined, it undoubtedly covers all C-suite executives with "officer" in their titles.

The Code prohibits retention payments unless the court finds that (1) the insider's services are essential to the survival of the debtor; (2) the executive has a bona fide job offer at another business at the same or greater rate of compensation; and (3) that the payment is no more than ten times the amount of the average retention bonus paid to non-management employees in that year.

Rather than deal with KEIPs (added, key employee incentive programs), however, debtors have increasingly turned to making payments to insiders on the eve of bankruptcy. While unseemly, this practice is currently perfectly legal; the Bankruptcy Code does not apply until the debtor files for bankruptcy.

As countries around the globe seek to modify and modernize their insolvency laws, Professor Levitin's observations and proposed amendments to Chapter 11's Bankruptcy Code are instructive. Despite these issues, Chapter 11 has been and continues to be an excellent strategic tool and forum to restructure and preserve economic enterprises which adds untold value to the global economy.

In fact, Chapter 11 channels virtually all issues dealing with the companies' balance sheets, capital structures, debt structures, major contracts, employment related issues, taxes and more into a uniquely efficient and singular forum. Yet, it is prudent for the U.S. Congress to consider Professor Levitin's recommended amendments to the Bankruptcy Code. After all, since 1978 the global economy, its industries and companies and how they are capitalized and funded have become significantly more complex, diverse and, as Lehman Brothers demonstrated, more globally interwoven.

Largely in response to the Purdue Pharma case, on 23 September 2021, Senators Warren (D-MA) and Cornyn (R-Texas) introduced the bipartisan Bankruptcy Venue Reform Act of 2021, which requires big businesses and wealthy individuals to file bankruptcy in their home states or where their largest assets are located. A step in the right direction. ■

> ***Chapter 11 has been and continues to be an excellent strategic tool and forum to restructure and preserve economic enterprises***

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*

Italy: Urgent measures to prevent company crisis and postponement of insolvency

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As occurred in all the world, the spread of the COVID-19 virus has had a strong negative impact on economic and commercial activities, causing serious company defaults and the consequent bankruptcy of many companies.

In Italy, due to an increase of the number of companies in financial difficulties or insolvent, and aware of the need to provide new and effective tools to prevent and deal with the crisis situation, the Legislator has been actively researching and designing the aforementioned tools.

Thus, on 24 August 2021, Law Decree no. 118 has introduced urgent measures concerning the business crisis and corporate recovery which have been published in the Official Gazette ("*Gazzetta Ufficiale*").

The Decree prescribes four types of intervention and in particular:

- the postponement until 16 May 2022 of the entry into force of the Company Crisis and Insolvency Code (Legislative Decree no. 14/2019);
- the Amendment of the Bankruptcy Law and, specifically, of the provisions concerning the procedures of arrangement with creditors and the restructuring agreements. These changes have been inserted with the aim of encouraging a positive exit from the crisis, trying to avoid the bankruptcy of the companies;
- the postponement of entry into force of the alert measures foreseen by the Legislative Decree n° 14/2019 until 31 December 2023. This postponement is aimed at testing the effectiveness of the negotiated settlement and at reviewing the alert mechanisms contained in the Company Crisis and Insolvency Code; and
- undoubtedly the most significant intervention is the introduction of the "*Negotiated settlement of the crisis*", which represents a new tool to help companies in difficulty to recover.

The main characteristics of this new tool are:

- it can be used by both commercial and agricultural entrepreneurs who find themselves in conditions of financial imbalance which makes a future crisis or insolvency probable;
- it is an exclusively voluntary composition process characterized by absolute confidentiality;
- the access is allowed through an online platform accessible to entrepreneurs registered in the business register through the institutional website of each chamber of commerce, industry, crafts and agriculture. The contents of the platform, the indications for the preparation of the recovery plan and the methods of the practical test – designed to verify the feasibility of the recovery operation – will be defined by the Decree of the Ministry of Justice to be adopted within thirty days from the date of entry into force of the Decree n°118/2021; and
- the entrepreneur who decides to use this tool will be supported by an independent expert with specific skills, as a third party, who will have the task to facilitate negotiations between the entrepreneur, the creditors and any other interested parties, in order to identify solutions for overcoming the crisis, e.g., the sale of the company (as a going concern) or its branches. The expert will be chosen from a list of experts trained by the territorially competent chamber of commerce, industry, crafts and agriculture. The appointment of the expert is made by a Commission that remains in charge for two years. ■

Estonia: The challenges of further digitalisation in insolvency proceedings

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Estonian digital governance has been among the best in the world, with almost 99% of state services available online.[1]

However, one could argue that insolvency proceedings have not been smooth or digital enough so far. Several years of insolvency law revision in Estonia have finally reached their momentum and significant amendments were enacted as of 1 February 2021.[2] The aim of these changes to the Estonian Bankruptcy Act is to make insolvency proceedings faster, more cost-efficient and transparent. This should also increase satisfaction of claims of creditors and decrease the number of assetless insolvencies.

The online framework

In Estonia, all bankruptcy petitions and documents can be submitted via the state electronic e-Filing system (called '*e-Toimik*').[3] The site also allows for tracking the status of insolvency proceedings and receipt of documents.

If a creditor insists that the bankruptcy petition must be heard at a court hearing, the creditor must indicate this in the bankruptcy petition. Otherwise, the creditor is deemed to agree to the adjudication of the matter by way of written (digital) proceedings. Thus, written (digital) proceedings are more favoured.

Creditors are required to notify the bankruptcy trustee of their claims against the debtor arising before the declaration of bankruptcy within two months from the date of publication of the notice concerning the bankruptcy of the debtor in the official electronic publication (*Ametlikud Teadaanded*).[4]

As a completely new method introduced by the changes, all creditors' claims are defended in

written (digital) proceedings managed and resolved by the court and not at a creditors' meeting or separate litigation over claims, which used to be a very lengthy process in Estonia.

On the basis of the proofs of claim received within one month after expiry of the period for submission of the creditor's claims, the bankruptcy trustee prepares a preliminary list of creditors which he or she presents to the creditors for examination by means of the official electronic publication. Any creditor may submit written substantiated objections to other creditors' claims. If no objections have been filed by a bankruptcy trustee or any creditor, the trustee shall submit the final list of creditors to the court via the *e-Toimik* system.

Afterwards, the court must adjudicate the submitted objections, positions, requests and petitions enclosed with the list of creditors on the merits, determine the rankings of claims and the distribution ratios and approve the list of creditors within 30 days. The court will publish a notice concerning a ruling on approval or refusal to approve a list of creditors in Ametlikud Teadaanded and send the ruling to the trustee, the debtor who filed an objection, the creditor who filed or received an objection and the creditor whose request for restoring the claim was not satisfied.

Further developments

The submission and receipt of all related documents via the *e-Toimik* system and publication of relevant notices in *Ametlikud Teadaanded* has been seen as an initial small step towards better digitalization of not only insolvency proceedings, but the whole judicial sector in Estonia.

Summary

Thus far, the judicial sector has been lagging behind in terms of digitalizing procedures and cross-border cooperation. In an increasingly digital society, cross-border judicial cooperation will rely more and more on e-justice solutions to facilitate the interaction between different national and European actors in legal procedures.

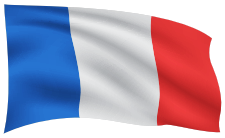
In this light, e-CODEX will offer a European digital infrastructure for secure cross-border communication and information exchange in criminal and civil law. It is a matter of pride to see that Estonia has been chosen as a forerunner and optimal location for this cross-border data exchange as well. There will be interesting and challenging times ahead, indeed! ■

Footnotes:

1 https://e-estonia.com/
2 https://www.riigiteataja.ee/en/eli/521012021001/consolide
3 https://etoimik.rik.ee/
4 https://www.ametlikudteadaanded.ee/eng/index

Thus far, the judicial sector has been lagging behind in terms of digitalizing procedures and cross-border cooperation

Legislative news from France



JEAN-LUC VALLENS
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During the course of the summer of 2021, the French legislator has adopted two important texts. The first text is a law of a temporary nature, which aims to allow companies to recover from the effects of the sanitary crisis, the second is an ordinance which transcribes the European Directive of 20 June 2019 on preventive restructuring frameworks and insolvency proceedings into the French Commercial Code.

Temporary crisis exit proceedings

The law of 31 May 2021 (applicable for a period of two years) has put in place specific proceedings for the smallest companies (with *less than 20 employees and with a turnover of less than €3 million*) to favour their exit from the crisis. These proceedings are of a voluntary nature, meaning that it is only available upon a demand of a debtor already insolvent. The eligible debtor has to submit a provisional budget showing that its business is profitable. The debtor must also have sufficient funds to pay the wage claims and be able to justify its ability to draw up a draft plan.

This procedure may also be applicable to a company being already in the implementation phase of a safeguard or reorganisation plan and expecting to become again insolvent. The specific proceedings can have a *maximum* duration of three months during which an insolvency practitioner draws up a list of claims from the debtor's accounting documents, which is then sent to each creditor, for a possible updating.

The proposals for settlement are drawn up on the basis of this list. Indeed, to enhance simplicity in these specific proceedings, the law sets aside the formalities for the lodgment and verification of claims.

The opening of such voluntary proceedings obviously obstructs any application for reorganisation or liquidation proceedings filed by creditors.

The plan must provide instalment payments of the claims mentioned on the above list: this precaution is likely to make the debtor company responsible from the beginning of the proceedings. Other creditors are not affected by the plan, but the stay of individual lawsuits applicable from the opening of the proceedings is nevertheless opposable to all of them. The plan also protects maintenance claims, wage claims, claims arising from tort, as well as the smallest claims.

Finally, current contracts remain in force: their termination is not open under the ordinary-law conditions of the Commercial Code. The same rule applies to third party claims on assets held by the debtor.

If a plan is not adopted within this period of three months, reorganisation or liquidation proceedings may be ordered under the current conditions laid down in the Commercial Code.

These specific proceedings will cease to apply in 2024, unless extended by legislation and subject, of course, to plans made under these temporary legislative arrangements.

Transposition of the European Directive of 20 June 2019

The Directive of 20 June 2019 on preventive restructuring frameworks has been implemented into French law with an ordinance of 15 September 2021, which introduces the standards enshrined by the European legislator while coordinating the Commercial Code with the domestic rules on security interests.

The goals of the new legislation are numerous: to improve the attractiveness of French law, to prevent the dissemination of non-performing loans, to encourage the maintenance of economic activity and jobs, to ensure the balance of interests involved and to guarantee the right of the debtors to a second chance. Its objective is also to harmonise French and German laws according to the Treaty on Franco-German integration and cooperation concluded between the two countries in 2019.

The ordinance makes few changes to the current effective mechanisms of French law and its administrative organisation, such as the preventive proceedings known as conciliation, which served as a model for the Directive concerning the rules for protecting the rights of employees and the consequences of the closure of liquidation proceedings resulting in the debtor's full discharge. Nor does it change the professional rules applicable to insolvency practitioners or to the specialisation of judges (these administrative aspects are already in accordance with the Directive).

That being said, each of the procedures is subject to amendments incorporating the provisions of the Directive.

Conciliation

The debtor will be entitled to file for a time extension against a creditor who refused to give him a delay and a postponement of payments for claims not yet due; in the case of the resolution of an amicable agreement, securities constituted during the conciliation procedure may be declared as lapsed (if this lapse is not waived by a contractual clause, except where the rules of the suspect period are applicable); the auditor may finally warn the president of

> ***The ordinance makes few changes to the current effective mechanisms of French law in preventive proceedings***

the commercial court of the foreseeable difficulties of the company under his supervision without any delay.

Accelerated safeguard proceedings

At the end of an unsuccessful conciliation, accelerated safeguard proceedings may be opened for a period of two months or a maximum of four months, at the request of the debtor, if a plan is likely to be approved by a majority of creditors. In this case, classes of creditors will be constituted: these accelerated safeguard proceedings constitute the preventive restructuring procedure as prescribed by the Directive: the claims will be established on the basis of the debtor's declaration subject to the updates possibly made by creditors; all companies, regardless of their size, will be able to access such proceedings. If the state of indebtedness allows it, the effects of the proceedings may finally be limited to financial creditors only.

Safeguard and reorganisation proceedings

The duration of the observation period in safeguard proceedings is limited to 12 months, except for SMEs, for which the preparation of a plan may take longer. Special provisions are provided for insolvency proceedings: creditors will have to lodge their claims as well as their securities, failing which those claims and securities will not be enforceable against the insolvent debtor.

Constitution of classes

To take into account the provisions of the Directive, the ordinance provides for a division of creditors and other stakeholders (such as shareholders) into classes. The 'class formation' will concern only those whose rights may be affected by the plan. The distribution will be made by the court-appointed administrator ('*administrateur judiciaire*') and concerns the creditors with sufficient commonality of interest in a same class. This distribution will have to take into account subordination

agreements prior to the proceedings. Creditors with security interests and equity holders will be allocated to different classes, as long as their rights are affected. The plan may not affect employees' claims, pension rights or maintenance claims. Shareholders will be in a specific or several specific classes.

As employees' claims will not be affected by the plan, the same rule applies to the claims of the Wage Guarantee Fund (AGS), which is subrogated to their rights. Affected parties will be able to challenge the 'class formation' before the supervisory judge ('juge-commissaire'). The adoption of a plan will be possible only if it achieves a majority of two-thirds of the amount of the claims in each class. The vote could be replaced by an agreement between the creditors, in the same proportions.

The sanction of the plan by the Court will take into account the principles prescribed by the Directive: the 'best-interest-of-creditors' test and a sufficient protection of all affected parties. The absolute priority rule will also apply, in order to allow the approval of a restructuring plan in the event that it is not approved according to these majority principles (according to the cross-class cram-down mechanism). In the event of a dispute, an expert opinion could be ordered by the court, to determine the value of the company. Affected parties will be entitled to challenge its judgment.

According to the Decree of 23 September 2021, classes will be mandatory either for companies with more than 250 employees and a turnover of more than €20 million, or for companies with a turnover of more than €40 million, or for the mother company of a group whose members all fulfill these thresholds.

Liquidation proceedings

The provisions introduced by the ordinance now include a detailed ranking of claims for the distribution of the proceeds of the assets, integrating the various liens and privileges established by the Civil Code, the Labour Code, the Tax Code or the Customs Code, for giving creditors and investors a better legal certainty. For disputed claims, as well as for the remuneration of company directors and legal costs, a corresponding amount will be placed in reserve.

With regard to the full discharge of insolvent entrepreneurs, the current mechanism whereby creditors do not recover their right to sue is preserved: the French Commercial code actually does not need any modification, for it already provides rules of discharge and exemptions consistent with the EU Directive

In parallel, current simplified liquidation proceedings will apply to individual debtors without any assets.

Lastly, another Ordinance of 15 September 2021 introduces a reform and a clarification of rules relating to privileges, personal guarantees and securities.

These new principles are due to come into force in October 2021, subject to future regulations. ■

> *As employees' claims will not be affected by the plan, the same rule applies to the claims of the Wage Guarantee Fund*

Latvia: Amendments to insolvency law and new relief for overindebted individuals

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Several amendments to the Latvian Insolvency Law have been adopted over the course of the Summer. In addition, a separate law providing for the discharge of obligations of natural persons has been passed and will come into force on 1 January 2022. Here is an outline of these changes.

Discontinuation of the insolvency moratorium

The moratorium pursuant to which creditors were precluded from filing for insolvency against their debtors (legal entities) came to an end on 1 September 2021. Further, the suspension of the obligation of the debtor's management board to file for insolvency against the debtor itself will come to an end on 31 December 2021. Both the moratorium and the suspension of the management's obligation formed a part of COVID-19 legislation package and were in place since 23 December 2020.

Changes in the regulation of insolvency office holders

Another set of amendments concerns the regulation of insolvency office holders and is in force as of 7 September.

Given that insolvency administrators and supervisors of restructuring proceedings are so-called obliged persons under the Latvian Law on the Prevention of Money Laundering and Terrorism and Proliferation Financing (national implementation of the 4th AML Directive[1]) and can therefore be removed from office due to a violation of the said law, an appropriate restriction has been included in the Insolvency Law for an insolvency administrator or a restructuring supervisor to be readmitted to the profession within five years upon such removal.

In addition, a re-examination period for insolvency administrators has been extended from two to five years. Moreover, changes have been made to the examination and admission of new insolvency administrators. Previously, administrators' entry exams had to be held at least every two years. From now on, the necessity to hold an exam will be assessed from time to time, by the Consultative Council on Insolvency Issues, taking into account the changes in the economic processes, the current workload of the active administrators and other objective parameters.

Law on the Discharge of Obligations of a Natural Person

The Law on the Discharge of Obligations of a Natural Person (*Fiziskās personas atbrīvošanas no parādsaistībām likums*) gives an opportunity for a natural person who is not an entrepreneur or a sole trader to be released from the debts arising from overdue consumer loans via a simplified out-of-court procedure.

The law aims to provide a relief for low-income consumers whose monetary obligations are below the threshold prescribed by the Insolvency Law as one of the entry criteria for insolvency proceedings of a natural person (€5,000). Pursuant to this law, the debtor wishing to be released from the debts must submit a standard form application to a notary, with printouts from the databases of the Bank of Latvia and credit information bureaus indicating the debt obligations enclosed.

If there are no obstacles to the procedure, the notary notifies the creditors indicated in the application, the bailiffs and the authority in charge of maintaining the Insolvency Register.

If the debtor has performed his or her duties during the procedure, the main being the duty to take financial literacy courses within six months from the registration of his or her application, and if there are no unresolved objections from the creditors, the notary makes a decision on the discharge of obligations.

The information on the discharge procedures will be publicly available online by means of the Insolvency Register. The debtor will have certain duties upon the discharge of obligations, such as the duty to seek employment and the interdiction to take new consumer loans. It is notable that the credit institutions and consumer lenders will equally be prohibited from issuing consumer loans to the debtor within two years from the discharge of his or her obligations.

This law will come into force on 1 January 2022. ■

> *The law aims to provide a relief for low-income consumers whose monetary obligations are below the threshold prescribed by the Insolvency Law*

Footnote:

1 Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC.

SCARP: The new rescue process for Small and Micro Businesses in Ireland

As countries across Europe face the implications of the COVID-19 pandemic, Mark Woodcock, Chairman of Restructuring and Insolvency Ireland (RII), considers innovative new Irish legislation, which will allow small companies to restructure their debt.

MARK WOODCOCK
Lawyer and head of insolvency department, Fieldfisher Ireland

Examinership is an internationally recognised rescue process for Irish companies. The process was most recently in the international news when the Norwegian Air Group restructured its affairs through the Irish Courts in June 2021. This was a super advertisement for the process as the Group had business interests in many European countries.

However, there has been a concern for some time that the Examinership process is out of reach for smaller businesses due to the associated costs. As part of the Irish government's response to the economic challenges of the pandemic, a law was passed in July allowing for a similar rescue process for small businesses.

New rescue process

The Small Company Administrative Rescue Process (**SCARP**) provides for a stand-alone rescue framework for small companies. The primary focus of the proposal is to reduce complexity and costs and the means of achieving this goal is by making it an out-of-court process.

SCARP will be available to companies that have a turnover not exceeding €12 million, a balance sheet total not exceeding €6 million, and whose average number of employees does not exceed 50. This means it will effectively be available to about 98% of companies in Ireland.

Key features

The process will be commenced by company resolution and will be overseen by an insolvency practitioner. This will provide safeguards to stakeholders against irresponsible and dishonest director behaviour. The insolvency practitioner will prepare a rescue plan within 42 days of appointment, which may be passed by 60% in number, representing a majority in value of at least one class of impaired creditors, and will allow for cross-class cram-down of debts. The rescue plan will not require Court approval, provided there are no formal creditor objections filed in Court. The process is to be concluded within a period of 50 days, which is considerably shorter than the time allowed in an Examinership.

Effect on creditors

Unlike Examinership, there will be no automatic Court protection for the company. This could be controversial, as it seems that creditors may still be a threat during the process. Although creditors will not be impaired by virtue of entry to the process, they may be impaired by the cross-class cram-down of debts.

In recognition of the property rights of creditors and the need to balance the respective rights, where an objection to the rescue plan is raised, there will be an automatic obligation on the company to seek Court approval for the plan. This will act as a safeguard for creditors. The rescue plan must satisfy the 'unfair prejudice' test, providing each creditor with a better outcome than in a liquidation.

In order for the rescue plan to be successful, creditors should engage with the process. However, State creditors will operate on an "opt-out basis" on prescribed grounds, such as if the company has a poor history of tax compliance. Although it is suggested that the State would not remove itself from the process for arbitrary reasons, where Revenue is often the largest creditor for struggling businesses, a poor tax compliance history will likely preclude that business from availing of SCARP. This could also prove controversial.

Conclusion

SCARP seeks to mirror key elements of Examinership but with increased efficiencies and lower costs making it more accessible to smaller businesses. This is welcome news for companies which have come under additional strain during the pandemic, but which have a viable business that should survive with the appropriate assistance.

We, in Ireland, believe it will be a real game changer and go a long way towards assisting struggling businesses. ■

> ***SCARP seeks to mirror key elements of Examinership but with increased efficiencies and lower costs making it more accessible***

Publications of interest on EU 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

> ***This Group of Experts' main task is to examine whether further convergence or harmonisation can be attempted***

The Group of Experts on Restructuring and Insolvency law contributing to the new EU initiative on 'Insolvency laws: increasing convergence of national laws to encourage cross-border investment.'

After its participation as a non-governmental organisation to a set of public consultations, it is now the turn for INSOL Europe to contribute within the Group of Experts on Restructuring and Insolvency law as an observer.

This group brings together experts among those who were mostly appointed for the first time in 2015, in the context of the legislative initiative that resulted in the Directive (EU) 2019/1023 of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt (commonly known as the EU Directive on Restructuring and Insolvency).

This Group of Experts' main task is to examine whether further convergence or harmonisation can be attempted and how that could be translated into a legislative text that might embody the findings of the Group and be acceptable for the law-makers of the Member States. To that end, the European Commission has set up different sub-groups tasked with formulating recommendations on *procedural issues, ranking of claims, asset-tracing, avoidance actions, directors' liability, IOH qualifications and judicial training*.

The five meetings that have already taken place (12 April, 10 May, 22 June, 14 July and 15 September) have produced recommendations that are currently being examined by the European Commission.

Next steps to follow: a further study and impact assessment will be commissioned to confirm these findings as work progresses. In the meantime, please note that the INSOL Europe contributions on the differing surveys which tackled important issues that were not addressed in the Directive on Restructuring and Insolvency (n°2019/1023), including the liability and duties of directors of companies in the vicinity of insolvency, the status and duties of insolvency practitioners, the ranking of claims, avoidance actions, identification and preservation of assets belonging to the insolvency estate or core procedural notions, are still available at: *www.insol-europe.org/eu-study-group-news*

Lexis®PSL

INSOL Europe/ LexisPSL Joint Project on 'How EU Member States recognise insolvency and restructuring proceedings of a third country'

Since my last technical column, new publications have been made available for **Austria, Belgium, Croatia, Finland, France, Greece, Hungary and Ireland** on the INSOL Europe website at: *www.insol-europe.org/technical-content/recognition-in-third-states*

Indeed, LexisPSL R&I's has sought the collaboration of INSOL Europe to provide answers to 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 result of this successful collaboration is the publication of a consolidated table (as of 9 August 2021) including the replies from INSOL Europe, as well as the publication of articles accredited to INSOL Europe.

Please note that the publications for **Bulgaria, Cyprus, The Czech Republic, Denmark, Estonia, Germany, Italy, Latvia, Lithuania, Luxembourg, The Netherlands, Poland, Portugal, Romania, Slovakia, Spain and Sweden** also remain available on the INSOL Europe website.

Tracker on the Implementation of the EU Restructuring and Insolvency Directive

As a reminder, a tracker on the implementation of the EU Directive on Restructuring and Insolvency in the EU Member States is available on the INSOL Europe website. Since my last technical column, updates were published for **France, Lithuania, Poland and Portugal** and the links for the legislation implementing the EU Directive on Restructuring and Insolvency in **Greece and Austria** have been published at: *www.insol-europe.org/tracker-eu-directive-on-restructuring-and-insolvency*

The tracker is still being updated and will continue to be until July 2022, which is the ultimate deadline for Member States having benefitted from the extension option provided for by Article 34(2) of the Directive.

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

CERIL's latest statements on the application of the EU Insolvency Regulation 2015/848 on cross-border insolvency proceedings

During the course of 2021, two CERIL Working parties have published statements and reports which are now available on our website at: *www.insol-europe.org/eu-study-group-links*

- CERIL Statement and Report on identifying annex actions under Article 6(1) of the European Insolvency Regulation 2015
- CERIL Statement on EU group coordination proceedings. ■

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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> www.insol-europe.org/technical-content/updated-insolvency-laws

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

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

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

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

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

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

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

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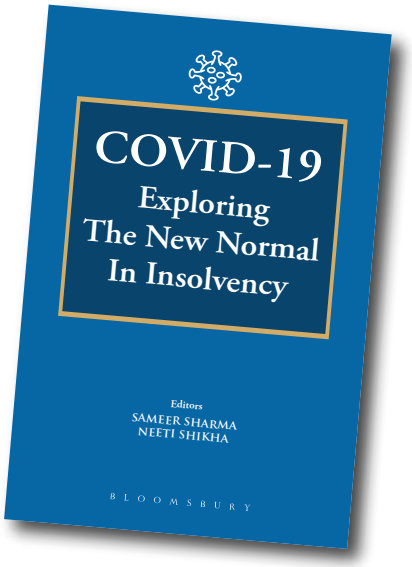
If you would like to suggest a book for a future edition, please contact our book editor **Paul Omar** (khaemwaset@yahoo.co.uk)

COVID-19: Exploring the New Normal in Insolvency



Dr Sameer Sharma and Dr Neeti Shikha (eds) (1st edition) (2021, Bloomsbury, New Delhi) 403 pp., INR 699, ISBN 978-93-54354-89-2

This text brings together perspectives from a number of jurisdictions worldwide on how the COVID-19 pandemic has affected them. It stems from a series of webinars in which academics and practitioners reflected upon the effect that the pandemic has had on insolvency and restructuring frameworks and legislative responses in their jurisdictions.

The book includes 'lessons learned' from the United Kingdom, Hong Kong, Germany, Singapore, the European Union (generally), Australia, New Zealand, South Africa, China, the United States and India. There is also an interesting editorial perspective presenting a reimagining of post-pandemic insolvency law and what could be expected in the future. Each contribution provides an overview of existing procedures; often a criticism of those procedures in the context of crisis; the impact of COVID-19 as well as any mitigating and insolvency specific measures taken; along with views on future challenges for governments.

COVID-19 and the variety of responses to it have highlighted both converging and diverging global policies and preferences in terms of social policy, the economy, medical science, healthcare, and dealing with business insolvency. This last issue has had a significant impact on the direction of insolvency and restructuring law and policy. As noted in the Foreword, what is unique about this crisis is that changes were made on the assumption that markets and economies had been working rather well and that businesses were functioning under normal economic circumstances. However, the pandemic has changed the nature of the markets and circumstances are not normal due to the continuing unpredictability of the pandemic as well as, at times, the seemingly capricious actions taken by governments in an attempt to balance public health and the economy.

This work distils common strategies to adjust insolvency regimes to deal with the impact of the pandemic shared by a majority of jurisdictions. It also acknowledges that the post-COVID-19 future for businesses is nothing if not uncertain. The clear focus on MSMEs may bode well for future reforms, but the significant issue remains as to whether insolvency frameworks are up to the task of handling the attrition of non-viable businesses once things 'get back to normal'.

Jennifer Gant, Lecturer, University of Derby, UK

The European Restructuring Directive

Gerard McCormack (1st edition) (2021, Edward Elgar, Cheltenham) 336 pp., GBP 145 (ebk GBP 116), ISBN 978-1-78990-880-0

The European Restructuring Directive, written by Professor Gerard McCormack (University of Leeds) makes a welcome contribution to the ongoing debates among academics, practicing lawyers and policymakers on the preferred and balanced solutions to rescue financially distressed businesses. Its publication could not have been timelier, as both the World Bank and the European Systemic Risk Board predict that after the lapse of the large emergency measures adopted to address the profound and wide-ranging economic effects of COVID-19, a rapid increase of insolvency cases is likely.

The book focuses on the EU Restructuring Directive (Directive (EU) 2019/1023). But it is not an article-by-article, clause-by-clause commentary. Instead, it singles out the most essential provisions, explaining their background, pondering on the current academic discussions and making references to the most recent reforms – primarily, in the common law jurisdictions.

The book is notable for:

(i) its comparative approach with well-justified references to Chapter 11 of the US Bankruptcy Code and English schemes of arrangements, which have served as sources of inspiration for the Directive;

(ii) critical analysis by the author and the insights concerning an optimal approach or approaches from the "marketplace" of alternatives supplied by the Directive (e.g. cautious position on the desirability of priming, reservations as to the necessity of the numerosity requirement for voting purposes, preference for the "flexible" absolute priority rule);

(iii) accessibility achieved through the use of very clear and precise language, comprehensive coverage of all the titles of the Directive (and even more, as the private international law aspects are not prescribed by the text) and its ability to serve as a source for interpretation of the Directive.

This is why the book will be of interest to the wide audience, interested in business rescue and ways to secure it.

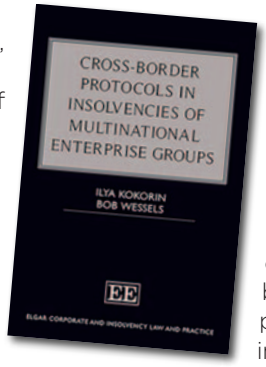
Ilya Kokorin, Department of Financial Law, Leiden University, Leiden, The Netherlands

Cross-Border Protocols in Insolvencies of Multinational Enterprise Groups

Ilya Kokorin and Bob Wessels (1st edition) (2021, Edward Elgar Publishing, Cheltenham) xxvii+343 pp., GBP 145, ISBN 978-1-80088-053-5

An excellent book, on Cross-Border Protocols in Insolvencies of Multinational Enterprise Groups, written by Bob Wessels and Ilya Kokorin, has been recently published. The authors present the problems that arise in cases of insolvency of multinational groups of companies with cross-border consequences and focus more specifically on the possibility to solve such problems by concluding cross-border protocols. An entity by entity or an insolvency solution for the whole group? Which would be the approach with most advantages, in cases of insolvency of one or more companies of the group?

New legal instruments emerge, as they point out, that contribute to the effective administration of cross-border insolvency proceedings of groups of companies. Early cases of cross-border protocols are presented, as well as their evolution through the years. UNCITRAL documents and EIR Recast solutions are thoroughly examined by the authors, who, subsequently, study and analyze the legal nature, the general features and the limitations of cross-border insolvency protocols. They present examples of such protocols according to various common law and civil law jurisdictions and they also touch on the issue of bank insolvencies and cooperation agreements between resolution authorities.



In the last chapters, they propose 15 recommendations for protocols in insolvencies of groups of companies, building on which they provide a design of such an insolvency protocol. There is also an extended annex with 10 "famous" insolvency protocols. In sum, this is a book on a very important subject and an evidence of its solid knowledge by the authors.

Professor Elina Moustaira, Law School, National and Kapodistrian University of Athens

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