INSOL EUROPE

#88 · Summer 2022

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- Event news *and more*

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#88 Summer 2022

NEXT ISSUE PUBLISHED:
October 2022
Copy deadlines available on request.

Correspondence and ideas for articles should be sent to: Paul Newson,
paulnewson@insol-europe.org

Welcome from the Editors

EDVĪNS DRABA

JOSÉ CARLES

We have welcomed summer solstice and, compared to the troublesome Spring filled with uncertainty for many, can now seemingly make more or less clear predictions at least as to the near future. This gives us the chance to reflect at the broader picture we now found ourselves in.

We have fresh memories of the various legislative and administrative measures introduced by parliaments and governments across the World to curb the pandemic, intruding into the space of private law: the insolvency moratoria, restrictions on the enforcement of security, prohibition of certain types of commercial activity, travel restrictions and many others. On the other hand, some businesses and industries became dependent on various government support schemes.

Now, the pandemic has (almost) stepped aside, however, new threats need to be addressed. There is an unprecedented expansion of sanctions regimes – both financial restrictions and sectoral sanctions, implemented not only by the legislatures that have traditionally been active in this field (US, EU, UK), but also by countries that have never previously resorted to this instrument of foreign policy (even Switzerland has followed suit). The said measures are affecting businesses and even whole industries in Europe. EU companies that have found themselves being under sanctions due to them being ultimately owned or controlled by sanctioned Russian individuals or entities are facing the prospect of insolvency due to inability to conduct business. Whilst Lithuania has adopted a special law to govern the liquidation of such companies, this has already led to an insolvency of a major bank in the Netherlands (p. 38). Many more businesses are affected indirectly – by the necessity to find new suppliers, markets, adapt to a new level of costs, to name a few.

Moreover, soaring energy prices are forcing the governments to look for support tools to boost the economy and avoid a wave of insolvencies, once again. Although the insolvency statistics are a patchwork nowadays, some of the countries are already showing an upward trend (p. 8, 41).

The good news here is that Europe has a historical chance to expedite its transition to a greener economy – and we are seeking answers both to the energy crisis and decarbonisation in this edition (p. 32).

The challenges faced by Europe in all of the aforementioned areas are minor, though, compared to what Ukraine is going through these days, where, besides tackling the immediate economic consequences of the war, the nation needs to fight the enemy. On this point, we provide a glimpse into the legislative measures effected by the country at war aimed at hitting these targets (p. 20).

Considering the above, it appears to me that the phenomenon of the intrusion of the prohibitory provisions into the private law domain and the reliance on government support by individuals and businesses is here to stay and would need to be watched closely in the coming years by the legal scholars and practitioners alike.

Apart from the said topic, this edition also brings us the valuable practical information the insolvency practitioner needs to know when dealing with cryptoassets as part of the bankruptcy estate (p. 14).

A chapter that has already become a tradition - an update as regards the transposition of the Directive on Restructuring and Insolvency – this time brings us a review of the *schwere Waffe* of a German insolvency practitioner – StaRUG – one year on (p. 22). In turn, Catarina Serra examines the compliance of the Portuguese implementation with the text of the Directive and even dares to ask a broader question – whether the Directive will achieve its aims of harmonisation across the EU at all (p. 28).

I hope that our readers will find articles of interest in this edition of Eurofenix and I wish that the struggles of Ukraine will end – on its terms – soon.

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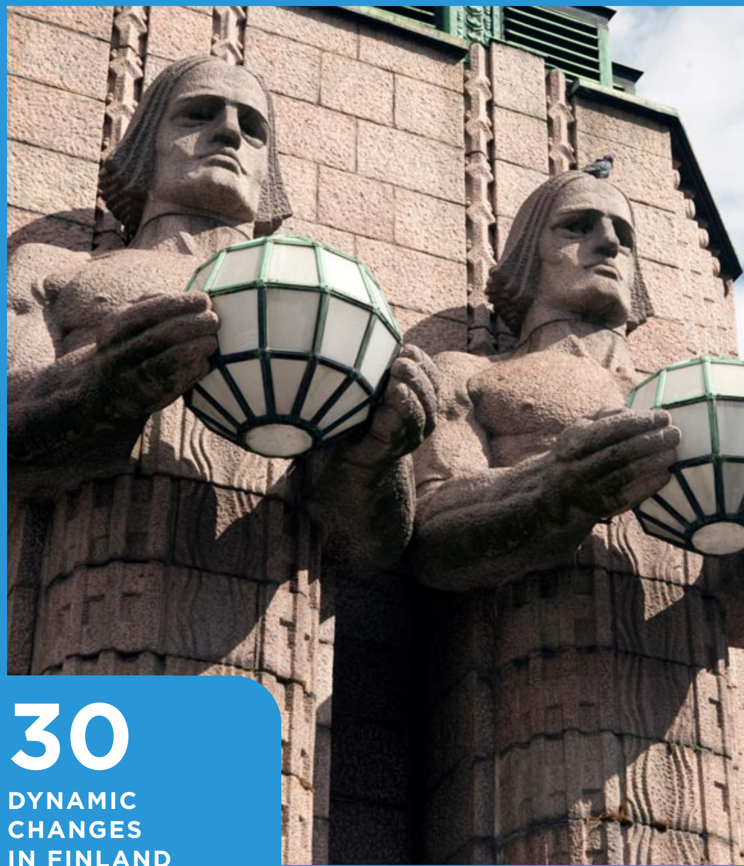


Time to seize the opportunity

FRANK TSCHENTSCHER
INSOL Europe President

Frank Tschentscher takes stock of the past two and a half years of dramatic change to see what opportunities there are for our profession

> *A year ago, I believe most of us were confident that we had seen the worst of the COVID-crisis and that global economies and businesses would slowly begin to return to what we had come to view as "normal"*

The time I spend on my editor's notes usually offers a welcome opportunity for reflection. As I am writing this piece, I reflect and look back not only to the beginning of my term as INSOL President but also take stock of the past two and a half years that have seen dramatic change.

Those of us old enough to remember the upheaval of the financial crisis of 2008/09 may also remember Nassim Nicholas Taleb, a mathematical statistician and former option trader and risk analyst, whose work concerns problems of randomness, probability and uncertainty, and whose claim to fame was his coining of the "black swan" metaphor. He chose said image to describe extraordinary events outside one's own horizon of experience and expectation and of enormous (economic) consequences.

What these extraordinary events have in common is that, in retrospect, they seem (supposedly) predictable. Hindsight is a great thing, I hear you say, and you would be correct, because even with the benefit of hindsight, there are always residual risks for which one simply cannot prepare!

Which is taking us to where we are today! Looking at the extraordinary events that have unfolded over the past two and a half years and ongoing, one would be forgiven in concluding that Taleb's "black swan" is no longer a suitable metaphor and instead we should collectively refer to a giant flock of black swans to do justice to today's challenges.

Return to normal?

As recently as a year ago, I believe most of us were confident that we had seen the worst of the COVID-crisis and that global economies and businesses would slowly begin to return to what we had come to view as "normal". Markets had plummeted in early 2020 but this was subsequently mitigated by effective state aid measures and funding made available by banks or capital markets. It helped businesses secure the necessary cash to weather the storm and across Europe saw them emerge strongly from the pandemic induced crisis. Revenues in the second quarter of 2021 were already 6% above the same period pre-crisis and EBITDA margins improved by more than 300 basis points. Admittedly, a closer look at individual industry sectors painted a more nuanced picture. Some sectors, such as tourism or aviation, were still very much in crisis and operating at significantly lower revenues compared to pre-crisis levels. However, other industries bounced back quick and strong and market confidence was high.

And then, our world (or better our perception of today's world) changed when Russia began its war in Ukraine. Russia's war and the sanctions that followed led us back all the way to the Cold War era, it appears, and its fallout is affecting the economy globally.

Russia and Ukraine are major commodities producers and the sanctions against Russia have all but turbo-charged inflation. Market disruptions have caused global energy prices to soar, especially for oil and natural gas, the former recording the highest price per barrel in ten years. Food costs have jumped, too. Wheat, for instance, where Ukraine and Russia account for 30% of global exports, has recently reached a record.

Add to the mix the continued impact of the global pandemic on supply chains. As with energy and food prices, the cost for container shipments have exploded correspondingly, albeit fuelled partly by capacity adjustments which had taken place in the shipping sector before the COVID-pandemic even started. Many companies are not able to pass on increased costs to their customers since price escalation clauses are not common practice in their industries or the delivery contracts which are in place are not designed to cope with such sudden cost increases. To make matters worse, waiting times for vessels to be unloaded in European ports increased from less than 20 days at the beginning of 2021 to almost 50 days during the rest of the year due to lockdowns or absence of workers. Businesses were unable to manufacture and/or deliver to their customers because of missing parts and inventory levels of European companies grew by double-digit rates, with the electronics industry and its dependency on the supply of semiconductors from Asia, being hit the hardest.

Growth forecasts

Given all that, it is hardly surprising that the EU Commission recently revised its own growth forecasts for the year significantly, predicting that the euro area economy will only grow by 2.6% in 2022 (down from 2.7% in May) and 1.4% in 2023 (a substantial markdown from the 2.3% estimated in May). The bloc as a whole is predicted to grow by 2.7% this year and 1.5% the next.

Of course, the picture across the bloc is fragmented. Germany's growth has been revised downward by more than one percentage point for next year (now 1.3%, as has Spain's). In contrast, Italy's GDP was revised upward for this year (to 2.9%) but significantly downward for 2023 (to 0.9% – the worst expected output in the eurozone).

The EU Commission also revised its predictions for inflation, the current expectation being that in the EU, inflation will reach 8.3% this year (up from 6.1%) and 4.6% in 2023 (up from the previously predicted 2.7%). However, a closer look and breaking down matters to the level of individual EU Member States is showing significant differences: inflation forecasts are ranging from 5.9% in France to a whopping 17% in Estonia and Lithuania this year, and generally higher in non-Euro area countries. It is expected to recede next year to lower levels but still very much above target.

Dealing with the crisis

All of this has had and will continue to have a direct and substantial impact on people and businesses, many of which will have to look for solutions to their financial difficulties. Helping our corporate clients adjust to this new reality will be a huge challenge.

As restructuring professionals, we will be called upon to deal with the consequences of the current crisis. Those consequences will be draconian and crossing borders. I believe that the way we as restructuring professionals react to this latest crisis, how we aid our clients in dealing with the plethora of issues they are faced with in these uncertain times, will have a profound effect not only on individual businesses and their respective workforces, but on the economy at large.

Companies that operate with global supply chains, who depend on commodities and consume a lot of energy such as automotive suppliers or manufacturing, engineering and construction companies have little negotiation power over customers and will be exposed to high levels of uncertainty and challenges. For these industries, the current environment has created a "perfect storm" as the crisis is hitting them at a time that they are experiencing and undergoing disruptive changes such as electrification, digitization and the need for environmental, social and governance (ESG) compliance. The coming years are likely to remain very difficult for them and company resilience, i.e. the ability to deal with unexpected negative events, will gain in importance.

The American psychologist Karen Reivich described resilience (or anti-fragility) as follows: "*Resilience is the ability to navigate adversity and to grow and thrive from challenges*." In relation to today's challenges, a sophisticated inflation management will prove to be a crucial new core competence.

For example, a high order-intake many years in advance and on agreed commercial terms used to be considered an advantage as it allowed businesses to plan reliably. Today, with the global markets in panic mode and prices rising exponentially, that approach may easily toll the death knell for businesses whose procurement processes are geared to sourcing production materials and components on short notice. These businesses are likely to feel the squeeze most as they will be forced to buy at inflated prices to honour the agreements committed to a long time ago. Of course, there is always hedging but that comes with a price tag, too; risk and reward are usually proportional to one other and thus, reducing risk will typically lead to reduced profits. Also, successful hedges require a lot of experience and management skills and not all businesses are sophisticated or experienced enough to operate them. The US economist Edgar Fiedler was certainly right when he concluded: "*There is no such thing as a risk-free hedge against inflation*."

Considering the challenges which I have described or touched upon here, I believe that controversy is very likely to be on the rise while at the same time there are fundamental changes that are forcing companies to re-think their business designs and operating models. There are a huge number of considerations for multinational corporations that will need input and advice to be able to plan and manage risk everywhere they do business. Companies who have a compelling plan how to adapt their businesses to cope with rising costs, supply chain challenges, and changing markets will be able to weather the storm while others perish.

> *There are a huge number of considerations for multinational corporations that will need input and advice to be able to plan and manage risk everywhere they do business*

To gather a more nuanced understanding of this present – and likely future – landscape and what we as practitioners may be able to offer our clients, what tools we have at our disposal in our respective countries and what is in store in terms of future regulation or harmonisation, is going to be vital, too. Therefore, I encourage you to attend our upcoming Congress in Dubrovnik. The Technical Committee has been working tirelessly and delivered a programme that is simply astounding. A thousand thanks again to all who have been working on delivering this defining event!

Seize the opportunity to hear and learn from recognised experts and industry leaders in our plenary sessions. Enjoy the educational offering as well as the networking opportunities and catch-up with friends old and new. I know you will not be disappointed.

I am very much looking forward to welcoming you in Dubrovnik. And, as always, please stay safe and be well. ■

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*

Eurostat Update: Statistics on bankruptcy declarations at a EU level

Emmanuelle Inacio, Chief Technical Officer, INSOL Europe

Eurostat[1] is the statistical office of the European Union and monitors inter alia declarations of bankruptcies on a quarterly basis[2] in the European Union and euro area as it is useful to provide more up-to-date and frequent information on the economic environment for businesses than the traditional annual business demography statistics.

In particular for 2020 and 2021, quarterly data is very helpful to track better the effects of the COVID-19 pandemic. This is particularly important for policy makers when policy responses are needed due to business cycle developments in the current context. Since the first quarter of 2021, the data on the absolute numbers of bankruptcy declarations are provided by the national statistical institutes of the EU Member States, on a mandatory basis in accordance with the provisions of Regulation (EU) No 2019/2152 on European business statistics. Bankruptcies are defined as the number of legal units that have started the procedure of being declared bankrupt, by issuing a court declaration, at any time during the considered quarter. The bankruptcy declaration is often provisional and does not always mean cessation of an activity.

Regarding the number bankruptcy declarations, there has been a downward trend between the first quarter of 2015 and the fourth quarter of 2016, then turning mainly upwards until the third quarter of 2019. There were considerable decreases in the first and second quarters of 2020 due to the government measures supporting businesses during the beginning of the COVID-19 crisis which allowed the businesses to avoid declaring bankruptcy. After that, the number of bankruptcy declarations increased for three consecutive quarters until the first quarter of 2021. Then the bankruptcy declarations decreased in three consecutive quarters. In the fourth quarter of 2021, the seasonally adjusted declarations of bankruptcies decreased by 0.7 % in the EU and by 1.6 % in the euro area, compared with the third quarter of 2021. The levels of the bankruptcy declarations in 2021 were considerably below the pre-crisis 2019 levels.

Comparing the fourth quarter of 2021 with the third quarter of 2021, among Member States for which the data is available, the largest decreases in the number of declarations of bankruptcies were found in Romania (-26.2 %), Estonia (-12.7 %) and Spain (-10.4 %). The highest increases in bankruptcy declarations were observed in Denmark (+37.8 %), Hungary (+24.7 %) and the Netherlands (+22.5 %). Throughout the whole of 2021, the bankruptcy declarations decreased in accommodation and food services, information and communication, financial and insurance services. Comparing the fourth quarter of 2021 with the third quarter of 2021, the number of bankruptcy declarations increased in transport, trade, and industry.

Footnotes:

1 See: <https://ec.europa.eu/eurostat/web/main/home>.

2 See: <https://ec.europa.eu/eurostat/web/experimental-statistics/quarterly-registrations-and-bankruptcies>.

INSOL Europe 2022 Dubrovnik Congress: Resilience in the face of adversity

Emmanuelle Inacio, Chief Technical Officer, INSOL Europe

We are still carrying in us the images and emotions of our fantastic 40th Annual Congress in Dublin[1] that was held in the beloved city of Dublin (Ireland) from 3 to 6 March 2022. It felt incredibly good to meet again in person following the Covid-imposed shelving and hibernation of our live events for more than two years. To be able to reconnect and catch up with good friends, who were so sorely missed during the dark days of the pandemic, and to reignite the passion we share for our organisation and for our industry at large was simply fabulous.

We are now most delighted to invite you to the breath-taking city of Dubrovnik (Croatia) for the 41st Annual Congress of INSOL Europe titled "***Resilience in the face of adversity***" which will take place from 6 to 9 October 2022 at the Hotel Rixos Premium Dubrovnik[2].

The city of Dubrovnik lies in the far south of the arc that forms Croatian soil, located on the thin coast strip between the high hills and the calmness of the Adriatic Sea. Dubrovnik is filled with outstanding natural beauty. Many efforts have been made to preserve its varied ecological sites. The city offers an astonishingly blue ocean, unique flora and fauna, scenic sunsets and a warm Mediterranean climate.

Counting only about 30,000 people, Dubrovnik is the cultural and social centre of the region, the County of Dubrovnik-Neretva and the most famous city of Croatia.

Known as "The Pearl of the Adriatic", the city of Dubrovnik is featured by the fairy-tale appearance Old Town - a World Heritage site - and its white stone defensive walls with mighty forts and towers. More than two-thirds of the Old Town's buildings suffered

bomb damage and were entirely rebuilt after the Croatia War of Independence. Dubrovnik's white walls reflect survival and resilience which is a symbol of hope.

We owe a huge thank you to our dedicated Dubrovnik Congress Technical Committee, who have prepared a wonderful programme under the supervision of the Co-Chairs Frances Coulson (Wedlake Bell, UK) and Jelenko Lehki (Lehki Law Office, Croatia).

Boris Vujčić, Governor of the Croatian National Bank and past Deputy Chief Negotiator in Republic of Croatia's negotiations with the European Union, will open our Congress with a keynote speech followed by José Garrido, Senior Counsel in the IMF's Legal Department, who will give the audience an insight on the future of finance and the global economy.

Our first plenary session will have the task of designing the new European restructuring plans as the extended deadline for Member States to implement the Directive on Restructuring and Insolvency will then have expired.

The delegates will then have to select two breakout sessions among four extremely interesting topics covering the Norwegian Air case, the issues of the insolvency management and supervisory bodies submitted to risk, healthcare industry cases in Ireland and the US and the adventures in assets tracing and recovery in Eastern European countries.

Our plenary sessions will then cover topics as diverse and captivating as the game of norms in recognition of insolvency(-related) decisions, harmonisation of transactions avoidance laws and the dangers of cyberattacks.

The second day of our Congress will be opened by the keynote speaker Fabris Peruško, who has served as Extraordinary Commissioner of Agrokor since February 2018.

Lord Justice Snowden from the Court of Appeal of England & Wales will then share with the audience his extensive practice in reconstruction and insolvency cases followed by a judges' discussions.

Our Congress will also be the opportunity to explore topical and fascinating subjects in our plenary sessions as hard skills vs soft skills in our industry, the energy sector in crisis and the future of harmonisation of insolvency laws.

With ancillary meetings before and after the main event, our 2022 Dubrovnik Congress will be the second opportunity in 2022 for our community to come together once again and leverage the educational and networking benefits that our delegates have come to expect – and to catch-up with existing friends and make new ones.

We look forward to welcoming you very warmly in this magnificent setting filled with promise!

Footnotes:

1 https://www.insol-europe.org/congress-videos

2 https://www.insol-europe.org/events

UNCITRAL WG5 Session 60: Focusing on Asset Tracing and Applicable Law

Report by Jennifer L.L. Gant in her role as INSOL Europe Working Group V Observer

Springtime in New York... although not many of the delegates and observers shared the joy of this trip to the Big Apple given the hybrid approach taken this year due to the continuing impact of COVID, many did attend in person to enjoy once again the camaraderie and fellowship with colleagues from all over the world.

During this session, the UNCITRAL Working Group V met to discuss firstly a few updates on the *UNCITRAL Model Law on Cross-Border Insolvency: the Judicial Perspective*. This document aims to acknowledge the international origin of the Model Law on Cross-Border Insolvency and to promote the uniformity in its application. The updates to the Judicial Perspective cover developments by other international bodies as well as interpretations of the MLCBI by judiciaries across the world. The updates proposed were accepted with a few additions during the session.

The second important topic on the agenda revolved around the introduction of some kind of harmonising instrument that deals with civil asset-tracing and recovery in insolvency proceedings. It is unclear as yet what form this will take, and despite some reservations expressed about sanctions and liability regimes, there was broad agreement that this project should progress the creation of some kind of instrument that would cover this important topic at a future session.

Finally, the Working Group considered the topic of applicable law in insolvency proceedings. It was agreed that the introduction of a harmonising instrument would promote certainty and predictability thereby enhancing efficiency while reducing the propensity for abusive forum shopping and filling the gaps in the current applicable law structure governing cross-border insolvency.

It will be interesting to see how these two particular areas develop given the wide differences that appear to exist between the approach to asset-tracing and recovery in many advanced jurisdictions.

We want you!

Call for expressions of interest for the INSOL Europe 2023 Amsterdam Congress

With the Congress in Dublin still fresh in our minds, and plans for our next Congress in Dubrovnik in October this year already well advanced, you may be surprised to learn that we have already started planning our 2023 Congress, which will be held in Amsterdam from 12-15 October 2023.

All INSOL Europe members are invited to express their interest to participate as speakers at our flagship event.

All expressions of interest should be sent to Emmanuelle Inacio, at **emmanuelleinacio@insol-europe.org**, and should indicate:

(a) the speaker's nationality, affiliation and qualifications,

(b) the topic on which the speaker would be interested in speaking, and

(c) a short statement as to what unique or compelling perspective the speaker would like to bring to the congress.

The Technical Committee seeks in particular proposals from speakers who have not been speakers at the last two Annual Congresses.

Expressions of interest should be sent as early as possible.

All expressions of interest will be considered by the Technical Committee, although due to the large number the Committee expects to receive, the Committee likely will not be able to accommodate all, or even most, requests.

The BWILC Workshop:

A forum connecting PhD researchers in European and International Insolvency Law

Johannes Kührt (Martin Luther Halle) and Defne Tasman (Antwerp)

On 28 and 29 April 2022, the Bob Wessels Insolvency Law Collection (BWILC) Foundation held its fourth PhD Workshop on European and International Insolvency Law at Leiden University.

Seven selected PhD researchers from universities across Europe had the opportunity to present their work and to connect with fellow academics, alumni, and the BWILC Board (composed of Professors Matthias Haentjens, Reinout Vriesendorp, Stephan Madaus and Joeri Vananroye as well as Dr. Paul Omar), along with Professor Emeritus Bob Wessels as the patron. The Workshop offered a unique and highly engaging forum for academic exchange. The questions, discussions, and feedback to the presenters provided invaluable insights helping further their studies.

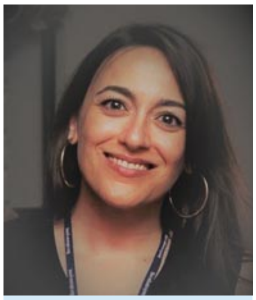
The Workshop was opened by Professors Vriesendorp and Haentjens on behalf of the BWILC Board. In the first session, presentations were given by Defne Tasman (Antwerp) discussing the use of Alternative Dispute Resolution within the EU corporate restructuring framework, Gauthier Vandenbossche (Ghent), who tackled the topic of divergent discharge of debt regimes for consumers and entrepreneurs, Ayodeji Ariyo (Wolverhampton) exploring new approaches on directors' liabilities in the UK and Johannes Kührt (Martin Luther Halle), who ended the first day with a presentation on the ESMA's approach to delay disclosure of inside information during financial distress.

The second day commenced with a presentation by Theodora Kostoula (European University Institute), who introduced the fast-developing issue of crypto-collateral in insolvency and its implications for international legal instruments. Jim van Mourik (Radboud Nijmegen) then addressed the role of mediation during corporate liquidation procedures, while the final presentation was given by Gert-Jan Boon (Leiden) introducing the development of the US and Dutch Debtor in Possession restructuring regimes. Dr. Emilie Ghio then closed the session with the BWILC lecture on European harmonisation of insolvency law and terminology issues which is also the topic of her recently published book "Redefining Harmonisation".

The Workshop was rounded off by Professor Wessels, who stressed the importance of a European approach to insolvency law. As a recognition for the most original presentations, the BWILC Board awarded a first prize jointly to Theodora Kostoula and Gert-Jan Boon, a third prize to Gauthier Vandenbossche and an Honourable Mention for Defne Tasman.

A closer look at:
Current business failure rates at artificially low levels

Emmanuelle Inacio takes a closer look at the Dun & Bradstreet 2021 Global Bankruptcy Report



EMMANUELLE INACIO
INSOL Europe
Chief Technical Officer

> *According to the Dun & Bradstreet 2021 Global Bankruptcy Report, nearly half of the 43 economies covered saw a decrease in business failures during 2021*

The analysts at Dun & Bradstreet Worldwide Network (WWN) have prepared a 2021 Global Bankruptcy Report that's covers bankruptcy data from 43 economies[1].

According to the Dun & Bradstreet 2021 Global Bankruptcy Report, nearly half of the 43 economies covered saw a decrease in business failures during 2021. In some countries, business failures reached their lowest level in a decade. Much like 2020, when business disruption rose to unprecedented levels, Covid-19 dominated the narrative in 2021. Sporadic increases in cases across many countries prompted mandatory shutdowns and continued to wreak havoc on businesses.

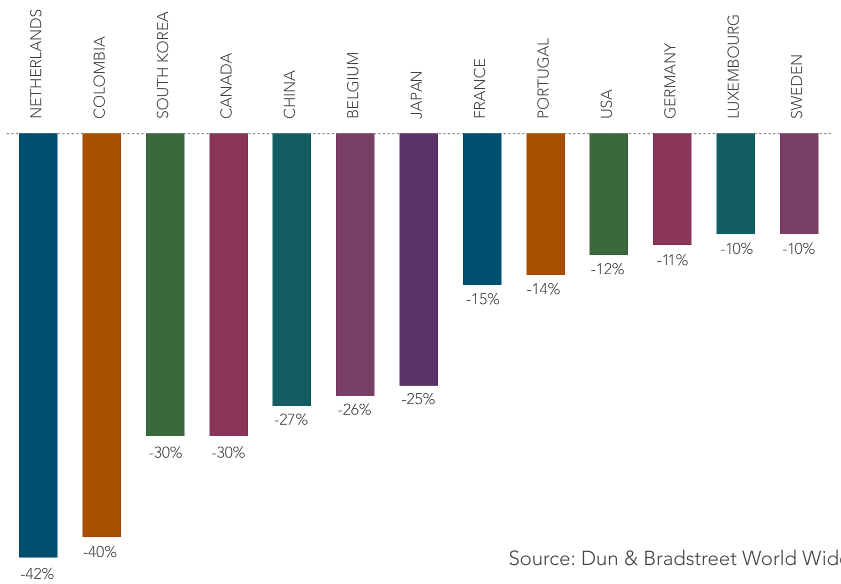
Data from the Dun & Bradstreet Commerce Disruption Tracker shows that the percentage of businesses disrupted globally increased by 4 percentage points in the first half of 2021 compared to the second half of 2020. As a result, the precipitous fall in business failures may appear counterintuitive. But there are several factors that have helped thousands of businesses keep their heads above water.

Undoubtedly, one of the biggest factors that helped many firms stay afloat was the massive support packages provided by governments across the world. While many of the measures were announced in 2020, they were also extended beyond this period. Cumulative fiscal measures in response to the Covid-19 pandemic account for 18% of the global Gross Domestic Product (GDP), according to data from the IMF.

Much of this stems from advanced economies, which on average have provided fiscal support to the tune of 28.4% of their GDP. By comparison, stimulus packages provided by these economies in response to the Global Financial Crisis of 2008 were worth just 2.6% of their GDP.

Access to low-cost liquidity has been a defining characteristic of the capital markets during the pandemic. The outstanding amount of total debt securities - which includes the amount borrowed in the domestic and international market, raised by non-financial corporations - stood

Economies Reporting Large Decrease In Bankruptcies During 2021 (y-o-y)



Source: Dun & Bradstreet World Wide Network at USD19.05 trillion as of June 2021, according to data from the Bank for International Settlements (BIS). This represents a 15.8% increase from March 2020, compared to a 6.2% average annual increase over the preceding five years. This has served as a lifeline for many firms that were on the brink of bankruptcy.

Central banks across the world have been equally swift in easing monetary conditions to help businesses survive the pandemic. 32 of the 35 countries for which data is available have reduced their policy interest rates in response to the pandemic. These economies have, on average, reduced their policy rate by 123 basis points, according to data from the BIS. A basis point is equal to one one-hundredth of a percentage point. This is a significant decrease given that the average policy rate of these 32 economies stood at 2.01% during March 2020. The remaining three countries – Switzerland, Japan and Sweden – already had either negative or zero interest rates.

Another equally important factor that has resulted in a lower level of bankruptcies is the forbearance of creditors. In some economies, changes were made to the bankruptcy laws to provide businesses more breathing space and to avoid hostile takeovers by predatory firms. Such changes included an increase in the threshold amount above which a creditor could take action against a late-paying debtor, and the period within which the debt had to be repaid. Economies that suspended the mandatory obligation to declare bankruptcy include: India until March 2021; Germany until April 2021; and Spain until June 2022. These factors have played a role in suppressing business failure rates.

It appears that as fiscal and monetary policy supports are withdrawn and lenders become strict we would see a spike in businesses failures during 2022. While bankruptcies may not rise sharply across many economies, there will be more pockets of

It appears that as fiscal and monetary policy supports are withdrawn and lenders become strict we would see a spike in businesses failures during 2022

distress surfacing, particularly during the second half of 2022. Fiscal packages are unlikely to be extended beyond 2021, given public debt has reached proportions comparable to those seen in the aftermath of the Second World War.

Driven by several factors of varying importance, inflation is turning out to be persistent and broad based than previously anticipated transient and narrow based (select commodities). As central banks scramble to ward off inflationary pressures by raising interest rates, the cost of servicing debt will increase for firms. Subsequently, the capital markets may also be less forgiving this time around. Data from the BIS shows that 16 out of 36 economies have already seen an increase in their policy rates during the second half of 2021.

The emergence of new variants of the virus, such as omicron, would further stress the already-fragile global supply chain, adding to inflationary pressures, and disrupt businesses by prolonging their recovery. In addition, comprehensive financial and trade sanctions imposed on Russia following its invasion of Ukraine threaten to exacerbate business bankruptcies in many countries, particularly in Europe, due to their high reliance on Russia for energy. A prolonged escalation of the crisis will also hurt businesses that are vulnerable to commodity shocks and increase bankruptcy risks. This warrants a more active approach to credit risk management. In the absence of additional support measures, this could be the spark that starts a chain reaction of bankruptcies and undermines creditors' confidence. ■

Footnotes:

1 Download the complete Global Bankruptcy Report here: https://www.dnb.com/content/dam/english/economic-and-industry-insight/Updated_FINAL_TSK-10488_Global_Bankruptcy_Report%202021_20220509.pdf

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

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

"Roads? Where we're going, we don't need (Silk) Roads!"

In this edition, we look at cryptoassets and fraud – what the insolvency practitioner needs to know

> *Cryptoassets are easier to track and trace than most non-digital assets and understanding the art of the possible in digital investigations can aid overall asset recovery efforts*

Cryptoassets are not a new concept that the insolvency practitioner should consider getting to grips with at some stage. They are already here. This was considered by a panel at the Dublin Congress, which included Carmel King (Grant Thornton UK LLP; Co-Chair, INSOL Europe Anti-Fraud Forum), José Carles (Carles Cuesta; Co-Chair, Insolvency Tech and Digital Assets Wing), Dani Haston (Chainalysis) and Aidan Larkin (Asset Reality).

In its *2022 Crypto Crime Report*, Chainalysis reports that, in 2021, the total amount of transactions across the cryptocurrencies it tracks grew to USD 15.8 trillion, up 567% on the previous year. Practitioners are already seeing insolvencies, where corporates are involved in this space, or cases where cryptoassets can unexpectedly form part on an estate or claim.

The good news is that practitioners do not need to become overnight experts, as the panellists at the Congress session are amongst an excellent group of specialists that can trace cryptoassets, advise debtors and creditors, identify strategies for recovery, offer safe custodianship options and realisation into fiat currencies. However, in order to avoid the obvious risks of falling afoul of various laws and regulatory guidelines, failing to identify assets of an estate or censure by creditors or professional regulators for failure to get value for those assets, practitioners need to be able to identify the signifiers of crypto and know what to do thereafter. It needs to be incorporated into checklists, included as part of due process.

Cryptoassets are just another **intangible asset** and, in the same way that practitioners quickly learn the specifics of managing fine art, livestock, intellectual properties or contract-based rights, crypto is due for demystification. Case law is on the practitioner's side, with a number of English and Spanish courts having already made decisions that will enable the pursuit and successful recovery of these assets. For example, the Criminal Section of the Spanish Supreme Court referred to bitcoin in its ruling from 30 June 2019 as "*an intangible asset, in the form of a unit of account defined by computer and cryptographic technology called bitcoin. Its value is the one that each unit of account (or portion) reaches by the rules of supply and demand in the sale of these units made through Bitcoin trading platforms*".

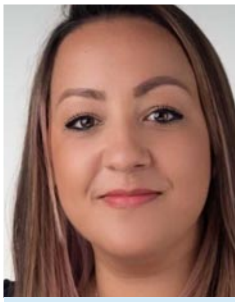
Too often in the industry a lack of basic understanding and awareness around cryptoassets prevails and the inevitable mis-categorisation of 'crypto cases' happens. It is easy when we hear the term "crypto" to immediately think of the incredibly technical ecosystem it operates in and that often leads to a combination of misconceptions, panic and assumptions that hinder asset recovery attempts for victims. The truth is, in an asset recovery context, crypto presents more opportunities for success than traditional cases.

Cryptoassets are easier to track and trace than most non-digital assets and understanding the art of the possible in digital investigations can aid overall asset recovery efforts, especially in contentious insolvency cases. Examples of this include the immutable evidence forever preserved on the blockchain that proves dissipation of assets or a debtor's attempts to obfuscate their actions when trying to conceal assets from creditors – this evidence, regardless of whether it leads to the recovery of a digital asset, could be used in other parts of a case such as proving a post-petition disposition of assets or transactions at an undervalue. There are also multiple regulatory developments to consider and a number of very interesting international crypto insolvency cases including Cryptopia, Mt Gox and Quadriga that are leading the charge.

Diagram 1

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

JOSÉ CARLES
Carles Cuesta; Co-Chair, Insolvency Tech and Digital Assets Wing



DANI HASTON
Chainalysis

AIDAN LARKIN
Asset Reality

One of the first issues that bankruptcy trustees or insolvency practitioners – or lawyers advising an insolvent debtor – should deal with is to find out **whether the debtor owns any kind of cryptoassets**. The information requests to prepare the lists of assets of the debtor should therefore be updated and include express references to crypto and digital assets. The bank statements (for example, searching for transactions which involve "Bitcoin" or "BTC") or references to cryptocurrency transactions in any documents could also help in this task. Besides, digital devices owned by the company could also reveal the existence of virtual currencies (for example, large files that could imply that blockchain has been downloaded in that device).

Another issue that might need to be addressed is **if there ever was crypto that might have disappeared**. Once you find a starting point in records/disclosure such as a crypto address or a transaction reference you can look it up in a free block explorer without leaving your desk… for example, you can type a transaction hash (such as "*da005b6c57cc4d70d70d5ff0669e05af4144887a98253969543daf6fe265c3ac*") which will let you see how much value was transferred, between which addresses and where it moved next, if it moved at all. Whereas following fiat requires you to obtain a disclosure each time funds move to a new bank, with cryptocurrency **you can follow funds indefinitely thanks to blockchains' inherent transparency**. But public blockchain explorers come up short when it comes to understanding who or what those addresses represent. Going back to our example, diagram 1 (above) shows what you would see when you look up the transaction above using free online tools.

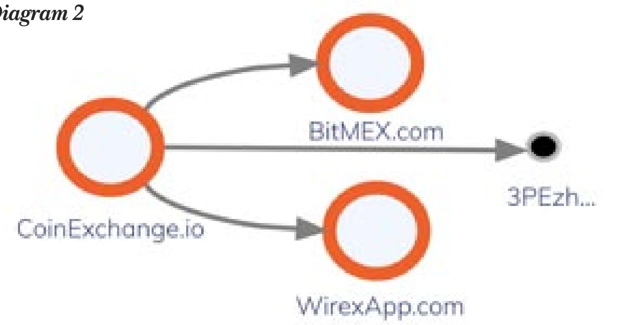
If you have had basic crypto investigation training, you know you are seeing funds move from the address starting with 3BK78… to the three addresses on the right. But that does not tell you the entity controlling the funds. That is the essential information you need to build your case evidence and to have a chance of recovering the funds. That is where Chainalysis Reactor comes in. This software maps cryptocurrency addresses to real world entities, so that the transactions you are analysing becomes readable and actionable. Diagram 2 (below) shows what the transaction above looks like in Chainalysis Reactor.

Now, you have the cryptocurrency services involved in the transactions rather than just pseudonymous addresses. You can reach out to those businesses and learn who the users behind the transactions are, as recent regulations mean virtually all of the most popular services now collect KYC information.

Applications to obtain disclosure from these virtual asset service providers, including those out of the jurisdiction, have already proven successful. Orders to secure funds in their custody under proprietary injunctions and freezing orders have already been made. Enforcement against assets they hold on behalf of the debtor using a third-party debt order has already been successful in the High Court in London. We are seeing similar orders being made elsewhere, including in the BVI and Canada. The Norwegian Court of Appeal has even expressly confirmed the evidentiary reliability of blockchain analysis techniques, such as, specifically, clustering and labelling (which Chainalysis Reactor uses). Moreover, that was in criminal proceedings which typically require a higher burden of proof.

Another issue that is relevant to take into account is the valuation and realization of digital assets, as they may experience relevant variations over time. From the insolvency practitioner or liquidator's liability perspective, insolvent Japanese exchange Mt. Gox (2015) taught us an important lesson: large realizations of digital currencies may impact the valuation of successive sales. Thus, expert opinions, utilising experienced asset managers (in the same manner that you would appoint an asset manager over a yacht or real estate) and Court approvals of when and how to realize cryptoassets prove really useful for the liquidator to avoid accusations from creditors. Cryptoassets have been repeatedly investigated, recovered, managed and realised around the world – best practice (and what to avoid) is available in abundance, knowing where to seek support and assistance will allow new practitioners in this space to get involved in this exciting and growing sector. ■

Diagram 2



Cryptoassets:
Their typology, classification and treatment in a crisis and insolvency

Marc d'Avoine explains how cryptoassets are recognized in Germany, with reference to particular characteristics which require specific actions by the insolvency administrator

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> *There is a widespread perception that cryptocurrencies are anonymous and transactions cannot be traced*

Type and classification of cryptoassets

Cryptocurrencies and other types of crypto assets have entered global financial systems. Cryptocurrencies, such as Bitcoin,[1] are a tradable means of exchange. Although state control or regulation is an objective, cryptocurrencies remain largely unregulated until today. There is a widespread perception that cryptocurrencies are anonymous and transactions cannot be traced. However, stated in such simple terms, that is not correct.

Treatment in a crisis and insolvency

From the perspective of an insolvency administrator, the treatment of cryptocurrencies in insolvency is highly demanding. The first problem is whether cryptocurrencies are even part of the insolvency estate. And if so, how best to recover them. It is also questionable how the insolvency administrator becomes aware of these assets and what consequences threaten insolvency debtors who refuse to cooperate in the identification/detection or recovery of assets.

Regulations of legal quality

The German legislature has defined the legal quality of cryptocurrencies in section 1 (11) sentence 4 of the German Banking Act (KWG).[2] According to this, cryptocurrencies are digital representations of value which serve as a means of payment or are used for investment purposes and are transmitted, stored and traded exclusively electronically. The fact that cryptocurrencies may be valuable assets is obvious, including due to the brisk trading of them on the market.

Cryptocurrencies are part of an insolvency estate

There is now widespread agreement in the German literature that cryptocurrencies also fall under the insolvency estate according to section 35 of the German Insolvency Code (InsO). The prerequisite for this is that cryptocurrencies are subject to seizure under section 36 (1) of the InsO. Attachability is part of the German law of compulsory execution and is regulated in the German Code of Civil Procedure (ZPO). Various enforcement options can be found there, sometimes also in relation to movable or immovable assets as well as to claims.

However, none of these possibilities initially applied to crypto assets. With the introduction of section 1 (11) sentence 4 of the KWG, the transferability of crypto assets has been clearly defined. The transferability of cryptocurrencies is intrinsic. Therefore, a catch-all provision of German enforcement law, which subjects transferable rights to seizure, applies via sections 857 and 857 (1) of the ZPO. Thus, with the derived attachability of cryptocurrencies, they are ultimately part of the insolvency estate pursuant to section 35 of the InsO. According to the principles of German insolvency law, the insolvency administrator shall exercise the power of administration and disposal over the assets of the insolvency debtor upon the opening of insolvency proceedings, as per section 80 (1) of the InsO.

Ownership of the private key

Basic technical knowledge is required for transactions with crypto assets. The technical requirements are in part extensive and complicated. The decisive factor is where the insolvent debtor keeps his private key. This private key is in fact absolutely necessary for the disposing party's ability to execute transactions with crypto assets. The private key is stored in a wallet. This wallet can be designed in different ways (hardware wallet, paper wallet, etc.).[3] The debtor may maintain the wallet itself or commission a provider to store it (crypto custodian).[4] This provider must grant the insolvency administrator the power of disposal upon request. However, it is more problematic if the debtor is keeping his private key himself.

Knowledge of cryptoassets

It is often difficult for an insolvency administrator to obtain information about existing crypto values in the first place. There is a risk that insolvency debtors "forget" or even knowingly conceal existing crypto assets. Detection of assets is then considerably more difficult. Account statements of the debtor could reveal conversions or purchases of crypto assets. Otherwise, of course, there is also the possibility of gaining knowledge from individual creditors who claim crypto assets in the table in insolvency proceedings. Without the cooperation of third parties, however, it is almost impossible to acquire knowledge of this, if the crypto assets have not been properly recorded in the debtor's books.

Participation of the debtor and enforcement

If the debtor's crypto assets are known, the debtor is obliged to cooperate in their recovery: section 97 of the InsO.[5] For this purpose, he can be asked to convert the crypto assets directly into fiat currency (i.e. money) such as euros and to pay the conversion value to the insolvency estate. In addition, he can also be asked to disclose the private key or the custodian of the private key and the respective access information (login, password etc.). The insolvency administrator only gains direct control over crypto assets or currencies with the private key.

If the debtor refuses to participate in the proceedings, he may also be subject to coercive measures under section 98 of the InsO. For this purpose, coercive means such as compulsory attendance or even imprisonment are available.[6] However, the term of imprisonment would be limited to a period of six months in accordance with section 802j (1) sentence 1 of the ZPO. Once a debtor has served a term of imprisonment, further coercive measures under the InsO are not available. Pursuant to section 300 (3) of the InsO, the insolvency court would also have to decide on the application of a creditor on the refusal of the discharge of the residual debt. Further measures to force the insolvency debtor to disclose the access data are not provided by the InsO.

Recovery in insolvency

If the insolvency administrator is ultimately in possession of the private key, he has several options to use existing cryptocurrencies.

The easiest way is to sell the private key directly to a third person and hand it over to them against payment of fiat currency. With the private key, the insolvency administrator could also transfer the crypto assets or currencies directly himself or convert them into money at a recognized crypto exchange. He could also engage special service providers to support him in the exploitation of the asset on a fiduciary basis.

Risks during recovery

Haste is required in the asset recovery.[7] The market value of individual crypto assets is extremely volatile. Significant price fluctuations up to the possible total loss of value of the crypto assets require rapid action by the insolvency administrator. At the same time, even if the private key is known, it is not excluded that the debtor will continue to use it and execute unauthorized transactions with third parties. The direct transfer of the crypto assets to the assets of the insolvency administrator as a security measure should be avoided[8] for liability reasons. This applies even if this is particularly advantageous if the insolvency administrator himself is a participant in crypto space.

Summary and outlook

Crypto assets play an increasingly important role in the global financial systems, as well as in insolvency of debtors. Whether and how government control or regulation can or should take place in the future is open. The current and future expected market capitalization of cryptocurrencies (currently approx. €112 billion) and the ability to transfer them from the crypto space into state-recognized currencies (Euros, US Dollars etc.) requires increased attention in all areas. As a result, crypto assets are also increasingly in the focus of restructuring companies and insolvency administrators. Treating them, securing them and exploiting extremely volatile values is both a task and a challenge. ■

Footnotes:

1 The first cryptocurrency was Bitcoin, launched on 3 January 2009.

2 Introduced with effect from 1 January 2020 (Federal Law Gazette [BGBl.] I p. 2602).

3 For more details, see: *Maume/Maute, Kryptowerte-HdB* (Beck, 2020), Section 1, Marginal note 24.

4 Known crypto custodians in the German-speaking countries are: coinbase, bison, Finoa, Tangany.

5 Applicable to legal entities via section 101 (1) (2), InsO.

6 Janssen in *MünchKomm/InsO* (4th edn) (Beck, 2019), Section 159 of the InsO, Marginal note 13; Schmittmann/Schmidt, *DZWIR* 2021, 652.

7 Section 159, InsO, requires the "immediate" realization of assets.

8 cf. D'Avoine/Hamacher, *ZIP* 2022, 6.

> "Significant price fluctuations up to the possible total loss of value of the crypto assets require rapid action by the insolvency administrator"

Regulation for cyber-resilience in the financial sector

Ludovic Van Egroo examines what the consequences for insolvency professionals are since the introduction of the new Digital Operating Resilience Act

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The pandemic has generated the emergence of new vectors of cyber-threats, such as the increased use of telecommuting, the increase in remote exchanges and the digitalization of most business sectors.

The deterioration of the geopolitical context has seen an increase in "sleeping" cyberattacks of state origin, as well as a professionalization of cyber-malicious actors, as illustrated by the Atlas of Cyberattacks produced by Thales.[1]

ANSSI, the French cybersecurity agency, has identified a 37.7% increase in attacks in Europe between 2020 and 2021.[2] This increase in cyber-attacks goes hand in hand with the development of intrusion techniques and rebound attacks. The latter consists in infecting subcontractors and partners of the target companies, such as software editors and service providers. There are now entire ecosystems becoming targets.

In this context, the European institutions and Member States are continuing to secure the European market in terms of cyber-security with the adoption of a second version of the NIS Directive adopted in 2016 (Network Infrastructure System No. 2) to cover new sectors, including energy, transport, financial markets, health and digital infrastructure. The proposals aim to strengthen security requirements by imposing a risk management approach.

The NIS2 directive is strengthened by a new Act called the Digital Operational Resilience Act (DORA)[3], specifically dedicated to financial actors. This regulation presents a major evolution in the definition of financial actors, which is extended to the broadest sense to subcontractors. The DORA regulation aims to cover the cyber-risk of the entire value chain of the financial sector.

Who are the new actors concerned by this regulation? What are the changes for the actors of the financial sector? What are the consequences for insolvency professionals?

Who are Financial Sector Actors within the meaning of the DORA regulation?

Entities concerned by the Digital Operating Resilience Act:

- Credit institutions
- Payment institutions
- Electronic money institutions
- Investment firms
- Crypto asset service providers, crypto asset issuers
- Central securities depositories
- Central counterparties
- Trading platforms
- Central repositories
- Alternative investment fund managers
- Management companies
- Data communication service providers
- Insurance and reinsurance companies
- Insurance intermediaries, reinsurance intermediaries and incidental insurance intermediaries
- Institutions for occupational retirement
- Credit rating agencies
- Statutory auditors and audit firms
- Administrators of critical benchmark
- Participatory finance service providers
- Securitization repositories

AND Third party IT service providers

Regulatory developments in the sector: Towards the greater accountability of economic actors

What are the new obligations of the regulatory framework?

The regulation is based on five pillars:

- Identifying exposure to cyber-risks by ensuring that controls are functioning properly and up to date (Articles 4-14);
- Harmonising and centralising incident reporting for transmission to authorities ICT incident report (Articles 15 to 20);
- Digital Operational Resilience Tests (Articles 21 to 24);
- Management of ICT risks by Third Parties (Articles 25-39): verifying the level of sufficient controls of third parties, especially IBOs, and putting into place required monitoring measures; and
- Information and Intelligence Sharing (Article 40) Establish information sharing agreements between companies for cyber-threats, including confidentiality requirements and the need to notify the regulator.

The Digital Operating Resilience Act in practice:

In practice, this regulation will allow the companies concerned to:

- Establish a risk governance strategy, involving management, defining responsibilities and identifying stakeholders;
- Develop a risk management framework with the function of identifying preventive and corrective measures as well as disaster recovery plans and continuous improvement and crisis communication plans;
- Assess cyber-risk exposure, particularly through company risk mapping;
- Identify and map critical functions and associated risks (which also includes interdependencies with third parties, such as service providers);
- Organize cyber-risk awareness plans not only for teams in charge of governance, but also for operational teams;

- Elaborate a standardized classification of cyber-incidents;
- Subscribe, where necessary, to insurance against cyber-risks;
- Be subject to an obligation to declare major incidents (1 week) to regulatory authorities (ANSSI, CNIL, ECB); and
- Implement a third-party risk strategy and policy, in particular through:
  - Establishing a registry containing a complete view of all third-party ICT service providers (services provided and functions);
  - Reporting annually on the criticality of outsourced services, updating the tracking of changes and keeping a register for regulators; and
  - Evaluating the level of security, concentration risk, subcontracting risks (termination, exit under constraints) prior to any contracting.

One of the key success factors of compliance for organizations is the development of a transverse governance framework, including management, legal and compliance departments, information systems departments and information systems security departments.

What are the penalties?

In case of non-compliance, the DORA regulation provides for several types of sanctions:

- Administrative Penalties and Remedial Measures (Article 44);
- An injunction ordering the person or entity to cease the conduct in question and prohibiting it from being repeated;
- Temporary or permanent cessation of any practice or conduct deemed by the appropriate authority to be contrary to the provisions of this bylaw and to prevent its recurrence;
- Any measure, including monetary measures, to ensure that financial entities continue to meet their legal obligations;
- Requiring records of existing data exchanges held by a telecommunications operator where there is reasonable suspicion of a violation of this law and where such records may be material to an investigation of a violation of this law;
- Issuing communications to the public, including public statements, indicating the identity of the individual or entity and the nature of the violation; and
- Criminal sanctions left to the discretion of the Member States (Article 46).

To carry out their missions, the regulatory authorities will be able to:

- Access and receive or make copies of any document or data;
- Conduct on-site inspections or investigations; and
- Impose corrective measures.

DORA: The challenges for insolvency professionals

Insolvency professionals are particularly affected by this regulation, as the companies concerned are no longer just major players in the financial sector. Financial start-ups and SMEs are also affected by these obligations, as are subcontractors.

First issue: Identify the criticality of activities within companies:

The insolvency practitioner will need to consider these cyber-resilience requirements to the extent that the defaulting business is engaged in activities that define it as a financial actor. The insolvency practitioner will need to verify the company's cybersecurity compliance. As such, insolvency practitioner will be able to request documents attesting to the good governance of cyber-risks, including the documents mentioned above, if needed. These documents can be added to the file as a guarantee of the compliance of the financial activity.

In order to carry out his/her mission, the insolvency professional may rely on the expertise of a consulting firm to conduct a compliance audit of the DORA regulation. In the event that the company is not in compliance, it is up to the insolvency practitioner to request that the company be brought into compliance with the identified discrepancy.

Second Issue: Taking cyber-factors into account in the due diligence of third parties

The second issue concerns the control of cyber-risk with the company's service providers. The insolvency practitioner will be responsible for verifying that the service providers do not pose a risk to the business, beforehand, by identifying the critical services, then by checking the security devices implemented.

The difficulty here lies in the ability to defend the cyber-security requirements of the business in a difficult context for the latter, where faced with third parties critical for its activity, but very often in an already degraded relationship. It is in this difficult context intersecting legal, financial and also security issues exogenous to the company that the practitioner will be able to employ his/her skills before the court of jurisdiction.

Conclusion

Facing systemic risks that cyber-risk represents for the economies of the Member States, the European Union continues to secure its digital borders by involving economic players.

The European regulation responds to the need to harmonize the response measures, but also the resilience capacity of financial players in order to avoid the scenario of serial bankruptcy of the economic fabric, faced with a risk of continuous change in order to guarantee the security of the common market and the interests of European consumers.

As illustrated by the measures defined in the regulations, cyber risk is a cross-functional risk, both within companies and in terms of law.

Of note, however: law is one of the first preventive measures to secure cyberspace. ■

"Facing systemic risks that cyber-risk represents for the economies of the Member States, the European Union continues to secure its digital borders by involving economic players."

Footnotes:

1 Thales, Atlas des Cyberattaquants (2022), available at: www.thalesgroup.com/fr/monde/securite/press_release/thales-presente-son-atlas-des-cyberattaquants-2022.

2 ANSSI, Une année 2021 marquée par la professionnalisation des acteurs malveillants, available at: www.ssi.gouv.fr/actualite/une-annee-2021-marquee-par-la-professionnalisation-des-acteurs-malveillants/

3 Proposal for a Regulation of the European Parliament and of the Council on digital operational resilience for the financial sector and amending Regulations (EC) No 1060/2009, (EU) No 648/2012, (EU) No 600/2014 and (EU) No 909/2014 of 24 September 2020 which will be adopted this year in accordance with the ordinary legislative procedure.

A is for Adversity, W is for War.

Alesya Pavlynska and Anton Molchanov report on the corporate and restructuring novelties in Ukraine resulting from the Russo-Ukrainian war

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For the absolute majority of Ukrainians, their lives changed drastically on 24 February – with air defence alarms heard for the very first time since the end of WWII and the first Russian cruise rockets hitting Ukrainian infrastructure and housing.

As the third month of the war is coming to an end, the Ukrainian Parliament (*Verkhovna Rada*) continues to introduce new legislation, not just aimed at tackling the consequences of the war, but also becoming a weapon itself against the aggressor.

"*For the absolute majority of Ukrainians, their lives changed drastically on 24 February*"

Corporate governance

With the start of the war and introduction of the martial law no major changes in corporate legislation have taken place in Ukraine. However, some restrictions implemented due to martial law have changed the corporate landscape directly or indirectly. Most of these restrictions affect Russian-affiliated companies.

For instance, the legislation currently provides for the following restrictions relevant to Ukrainian legal entities:

1. Moratorium on fulfilment of obligations[1] towards Ukrainian companies with Russian affiliation (i.e. those having Russian UBOs or shareholders holding ≥10% of the share capital).
2. Moratorium on sale (or actions that may result in property title transfer)[2] of real estate, securities, shares, vehicles, aircrafts and vessels possessed by Russian-affiliated Ukrainian companies. These restrictions are applied in both ways – neither sale nor acquisition is possible.
3. Prohibition to conclude notarial acts[3] at the request of Russian-affiliated Ukrainian companies.
4. Prohibition of foreign exchange transactions[4]
   i. with Russian and Belarusian roubles,
   ii. with any individuals/companies residing/registered in the Russian Federation or the Republic of Belarus,
   iii. for the fulfilment of the obligations before individuals/companies residing/registered in the Russian federation or the Republic of Belarus.

The above restrictions have affected all companies with Russian shareholdings, be it purely Russian businesses or international companies with Russian subsidiaries in the ownership chain.

Moreover, even if the affected companies wish to restructure and change their shareholders (e.g., within the same group of international companies, transferring the shares held by the Russian subsidiaries to the headquarters) this is also now not technically possible. In practice, this means that it is impossible to change shareholders or UBOs in the Ukrainian corporate register even if legitimately changed at the foreign ownership level. This restriction is universal and refers even to companies without any Russian shareholdings in the chain.

On the other hand, the Ministry of Justice have identified a limited list of permissible registration actions, not including changes of the shareholders or UBOs (as registration of charitable organizations, NGOs and limited liability companies, change of the director and the address). Placement, turnover and redemption of securities, as well as operations in the depository system, have also been suspended (with some exceptions made for government securities). This means that joint stock share trading/transfers also remain blocked.[5]

Possible nationalization

Law of 3 March 2022 has established the following mechanism for the nationalization of the property of the Russian Federation in Ukraine:

- no compensation as the by-default approach;
- the procedure consists of the following stages:
  i. submission of a draft decision with a list of objects by the Cabinet of Ministers of Ukraine to the National Security and Defence Council;
  ii. adoption of the decision by the National Security and Defence Council; and
  iii. its implementation by a decree of the President of Ukraine;
- nationalization applies to the possessions of the Russian Federation and its residents.

Currently, Ukrainian legal entities controlled by private Russian companies are not affected by this Law. Nevertheless, due to the changes soon to be in force, either the National Security and Defence Council or a court will be granted a right to expand the nationalization to any individuals or legal entities supporting the aggression and/or not stopping their activities in the Russian Federation. This puts at risk even those companies with no direct nexus to Russia.

Restructuring and workouts

Immediately after the war began, the Ukrainian National Bank instructed domestic lenders to suspend default interest and maturity of contractual penalties prior to martial law coming to an end as well as use long-range restructuring for NPLs arising from the war with a direct workout restriction.

Later in March 2022, a separate law expanded the relief measures by suspending the default 3% p.a. interest and inflation compensation accruals for all UAH defaults and also all default interests and contractual penalties (be those loan-related, commercial or private ones). At the same time, general interest accrual under pre-war loans have not been suspended – nor have principal loan payments.

This, together with the lack of insolvency-related moratoriums, threatens debtors with a continued snowballing of NPLs and the following tsunami of war-related insolvencies driven by creditors. ■

Footnotes:

1 Resolution of the Cabinet of Ministers of Ukraine "*On Protection of the National Interests on Ukraine in Future Claims related to the Military Aggression of the Russian Federation*" No. 187 of 03 March 2022.

2 Ibid.

3 Resolution of the Cabinet of Ministers of Ukraine "*On Certain Matters of the State Registration Under Martial Law*" No. 164 of 28 February 2022.

4 Resolution of the National Bank of Ukraine "*On Amending the Resolution of the National Bank of Ukraine: On the Operation of the Banking System Under Martial Law. No. 18 Dated 24 February 2022*" No. 21 of 24 February 2022.

5 Decision of the National Securities and Stock Market Commission No. 136 of 24 February 2022.

6 See: https://zakon.rada.gov.ua/laws/show/2116-IX#Text>.

> *Restrictions implemented due to martial law have changed the corporate landscape directly or indirectly*

The first year of StaRUG: A disappointing result?

Olomon Ljumani and Peter Neu report on the high hopes and low acceptance for the new German toolbox

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Over a year has passed since the EU Directive on Restructuring and Insolvency (EU 2019/1023) was implemented in Germany. With the implementation of the Directive came the adoption of the Stabilisation and Restructuring Framework for Enterprises Act (StaRUG) (*Unternehmensstabilisierungs- und restrukturierungsgesetz*) by the German legislature on 17 December 2020.

As reported in the Spring 2021 edition of Eurofenix, the StaRUG was intended to create the basis for the enforcement and implementation of corporate restructurings against the resistance of minority creditors, while avoiding insolvency proceedings. German policymakers made great efforts to implement the law at the beginning of 2021, seven months earlier than necessary, in order to pre-empt the wave of insolvencies that was expected, due to the coronavirus pandemic.

The reason behind this was to give companies affected by the pandemic an additional tool for their restructuring toolbox, in order to allow a more differentiated response to the potential crisis. Expectations of the new law were accordingly high. German politicians even prided themselves on having created a law that was not only in line with the modern approach to restructuring law, but that could also compete with the English Scheme of Arrangement and the Dutch WHOA (*Wet homologatie onderhands akkoord*). One of the aims of the StaRUG was to counteract so-called forum shopping and to develop Germany into a more attractive place for restructuring. There was even concern, in part, that the courts would be overburdened with the adaptation and the resulting workload.

> *The StaRUG has not been accepted by practitioners to the degree that was expected when it was implemented*

Falling short of expectations

To the surprise of the majority of experts, these high expectations have not been met. The StaRUG has not been accepted by practitioners to the degree that was expected when it was implemented. According to the German insolvency trade journal "INDat Report", there were only 22 applications for StaRUG proceedings in 2021. This figure is based on a survey among restructuring courts located in Germany. Thus, while the Dutch WHOA enjoys great popularity, with an estimated 130 procedures in 2021, the German StaRUG is only of secondary importance. The difference in acceptance levels becomes even clearer when one takes into account that Germany has five times as many inhabitants as the Netherlands. Malicious tongues sarcastically claim that there are now more legal commentaries on the StaRUG than there are procedures.

Manifold causes for low acceptance and German cautiousness

Possible reasons for the low level of acceptance among practitioners are the subject of much debate among experts. It is difficult to identify a clear reason, particularly since StaRUG procedures are, by their very nature, not public. However, one reason for the low acceptance probably has to do with the cautiousness for which Germans are known around the world. The StaRUG is new, it is a behemoth of 100 sections and is generally perceived as complicated. Many decision-makers are therefore suspicious of the StaRUG and are worried about making things worse in an already bad economic situation. Such caution is nothing new in Germany.

A very similar reaction was provoked in Germany when the Act to Further Facilitate the Restructuring of Companies (ESUG) (*Gesetz zur weiteren Erleichterung der Sanierung von Unternehmen*) was introduced in 2012. The ESUG was also a law that aimed to innovate and modernise the possibilities for restructuring companies. The changes introduced at that time were as far-reaching as those in the StaRUG. Here too, the reaction in the German industry was initially very restrained. However, the initial hesitation has subsided over time and today the restructuring instruments introduced by the ESUG are part of the daily work in restructuring practice. It seems likely that the acceptance of the StaRUG will increase similarly, once a number of successful StaRUG proceedings have been completed.

First showcase example

The restructuring proceedings of *eterna Mode Holding GmbH*

(Eterna) could serve as such an example. Eterna is one of Germany's largest shirt manufacturers, which ran into financial difficulties in the recent past. Eterna's advisors and management decided to file for a StaRUG proceeding in September 2021 and to implement a restructuring plan. The restructuring plan was subsequently confirmed by the restructuring court in October 2021. The central point of the plan was an agreement with Eterna's bondholders, according to which they would receive only 12.5% of their outstanding claim, so that the company's survival could be ensured. Eterna is therefore the first media effective StaRUG procedure in Germany and, so far, it looks like it has been a success.

Low insolvency figures

Since the beginning of the coronavirus pandemic, a great wave of insolvencies has been expected in Germany. However, such a wave has so far failed to materialise. This is probably due to the fact that the German government generously distributed state subsidies to industries affected by the pandemic and even suspended the obligation to file for insolvency for a certain period of time. With the help of state subsidies, some of which are being paid until summer 2022, many companies hit by the coronavirus pandemic were able to stay afloat. This is also a partial explanation for the low number of proceedings under the StaRUG. This situation is likely to change by late summer 2022, when the last of the government aid programs will expire. It is expected that there will be an increasingly high number of companies whose financial difficulties will become apparent in the near future, due to the expiry of the state subsidies. This means, not only would the number of insolvencies increase, but also the number of companies that could potentially initiate StaRUG proceedings.

Is the Toolbox too small?

Some experts attribute the restrained acceptance of the StaRUG to the fact that the "toolbox" is not big enough. Criticism focuses primarily on the lack of an option to terminate ongoing contracts. This was a highly controversial issue at the time of the introduction of the StaRUG. Ultimately, however, the voices of legislators who demanded that the right to terminate an existing contract should be reserved only for insolvency proceedings have prevailed.

A further point of criticism is the lack of regulations providing for a "shift of fiduciary duties" of the management. According to such provisions, as of the moment of imminent insolvency, the management of a company would have been obliged to give priority to the interests of the creditors and to act in accordance with these interests as opposed to acting in accordance with the interests of the shareholders. As a result, there is no obligation on the part of the management to initiate restructuring proceedings; it remains merely an option. Admittedly, the StaRUG is therefore more suitable for financial restructurings (i.e. debt restructuring) than it is for restructuring the operating business. As such, the StaRUG certainly does not offer the right restructuring tool for every company.

Changes would be premature

With regard to the very low number of proceedings, voices have been raised calling for an amendment to the StaRUG. However, this would be premature at this point in time. An overall view of the reasons for the poor acceptance level does not necessarily lead to the conclusion that the law itself has failed. Rather, the business community and consulting practice must be given time to embrace the new possibilities of the StaRUG. Successful restructurings, such as that of Eterna, will serve as positive examples and will increase the level of acceptance. In addition, the expiry of state subsidies is likely to contribute to long-existing financial imbalances within companies becoming apparent.

Moreover, the success of the StaRUG cannot only be measured by the number of proceedings carried out. It may very well be that the goal of the StaRUG, which is to implement a restructuring against the will of opposing creditors, is achieved even without conducting official proceedings. In many cases, the mere possibility of a StaRUG proceeding is enough to act as a deterrent for opposing creditors. Such creditors tend towards reaching an agreement and making concessions outside the StaRUG procedure in order to avoid it.

> *"In many cases, the mere possibility of a StaRUG proceeding is enough to act as a deterrent for opposing creditors"*


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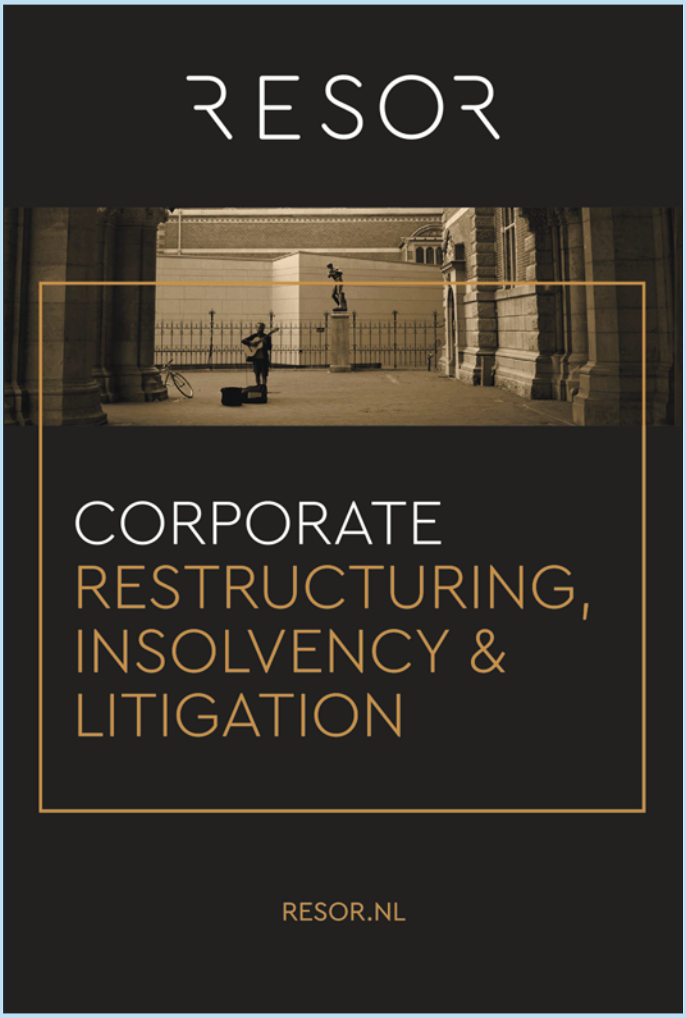
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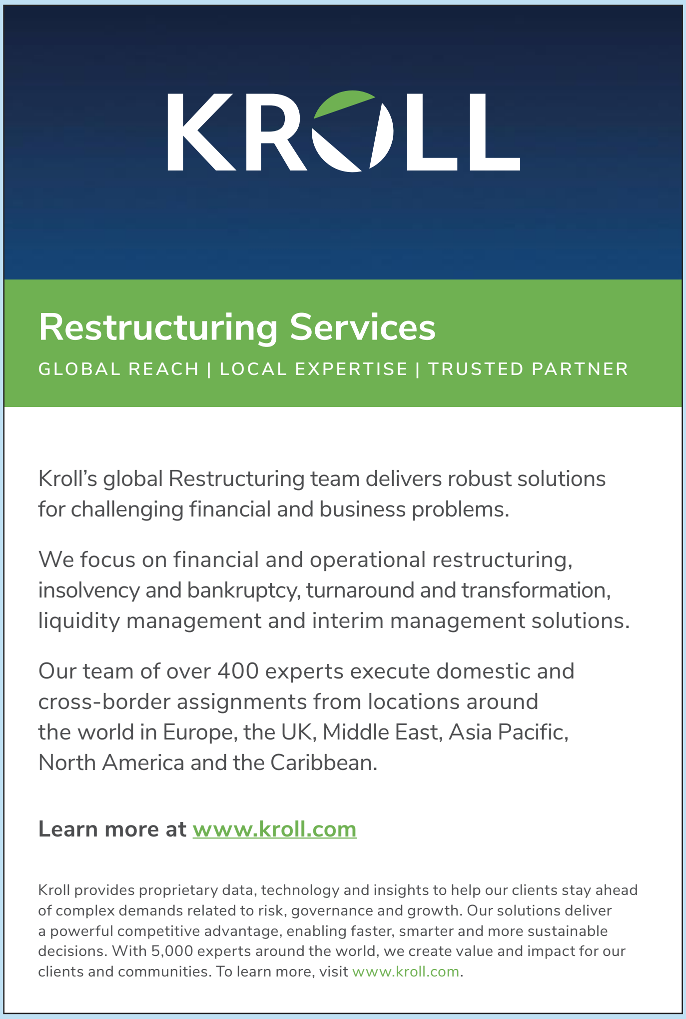
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Mission (almost) impossible: The successful restructuring of a FMCG retailer in Poland:

Patryk Filipiak reports on the difficult but not impossible restructuring of a retail chain

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The successful restructuring of an insolvent Fast Moving Consumer Goods (FMCG) retail chain in Poland is a rarity. For various reasons, brands such as *Alma, Real, Billa, Hit, Géant, Leader Price, Bomi and MarcPol* have not survived the competitive race and have ceased operations. Further-more, after 25 years in Poland, *Tesco* sold its 300 stores in 2020 to *Netto (Salling Group)*. The Polish retail market may be tempting (€60 billion/2019, PMR), but it is also highly competitive with strong consolidation trends.

Nonetheless, the recent successful turnaround of the *Piotr i Paweł* retail chain has made two things apparent: it is extremely difficult to continue doing business while displaying an "under restructuring" banner and, furthermore, that restructuring an FMCG operation in distress cannot be carried out without serious support from an external financing entity, preferably a strategic investor. What may also be needed is a huge amount of luck!

> *It is extremely difficult to continue doing business while displaying an "under restructuring" banner*

Case facts and turnaround scenario

Historically, *Piotr i Paweł* was a well-known delicatessen brand in Poland. The company started just after the transformation in 1990 with one store in Poznań founded by the Woś family. The brothers Piotr and Paweł Woś gave their names to the chain. It grew rapidly with a mixed model: over time, owned stores gave way to franchise stores, reaching at its peak in 2019 150 supermarket stores of an average 1200 m^2 each, with €430 million of revenue per year, 1,200 employees and 14,000 products on the shelf. It was in the upper price and quality segment; the basket prices were the highest in Poland.

Nevertheless, for the past few years, the business model became progressively broken, through migration to smaller cities, where cheaper large discount and post-discount chains reigned supreme: *Biedronka* (owned by *Jerónimo Martins*) (3,000 stores, €11 billion in sales in 2018), *Lidl* or *Dino*. The expansion pursued a short-term revenue model of selling incubated stores into the hands of private franchisees. Trends were also changing: customers were less and less attached to the brand, choosing other stores if they gave them the expected values (price, proximity, less - comfort of purchase and variety). Additionally, Sunday trading was banned in 2018.

This led to deepening unprofitability of the core business. A delayed transaction process was launched but it was not successful: only a dozen or so locations were acquired by competitors (*Biedronka* and *Carrefour*).

Procedural steps

As a result, after a delay of a year, in September 2018, court restructuring proceedings (*post powanie sanacyjne*) were initiated against 3 main operating companies from the group. The chain entered the process with more than half of its stores unprofitable.

Restructuring proceedings that have been available in the law since 2016 can provide for airtight protection against enforcement and termination of certain agreements, including the key ones for *Piotr i Paweł*: lease agreements. Additionally, it is possible to:

- rescind unprofitable contracts without having to pay contractual penalties;
- reduce employment with the exclusion of employee protective regulations; and
- sell redundant assets with the release of mortgages and other encumbrances.

Obviously, the proceedings are aimed at concluding an arrangement with the creditors and restructuring the liabilities.

These recovery actions are normally performed by a court-appointed administrator, though it is possible for the debtor to nominate a candidate for the position. The *Piotr i Paweł* board selected our company (Zimmerman Filipiak Restrukturyzacja SA). As the administrator, we rescinded 60 lease agreements, sometimes resulting in disputes with landlords. We sold a dozen or so stores and focused on growth only in profitable stores in the largest cities. We reduced employment to a relatively small extent (100 employees in the central warehouse as part of a group layoff). All employees received full severance payments and we were never in default in making remuneration payments.

The most difficult relationships were with suppliers, who – after the withdrawal of insurers and guarantors – stopped selling with extended payment terms and significantly reduced

trade limits. In fact, by the end of proceedings, the suppliers had not restored normal payment terms. As *Piotr i Paweł* could not count on bank financing for almost one year, it was practically deprived of what is most important in trade – working capital. This is the critical issue that determines the failure of most such projects. It was also not easy with franchisees, who were disappointed with the lack of goods in the central warehouses and the lack of well-budgeted marketing campaigns.

It was not until very quick and effective talks with a strategic investor that a breakthrough was achieved. The SPAR Group Ltd. from the Republic of South Africa planned to enter the attractive Polish market, having already had experience in taking over projects during the crisis (Switzerland, Ireland). Despite significant restrictions on the transfer of funds from South Africa (requiring central bank currency approval), it was possible to reach a final agreement with three banks within five months (subject to a 50% reduction of claims) and to support the project financially and organisationally.

After a further three months period, arrangement proposals were presented. They were very strict for Polish conditions: most creditors received 10-30% repayments (however, these creditors would receive nothing in bankruptcy), but the smallest ones and the Social Security received 100% satisfaction. This happened immediately after the approval of the arrangement being final and binding, on a one-off basis. The arrangement was adopted by vote in March 2020. Currently, all *Piotr i Paweł* stores have been rebranded to SPAR. Apart from the 100 employees from the logistics warehouse, no other employee lost his job.

Summary

The success of the restructuring of *Piotr i Paweł* shows that such restructurings, though rare, are possible. In the author's view, the key conditions for success are:

1) where external financing is cut off, it is necessary to cut costs extremely quickly, sometimes brutally, and try to restore cash-flow balances;
2) a review of strategic options to find an investor needs to be initiated immediately; in many cases a reputational downgrade of the brand will be required; and
3) state support schemes for restructuring (credit and guarantees for business in crisis) must be used. ■

> *The success of the restructuring of Piotr i Paweł shows that such restructurings, though rare, are possible*

The goal of harmonisation from the Portuguese example

Catarina Serra reports on the progress so far of the transposition of the Directive on Restructuring and Insolvency in Portugal

CATARINA SERRA
Justice of the Portuguese Supreme Court

> *Some of the measures in the Directive present a considerable degree of novelty and of complexity and even some syncretism*

The transposition of the Directive on Restructuring and Insolvency ("Directive") in Portugal was carried out by Law No 9/2022, of 9 January, in force since 9 April. It is no secret that the transposition was made with little time, hence without much reflection. The COVID-19 reason may be invoked, but the fact remains that the main lines of the Directive have been known since the Commission Recommendation of 12 March 2014.

Some of the measures in the Directive present a considerable degree of novelty and of complexity and even some syncretism (aggravated, the latter, by a poor translation of the Portuguese version). Inevitably, there are discrepancies or non-conformities with regard to what the Directive required. A general consequence may be drawn just from the Portuguese example: it is doubtful that the Directive will achieve the much-coveted harmonisation of insolvency law.

The scope of Law No. 9/2022

The scope of Law No. 9/2022 roughly corresponds to the scope of the Directive on restructuring and insolvency which is reflected in its title – *"preventive restructuring frameworks" and "discharge of debt and disqualifications"*. The amendments with the greatest impact are relating to, therefore, the Special Revitalisation Proceedings ("PER")[1] and the discharge.

As mentioned, at several points, the regime presents discrepancies, non-conformities or deviations from the provisions of the Directive. This assertion may be illustrated with only two (emblematic) examples: the rule on the formation of separate classes and the rule on ipso facto clauses.

The formation of separate classes

The possibility of treating affected parties in separate classes has two well-known virtues. In the first place, it converts the adoption of the plan into an operation that certifies the ability of the plan to satisfy a diversified majority of interests, rather than perpetuating it as a mere quantitative operation.

In the second place, it facilitates preventive restructuring. It is easier, in principle, to take the conditions of cross-class cram-down for granted when it is not necessary to compare the treatment of each individual with the treatment of the whole of the individuals and it suffices to compare it with the treatment of the individuals of the same class or of classes of the same ranking. Pursuant to the Insolvency Act (hereinafter IA), as amended by Law No. 9/2022, there are two classifications of the affected parties: one in basic classes (secured, privileged, unsecured, and subordinated creditors), and the other in ulterior classes.

The second classification presents several discrepancies regarding the Directive.

Firstly, ignoring the necessity of general and objective criteria being made available in national law[2], the Portuguese legislator provides just for an exemplary cast of five classes (employees; equity holders; banking entities; suppliers; and public creditors).

Then, and more importantly, in the Directive, there is a separate provision on the adoption of the plan. More precisely, the Directive requires that a majority in the amount of their claims or interests is obtained in each class (Article 9 (6)]). It follows that cross-class cram-down is an instrument designed to overcome the situations where the plan "*is not approved by affected parties, as provided for in Article 9(6), in every voting class*" (Article 11 (1)).

The preference for unanimity is noticeable: the plan should be approved, primarily, by all classes and, only subsidiarily, as a condition for cross-class cram-down, by a majority or by part of the classes. In addition, the Directive requires that majority of the claims / interests in each class is in favour of the plan.

In contrast, the Portuguese law regulates the different modalities of approval of the plan all together(Article 17-F (5) a), i), ii), iii) and iv), IA), as equivalents for the purpose of cross-class cram-down (Article 17-F (7), IA). To make it worse, pursuant to Article 17-F (5), a), IA, for the plan to be considered adopted in each class, it is sufficient for it to obtain "*more than two-thirds of the total votes cast*", which does not correspond to a majority of the claims or interests represented in that each class.

The absence of a provision on the adoption of the plan separately from the conditions for cross-class cram-down has yet another harmful consequence. According to the Directive, cross-class cram-down may only take place "*upon the proposal of a debtor or with the debtor's agreement*" (Article 11 (1)), but Member States may limit this requirement to cases where debtors are SMEs (Article 11 (1), 2nd paragraph). This means that, at least in the case of SMEs, the debtor must give his agreement so that the plan proceeds to the cross-class cram-down stage[3].

The Portuguese legislator did not accommodate this opt-out scheme. Under the Portuguese law, the approval of the plan, involving the approval by all the classes or not, is inevitably followed by the assessment of conditions for the cross-class cram-down. Against this background, it is likely that Portuguese entrepreneurs will refrain from forming classes, which will dictate the practical uselessness of a system that would be very important in facilitating preventive restructuring.

Ipso facto clauses

It is well known that the expression *ipso facto* (literally: for that fact) clauses traditionally designates those clauses which give one of the parties the right to terminate the contract when a certain fact occurs. That is to say: the effect is produced by force of the mere occurrence of the fact (*ipso facto*), even if the debtor has not failed to fulfil any obligation.[4]

The regulation of *ipso facto* clauses in the context of insolvency and pre-insolvency is noteworthy: by removing the risk of the company being penalized for the mere fact of adopting preventive restructuring measures, it works as a mechanism to promote timely action.

Article 17-E (13), IA lays down: "*A contractual clause that attributes to the request for the opening a special revitalisation process, the opening of a special revitalisation process, the request for an extension of the stay of individual enforcement actions or the granting of the extension of the stay of individual enforcement actions the value of a resolutive condition of the contract, or, in that case, confers to the counterparty a right to compensation or termination of the contract is null and void*".

From the outset, the differences between this provision and Article 7 (5) of the Directive are visible.

The most striking difference is that the Portuguese regime of *ipso facto* clauses was conceived as if the only restructuring instrument that existed was the PER and the measures taking place in the framework of the PER. It does not cover situations where it is not possible or appropriate for the debtor to file for these proceedings and the negotiation of the plan is carried out through out-of-court regimes or mere informal workouts. Yet, any of these forms constitutes a legitimate course of action and consequently should be protected in the light of the purpose of promoting timely action. Timely action is the first step towards the success in any preventive restructuring.

This constitutes a significative shortcoming – and a deviation from the Directive, considering recital 40, which, as a complement to Article 7 (5), clarifies that: "*it is necessary to provide that creditors are not allowed to invoke ipso facto clauses which make reference to negotiations of a restructuring plan or a stay or any similar event connected to the stay*".[5,6]

> *The Portuguese case illustrates the difficulties of the transposition procedure and, consequently, shows how far we still are from convergence in this domain*

Final remarks (from the future backwards)

Going back to the beginning, the Portuguese case illustrates the difficulties of the transposition procedure and, consequently, shows how far we still are from convergence in this domain. Looking at what has been done, and, most of all, what remains to be done, knowing what is already planned for the future (the imminence of a Directive), it will be necessary to think carefully before acting. Harmonisation has more limits than those imagined, relating to the "accidents" of the transposition itself. ■

Footnotes:

1 On the PER and the remaining preventive restructuring instruments of Portuguese law, see C. Serra, "Reforms in Adverse Economic Climates: How Reforms Take Place in the Eurozone – Part I: Portugal", in P. Omar and J. Gant (eds), *Research Handbook on Corporate Restructuring* (Edward Elgar Publishing, 2021), 87 ff.

2 See R. Dammann, in C. Paulus and R. Dammann, *European Restructuring Directive – Article-by-Article Commentary* (Beck/Hart/Nomos, 2021), 158.

3 In Recital 58 of the Directive, this safeguard is reiterated.

4 According to T. Richter, in Paulus and Dammann (above note 2), 135-136, the purpose of such a regime in insolvency proceedings is to prevent the creditor from resolving his situation outside the proceedings simply because the debtor resorts to the proceedings – hence its name "*ipso facto*".

5 Recitals help to clarify the purpose of normative instruments, consequently performing, themselves, a normative function, though complementary – *a supplementary normative role*. See R. Baratta, "Complexity of EU Law in the Domestic Implementing Process" (2014) 2(3) *The Theory and Practice of Legislation* 293, 296-298, available at: https://pdfslide.net/documents/the-theory-and-practice-of-legislation-unimcit-theory-and-practice-of-legislation.html.

6 In contrast, Richter, 136, submits that Member States can opt for the narrower terms of Article 7(5) of the Directive.

Dynamic changes planned for Finnish insolvency proceedings

Mikko Tavast and Jan Lilius write on the forthcoming amendments which will bring dynamic changes to individual proceedings in Finland

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> *The last major amendment took place in 2007 just before the global financial crisis*

The Finnish Act on the Restructuring of Enterprises ("Restructuring Act") was prepared quickly during the recession that hit Finland in the 1990s. The intention was to offer an alternative to bankruptcy for viable companies experiencing temporary hardship. The Restructuring Act has since seen several amendments, and – more likely by chance rather than design – major amendments have always taken place during times of crisis.

The last major amendment took place in 2007 just before the global financial crisis and, as the latest amendment nears implementation, the times are once again insecure.

Despite the pandemic, the number of bankruptcies and restructurings in Finland is intriguingly low. The record low figures of 2020 can be explained by temporary legislation providing solace to debtors, but, over a year after the temporary legislation ceased to be in force, the numbers are yet to reach even 2019 levels. Now in 2022, Finnish companies are facing new challenges following the conflict in Ukraine and related sanctions on Russia, but recent insolvency statistics do not seem to reflect the added challenges in the business environment.

The current amendment relates to the Directive on Restructuring and Insolvency (Directive 2019/1023). The final date for the implementation of the Directive was 17 July 2021, but Finland applied for the maximum one-year extension, which means that the implementation must take place by 17 July 2022. In fact, the amendment to the Finnish Restructuring Act will be implemented on 1 July 2022. The Directive has many objectives: enabling preventive restructuring frameworks, ensuring a second chance to over-indebted entrepreneurs and increasing the effectiveness of insolvency procedures, but here the focus is solely on the topic of preventive restructuring frameworks, which will be implemented in Finland by amending the Restructuring Act.

After the implementation of the amendment, there will be two options for restructuring proceedings: the new early proceedings and regular restructuring proceedings, the latter of which will materially resemble the current restructuring proceedings. Only the debtor will be able to file for the early proceedings, which means that, without the debtor's contribution, creditors only have the option of regular proceedings. However, in practice, it is very rare that a petition for restructuring would be filed by a creditor, as bankruptcy is often the preferred choice.

The early proceedings will be suitable for debtors facing impending insolvency, while insolvent debtors (and their creditors) will have to choose between the regular proceedings and bankruptcy, depending on the depth of their insolvency. This is likely to mean that drawing the line between impending insolvency and actual insolvency will become an interesting legal issue in the future. While there are many differences between the early restructuring proceedings and the regular restructuring proceedings, the means of restructuring, i.e., the legal tools to restructure the debtor company's business, will be materially the same in both proceedings.

With the implementation of the Directive, there will be many changes in Finnish restructuring legislation – too many to mention them all here. Notably, the early proceedings will be time-limited, because the maximum time for the moratorium, which includes the interdictions protecting the debtor from measures from its creditors, such as the interdictions of repayment and debt collection, will be 12 months. No time limit will be applicable to regular proceedings. If the 12-month moratorium proves insufficient, it will be possible to apply for a transition to the regular proceedings. A transition may also be made if the debtor proves to be or becomes insolvent during the process.

The amendment also contains other notable changes, including a prohibition on *ipso facto* clauses in restructuring. Such clauses have already been considered ineffective according to Finnish Supreme Court practice, but the application of the principle has been clear only in the case of bankruptcies, whereas the ineffectiveness of *ipso facto* clauses in restructuring has not been properly tested. The codification of the prohibition will be a welcome clarification to the legal state of *ipso facto* clauses in restructuring.

In addition to the changes required by the Directive, there is another amendment to the

Restructuring Act planned for 2023. The proposed changes are not based on the requirements of the Directive. The intention is to streamline and simplify restructuring proceedings and to prevent the misuse of the provisions of the Restructuring Act, for instance, by filing several successive restructuring petitions. The changes proposed for 2023 also include imposing an incentive on creditors to notify the restructuring administrator of their restructuring claims in time, lowering the requirements for summary approval of a restructuring programme and making it easier to reject successive restructuring petitions.

As a result of the amendment of 2022 and the proposed amendment for 2023 described above, Finnish restructuring legislation will see many changes in a short time that will dramatically change not only the options available, but also the dynamics of individual proceedings. It will be very interesting to see how and to what extent the field of restructuring will change with the availability of two different restructuring proceedings and how the changes will in practice affect debtors, creditors, and insolvency practitioners.

The Directive's objective to encourage debtors to file for restructuring at an earlier phase is advisable. Notoriously, debtors file for restructuring too late, which means that debtors often enter the proceedings in a worse financial situation than they would if they had filed earlier. This causes a risk for restructuring proceedings by making it harder to prepare a restructuring programme that fulfils the requirements of the Restructuring Act and gains sufficient creditor support. It also increases the risk of the restructuring programme failing in the implementation phase.

However, the actual effect of having an option of early restructuring proceedings remains to be seen. Even with current legislation, it is possible to file for restructuring proceedings at an early phase either with an application based on impending insolvency or with sufficient creditor support in the petition phase. Regretfully, this option has not been used often enough. ■

> *Finnish restructuring legislation will see many changes in a short time that will dramatically change not only the options available, but also the dynamics of individual proceedings*

The perfect storm: The energy sector in crisis

Eduardo Peixoto Gomes reports on how the rocketing cost of energy is affecting the European energy market

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> *Futures markets are pricing European gas at three times their 2021 levels for (at least) the next three years*

Unprecedented high energy costs are striking European energy markets since late 2021. Historically, EU Natural Gas reached an all time high of €345/MWh in March of 2022. According to Trading Economics' global macro models and analysts expectations, EU Natural Gas is expected to be traded at €91.39/MWh by the end of this quarter and at €124.37/MWh in 12 months time.

Futures markets are pricing European gas at three times their 2021 levels for (at least) the next three years. In sum, households and industry are being punched full in the face.

This energy price surge is the outcome of several factors, notably the post Covid-19 rise in global demand, carbon pricing and, more recently and relevantly, the Russian invasion of Ukraine.

As newspapers keep reminding us daily, Russia has historically been the European Union's (EU) largest supplier of natural gas. In fact, in 2021, the EU imported an average of over 380 million cubic metres per day of gas by pipeline from Russia. This corresponds approximately to 45% of EU gas imports in 2021 and almost 40% of its total gas consumption.

Considering the dearth of Russian gas supplies, the EU Energy Commissioner has started to take measures to try to mitigate the impact of high energy prices, notably, by presenting a proposal to revise gas supply regulations to improve coordination among member states over gas storage and getting in touch with partners to try to replace Russian gas supplies from alternative sources and, consequently, boost EU gas supplies.

Nonetheless, will these measures be sufficient? What is the path Europe should take to get out of this crisis?

The soaring energy prices are causing a profound and adverse impact on production costs and consequently, rising costs for consumers, with potentially dire effects on economic activity and on the banks' loan books. Furthermore, the aforementioned higher costs for consumers, but also supply chain disruptions, may well affect consumers' behaviour and, therefore, reduce economic activity. Moreover, industries, specifically the most energy-intensive sectors, need urgent intervention as their business viability and sustainability are facing a massive survivability test.

The European Commission has reminded us that increasing pressures on prices might accelerate monetary policy normalization, i.e. will cause the European Central Bank (ECB) to start raising interest rates to curb the inflation peak. As per a post by Christine Lagarde, President of the ECB, dated 23 May 2022:

> *"Based on the current outlook, we are likely to be in a position to exit negative interest rates by the end of the third quarter. The next stage of normalisation would need to be guided by the evolution of the medium-term inflation outlook. If we see inflation stabilising at 2% over the medium term, a progressive further normalisation of interest rates towards the neutral rate will be appropriate."*

The most immediate consequence of the increase of the Euribor rate, which is the rate at which the majority of mortgages are indexed, is the exacerbation of the burden on families' through interest payments to banks on mortgage loans, which may deepen the economic slowdown.

My understanding is that this energy crisis is a test for the resilience of European companies. Today's crisis could be the trigger for action that protects their short-term profitability while helping them pull ahead in the race to a net-zero world. In sum and quoting John F. Kennedy:

> *"The Chinese use two brush strokes to write the word 'crisis.' One brush stroke stands for danger; the other for opportunity. In a crisis, be aware of the danger – but recognize the opportunity."*

Therefore, in order to tackle the current energy crisis, measures need to be implemented to reduce Europe's reliance on fossil fuels, especially on Russian gas.

Experts view the only lasting solution to fossil fuels dependence to be to complete the green transition. As this seems to be an extremely bold objective to be fully achieved in a short period of time, the sooner companies adopt and implement decarbonization strategies, such as the deployment of new wind and solar projects, the sooner they will be able to mitigate their high energy costs.

It is important to highlight that the European Investment Bank (EIB) has financed energy infrastructure with around €60 billion between 2016 and 2020. This included over €53 billion for renewable energy, energy efficiency and electricity grid projects in Europe and around the world. In 2020 alone, the EIB provided €11.6 billion for energy related projects. Towards the end of 2019, the EIB adopted a new energy lending policy which calls for the following:[1]

Unlocking energy efficiency investments

The EIB will set up a European Initiative for Building Renovation to support new ways of financing building rehabilitation. During the coming decade, the EIB will double the volume of investment in energy efficiency, especially in residential buildings.

> *"Given the pressing need to accelerate market uptake for energy efficiency measures, the EIB will consider financing up to 75% of a project's costs".*[2]

Decarbonising energy supply

The EIB will support the market integration of renewable electricity projects and promote increased regional cooperation, as well as back other types of renewables, including renewable heating, the production and integration of low-carbon gases, such as hydrogen, and low-carbon fuels, in order to try to more than double its renewable energy capacity to decarbonise its energy supply and meet its 2030 renewable targets.

Supporting innovative low-carbon technologies

The EIB also supports the early deployment of technologies to increase industrial learning and promote future cost reduction, as energy transformation is only possible with a wide portfolio of energy technologies and services, many of which are still at the developmental stage and come with relatively high costs. The EIB will also support initial commercial production lines related to breakthrough technologies and new types of energy infrastructure to stimulate their market uptake.

Investing in a more secure enabling infrastructure

Besides interconnections, investment in national electricity networks is likely to remain high for the next decade, both at transmission and distribution level. The EIB will continue to support the development of electricity networks, including the interconnection target agreed for 2030 as well as European Projects of Common Interest. The EIB will also look to prioritise investments that increase network flexibility.

Considering the abovementioned energy lending policy by the EIB, the commitment made by the Parties to the Paris Agreement to transforming their development trajectories towards sustainability, the urgent need to tackle the current energy crisis and the growing demand for energy and related services, there will be plenty of opportunities for new business and hope (still!) for a better and greener Europe. ■

> "Measures need to be implemented to reduce Europe's reliance on fossil fuels, especially on Russian gas"

Footnotes:

1 European Investment Bank Group – Energy Overview 2021, available at: <www.eib.org/en/publications/energy-overview-2021>.

2 *idem*

Corporate bankruptcy reformation in the US

David H. Conaway reports on the proposed legislation to address controversial practices in chapter 11

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As a result of recent high profile Chapter 11 cases, such as *Purdue Pharma* and *Johnson & Johnson*, there has been great Congressional and media attention to controversial Chapter 11 practices. These include debtors' forum- and judge-shopping, nonconsensual third party releases of non-debtors in the Plan of Reorganization and the use of divisional mergers to isolate liabilities into special purpose entities.

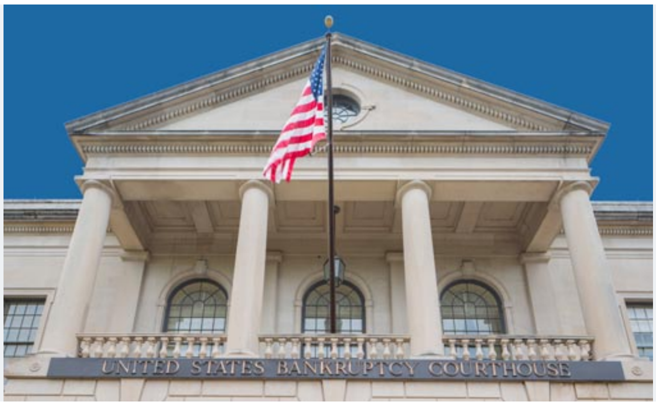
In 2021, to address these concerns, two bills were introduced in the US Senate and House of Representatives:

- Bankruptcy Venue Reform Act of 2021 ("Venue Bill"); and
- Nondebtor Release Prohibition Act of 2021 ("Release Bill").

Venue Bill

Currently, a corporate debtor can file a Chapter 11 case where it has its domicile (usually state of incorporation), principal place of business (usually corporate headquarters) or location of principal assets for at least 180 days. **Or, where there is pending a Chapter 11 case of an affiliate.** Chapter 11 debtors have routinely filed their cases essentially wherever they choose. According to testimony in a 28 July 2021 House Judiciary Subcommittee on Confronting Abuses of the Chapter 11 System, certain US Bankruptcy Courts are eager to attract large complex Chapter 11 cases to their districts. In fact, it was noted that 3 out of 375 U.S. bankruptcy judges

> *Chapter 11 debtors have routinely filed their cases essentially wherever they choose*



presided over 57% of large public company cases in 2020. Furthermore, the suggestion is that certain courts may be more likely to rule in favour of Chapter 11 debtors on key issues, such as third party releases, incentive compensation packages and fast-track sales of assets or pre-packaged plans. In *Purdue Pharma*, the Bankruptcy Court for the Southern District of New York (SDNY) (White Plains division) approved a Plan of Reorganization that included releases of all claims against the Sackler family (officers, directors or shareholders), including the claims of opioid victims.

In addition, certain Bankruptcy Courts have case assignment procedures that direct cases to certain judges. In the SDNY, all White Plains cases were assigned to Judge Robert Drain, who presided over the *Purdue Pharma* case. In the Southern District of Texas, all complex cases are assigned to Judges David Jones or Marvin Isgur. Delaware's case assignment procedures are random. In the wake of media attention and judicial challenges to third party releases, the SDNY changed the case assignment procedures so that White Plains cases are now randomly assigned. The same change has occurred in the Eastern District of Virginia.

Under the Venue Bill, businesses would only be able to file their Chapter 11 cases where they have their principal place of business or where their principal assets are located. The Venue Bill would eliminate affiliate-based filings unless the affiliate were the debtor's controlling shareholder.

The Venue Bill would certainly end debtors' forum- and judge-shopping, which presumably would reduce alleged debtor bias by certain Bankruptcy Courts. On the other hand, certain Bankruptcy Courts, including Delaware, the SDNY and the Southern District of Texas, have developed a high level of expertise in handling complex Chapter 11 cases efficiently. In considering the Venue Bill, these conflicting policy issues should be considered.

Non-debtor third-party releases

The Release Bill would generally prohibit bankruptcy courts approving nonconsensual third-party releases of claims against non-debtors, such as the Sacklers in *Purdue Pharma*. In addition, the Release Bill would prohibit bankruptcy courts from applying the section 362 automatic stay (injunction of all actions) to non-debtors for more than 90 days. Finally, the Release Bill would require the dismissal of Chapter 11 cases where the debtor was created by a "divisional merger", effectively ending the so-called "Texas 2-Step" cases, such as in *Johnson & Johnson*.

To date, US Bankruptcy Courts have issued conflicting rulings on third-party releases. The most notable ruling was in the *Purdue Pharma* case, where, on 16 December 2021, the SDNY vacated the order confirming the Chapter 11 Plan of Reorganization and the releases in favour of the Sackler family. The District Court found there was no statutory authority in the Bankruptcy Code for third party releases, except in cases involving asbestos claims (where channelling injunctions are permitted). However, in another opioid case, *Mallinckrodt PLC*, the Delaware Bankruptcy Court ruled that nonconsensual third-party releases were permissible.

The Release Bill would simply prohibit nonconsensual third-party releases of non-debtors, applicable to all US bankruptcy courts. Moreover, the Release Bill would require consent to a proposed release only by a written consent signed by the releasing party (example, opioid claimants). This would eliminate consent by voting for a plan, failing to reject or object to a proposed plan or failing to opt out of or object to the releases, all of which are common tactics utilized by debtors.

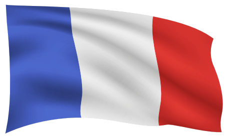
The controversial third party release cases have generally been associated with mass tort claims, such as the opioid claims in *Purdue Pharma* and *Mallinckrodt* or asbestos claims. However, third party releases are very broadly drafted and have released perhaps unintended claims. We were involved in a Delaware case where our client had significant executory contracts, specifically a USD 3.5 billion supply agreement and related consignment and security agreements. Negotiations regarding the assumption of these contracts were complex and sometimes contentious.

Ultimately, our client was able to achieve a favourable resolution, requiring the debtor to honour 100% of its obligations post-confirmation of the Plan on a fully secured basis. However, the Plan contained broad releases of all claims with respect to any creditor that would include obligations owed to our client that were negotiated and approved by the Bankruptcy Court. Thus, we were required to file an objection to the Plan's third party releases to preserve the performance and other obligations by the debtor and its lenders with respect to our client's executory contracts. ■

To date, US Bankruptcy Courts have issued conflicting rulings on third-party releases

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*

Towards a French code of private international law for insolvency proceedings



JEAN-LUC VALLENS
Honorary judge, Professor emeritus, University of Strasbourg

> *The new principles will be consistent with the guidelines provided by the UNCITRAL Model Law on Cross-Border Insolvency*

In March 2022, a French think tank, the French Committee on Private International Law ('*Comité français de droit international privé*'), which brings together judges and academics in coordination with the Ministry of Justice), drew up a draft code of private international law. This is a major step towards the introduction of a text codifying private international law in French law. The draft covers all matters of civil and commercial law, including insolvency law.

Specific jurisdictional rules adopt the criteria of the debtor's centre of main interests and secondary establishment based on the European Insolvency Regulation. They also neutralise the transfer of the registered office to a non-EU state within six months before any application: in such cases, the draft maintains the jurisdiction of French courts. The draft determines a broad scope of application, extended to proceedings for dealing with company difficulties, which is broader than the term of 'insolvency proceedings'. The aim is to cover the preventive proceedings recommended by the European Directive of 20 June 2019.

The draft code then contains conflict-of-law rules inspired by the terminology of the European Insolvency Regulation. On the model of the European Insolvency Regulation, the law of the opening state applies to questions relating to any proceedings, but also to the guarantees and privileges of employee claims as well as the liabilities of managers. As regards financial claims, all creditors will of course be able to lodge their claims by virtue of the universality principle of insolvency proceedings.

Proceedings opened abroad will be recognised, while their enforcement will be subject to the rules of *exequatur*. In this respect, the draft code adopts common rules for all civil and commercial disputes as well as for insolvency proceedings based on French case-law.

What are the conditions of enforcement?

- The dispute must have a clear and sufficient link ('*lien caractérisé*') with the foreign court.
- Recognition and enforcement must not be contrary to international public policy on substance and procedure.
- The foreign judgment must not be obtained by fraud.
- The foreign judgment must not be irreconcilable with a decision already delivered in France as, for example, a pending insolvency proceeding toward the same debtor.

The exequatur judgment will be the responsibility of the French judicial court (i.e. the civil court, and not the commercial court), determined by the place of enforcement of the foreign judgment, and will be granted under an accelerated procedure, ensuring rapid processing.

Given this perspective, the new principles will be consistent with the guidelines provided by the UNCITRAL Model Law on Cross-Border Insolvency: the future code will grant predictability and efficiency to most of foreign insolvency proceedings. It only remains for the French legislator to enshrine this project into positive law. ■

Latest news on the Italian Code of Business Crisis and Insolvency

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GIOVANNA CANALE
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After two years of postponement due to the COVID-19 health crisis, the new Code of Business Crisis and Insolvency will finally come into force on 15 July 2022. Though the aim of the Code initially was to transpose Directive 2017/1132, amended by the Preventive Restructuring Directive (Directive 2019/1023), the health crisis and its negative impact on the economy and business activities reinforced the urgency of adopting such a mechanism in response to the increased number of companies in financial difficulties or insolvent.

The Code of Business Crisis and Insolvency was first introduced by Legislative Decree no. 14 of 12 January 2019, implementing Law no. 155 of 11 October 2017. Subsequently, as reported in previous editions of Eurofenix (specifically the Autumn 2019 edition), some provisions of the 391 articles came into force 30 days after the publication of the Legislative Decree in the Official Gazette on 14 February 2019, in particular the following provisions:

- Article 356 concerning the creation of a single National Register of Experts;
- Article 375 related to the requirement for the entrepreneur to establish an organizational, administrative and accounting structure to favour the timely detection of crisis and to adopt and implement one of the instruments provided by the law to overcome crisis and recover business continuity;
- Article 378 requiring directors of limited liability companies to employ a higher degree of attention in a situation of company crisis, at the risk of being liable to the company's creditors where the company's assets are insufficient to satisfy their claims; and
- Article 379 extending the cases in which limited liability companies are forced to appoint the controlling body or the auditor to facilitate the detection and timely management of crisis.

The remaining provisions should have come into force in August 2020. Nevertheless, due to the COVID-19 crisis, on 24 August 2021, Decree-Law no. 118, introducing urgent measures in the field of corporate crisis and corporate recovery, postponed the entry into force of the Code of Business Crisis and Insolvency to 16 May 2022. Finally, the Council of Ministers resolution no. 72 of 13 April 2022 approved the Legislative Decree containing "urgent measures for the implementation of the National Recovery and Resilience Plan", which amends Article 389 of the Code, enabling the decree to come into force on 15 July 2022.

According to the recommendations of Directive 2019/1023, the new Code of Business Crisis and Insolvency will:

- provide a systemic and organic framework for the bankruptcy and insolvency regime;
- reduce the duration and cost of insolvency proceedings;
- uniformize and simplify the legislation on various special proceedings; and
- prioritize dealing with proposals that lead to the overcoming of the crisis by ensuring business continuity.

Furthermore, it will also reassure external investors wishing to invest in Italy, who were facing some uncertainties regarding solvency rules or the risk of prolonged and complex insolvency procedures. ■

> **"The new code will... reassure external investors wishing to invest in Italy, who were facing some uncertainties regarding solvency rules"**

Dutch bank ATB enters insolvency due to sanctions

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On Friday 22 April 2022, the Amsterdam District Court opened bankruptcy proceedings in respect of Amsterdam Trade Bank NV (ATB) on the application of ATB and after hearing the Dutch Central Bank (DNB). Toni van Hees and Job van Hooff from the Stibbe law firm in Amsterdam were appointed by the court as administrators. They have been assigned with the task to liquidate the bank for the benefit of the depositors and other creditors.

ATB's bankruptcy, the first of a Dutch bank since 2009, is peculiar, because it was not caused by a deteriorating financial position. It is a direct consequence of the sanctions packages announced by various jurisdictions in response to the Russian invasion of Ukraine. ATB has a Russian connection: the Russian Alfa Bank holds a majority stake of 78% in ATB and part of the ultimate beneficial owners (UBOs) of ATB are sanctioned Russian natural persons. ATB was particularly affected by the sanctions imposed in the United Kingdom and the United States. In these sanctions packages, ATB, as a subsidiary of Alfa Bank, was directly sanctioned, as a result of which certain companies and individuals from these countries were no longer allowed to do business with ATB as of 24 April and 6 May respectively.

As a result, several service providers terminated their services to ATB or threatened to do so in the near future. Several employees also terminated their contracts with ATB, or threatened to do so in the short term. This had far-reaching consequences for the business operations of ATB and meant that ATB was no longer able to perform its core activities, even though ATB is Netherlands-based and it does not fall under

EU sanctions. Due to further terminations of services around 24 April and 6 May, ATB would no longer have access to essential systems, personnel, information and services to meet its obligations towards its depositors and other counterparties. Therefore, it saw no other option than to apply for its bankruptcy.

Since the opening of the bankruptcy proceedings, Van Hees and Van Hooff in their capacity as court appointed administrators have been able to secure exemptions from the US and UK sanctions packages. Both the US authority OFAC and its UK counterpart OFSI granted licenses to facilitate the administrators in fulfilling their statutory tasks. Meanwhile, Van Hees and Van Hooff sought and obtained an injunction from the Amsterdam District Court against Microsoft. Microsoft had stopped its services to ATB prior to the bankruptcy, thus blocking the administrators from access to crucial systems, like company emails and cloud services. The court considered that the administrators, by order of the court and in accordance with the rules of the Dutch Bankruptcy Act, perform a statutory duty. Pursuant to Article 105b of the Dutch Bankruptcy Act, they must have access to the entire records of ATB, including the records located in the cloud. The court therefore ordered Microsoft to provide the administrators with access in the manner requested by them on penalty of €10 million per day with a maximum of €100 million.

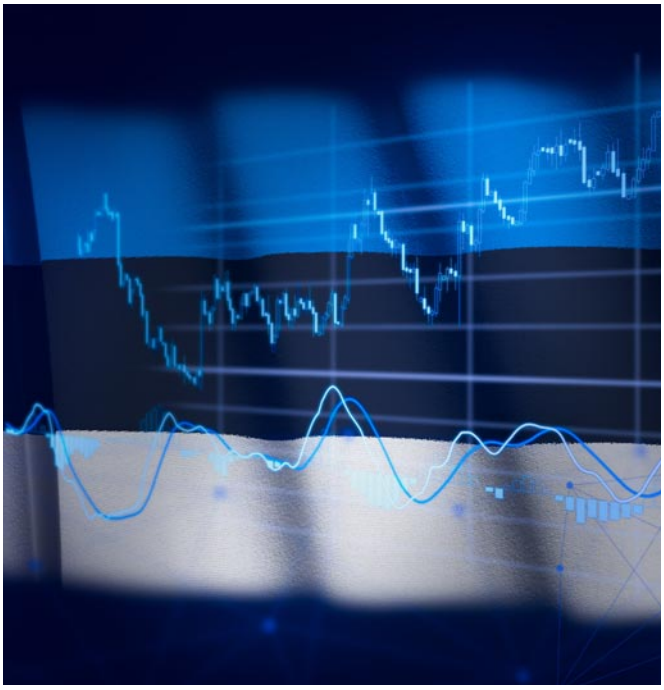
The administrators continue to face operational issues that are caused by sanctions, even though they are performing their tasks for the benefit of the more than 23,000 depositors holding accounts with ATB and who are Dutch and German nationals, many of whom are pensioners. Meanwhile, many of these positions have been taken over by the Dutch Deposit Guarantee Scheme (DGS). Directly after the bankruptcy order, the Dutch Central Bank DNB activated the DGS and, as at the time of writing, DNB has already paid out over €500 million to depositors.

It is noteworthy that the interest accruing over that claim and other claims after the date of bankruptcy is eligible for verification, according to a special provision to that effect. This rule only applies to bankruptcies of credit institutions, in deviation from the general rule under Dutch bankruptcy law, and which came into force on 2 March 2022, seven weeks before the ATB's bankruptcy. ■

> *ATB's bankruptcy … is a direct consequence of the sanctions packages announced by various jurisdictions in response to the Russian invasion of Ukraine*

The establishment of an Insolvency Division in Estonia

The main issues in Estonian bankruptcy proceedings are associated with the late initiation of bankruptcy proceedings and its financing. If bankruptcy proceedings are initiated later than prescribed by law, the debtor may not have the funds to conduct the bankruptcy proceedings.



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If there is a lack of assets to conduct the bankruptcy proceedings and there are no creditors who are willing to finance it, the company will be deleted from the Commercial Register without conducting bankruptcy proceedings. In such cases, the reasons for the company´s bankruptcy will not be investigated and the persons involved in causing the bankruptcy will not be held liable. This damages the credibility and transparency of the Estonian economic environment.

To solve this problem, a special governmental institution – the Insolvency Division (*maksejõuetuse teenistus*) – was established as of 1 January 2022. Its task is to investigate bankruptcy proceedings and find out the causes of bankruptcy and possible misconduct by the debtor's management. Moreover, the Insolvency Division must supervise the debtor and the persons related to it in connection with transactions concluded just before the declaration of bankruptcy.

For the supervision of bankruptcy proceedings, the main tools at the disposal of the Insolvency Division are the special audit and a public investigation. The Insolvency Division can conduct a special audit at its own discretion or on receipt of a reasoned request from a trustee in bankruptcy. In a nutshell, the purpose of a special audit is to analyse a specific fact, for example, to establish the economic situation of the debtor, whether the bankruptcy petition was submitted on time and whether possibilities for recovery exist.

Public investigation is a special form of conducting bankruptcy proceedings, where no general meeting of creditors is called and no bankruptcy committee is formed. In order to initiate a public investigation, the Insolvency Division must file a reasoned application with the court, if abatement of proceedings on a bankruptcy petition would otherwise occur, and it may be at least reasonably suspected that there is public interest in the debtor´s bankruptcy, for example, where the debtor has committed an act with criminal elements in connection with becoming bankrupt or the bankruptcy is caused by a grave error in management. Simply put, the objective of conducting bankruptcy proceedings by public investigation is to prevent particularly malicious bankruptcy schemes such as the debtor hiding its assets by making deals with persons connected to it.

Thus, the main goal of the Insolvency Division is to improve the economic environment by investigating bankruptcy proceedings with the aim of directing debtors to file for bankruptcy in a timely manner. In turn, this should help to ensure that there are sufficient funds to carry out bankruptcy proceedings and that the debtor is not removed from the Commercial Register without bankruptcy proceedings being conducted. The effectiveness of the Insolvency Division will only become apparent over the years, but it is clear that the Insolvency Division will not be able to supervise all of the bankruptcy proceedings and will serve more as a random check. ■

> *The main goal of the Insolvency Division is to improve the economic environment by investigating bankruptcy proceedings with the aim of directing debtors to file for bankruptcy in a timely manner*

Changes to the Croatian insolvency framework: Restructuring procedure revisited

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A second set of amendments to the Croatian Bankruptcy Act (2015) came into effect on 31 March 2022 and was introduced to implement the EU Directive 2019/1023 (Directive on Restructuring and Insolvency).

Most of the new provisions were added to the existing "*pre-insolvency*" procedure (*predstecajni postupak*), which is intended to be used as a restructuring procedure. The changes are substantial and introduce new tools intended for businesses in a distressed situation that are not yet in a state of permanent insolvency which would "qualify" them for insolvency (bankruptcy) proceedings.

Notable changes include additional provisions for temporary new money which can be approved by creditors who hold two-thirds of established claims, subject to being necessary for restructuring and aimed at increasing the value of the business in restructuring. The final decision goes to the court which will specify the amount and any conditions. Furthermore, there is the possibility for new money, included in a restructuring plan, to be given, in case of subsequent insolvency, priority over unsecured claims (second to employee claims and social security and health security fund contributions).

Other changes include new duties for insolvency practitioners whose appointment by court becomes mandatory. Their role will be to supervise and, in some cases, also make decisions on the debtor's day-to-day business. In relation to the period while the debtor is in restructuring, there is a limitation on avoidance actions regarding new money transactions in case of (subsequent) bankruptcy proceedings.

The possibility to reduce the rights of secured creditors has also been introduced, as long as they are no worse off than in the case where there is no plan and insolvency (bankruptcy) proceedings are opened. Moreover, the mandatory moratorium in this procedure is now limited in the first instance to 120 days, with the possibility for two further extensions of 90 days each.

As an added benefit, the restructuring plan can be submitted at a later stage, which is also a big difference from the last legislative changes. Provisions that debtor can submit bankruptcy plan in "regular" insolvency (bankruptcy) proceedings have been reintegrated in the text.

Additional to the changes in restructuring proceedings, the mandatory differentiation of creditor classes has been introduced, together with shareholders being placed in a separate class. Changes in voting include the presumption of acceptance of a restructuring plan in case no vote was cast/submitted. Provisions for the treatment of "executory contracts" now feature as do new provisions rendering "*ipso facto*" clauses ineffective once restructuring proceedings have commenced.

In regards to insolvency practitioners, the previous two lists for appointments, depending on the type of procedure (summary/regular), have now been merged, though there is also a newly-introduced list of "highly skilled insolvency practitioners". In other improvements, an early warning system has been introduced, as has the systematic collecting of data in insolvency proceedings, the introduction of restrictions for debtors previously convicted for criminal acts connected with insolvency proceedings, all of which are awaiting secondary legislation to be enacted by the Ministry of Justice and Public Administration.

These new provisions will bring additional flexibility to the restructuring regime through providing more solutions, but will also be more demanding for courts and practitioners alike. In light of the small number of restructuring procedures compared to insolvency (bankruptcy) procedures in Croatia (and the overall reduced number of insolvency proceedings in the last two years), it will probably take some time to properly analyse the outcomes and allow for relevant feedback. ■

> *These new provisions will bring additional flexibility to the restructuring regime through providing more solutions*

View from the UK: An upward trend?

Colin Haig, Immediate Past President of R3, the insolvency and restructuring trade body, looks at insolvency trends in England and Wales

Insolvencies in England and Wales are on the rise according to the Insolvency Service. Numbers are surpassing pre-pandemic levels after two years in which they did not reflect the scale of the challenges faced by businesses, individuals and the economy following the pandemic.

The data from the Insolvency Service shows corporate insolvencies were 112% higher in Q1 of this year (4,869) than in Q1 2021 (2,309) and 17.1% higher than in Q1 2019 (4,182).

The main driver of the increase is a rise in Company Voluntary Liquidations – with Q1's figures the highest seen since the records first began in 1960 – while Q1 of this year also saw compulsory liquidation numbers increase, although this increase was not to pre-pandemic levels. Meanwhile, administration numbers have also risen back to 2020 levels over the last quarter, but are still nowhere near what they were before the pandemic.

A multitude of factors

What is behind this increase? Well, it is fair to say the business climate is a challenging one right now. After two years of trading through a pandemic, firms are now having to deal with the sharp rise in the costs of fuel and energy – as well as staff requests for wage increases. The main driver of these requests for increased pay is the surge in inflation, which has happened at a point where many were hoping for a return to pre-pandemic levels of trading. As a result, the spending boom many were hoping for has not happened and businesses are facing increased costs as well as flatlining revenue.

It is also worth noting that the last of the Government's COVID-19 support measures ended before Christmas. Although these have played a critical part in supporting businesses through the economic effects of the pandemic, they could not remain in place indefinitely. With the final remaining measures ending, businesses are finding themselves under increased pressure to pay creditors, staff and suppliers at a time when revenue levels have yet to recover from the pandemic.

Personal insolvencies: A pre-pandemic state

Personal insolvency numbers for the first four months of this year are nearly as high as they were at the start of 2019. A closer look at the data shows that, while overall process numbers are back to 2019 levels, the balance of personal insolvency processes has changed. Bankruptcy numbers are now significantly lower than before COVID-19 and from the peak of the pandemic, while Debt Relief Order (DRO) numbers are also lower than in April 2019, but have increased compared to 2021's figures.

The main reason for this year-on-year increase in DROs is the changes to the eligibility criteria which were introduced in June 2021. It was predicted numbers would rise in the latter half of last year because of this change, but the increase appears to be continuing into this year as well. What is driving the personal insolvency increase? Well, much like with corporate insolvencies, a combination of the economic aftereffects of the pandemic and the increased cost of living is the main reason behind the rise in numbers. As prices have increased, wages have not kept pace with inflation, which has meant there are a large number of people who are struggling to cover their outgoings and worried about their personal finances and whether they will have enough money every month.

A trend or a spike?

Around 6,000 fewer companies and more than 15,000 fewer individuals have entered an insolvency process over the last two years compared to 2018 and 2019. This suggests there are potentially a number of insolvency cases that would have happened but for the Government's support measures. As a result, it is likely we will see insolvency numbers increase in the short to medium term, but when this will be – and whether it will be a sharp rise or a slower one – is harder to call.

As inflation continues to rise, the next Quarter Day draws closer, and if consumers remain reluctant to spend, there is a high probability the next six months will be busy ones for the profession – especially if those who are suffering from financial distress make a sensible choice and seek advice before they become insolvent. ■

COLIN HAIG
Immediate Past President of insolvency and restructuring trade body R3, London

> *After two years of trading through a pandemic, firms are now having to deal with the sharp rise in the costs of fuel and energy*

Technical Update:

Significant progress in relation to the implementation of the EU Preventive Restructuring Directive in EU Member States in the context of the post COVID-19-crisis

Myriam Mailly writes about the new joint project between LexisPSL and INSOL Europe in relation to the implementation of the EU Preventive Restructuring Directive in EU Member States

MYRIAM MAILLY
INSOL Europe Technical Officer

> If you want to contribute, please do not hesitate to send me the relevant materials at: technical@insol-europe.org

New INSOL Europe/LexisPSL Joint Research on Implementation of EU Directive 2019/1023

After the successful joint project on '*How EU Member States recognise restructuring/insolvency proceedings commenced in third country states*' (still available online at: *www.insol-europe.org/technical-content/introduction*), a new collaboration has started with LexisPSL in relation to the implementation in the EU Member States of Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on Restructuring and Insolvency).

This research looks at how the EU Member States as well as the UK (before Brexit) have implemented Directive (EU) 2019/1023 as part of the Joint Project between INSOL Europe and LexisPSL to track implementation.

With the precious assistance of the INSOL Europe membership and INSOL Europe Country Coordinators, a table summarising some of the key findings has been published to cover issues of whether the implementation of the EU Directive on Restructuring and Insolvency has led to the creation of new proceedings or to minor/major changes to existing proceedings (Q.1), the relevant opening criteria (Q.2), the voting threshold for the approval of a restructuring plan (Q.8), the conditions under which creditors can be crammed down (Q.12) or whether the targeted proceedings will be listed in Annex A of the EU Insolvency Regulation (Recast) (Q.14).

The consolidated table also includes a final column which gives links to the full article for each country, which answers all 17 questions relating to the involvement of courts (Q.2), the eligibility of foreign companies (Q.4), the DIP principle and the appointment of an insolvency practitioner (Q.5), the length of the moratorium on claims when applicable (Q.6), the constitution of classes for 'affected creditors'(Q.7), the position of secured creditors and employees (Q10-11), the application (or not) of the absolute priority rule in case of (cross-class) cram-down (Q.12), the consequences on current contracts (Q.13), the eventual protection or priority of new money or other arrangements (Q.15) as well as the cost and length of the preventive restructuring process (Q16-Q17).

While the EU Directive has been effective since 17 July 2019 and had to be implemented by Member States by 17 July 2021, some Member States that encountered particular difficulties in implementing the EU Directive notified in January 2021 their wish (under Article 34.2 of the text) to request an extension of a maximum period of one year (i.e., to 17 July 2022).

Consequently, the consolidated table is not yet complete and will be updated with more countries, as more articles are received in the weeks to come. At the time of writing, answers from the following countries are available: **Austria, Croatia, Cyprus, Finland, France, Germany, Greece, Hungary, Lithuania, Portugal, Slovakia, The Netherlands** and the **UK**.

We are grateful to the following contributors for their precious cooperation: Gottfried Gassner and Johannes Varga (AT), Jelenko Lehki (HR), Andri Antoniou (CY), Jan Lilius (FI), Jean-Luc Vallens (FR), Frank Tschentscher (DE), Yiannis Bazinas (HL), Zoltan Fabok (HU), Frank Heemann (LT), Catarina Serra (PT), Dávid Oršula (SK), Alice van der Schee (NL) and Kathy Stones (UK).

Individual articles as well as the consolidated table are available at: *www.insol-europe.org/technical-content/insol-europelexispsl-research-on-implementation-of-the-eu-directive-20191023*

National Insolvency Statistics

Updated insolvency statistics have been published for **Cyprus** (Year 2021 and monthly statistics for 2022), **France** (Q1 2022) as well as for **England & Wales, Northern Ireland and Scotland** (Q1 2022).

Direct links to national insolvency registers are now available for **Cyprus, Croatia, Greece, Hungary, Latvia, Lithuania, Slovenia** and new statistical entries have been published for **Bulgaria, Romania** and **Slovenia**. It is also worth mentioning that **Greece** has already published relevant statistics in accordance with the EU Directive (source: EBRD).

At the **European** level, a link to statistics in relation to declarations of bankruptcies published by Eurostat on a quarterly basis has been also added for the benefit of the INSOL Europe members (latest edition as at 17 May 2022). As part of this collection, quarterly comparisons in the EU and euro area, quarterly comparisons by Member State and quarterly comparisons by activity are available. At the **global** level, a link to the 2021 Global Bankruptcy Report from the Dun & Bradstreet Worldwide Network (May 2022) has also been made available.

All these relevant sources f information are now available via the dedicated technical section of our website at: *www.insol-europe.org/technical-content/national-insolvency-statistics* ■

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/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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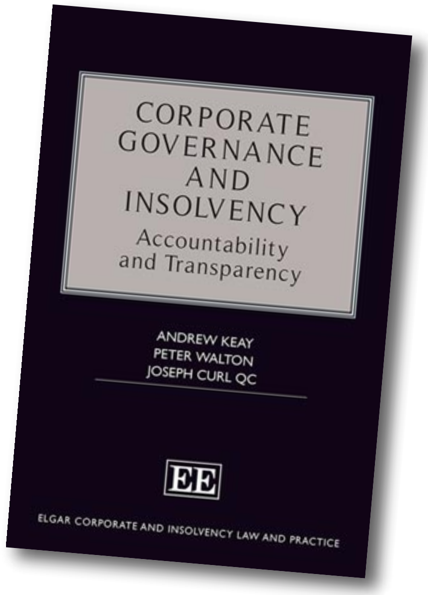
Books

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

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

Corporate Governance and Insolvency Accountability and Transparency



Andrew Keay, Peter Walton and Joseph Curl QC (1st edition) (2022, Edward Elgar Publishing, Cheltenham), xli and 402pp, £155, ISBN 978-1-78897-933-7.

Companies have traditionally operated in challenging markets. However, recent years have resulted in unprecedented changes to business environments, at a pace and magnitude never experienced in living memory. This book looks at corporate governance issues affecting companies experiencing financial difficulties under English law.

A lot has been written on the governance of solvent companies, particularly large ones, but insolvent companies have been largely neglected. The book provides a comprehensive analysis of corporate governance issues that exist in relation to the management of insolvent companies. Its focus is on the directors' duties and behaviour when these managers are still in control of the company's business, as well as the consequences arising from the commencement of a formal insolvency procedure (and the appointment of an insolvency practitioner).

The book considers the role of several stakeholders (the Insolvency Service, special managers, shareholders and creditors and their committees) when companies are on the verge or in a state of insolvency. It also analyses how these stakeholders relate to the people in charge of the insolvent companies (directors or insolvency practitioners). The book argues that the two most important "virtues" of corporate governance are transparency and accountability. Accordingly, the authors look at the behaviour of the parties involved in these procedures through those two lenses. They provide advice to directors and insolvency practitioners to facilitate the achievement of these goals when distressed or insolvent companies are run by directors and insolvency practitioners.

The book is doctrinal in nature, and it comes as highly recommended. Overall, the book is geared primarily towards a specialist audience of lawyers and insolvency practitioners. At the same time, researchers or students who approach this topic for the first time will not find it challenging to follow the comprehensive, accurate and easy-to-understand explanations of the topics covered in the book. Such a clear analysis of complex issues had only been possible thanks to the expertise and knowledge of its authors.

Eugenio Vaccari, Lecturer in Law, Royal Holloway, University of London

> *The book provides a comprehensive analysis of corporate governance issues that exist in relation to the management of insolvent companies*

Research Handbook on Corporate Restructuring

Paul J Omar and Jennifer L L Gant (eds) (1st edition) (2021, Edward Elgar Publishing, Cheltenham) xiv + 566 pp., GBP 215, ISBN 978-1-78643-746-4

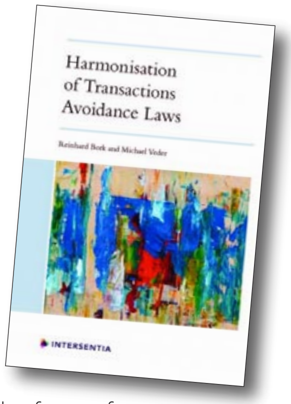
By far, most formal insolvency procedures aim at liquidating the debtor's assets and distributing the proceeds to their creditors. Despite the prevailing liquidating nature of most formal insolvency procedures, the last three decades have witnessed a paradigm shift in the focus of what is commonly known as "insolvency" or "bankruptcy" law. Scholars around the world have made convincing arguments for rescuing distressed yet viable debtors. This change in the basic assumptions of this area of law has not gone unopposed. It has been met with criticism and resistance by scholars (particularly from contractualist and proceduralist movements), regulators and practitioners. It has also resulted in the emergence of new research questions, some of which are dealt with in the reviewed handbook.

This text is expertly edited by two prominent scholars in the field, Dr Paul Omar and Dr Jennifer Gant. This handbook includes valuable and significant contributions on rescue-related themes from expert academics, practitioners, and judges from all over the world. The main themes covered in the handbook are: (i) national and international models for rescue; (ii) stakeholders in insolvency; (iii) corporate structures and organisational models; (iv) specialist process issues; (v) institutional support; and (vi) interdisciplinary and cross-fields of insolvency and restructuring.

I thoroughly recommend this handbook as an invaluable addition to the libraries of the many scholars and researchers passionate about corporate insolvency law debates. Its inter-disciplinary nature makes this handbook suitable for a variety of other readers, including researchers and students in commercial, economics and contract law issues. Its global and cross-border outlook makes this handbook an essential addition to any library in higher-education institutions across the world. Finally, its timely nature and varied approach to key debates in corporate restructuring provide the basis for the identification of the topics that will prominently feature in regulatory and academic discussions in the years to come.

Eugenio Vaccari, Lecturer in Law, Royal Holloway, University of London

Harmonisation of Transactions Avoidance Laws



Reinhard Bork and Michael Veder (1st edition) (2022, Intersentia, Antwerp), xvii and 1314pp, €124, ISBN 978-1-83970-182-5.

In the European context, voice has been given to a possible common approach within the European Union through the work of the European Commission Group of Experts in Restructuring and Insolvency Law (GERIL), of which both authors of the text reviewed here are members. It is in light of what is referred to as the Insolvency III initiative that attention has been drawn to an intriguing question: whether it is possible to harmonise the rules of, inter alia, transactions avoidance. The ostensible reason is that these, and other, rules constitute an impediment to cross-border investment and the conduct of transnational insolvencies. The answer the authors give is nuanced.

The project, out of which this text comes, begins with a questionnaire answered by eminent academics, judges and practitioners in the 23 jurisdictions surveyed (22 EU + UK). On the back of the information included in the returns, the authors adopt a principles-based approach to tease out individual principles informing the structure of transactions avoidance laws, both individually (by state concerned) as well as more generally. The authors then determine which of these principles would usefully inform a harmonisation initiative and what aspects would need to be developed for the purposes of any regulation. Lastly, the authors draft a proposed Model Law, which, in eight fairly concise articles, attempts to encapsulate the essentials for any proposal.

Although the text has been further worked on within GERIL, the core that is contained in this volume gives a flavour of what might emanate when the European Commission eventually settles on a draft text, which the authors recommend could usefully take the form of a Directive. The material here is well-developed, given the inclusion of the questionnaire in this over 1300-page text, and it is possible to see and follow the reasoning the authors employ and how they build to their conclusions. Overall, this is a magisterial work, unsurprisingly so, given the stature of the authors, and is well worth the acquisition for all those keen on understanding the workings of this key core area of the discipline.

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