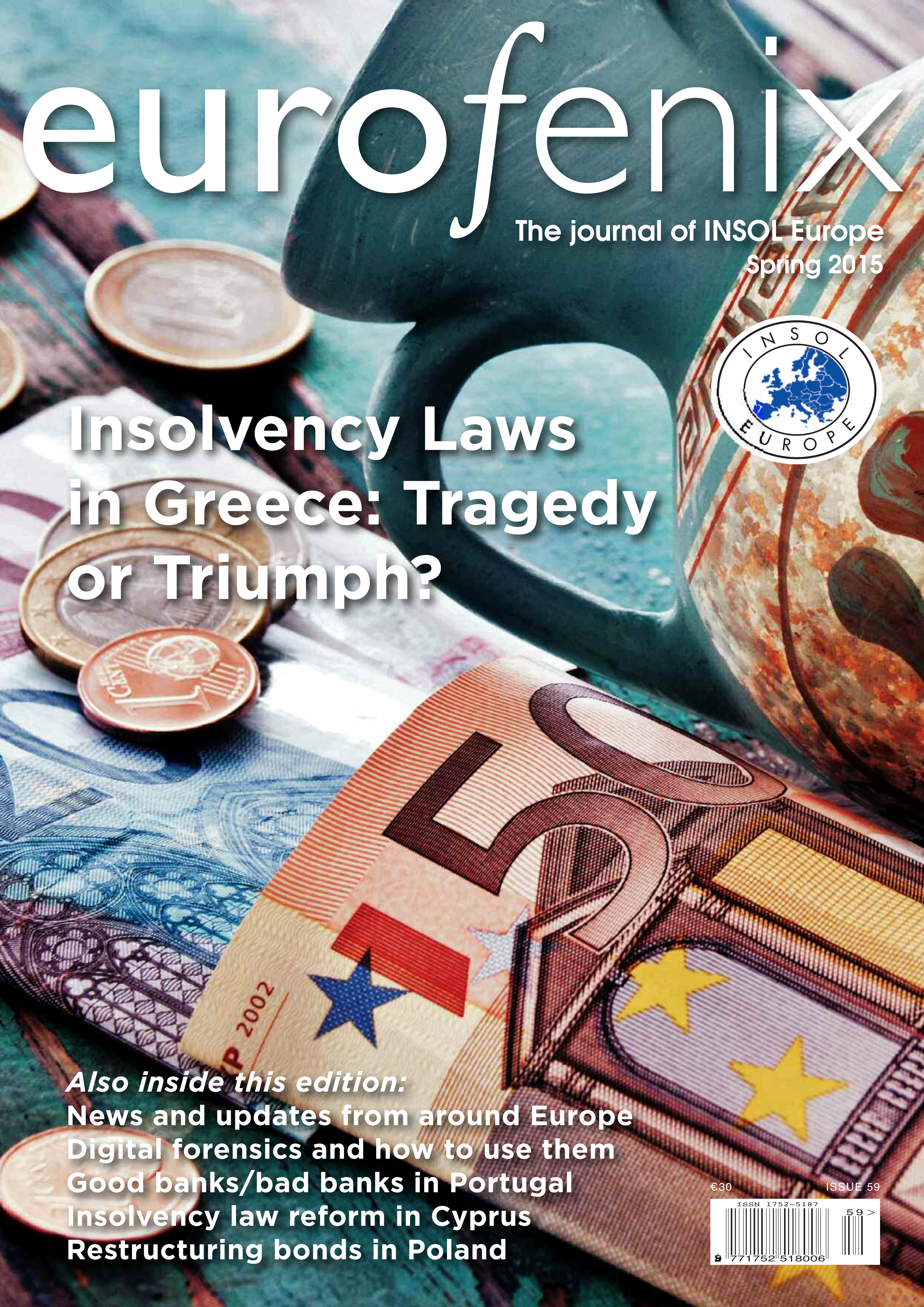

eurofenix

The journal of INSOL Europe
Spring 2015

Insolvency Laws in Greece: Tragedy or Triumph?

Also inside this edition:
News and updates from around Europe
Digital forensics and how to use them
Good banks/bad banks in Portugal
Insolvency law reform in Cyprus
Restructuring bonds in Poland

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Welcome from the Editors


ANNEROSE TASHIRO


GUY LOFALK

Dear readers,

The beginning of this year was by no means pleasant or smooth, with the terror attacks in Paris at the Charlie Hebdo satirical magazine, the wilful crash of the Germanwings plane in the French Alps and the ongoing negotiation between the new Greek government and the Euro Group, the European Central Bank and the International Monetary Fund.

As a professional in our industry you probably cannot help but let these thoughts go on in your head. We have all been at negotiation tables, demanding and requesting supporting documents, business concepts, liquidity plans and crystal clear (!) transparency for our creditor clients or offering financial information, explaining the re-shaping of the business, re-calculating the figures over and over again and negotiating the refinancing terms that would allow our clients to preserve their hope of rescuing their life time achievement by begging for another bridge loan.

While all these images run through your head (at least, my head) while watching the news over the last couple of weeks, **Alexandra Kastrinou** from Nottingham Law School and **Stathis Potamitis** discuss in this issue their views of some reform items in Greece, including the needed insolvency law reform as well as the reform of the civil proceedings law, against the background of mounting non-performing loans in particular.

While Cyprus is not so much in the spotlight at the moment, a first step has been made by putting together a draft bill to modernise the insolvency laws as required by the April 2013 Memorandum of Understanding between Cyprus and the European Commission and the Memorandum of Economic and Financial Policies between Cyprus and the International Monetary Fund in December last year. **Kyriacos Kourtellos** and **Demetris Roti** shed some light on what is going on.

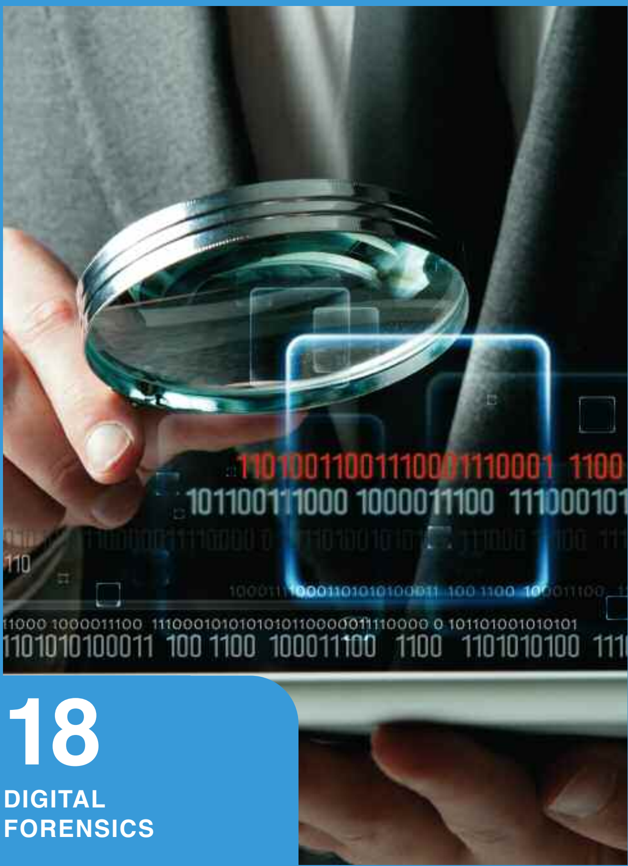
There are other important reforms going on in Europe at the moment: Lithuania has found an interesting way to tackle potential independency issues and bad reputation in connection with the appointment of office holders. An update of whether this works should be due in about two years, I hope.

Interestingly, like in other countries, the restructuring of bonds and the re-negotiation of bond issuance terms take also a new route in Poland – separate from the insolvency regimes to be used prior to or parallel to formal insolvency proceedings. **Przemysław Wierzbicki** touches on this very interesting matter.

To mention two more highlights of this issue: **Nuno Líbano Monteiro** proposes some interesting thoughts on what can happen when applying an EU directive enacted in a rush, in order to help solve the Banco Espírito Santo matter. **Phillip Taylor** takes us once around the globe – from Cayman Islands to Hong Kong and to Europe in order to explore the knots tied together for the rescue of solar panel maker LDK.

Reading through this magazine, we hope that you will find interesting and meaningful articles and considerations. If anything triggers a thought, please comment through our Eurofenix group on LinkedIn or send us your proposal for the next edition of this journal.

Annerose Tashiro



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ROBERT VAN GALEN
INSOL Europe President

Robert van Galen reports on some of our forthcoming events

> OUR APP HAS GONE LIVE AND YOU CAN SUBSCRIBE TO IT BY SEARCHING FOR INSOL EUROPE IN THE STORE OF YOUR SMARTPHONE

Dear members of INSOL Europe

In front of you lies a new issue of *eurofenix*, full of interesting articles and overviews. For the most current news about our activities, please note that our App has gone live and that you can subscribe to it by searching for INSOL Europe in the store of your smartphone.

Invest in your network

Fortunately for the economy, but maybe somewhat less fortunate for you, the demand for insolvency work has gone down over the last year. However this pause for breath may provide you with an opportunity to invest in your network and your knowledge.

Eastern Europe

An important opportunity is our EECC conference in Vilnius (Lithuania) on May 15. The programme is very promising and goes under the title "**Banks' insolvencies, investors and harmonisation**". There will be a focus on financial institutions, but you will also get the latest developments on the revision of the European Insolvency Regulation.

Our EECC co-chairs Radu Lotrean and Carlos Mack are working very hard, assisted by Frank Heeman, Rimvydas Norkus and a team of Lithuanian insolvency practitioners. As I am writing this contribution the seats are filling up, but there may still be some places available, so if you would like to attend you should register today.

Uzupis Angel, Vilnius

After the Vilnius conference, Carlos Mack will be succeeded as co chair and the selected candidate will be announced in the next issue. Carlos is one of the founders of the EECC and has seen his baby grow to a successful branch on our tree.

Germany

The other main event of the year is the Berlin congress which will take place from 1-4 October in the Maritim hotel (actually there are two Maritim hotels, remarkable since there is no sea, so make sure that you direct your taxi driver to the right one, on the Stauffenbergstrasse, you know, the guy from the coup).

The congress will focus on three topics, the revision of the European Insolvency Regulation, issues concerning Insolvency Office Holders and the convergence of insolvency laws.

In my last contribution I mentioned that we tendered for the EU project on Substantive Insolvency Law.

Share your views!

Although we were rated with the strongest organisation and came very close, we did not win. The University of Leeds was awarded the project and I congratulate the University wholeheartedly. Obviously we will invite the project team to our Annual Congress to inform us about their findings.

I very much hope to see many of you at that event. It is always a marvellous occasion to meet new and old friends and to broaden our understanding of insolvency in Europe. And Berlin is a fantastic city.

IOH Forum

Another challenge you might want to engage in is our new Insolvency Office Holders Forum, chaired by Marc André, Daniel Fritz and Stephen Harris.

The Leiden study on best practice rules for insolvency office holders that was made on behalf of INSOL Europe, is published on the website, but it was not endorsed by INSOL Europe, *inter alia* because only a few members filled out the (rather lengthy) questionnaire that was circulated by the project team.

However, according to the IOH Forum co-chairs, the report undoubtedly constitutes a good starting point for further discussion within INSOL Europe and this will therefore take place in the IOH Forum.

If you would like to participate in the forum for this project or other projects, please contact one of the co-chairs.

Other activities

INSOL Europe is bustling with other activities. On 19 and 20 March the joint conference of the University of Trier (ERA) and INSOL Europe took place; it was entirely devoted to the revised European Insolvency Regulation.

In June there will be the mid year conference of the Academic Forum in Nottingham, UK.

As I reported, in December an INSOL Europe delegation joined the deliberations of UNCITRAL Working Group V for the first time. A new session will take place in May which INSOL Europe will join again. On the agenda are recognition of judgements in proceedings ancillary to insolvency proceedings, COMI in group insolvency situations and directors liabilities.

I look forward to an engaging year with you all. ■

> **SEATS ARE FILLING UP FOR THE EECC CONFERENCE IN VILNIUS, BUT THERE MAY STILL BE SOME PLACES AVAILABLE**

Eastern European Countries' Committee Conference 2015: **Vilnius**

INSOL Europe would like to thank the following conference sponsors at the time of printing, for their generous support of EECC Vilnius 2015.

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With thanks to our Conference Supporters:

AIJA (International Association of Young Lawyers) – www.aija.org
National Association of Business Administrators in Vilnius – www.nvaa.lt

Sponsorship opportunities still available – contact Hannah Denney: hannahdenney@insol-europe.org

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 year, please contact Paul Newson, Publication Manager: paulnewson@insol-europe.org

INSOL Europe now has several LinkedIn groups which you can join and then engage with its members:

- INSOL Europe (main group)
- Eurofenix: The Journal of INSOL Europe
- INSOL Europe Turnaround Wing
- INSOL Europe Lenders Group
- Eastern European Countries' Committee
- INSOL Europe Anti-Fraud Forum

To join one of the groups, visit: **www.linkedin.com** and search for the group by name.

Make a comment!

Share your views!

You will have noticed that we have added QR Codes to every main article to encourage readers to give us their views. The QR codes take you the LinkedIn group for Eurofenix (see above).

Of course, you are welcome to pass on your comments to any member of the Executive Committee, whether by email or in person!

New website launched

INSOL Europe's new website (www.insol-europe.org) was finally launched in January this year after several months in development and final live testing.

The new site features a more dynamic and engaging interface, providing a better user experience for our members.

New features include an enhanced events section and on-line booking facility (www.insol-europe.org/events); dedicated sections for each working group and committee (www.insol-europe.org/about-us/about-our-working-groups); and a totally new database-driven section for technical content (www.insol-europe.org/technical-content/introduction).

We hope you enjoy using the new site and look forward to your comments.

Turnaround Wing Guidelines Project: First Phase

Bernard Santen, Chair of the Turnaround Wing Guidelines project reports

The Turnaround Wing project to design 'guidelines for out-of-court turnaround professionals' is well underway. A Review and Advisory Group to the project, consisting of 10 people, practical experts and other judicial professionals, has been established.

At this very moment, six country experts are filling out a questionnaire on the legal position of out-of-court turnaround professionals and their assignments in their countries (France, Germany, Italy, Spain, Portugal, United Kingdom). These reports will be combined with an analysis of six international documents relating to out-of-court restructuring. Based on this data, the Leiden Law School will present a coherent framework of common or otherwise interesting issues, which would be covered by the Guidelines.

This framework, which will be central in Report I, will be presented for critical evaluation to the Review and Advisory Group to the project mid-March 2015. After this evaluation process, the actual process of formulating Guidelines will be executed.

New Insolvency Office Holders Forum

Reported by Stephen Harris, on behalf of the co-chairs of the IOH Forum

During INSOL Europe's AGM at the Annual Congress in Istanbul (October 2014), Catherine Ottaway (INSOL Europe's President at the time) announced the decision to create a new forum focused on insolvency office holders – the "Insolvency Office Holders Forum".

The Council of INSOL Europe has seen a growing interest from the association's members to reflect and react on current issues and challenges facing the profession of insolvency officeholders throughout Europe. Three practising office holders have agreed to co-chair the forum in the first instance and support and steer the forum through its initial stage: Stephen Harris (Ernst & Young, UK), Marc André (France) and Daniel F. Fritz (hww hermann wienberg wilhelm, Germany). The co-chairs, together with the executive of INSOL Europe, will now evaluate how best to meet interests, needs and expectations in an appropriate way and come up with suggestions. Be sure to read more about this initiative soon!

Members having suggestions concerning matters worthy of debate or pursuit within the IOH Forum should kindly send a note via Caroline Taylor (carolinetaylor@insol-europe.org). The co-chairs would be more than happy to see a high level of participation from members throughout the many jurisdictions encompassed within the membership of INSOL Europe.

MEMBER NEWS

Rimvydas Norkus

INSOL Europe member Rimvydas Norkus has been appointed to the post of President of the Supreme Court of Lithuania.

Prior his appointment to the post of a judge, Dr Norkus was Director of the Department of Legal Research of the Supreme Court of Lithuania; from 2003 to 2009, he worked as an Adviser to the Chairman of the Supreme Administrative Court and the Director of the Department of Judicial Practice. In addition, between 1999 and 2003, Dr Norkus worked at the Court of Appeal as a consultant and adviser to the Chairman of the Civil Division of that Court. Since 2003, Dr Norkus has also been engaged in pedagogical work, he is a Professor of Law.

'*It is not for this post that I express my thanks, it is for the opportunity provided to improve the activity of the Supreme Court of Lithuania*' said Dr Norkus on accepting the post.

For more information see the website of the Supreme Court of Lithuania www.lat.lt

Giorgio Cherubini

INSOL Europe Past President and Honorary member Giorgio Cherubini, who is also eurofenix's correspondent from Italy, now operates as a partner in the firm EXPLegal.

EXPLegal provides its clients with legal and strategic assistance in domestic and cross-border transactions.

Operating from Rome and Milan, EXPLegal advises on areas of practice such as information and communication technology, international taxation and tax planning in addition to insolvency and restructuring, corporate law, commercial law and contracts, M&A, banking and finance, media, sport and entertainment law, international and diplomatic organizations, litigation and arbitration.

INSOL Europe takes an important step in Poland

INSOL Europe's Vice President, Steffen Koch, visited Poland on 12 March to make a presentation during the 2nd Allerhand Restructuring Law Summit in Warsaw

Steffen Koch addressing the audience in Warsaw with Pawel Kuglarz

Wojciech Węgrzyn, Polish Vice Minister of Justice in conversation with Steffen Koch

At the invitation of Pawel Kuglarz (Vice President of the Insolvency Department of the Allerhand Institute), Steffen presented INSOL Europe, its history, structure and various methods of activity. He invited participants of the Congress, more than 80 insolvency practitioners, lawyers and judges, to join INSOL Europe and explained the advantages of membership for individual members and Poland.

After the presentation, Pawel and Steffen discussed the development of insolvency law in Poland, Germany and in Europe. They particularly emphasised the involvement of INSOL Europe in preparing the amendment to the new insolvency regulation, and informed the audience about the development of insolvency law in Poland and in Germany.

New consumer insolvency act for Poland

The Polish consumer insolvency act came into force on 31 December 2014. During the preceding five years, there were fewer than 300 insolvency cases in Poland, while in Germany there were 132,000 cases in 2014 alone. In this context, Steffen and Pawel spoke about one of the most common problems that has to be solved – "forum shopping." In 2012 alone, more than 200 debtors changed their COMI (centre of main interests) to England. 134 were from Germany, 35 from Ireland and 48 from all other countries. Poles tried to go to England and open the insolvency procedure there, but now the situation could change. The Polish debtor who becomes insolvent unintentionally can apply to open the proceedings. There is a supervised period of three years for the debtor. After that he can get a discharge from his debts with no minimum sum to repay to the creditors. Compared to Germany, where the debtor can be discharged only after six years, this can be very attractive.

According to the current legislation in the European Union, a debtor can apply for insolvency directly after moving to a new Member State. This lack of a back period facilitates forum shopping. That is why INSOL Europe proposed a back period of one year. The European Commission, however, decided on six months for consumers and three month for companies. We can hope that these back periods will be sufficient.

Report by Pawel Kuglarz, Vice-President of the Insolvency Department of the Allerhand Institute, Poland.

Book **News** & Reviews

Licences and Insolvency

(Consulting Editor: Marcel Willems, Matthias Nordmann and Ulrich Reber) 2014, GBP Law Books) 328pp, £120. ISBN 978-1-909416-25-3

In the contemporary environment, particularly in a globalised world economy, the asset-base of debtors will almost always include intellectual property rights. These may consist of licences to use technology, whether hardware or software, to use names and trademarks for commercial and marketing purposes or to exploit media rights.

While intellectual property law across jurisdictions is slowly converging, in part prompted by international conventions, with the protection of property rights being guaranteed by the prevalence of registration systems, domestic rules may be widely divergent, particularly in matters of private international law. This may affect issues such as the question of jurisdiction and applicable law in intellectual property and connected matters.

Furthermore, differences also exist in relation to the treatment of such rights in the case of the debtor's insolvency (whether the debtor is licensor or licensee), as well as in the impact of domestic procedures on the position of exclusive and/or perpetual licences, sub-licensees and the termination rights often contained in such agreements.

In this handsomely bound book, a number of seasoned practitioners provide answers to the above questions for some 26 jurisdictions: it is a truly global coverage representing most of the major commercial jurisdictions worldwide.

The issues are dealt with in a structured way, first outlining the applicable insolvency law and range of procedures where available. Then, each chapter takes a look at the position of licence rights in the period between bankruptcy filings and adjudication of insolvency, as well as after insolvency proceedings are opened, discussing the impact of procedures on licensing agreements and the participants in such transactions.

Finally, the issue of contracting out and termination rights are referred to, together with any applicable rules in the event of cross-border insolvencies.

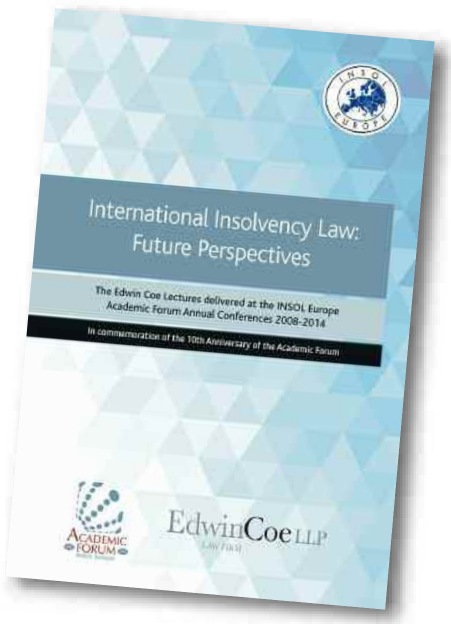
The approach taken in this collection of texts is highly practical and enables a good overview of the issues in this area to be obtained in relation to each of the countries covered.

In summary, a useful book for those engaged in insolvency practice and providing a sound basis for those considering the major issues involved in intellectual property transactions.

Reviewed by Paul Omar, Professor of International and Comparative Insolvency Law at the Nottingham Law School (UK)

ACADEMIC FORUM INSOL Europe

The Academic Forum commemorates 10 years with new publication



Over the period 2007-2014, the Academic Forum was fortunate in being sponsored by Edwin Coe LLP, a firm of insolvency practitioners based in London. This support has enabled a number of things to occur, including the inauguration of a series of annual lectures given by judges, practitioners and academics of international repute and eminence.

These lectures have greatly added to the annual conferences, offering an insight into the great themes of insolvency law existing today, as well as a preview of future developments in the subject area. They are now updated and re-published in this volume entitled "**International Insolvency Law: Future Developments**". with the intention of commemorating the 10th anniversary of the Academic Forum. The volume is also the 21st publication in the Technical Publications series since its inception.

Visit our website for a full list of other titles available or to order your copy: www.insol-europe.org/publications/technical-series-publications

Technical Update

The Co-Technical Officers of INSOL Europe report on the new technical content and other updates available on the INSOL Europe website

MYRIAM MAILLY
INSOL Europe Co-Technical Officer

EMMANUELLE INACIO
INSOL Europe Co-Technical Officer

“THE FINAL VERSION OF THE EUROPEAN INSOLVENCY REGULATION SHOULD BE ADOPTED IN THE FOLLOWING WEEKS”

A CLOSER LOOK AT...

The new text of the European Regulation 1346/2000

On Thursday 26 February 2015, the “Position of the Council at first reading with a view to the adoption of a regulation of the European Parliament and of the Council on insolvency proceedings (recast)” was circulated.

This text is a slightly amended version of the initial text of the European Insolvency Regulation, especially concerning Article 89 which now introduces a committee (of representatives of Member States) to assist the Commission, e.g. in assessing proposals to amend Annex A.

As a reminder, previously, on Thursday 4 December 2014, the Council of Justice Ministers adopted a political agreement on the first version of the text of the European Insolvency Regulation agreed with the European Parliament.

The final version of the European Insolvency Regulation should be adopted in the following weeks by the European Parliament before being published in the Official Journal.

The entry into force of the new version of the European Insolvency Regulation is expected for May 2017.

If you wish to consult both texts, they are available at: **http://bobwessels.nl/blog/**

Make a comment!

New technical content on the INSOL Europe website

We invite all Members of INSOL Europe to provide contributions to cover all countries around Europe and beyond or to update the information published. Please see the links in the column on the right or contact Emma and Myriam on: **technical@insol-europe.org**

National Insolvency Statistics

Current national insolvency statistics from Croatia, England & Wales, Finland, France, Germany, Ireland, Italy, Latvia, Lithuania, Luxembourg, Portugal, Scotland & Northern Ireland, Spain, Sweden and Switzerland are published on the INSOL Europe website.

Since our last column, we published updated national insolvency statistics for **England and Wales** (Third and Fourth Quarter 2014) at: www.insol-europe.org/technical-content/national-insolvency-statistics-england-wales

If you are interested in contributing for any uncovered Member States (or beyond), please contact us.

Glossaries

If you are interested in contributing for Malta and Slovenia (or beyond), please contact us.

EIR Case Register Website

As of 6 March 2015, 449 abstracts are uploaded on the new LexisNexis-INSOL Europe European Insolvency Regulation Case Register platform including the abstract of the last CJEU case of 4 December 2014 ("H v HK").

In the last few weeks, 17 new abstracts on cases related to EIR and issued by Bulgarian Courts have been submitted and should be available online soon.

How to become an Insolvency Practitioner across Europe?

At present, 18 countries are covered (Austria, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Latvia, Lithuania, Luxembourg, Poland, Portugal, Romania, Slovakia, Slovenia, Russia and United Kingdom) and reports from 4 countries should be available soon (Serbia, Sweden, Romania (update) and Cyprus).

If you are interested in contributing for any uncovered Member States (or beyond), please do not hesitate to contact us.

INSOL Europe Academic Forum: Newsletters

For your information, the INSOL Europe Academic Forum First Quarter 2015 (January-March) Newsletter is now available at: www.insol-europe.org/academic-forum/newsletters/

2015 INSOL Europe Academic Forum Conferences

Registration brochures for the INSOL Europe Academic Forum conferences in Nottingham (25-26 June 2015) and Berlin (30 September-1 October 2015) are now available at www.insol-europe.org/events

INSOL Europe EECC Conference (14-15 May 2015), Vilnius

The Registration brochure as well as the technical programme of the next INSOL Europe Eastern European Countries' Conference are available at www.insol-europe.org/events

INSOL Europe Annual Congress (1-4 October 2015), Berlin

The registration brochure of the next INSOL Europe Annual Congress is available at www.insol-europe.org/events

For your information, registration is now open and early booking rates apply until the 1st of July.

Keep in touch!

We would like to invite you to join the INSOL Europe Group on LinkedIn at: www.linkedin.com/ and follow us on Twitter at @INSOLEurope

If you have any enquiries regarding insolvency matters, do not hesitate to submit your project or questions to us at: technical@insol-europe.org. ■

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EIR Case Register
www.insolvencycases.eu

Suddenly last Summer... The good bank/bad bank dichotomy in Portugal

From the rushed partial enactment of the EU directive to the untested application of a "resolution action", Nuno Líbano Monteiro discusses the Good Bank/Bad Bank dichotomy as a supposed safeguard for the legitimate interests of customers

NUNO LÍBANO MONTEIRO
PLMJ Law Firm, Lisbon

Factual and legal background – the need for intervention by Banco de Portugal

On 11 July 2014, *Banco de Portugal* announced publicly, in light of the information reported the previous day by *Banco Espírito Santo, S.A.* ("BES") and by its external auditor, KPMG, that BES held sufficient equity to bear any negative impact arising from its exposure to the non-*financial arm of Grupo Espírito Santo* ("GES") without compromising compliance with the minimum ratios in force. *Banco de Portugal* made the announcement because, a few days earlier, it had learnt of the high-value default by a GES holding, for the Portuguese economy of commercial paper (notes).

According to the information disclosed by BES on 30 July 2014, the losses resulting from the exposure to GES, determined and recognised in the financial statements as at 30 June, had remained within the expected limits and in compliance with the provision of €2 billion that *Banco de Portugal* had required BES to constitute for this exposure.

However, and surprisingly, in the second half of July, the external auditor identified situations that increased the value of the losses to be recognised in the profit and loss accounts for the first half of the year by around €1.5 billion , calling into question compliance with the applicable minimum solvency ratios.

According to *Banco de Portugal*, these actions, taken between June and July 2014, prior to the appointment of new members on BES's executive committee, triggered the following consequences:

1) placing BES in a position of non-compliance with the applicable minimum solvency ratios;
2) *Banco de Portugal*'s decision to suspend BES's access to monetary policy operations and, therefore, to Eurosystem liquidity;
3) increasing pressure on BES's cash flow;
4) damaged public perception of BES, demonstrated by the very negative performance of the respective securities, a situation that harmed depositor confidence[1]; and,
5) increased uncertainty about BES's balance, making a private capitalisation solution in a short space of time unviable.

Against good legislative practice and faced with an imminent need to intervene in the management of BES, the Portuguese Government published Decree-Law 114-A/2014 of 1 August, which made certain amendments to Chapter VIII of the General Regime of Credit Institutions and Financial Companies.

The new Decree-Law introduced the clarifications and adjustments necessary to partially enact Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 in the Portuguese legal system. The EU Directive establishes a framework for the recovery and resolution of credit institutions and investment firms and the Decree-Law enacts one of its guiding principles into Portuguese law. This principle, to safeguard the legitimate interests of creditors affected by resolution actions, provides that no creditor should be worse off under resolution than it would have been had the bank been wound up under applicable insolvency law. Besides this, it clarifies the means for making the resources of the Resolution Fund available, specifically the possibility of the Fund providing guarantees in the context a resolution action.

The application of the resolution action by Banco de Portugal – the good bank/bad bank separation

According to *Banco de Portugal*, BES's capital cushion was not sufficient to accommodate the losses of the first half of 2014. Having (hastily!) created the legal conditions for its intervention, on a Sunday night last summer, 3 August, at a press conference, the Governor of *Banco de Portugal* announced the decision to apply a resolution action to BES. It was undoubtedly an original way to determine intervention in one of Portugal's largest banks: in front of television cameras, after the 8 o'clock news.

Faced with the alleged financial difficulties of a credit institution and the fact that it was impossible to find a private solution with the required speed, *Banco de Portugal* used this regulatory instrument, on the one hand, in order to isolate BES's problem assets which were to be subsequently liquidated and, on the other, to concentrate its core business in a capitalised entity to be sold post-haste.

As such, the resolution actions included the creation of a bridge bank to which the core business would be transferred. In the opinion of *Banco de Portugal*, this solution is a fast way to ensure (i) the protection of deposits and customers, (ii) the continuity of the financial services provided by BES, and (iii) the maintenance of stability and confidence in the Portuguese financial system.

The bridge bank was given the name *Novo Banco*. Most of the business and assets of BES were transferred to it and business continued to be carried on as usual. However, this made BES into the bad bank, as opposed to the good bank, which was to be the *Novo Banco*.

Besides this, *Banco de Portugal* intervened in BES, by taking the following steps and corrective intervention measures:

> "IT WAS AN ORIGINAL WAY TO DETERMINE INTERVENTION IN ONE OF PORTUGAL'S LARGEST BANKS"

a) the prohibition to grant credits and apply funds to any types of assets, except to the extent that the application of funds is necessary to preserve or increase the value of its assets;
b) the prohibition to take deposits; and,
c) a waiver, for one year, of the requirement to comply with the applicable prudential rules and with timely compliance with previously contracted obligations, except if this compliance is crucial to preserving or increasing the value of its assets. In this case, *Banco de Portugal* may authorise the operations necessary.

As a result of this intervention, BES is not carrying on its banking activity and *Banco de Portugal* will end up by revoking its authorisation to do it. This decision will have the effect of a statement of insolvency, which in turn will lead to BES's liquidation. The liquidation process will only apply to the liabilities and assets that were not transferred to *Novo Banco*, and the costs associated with this process will be similar to those arising from any insolvency process and will be borne by the insolvent estate.

In turn, *Novo Banco*, as a bridge bank, is a credit institution in the form of a public limited company. It has been incorporated specifically to receive and manage the assets, the liabilities, the assets under management and off-balance-sheet items transferred from a credit institution in a situation of financial imbalance. As it is a bank, it can carry on all the activities permitted for credit institutions under the management mandate put in place by *Banco de Portugal*. It is also subject to all the applicable rules, including the prudential requirements imposed on banks operating in the market.

The 'good bank/bad bank' distinction becomes clearer if we look at the diagram below.

Good bank/bad bank separation

Banco Espírito Santo, S.A.

↓

Resolution measures applied by Banco de Portugal (03.08.2014)

Novo Banco, S.A. (Bridge Bank) receives:

a) All the assets, licences and rights, including BES's ownership rights;
b) BES's responsibilities towards third parties, be it liabilities or off-balance-sheet items;
c) Control over the management of BES's assets under management;
d) All BES's employees and service providers.

Banco Espírito Santo, S.A. (Bad Bank) is made up of troubled assets:

In essence, these correspond to the responsibilities of other entities of GES and to the stakes held in BES Angola, S.A., Espírito Santo Bank (Miami), Aman Bank (Lybia) and Espírito Santo Internacional, the losses of which are the responsibility of BES's shareholders and subordinated creditors.

Costs of application of the resolution action – the importance of the Resolution Fund and the impact on public funds.

Allegedly and according to *Banco de Portugal*, one of the main objectives behind the creation of the resolution framework was to minimise the impact on public funds resulting from the situation of financial imbalance of a credit institution.

In the case of BES, the costs of the resolution were, in the first place, borne by the shareholders and subordinated creditors of the institution. In the second place, and because the final costs of the resolution action are greater than the amount covered by the shareholders and subordinated creditors, it was necessary for the Resolution Fund to intervene. It did so as a public-law, legal entity whose main object is to provide financial support for the application of resolution actions imposed by *Banco de Portugal*.

As a result of this intervention, the share capital of Novo Banco is €4.9 billion, fully subscribed by the Resolution Fund. The resources of this fund come from the contributions paid by member institutions and from the banking sector levies which, under the applicable rules, are charged without compromising solvency ratios.

This means that ideally, public funds will not have to make any contribution. However, the Resolution Fund only came into being in 2012, thus it does not yet have sufficient financial resources to finance the resolution action applied to BES. For this reason, the Fund, using the option established by law, had to take out a loan from the Portuguese State, the Fund's intention being to substitute this loan with financing from credit institutions. In any case, the amounts lent from the public purse plus the applicable interest will be paid back in the future, as and when the Resolution Fund accumulates revenue.

Finally, at the end of the operation, the State should not have to bear any costs related to the resolution of BES. Time will tell, but it is very unlikely that *Novo Banco's* sale price will be enough to repay the State the amount it lent to the Resolution Fund. If that turns out to be the case, only two possibilities remain. Either the members of the Resolution Fund, in other words, most of the banks operating in Portugal, provide the Fund with the amounts necessary to pay the State's loan, or the State forgives part of the amount it lent, meaning the public will bear the cost of the intervention in BES.

It is important to remember that the resolution action has been legally challenged by a number of entities and all the cases are now before courts.

Consequences of the resolution action for customers and shareholders – the particular concern to protect the interests of customers

According to *Banco de Portugal*, the resolution action it applied is intended to guarantee the security of deposits made in BES and to maintain the contractual conditions of the credits granted by that bank. *Banco de Portugal* holds that there have been no effects on the legal or contractual rights of depositors. The deposits are transferred in full to *Novo Banco*, except for deposits made by persons having a special relationship with BES. Despite this show of intent by Banco de Portugal, reality has shown that the application of the measure has indeed affected the bank's customers, resulting in intense litigation before the Portuguese courts.

The deposits transferred to *Novo Banco* and not subject to any dispute are available for immediate use by customers, without any restrictions (except those that already existed with BES). These customer deposits in *Novo Banco* have exactly the same characteristics they had in BES: namely, the same balance, term and conditions of operation of the deposit. These deposits also continue to benefit from the guarantee offered by the Deposit Guarantee Fund.

In contrast with the outcome described above, the shareholders of BES, now transformed into a bad bank, have seen primary responsibility for the debts resulting from the financial imbalance of BES moved into the sphere of the company they hold.

Under the applicable legal rules, the fact that the set of assets with the greatest value were transferred to *Novo Banco* (the good bank), leaving behind the toxic assets, does not, in itself, give the shareholders any right to compensation. As the part of BES's business that was not transferred to *Novo Banco* will be subject to a liquidation process, any rights the shareholders may have will have to be exercised in the context of that process, under the applicable law.

Final considerations

Having reached the end of our story, we have also reached the conclusion that the resolution action applied to BES by *Banco de Portugal* is an innovative solution in the context of the European Central Bank's protection mechanisms. As such, the 'good bank/bad bank' solution will have to pass under the scrutiny of the courts in the pending legal proceedings before it is considered stabilised. Furthermore, the resolution action may violate principles of distributive justice.

Time and the courts will tell whether the action taken by Banco de Portugal stands. ■

Footnotes:

1 This negative public perception led to the suspension of transactions on the afternoon of Friday, 1 August 2014, with the risk of contaminating the perception of all the other institutions in the Portuguese banking system.

> "THE 'GOOD BANK/BAD BANK' SOLUTION WILL HAVE TO PASS UNDER THE SCRUTINY OF THE COURTS IN THE PENDING LEGAL PROCEEDINGS BEFORE IT IS CONSIDERED STABILISED"

Share your views!

Digital forensics in a liquidator's investigation

David Ingram and Carmel King follow up their previous article by considering the tools available to us when interrogating electronic evidence

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In the Summer 2014 edition of Eurofenix, we considered the importance of the golden hour, that is how the first actions taken by a liquidator can dictate the outcome of the case, particularly where fraud is suspected, and the risk of asset dissipation and missing company records is high.

We looked at the initial information gathering phase, which involved the assessment of various threats and the identification, securing and collection of evidence. We will now consider the tools available to us when interrogating electronic evidence. These can be used to reduce costs and improve efficiency, contributing significantly to a meaningful investigation and the development of a strategy that will result in the recovery of misappropriated assets for the benefit of creditors.

Size matters

The electronic records uplifted from the company are likely to be very substantial in size. How big is a gigabyte? Say, for example, that the data from the email servers, file servers, the cloud and various data sources such as usb memory drives, laptops, company mobile phones and tablets of a company in liquidation amounts to 210GB. This could be as much as 580,000 Word documents, plus 139,000 Excel documents, 4 million emails, 26,000 PowerPoint presentations and 46,000 images. When we consider the storage capacity of various electronic items, 210GB is a very modest estimate. It is not unusual for laptops to have 1 terabyte hard drives, my mobile phone has a 16GB capacity, the usb memory drives on my desk each have a 4GB capacity. Such an overwhelming amount of data is likely to give even the most determined (or deep-pocketed) liquidator pause for thought. By combining your knowledge of the case with the skills of a digital forensics team to process, analyse and review the data, the liquidator can approach this volume in a sensible way.

The digital forensics team will provide the liquidator with the essential details he needs to start the process. They should report the valuable information – the volume, file types, languages and size of the data. Essentially, they should communicate the time and cost required to process the data for the liquidator.

Culling and analysing the data

It is at this stage that the liquidator's steer is required to process and cull the electronic records, in order to reduce them to a manageable size for review. Culling the data in a methodical way will result in a reduced review, which reduces cost and improves efficiency. It is essential to be aware of the various methods available to the liquidator, this is a more sophisticated exercise than a basic keyword search. Some simple processing, for example the application of a date filter to the records can, in our example, reduce 210GB right down to 80GB. The liquidator's case knowledge will be required to identify the relevant dates. A de-duplication of the data held could further reduce this down to 18GB. This volume is likely to be unwieldy, still too much to manually review in any efficient way. Fortunately further tools are at the liquidator's disposal for an intelligent review of the company records.

When a computer program requires memory from a computer system, it is allocated in clusters. The clusters allocated are sometimes larger than is required, and the excess allocated memory is known as slack space. Slack space is another storage area that can be interrogated by the digital forensics team, which can hold information such as data dumped

when a file is closed at the end of a work session. This can be particularly useful when the liquidator suspects fraud, and there is every chance that those involved made efforts to avoid saving documents to their system. In a recent case, we suspected that a fraudster was using one or more web-based email accounts to avoid conducting his illegitimate business using the company email server. We identified partial pages for web-based email accounts in the slack space, the contents of which confirmed our suspicion, and enabled us to identify a number of web-based email addresses used by the fraudster.

Similar to slack space is unallocated space. We should all by now be familiar with the concept that deleted items don't disappear entirely. This applies to digital material stored on a system as well as that shared online. When we delete a file, it is not entirely removed, but the allocated cluster is classified as available for reallocation. Accordingly, prior to being overwritten the unallocated space can be host to a wealth of deleted files or data which may be of interest.

Part of the liquidator's strategy should be a methodical interrogation of the slack space and unallocated space, in addition to the live digital materials delivered up. This may seem the opposite of culling the data, however the liquidator will ignore the depositories of deleted or less-obvious materials at his peril. Keyword searches have become very sophisticated, and are infinitely preferable and more useful than trawling through vast amounts of data. Some examples of the smarter types of keyword searches include:

- **Proximity searches:** Allowing for keywords within a set distance of each other. Useful for example where parties of interest use middle or family names on occasion, and all variations must be considered.
- **Boolean searches:** Combining keywords with instructions such as AND, OR, NOT in order to produce more relevant results.
- **Fuzzy searches:** Allowing for minor variations in the keywords to produce a match. Useful for overcoming variations in spelling or spelling errors.
- **Wildcard searches:** Using * and ? to search for words containing a certain combination of characters, as determined by the person setting the search parameters.

Other types of searches will be able to automatically identify such things as email addresses, telephone numbers, locations and currencies. Using these instruments, in our example the liquidator has culled the relevant digital material down to 7GB, which, with the application of his practical knowledge of the liquidation, is a manageable amount for review purposes.

A timeline analysis can be constructed using the metadata stored in the digital material, and is a good technique for structuring the material in an accessible, chronological order. The

> **"A DIGITAL FORENSICS TEAM WON'T WORK FOR FREE, ANY MORE THAN THE LIQUIDATOR IS LIKELY TO"**

> WE SHOULD ALL BY NOW BE FAMILIAR WITH THE CONCEPT THAT DELETED ITEMS DON'T DISAPPEAR ENTIRELY

metadata provides information about various aspects of the digital material. For example, the time and date of creation, the identity of the author, details of changes to the material, and in some instances the applicable geographical location where the material was created, sent, received etc. The metadata is essentially an electronic audit history of digital material. The liquidator accordingly can identify when files were created, accessed and modified; he can assess various users' access to certain accounts and browser usage, downloads and usb memory drive usage.

The application of a timeline analysis to the liquidator's knowledge of the operation of the company can be very powerful. How do the director's daily usage patterns compare to his own account of his daily routine, his role and responsibilities? Who accessed the company's online banking facility at the time of a suspicious payment out? Where hard copies of correspondence were not retained by the company, do the date stamps on the electronic copies fit with the estimated date of postage, or have the documents been modified since?

Other tools that the liquidator will have readily available when reviewing the digital material should include the ability to sort and filter the material, to tag or categorise items, to add comments, highlight sections of the material or redact as required. This will be provided by the digital forensics team using an appropriate e-discovery platform. The more commonly-used platforms have a web interface, which not only enables the liquidator to carry out his review from his preferred location in the event the digital forensics team is not in-house, but it will also allow the liquidator to share the digital material with his legal advisors in consideration of litigation.

Cost

Cost, of course, is a major factor. Industry articles refer to digital forensics as a billion-dollar sector with huge potential for growth and expansion. A digital forensics team won't work for free, any more than the liquidator is likely to. There are obvious considerations to be made prior to embarking upon a potentially costly digital forensic review exercise, such as budget and proportionality of work carried out in relation to the size of company or complexity of the case.

It is important to appreciate however, that whilst it may seem an extravagance to instruct a digital forensics team, a meaningful interrogation of the electronic materials is increasingly unlikely to be possible without some employment of the tools available. It doesn't have to be extortionate. Smaller tools for use by the liquidator without the need to instruct a digital forensics team can be purchased online, along with training, support and upgrades.

A digital forensics team can use automation of processes where possible in order to control costs. It can be more cost-effective: a colleague has advised just today that our digital forensic team was able to extract data (with time-stamps stored in the metadata) to a spread sheet in a very short period of time and at reasonable cost, when the same exercise conducted manually would have been cumbersome, complicated and costly. Our colleague has also managed to practically eliminate the risk of human error, and as we know, where significant data is overlooked it can be a costly mistake to make.

Conclusion

Our lives are increasingly lived electronically, and the same can be said for the majority of companies. We email rather than write letters or make telephone calls, spread sheets have replaced ledgers, we strive for paperless offices in place of shelves full of files. This is probably the most significant change in workplace life in recent years. Liquidators are going to need to be familiar with the tools available to them in order to conduct a successful investigation, pursue fraudsters and recover company property for the benefit of creditors. ■

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Greece:
In the spotlight… yet again!

With major reforms on the to-do list, Alexandra Kastrinou takes a timely look at the deficiences of the current insolvency system

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For over five years, Greece has been subject to severe austerity measures in its quest to service its sovereign debt. Greece has had to resort to both European and international institutions (the Troika[1]) for financial support.

In return, a series of commitments were imposed with the goal of eliminating fiscal imbalances, achieving fiscal surpluses and market flexibility.

Following the early bailout agreement in 2010,[2] structural reforms were introduced in order to improve liquidity and growth prospects. The reforms ranged from implementing an unprecedented privatisation plan to slashing expenditure for social benefits, health, education and welfare provisions and, moreover, introducing profound changes to labour law. In addition, reforms were to be introduced to tackle longstanding problems of corruption and tax evasion. Furthermore, the Insolvency Code saw a series of amendments.[3] In 2012, Greece has enhanced its corporate rescue process by abolishing the outdated conciliation procedure and introducing new rehabilitation proceedings.[4]

As part of the bailout agreement with the troika, Greece has also had to put in place a large scale privatisation scheme,[5] which is the largest declared divestment programme in the world. The aim is to attract significant international capital flows that will contribute to restarting the Greek economy and fuel economic growth.[6]

In particular, by means of "emergency legislation" (L.3986/2011) introduced in 2011, provision has been made for the establishment of an Asset-Development Fund (ADF) for the use of the State's private property. The ADF was set up with the primary function of raising approximately €50 billion, through the disposal of State assets of strategic importance.[7]

The privatisation process has been taking place under the watchful eye of Greece's EU creditors. It is perhaps of no surprise that two observers have been appointed to the ADF's Board of Directors (one from the Eurozone and one from the European Commission) or that, though the Board has the absolute authority in privatisation decisions, it is required to act upon the advice of a Council of Experts, three members of which are appointed by the Troika.[8] It has been argued that the independence of the ADF and its operations has been compromised for the benefit of Greece's European creditors.[9] The current Greek Minister of Finance, Professor Yanis Varoufakis, has described the privatisation scheme as undemocratic and malignant. He also contends that "*European leaders have taken it upon themselves not only to decide that the Greeks will sell the family silver but, astonishingly, to effect the sale themselves.*"[10]

Greece's ill-drafted fund-raising exercise[11] has blatantly failed to attract a healthy inflow of investment. Coupled with the lethargic efforts of the previous Greek administration to take active steps to fight corruption and to introduce structural reforms to a rather broad and ineffective public sector, Greece has been diving further into recession. The continuous recession has in turn resulted in a humanitarian crisis. Poverty levels have dramatically risen, unemployment rates have increased rapidly (particularly youth unemployment)[12] and wages have dropped drastically.[13]

The despair of the people of Greece and their opposition to the austerity programme was arguably reflected in the outcome of the recent 2015 elections. Greece's newly elected coalition Government stated that it has made it its main mission to combat the destructive effects of the longstanding austerity. It has

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announced a number of regulatory reforms, which are to be introduced in Parliament in March seeking not only to provide relief for those with lower incomes (or no income at all!), but to also improve productivity by reshaping both the public and private sector and rendering the economy viable and competitive again.

However, the implementation of the promising social and economic policies, as proposed by the new Government, require the support of the Troika. That in turn presupposes Greece's staying with the Eurozone. During recent Eurogroup meetings, the new Government has asserted that a Grexit is not yet on the cards and that the country's future is very closely linked to both the Eurozone and the EU. Although the negotiations between the Greek Government and the 'institutions' regarding the review and completion of the previous bailout programme are still ongoing, Greece has recently been allowed some breathing space by means of a four month extension of the current Master Financial Assistance Facility Agreement. However, this might be of little comfort, as only approval of the conclusion of the review of the extended arrangement by the institutions in turn will allow for any disbursement of the outstanding tranche of the current EFSF programme.[14]

To conclude, the question that still remains is how a virtually bankrupt state will be able to restructure its failed economy. The answer arguably depends on the European approach to the Greek crisis. The dilemma placed before the EU is whether the hardships of Greece form part of a wider European problem that needs to be collectively addressed and that will require institutional reforms at a European level. Alternatively, if a possible withdrawal of Greece from the Eurozone does not pose a serious threat for the very existence of the Union, whether the time has come to punish the prodigal child. One would hope that at the end of this Greek drama, the catastrophe will give its place to a catharsis. ■

Footnotes:

1 The International Monetary Fund, The European Central Bank and the European Commission.

2 Greece was granted financial assistance in exchange for its adherence to the terms of a Memorandum of Understanding.

3 Not so long before the crisis, in 2007, Greece introduced significant amendments to its Insolvency Code in order to update and promote its corporate rescue regime and make it more attractive and effective.

4 Article 234 of Law 4072/12 amending Article 99 of Law 3588/2007. See also Word Bank Report '*Doing Business*' 2015, at p.104.

5 Bazinas, G., & Sakkas, Y., Greek Privatisations: A Euro Phoenix Tale, Eurofenix, Autumn 2011.

6 See http://www.hradf.com/en/the-fund

7 The Fund is a "*societe anonyme*",which is governed by private law. Its board of directors is comprised of five members and is appointed by the General Assembly for a three year term.

8 Articles 3-4 Law 3986/2011.

9 See note 5 above.

10 Varoufakis, Y., '*Privatisation Without Representation: European democracy's last gasp*', 2011, available at http://yanisvaroufakis.eu/2011/05/24/privatisation-without-representation-european-democracys-last-gasp/

11 In 2013 the IMF acknowledged the programme was wrong. See L., Elliot, P., Inman & H., Smith 'IMF admits: we failed to realise the damage austerity would do to Greece', the Guardian, 5 June, 2013.

12 It was reported in late October 2014 that unemployment reached 27% and youth unemployment in particular, reached 50%.

13 Greeks show a 30-50% reduction of their wages.

14 See Eurogroup statement on Greece, 20-02-2015, available at http://www.consilium.europa.eu/en/press/press-releases/2015/02/150220-eurogroup-statement-greece/

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ONE WOULD HOPE THAT AT THE END OF THIS GREEK DRAMA, THE CATASTROPHE WILL GIVE ITS PLACE TO A CATHARSIS

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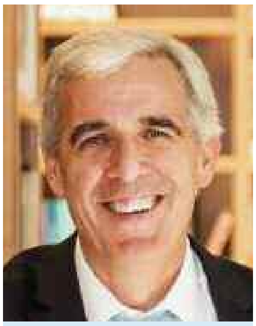
The mounting 'non performing loan' problem in Greece

Stathis Potamitis discusses the recent attempts by the Greek government to deal with the mounting non-performing-loan (NPL) problem



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Greece entered its current economic downturn nearly six years ago. Since then, it has given up more than 25% of its GDP while unemployment and especially youth unemployment is skyrocketing.

At the end of 2014 we saw the first indications of a return to growth but the recovery remains fragile and uncertain. Political uncertainty, to which the recent change of government is a significant contributor, adds further complexity to the recovery effort.

The crisis has served to highlight the problems of the Greek insolvency laws. For instance, while the crisis (and the liquidity crunch) unfolded, debtors stopped paying but very few amongst them, and very few creditors, resorted either to insolvency or one of the pre-insolvency proceedings. It actually appears (statistics are informal and unreliable) that there have been fewer insolvency petitions in the crisis years on an annual average than previously. As a result, we now have a great number of practically insolvent debtors in Greece who remain outside any kind of formal insolvency proceeding. A recent study by PriceWaterhouse Coopers[1] shows that a very large percentage of Greek companies can be described as "zombies" (54% of their sample, employing 46% of the total number of employees and 42% of the total revenues) and that at least one quarter of the outstanding debt is held by debtors which are incapable of servicing their debt and are even beyond restructuring. The study also shows that the largest portion of the overall debt is held by entities that require debt restructuring. Nevertheless, creditors and debtors rarely resort either to liquidation or restructuring. This means that unserviceable debts continue to pile up, productive means remain trapped in the hands of inefficient or inactive producers, and yet there is no general trend towards the use of insolvency and pre-insolvency tools as a solution.

The reform of the insolvency laws is an outstanding item of the bail-out agreement between the Greek state and the official creditors' group; some initial steps have been taken in defining the direction of these reforms and the areas of greater emphasis. A related reform that has advanced closer to implementation is the Greek Code of Civil Procedure as regards the execution of security interests and the ranking of creditors, especially the super-priority currently enjoyed by public creditors and employees. The fate of these reforms is now uncertain given the change of government at the end of January 2015 and the formation of a new cabinet by a coalition of fervently anti-austerity radical left and extreme right wing parties united in their commitment to renegotiate the bail-out agreement and revisit the agreed reforms.

However, just before the elections of January 2015, a series of emergency measures to address the NPL crisis were adopted by the Greek Parliament. These measures were intended to provide stop-gap solutions to debtors and creditors that were unable or unwilling to resort to the normal insolvency and pre-insolvency proceedings and provide a mix of out-of-court and simplified in-court solutions. These emergency measures fall into two categories.

The first category includes a set of fiscal and other incentives to encourage banks to forgive and/or reschedule small enterprise debt ('small' meaning having an annual turnover of up to €2.5 million). These incentives dovetail with a new installment plan for the repayment of tax and social security debt by the private sector. The rescheduling of that debt also includes the writing off or writing down of surcharges and penalties for delinquent debtors. The fate of these measures has been rendered uncertain by the election of the new government that has promised to introduce new, and possibly, more drastic measures for private debt restructuring.

The second category includes two new court proceedings for larger debtors. The first is a ratification process for restructuring agreements agreed between the debtor and more than half of its creditors and of the secured creditors (in terms of amount of debt); consenting creditors must include at least two financial institutions. The proceedings are similar to the "*pre-pack*" ratification under the Bankruptcy Code, but significantly simplified and streamlined by comparison thereto. In particular, the ratifying court need not assess the viability of the debtor as a precondition for providing its ratification. Similarly, the court need not establish that treatment of the non-consenting creditors (who are crammed down) meets the best interests test,

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but any such creditors have a short period within which to sue for any deficit between what they are entitled to receive under the ratified plan and what they would be able to receive in liquidation. The second type of proceedings, styled as "*special administration*", is an expedited public sale of the insolvent entity's business upon the application of at least 40% of its creditors (by amount of outstanding debt), that includes at least one financial institution. The statute provides that this sale must be completed within 12 months, otherwise being converted into a bankruptcy liquidation.

The emergency court proceedings that were just introduced are intended to deal with a number of problems that plague the standard Insolvency Code proceedings. Insolvency liquidation is extremely inefficient. As the most recent World Bank "*Doing Business Report*" shows,[2] compared to other European jurisdictions (including Italy which is similar to Greece in terms of delays in the judicial process), the Greek proceedings are much slower (more than two times), relatively cheap (less than half the cost in Italy but twice as expensive as in Belgium), and securing far lower returns to the creditors (approximately half of those in Italy and less than half compared to Belgium and Spain).

Greek bankruptcy liquidation is therefore exceedingly time-consuming while providing very low returns to creditors. As a result, debtors do not perceive bankruptcy as a credible threat and resist reasonable restructuring offers by creditors. In addition, pre-insolvency proceedings are procedurally complex and overly sophisticated for the general jurisdiction courts that are called upon to try them. This results in great delays and unpredictable outcomes which discourage their use. The new emergency proceedings try to address both the hold out and the time and complexity problem. They also provide banks with a pivotal role and their customers with a special tax and other incentives for debt relief.

It is still too early to gauge the success of the new measures; external factors, such as the rate of economic growth and the liquidity in the market, will surely be significant contributing factors. Nevertheless, it is a safe bet that as Greece struggles to deal with the crisis and its impact and the ever growing mountain of private debt, we will see continuing efforts to reshape and improve Greek insolvency and pre-insolvency tools. ■

Footnotes:

1 http://www.pwc.com/en_GR/gr/publications/assets/stars-zombies-eng.pdf

2 http://www.doingbusiness.org/~/media/giawb/doing%20business/documents/profiles/country/GRC.pdf.

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WE NOW HAVE A GREAT NUMBER OF PRACTICALLY INSOLVENT DEBTORS IN GREECE WHO REMAIN OUTSIDE ANY KIND OF FORMAL INSOLVENCY PROCEEDINGS

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Insolvency law reform in Cyprus – the first steps

Kyriacos Kourtellos and Demetris Roti look at the first steps toward reform in Cyprus aiming to modernise and streamline the procedure for the compulsory liquidation of companies

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The Companies Law of Cyprus CAP113 ("Companies Law") is based on the UK Companies Act of 1948 with the necessary amendments to incorporate the relevant EU Directives.

The sections referring to restructuring and corporate insolvency, winding up voluntarily or compulsorily, registration and enforcement of charges and appointment of liquidators or receivers and managers remain basically unchanged, with the exception of the incorporation of the Third Council Directive on mergers and divisions of public companies. The insolvency regime under the Companies Law generally favours creditors and clearly defines the collection, liquidation and distribution of proceeds to the creditors, and the remainder, if any, to the members.

Under the Companies Law as it currently stands there are two regimes for the winding up of a company: compulsory and voluntary. A compulsory winding up (also known as winding up by the court) is triggered by a winding up order from the court, concerning a petition filed by one of a range of stakeholders (a creditor, a contributory or the company itself). A voluntary winding up is initiated by the company itself after passing an appropriate resolution. The substantial criteria which will determine the most appropriate procedure in any case are whether a company has had any activities, has any assets or liabilities to third parties and whether it is solvent or not. A solvent company can be voluntarily dissolved via the members' voluntary liquidation procedure or, if it has no significant assets, by being struck off the Register.

The Council of Ministers at its meeting held on 23 December 2014 approved a draft bill entitled *"The Companies Law (Amendment) (No. 4) Law of 2014"* (the "Bill") amending the provisions of the Companies Law relating to compulsory liquidation, and authorised it to be submitted to the House of Representatives for enactment into law. The amendments are required under the April 2013 Memorandum of Understanding between Cyprus and the European Commission, on behalf of the European Stability Mechanism and the Memorandum of Economic and Financial Policies between Cyprus and the International Monetary Fund. The Bill has been reviewed by the Attorney General of Cyprus, who signed the relevant Explanatory Memorandum.

The main objective of the Bill is to modernise and streamline the procedure for the compulsory liquidation of companies, with the aim of minimising the time taken to complete the process, thus facilitating and expediting the return of productive assets on the market, as set out in the Insolvency Framework which was adopted by the Council of Ministers on 30 July 2014 and endorsed by the House of Representatives in a Resolution dated 6 September 2014.

The Companies Law provides that one of the grounds for a company to be wound up by the court is its inability to pay its debts. The Bill amends the criteria for assessing the inability to pay debts, and adds a criterion showing that, to the satisfaction of the court, the value of the company's assets is lower than the sum of its liabilities, taking into account its current and future obligations. The Bill also provides that once a winding up order is made, the Official Receiver, who is a government official and an officer of the court, becomes the liquidator and not a provisional liquidator, as is the case at present.

Other significant amendments introduced by the Bill are as follows.

a. any liquidator other than the official receiver must be an independent licensed professional (registered lawyers and accountants will be considered to meet this requirement);
b. the liquidator may be appointed not only by the court but also by the meetings of the creditors and contributories;
c. to address the delays and bottlenecks created by the existing decision-making process in creditors' meetings, the Bill amends the decision-making process in such assemblies and replaces the requirement for a majority by number and value with a majority by value alone;
d. under certain circumstances the liquidator may be given power by the court to manage assets subject to charges in favour of third parties if the court is satisfied that the disposal of any secured property of the company in this way may result in a more beneficial realisation of the company's assets than by alternative means. The liquidator may distribute any surplus, after repaying the secured creditors, to unsecured creditors. However, the rights

of the secured creditors to repayment of the amount secured by the charge are not diminished;

e. the liquidator's powers to obtain information from officers and managers of the company are enhanced, and a liquidator may apply to the court for public examination of any contributory, or any previous liquidator or insolvency office-holder of the company;

f. under an expedited process aimed at avoiding delays and reducing costs, the Official Receiver may apply to the court for early dissolution of the company if he is satisfied that the assets of the company are insufficient to cover the costs of liquidation and that the company's affairs do not require further investigation; and

g. the period in which a compulsory liquidation must be completed is limited to 18 months, with any extension of the period in a particular case requiring the approval of the court.

The Bill, together with the Explanatory Memorandum signed by the Attorney General, and the completed Impact Analysis Questionnaire, have been submitted to the House of Representatives in order to enact the Bill into law.

While enactment of the Bill will mark a long-awaited first step in the modernisation of the insolvency regime in Cyprus, the changes it introduces are limited in scope, and many practitioners were hoping for a far more comprehensive reform. For example, the Bill does not deal with issues that have recently been addressed in the United Kingdom, such as the registration of a pledge of shares or the abolition of the requirement for a memorandum of association of a company. Nevertheless the Bill is a move in the right direction as it should simplify compulsory liquidation procedures and save time and costs.

Once the Bill becomes law, the manner in which it is implemented, and particularly the approach adopted by the courts, will be critical factors in determining the degree of success it will achieve. As the courts themselves are currently a major bottleneck, reducing the time taken to complete liquidations will require a much more expeditious approach on their part. ■

> **"THE MAIN OBJECTIVE OF THE BILL IS TO MODERNISE AND STREAMLINE THE PROCEDURE FOR THE COMPULSORY LIQUIDATION OF COMPANIES"**

Lottery and liability: Recent developments in Lithuanian bankruptcy law

Frank Heemann and Karolina Grityte explain the rationale behind the new 'lottery' system

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Recently enacted changes to the Lithuanian Enterprise Bankruptcy Law (EBL) as well as a fresh initiative by the country's Presidency to further amend the EBL merit a closer look.

At the beginning of this year important changes came into effect significantly altering the process of selecting administrators for enterprise bankruptcies. As before, the court opening bankruptcy proceedings against a company must also appoint an administrator. What is new is that as of 1 January 2015 the bankruptcy administrator is selected randomly by a computer program. Such a "lottery" might seem strange, in particular to Western European insolvency practitioners. In the eyes of Lithuanian lawmakers, however, this algorithm-based selection process ensures the independence and objectivity of the appointed administrator while carrying out their functions.

Early in February 2015, the Presidency submitted a Bill proposing amendments to the EBL in order to address serious shortcomings in current bankruptcy proceedings highlighted by the National Audit Office in its audit report "*Management and Supervision of the Enterprise Bankruptcy Process*" (Audit Report) on 25 November 2014. The aim of the proposed amendments is to ensure quicker and more effective bankruptcy proceedings. One of the main areas addressed in this context is the directors' liability and that of other persons responsible for late filing or non-filing for bankruptcy. In addition, changes are proposed for realisation of assets and remuneration of bankruptcy administrators. The Parliament is expected to vote on the Bill by the end of April 2015.

"Lottery" for selection of Administrators

The new process for selecting administrators is set out in the Selection Rules for Bankruptcy Administrators.[1] Under these Rules, both administrators and insolvent companies are placed in categories. An insolvent company is to be categorised as small, medium, or large. The criteria to be applied are the value of the company's estate, the total value of the creditors' claims, and the absolute number of creditors and employees.

For example, in order for a company to fall into the 'large' category, the judge handling the petition to open bankruptcy proceedings must have determined that both the estate of the insolvent debtor and the total value of the creditors' claims exceed €300,000, and that the number of creditors is above 80, the calculations being based on documents and data submitted with the petition and gathered in the opening procedure. Administrators are placed in A1, A2, B and C categories. Placement in categories depends on the respective administrator's:

- general experience (determined by an algorithm taking into consideration the number of previously administered companies of different sizes);
- special experience (determined by taking into consideration administration of specific proceedings such as proceedings with cross-border elements or administration of going concerns);
- effective penalties; and
- past refusals to accept an appointment.

Within a category, administrators are ranked according to their current workload.

As already mentioned, this "lottery" might seem strange, in particular to Western European insolvency practitioners. Yet critics should bear in mind that the new system is an attempt to address the rather negative reputation of the previous system of selection and appointment of bankruptcy administrators. The old system obliged the party filing for bankruptcy not only to propose an administrator but also to include in the filing documents showing the consent of the proposed administrator to accept the appointment.

Not surprisingly, the necessary pre-filing communication between the potential administrator and the filing party sometimes resulted in the appointed administrator being biased in favour of the filing party and its interests. It still remains to be seen, however, if the new computer-based selection system ensures the appointment not only of an objective and neutral administrator, but also of someone possessing the necessary skills and experience to administer the case.

Changes proposed by the Presidency Bill, in particular regarding the directors' liability

Having examined in particular the period between 2011 and 2013, the National Audit Office in its Audit Report criticises the long duration of bankruptcy proceedings in Lithuania (average: 2-3 years) and the low satisfaction rate among creditors (average: 13%, but only 2% for unsecured creditors without priority rights).

Recommendations in the Audit Report include improvements for effective realisation of assets and changes in the way administrators are remunerated; particular emphasis, however, is placed on the need to improve the current regime with regard to the liability of directors of insolvent companies, since clearer and stricter rules for holding directors liable should incentivise earlier filings for bankruptcy and thus help increase the realisation rate for creditors. The Presidency Bill addresses the findings in the Audit Report.

As regards the directors' liability, the Bill proposes:

- to establish a clearly defined period of one month within which a director must file for bankruptcy once the company meets the criteria under the EBL for an insolvent company;
- to clarify who must file a claim for compensation of damages for late filing or non-filing by stating that it is the administrator's duty to claim for damages;
- to clarify who may initiate the process to have a director disqualified from holding management positions for three to five years after having failed to file for bankruptcy in due time or after having failed to meet certain obligations during the proceedings. The Bill proposes that the disqualification procedure may be initiated by the bankruptcy court on its own initiative or after having received a request from the administrator or creditor(s) with more than 50% of the total value of the approved claims; and
- to entitle the creditors' meeting to order the administrator to file a claim for damages against a director and to address the court in order to initiate the disqualification of the director for holding management positions in the future.

Once enacted, the changes to the EBL will, to a certain extent, remove ambiguities in the current regime, which indeed offer ample room for directors to argue why they should not be held liable for not meeting their obligation to file for bankruptcy, while at the same time not clearly obliging the administrator to act against a former director. Yet, a clear rule in the EBL establishing the time when a director must file for bankruptcy is only one clarification, though an important one. Other clarifications are still necessary, be it by amending the law or by future court practice. For instance, open questions remain related to determining "insolvency", as well as to the calculation of damages caused by late filing or non-filing.

EECC Conference

INSOL Europe's Eastern European Countries' Committee Conference will hold its annual conference on 15 May 2015 in Vilnius, Lithuania. Recent developments related to the appointment of insolvency office holders (including the Lithuanian "lottery" system) and to the liability of directors in the twilight zone are two of many interesting topics to be presented and discussed during the conference.

For more information visit: www.insol-europe.org/events ■

Footnotes:

1 Selection Rules for Bankruptcy Administrators as approved by Government Order No 647 of 9 July 2014.

"THE NEW SYSTEM IS AN ATTEMPT TO ADDRESS THE RATHER NEGATIVE REPUTATION OF THE PREVIOUS SYSTEM OF SELECTION AND APPOINTMENT OF BANKRUPTCY ADMINISTRATORS"

Luxembourg: Out of the frying pan and into the fire?

Christel Dumont examines the liability of directors when groups of companies fail

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“A DIRECTOR HAVING SEVERAL MANDATES IN THE SAME GROUP OF COMPANIES MAY BE IN AN UNWORKABLE SITUATION AS THE CORPORATE INTERESTS OF THE GROUP MAY NOT COINCIDE”

There is no doubt about it, being a director in a company facing difficulties is a complex and dangerous task, but one notch higher in the danger stakes is being a director of several companies belonging to the same group facing difficulties.

Directors are often in the middle of a power game between various stakeholders, whether they are creditors or shareholders, who nowadays have no hesitation in putting pressure or even in suing them to have them held liable for breach of their fiduciary duty. In this context, a director having several mandates in the same group of companies may be in an unworkable situation as the corporate interests of the various entities of the group may not coincide.

Duties and liabilities of directors are mainly governed under Luxembourg law by the law dated 10 August 1915 on commercial companies as amended (“Company Law”) and by several provisions of the civil, commercial and criminal codes.

The notion of group of companies is not unknown under Luxembourg law, especially in labour law, accounting law or in the law dated 2 September 2011 regarding business licenses[1]. However, even if the notion has been defined in these legal provisions, the notion of group in itself does not have consequences and there are no specific provisions regarding groups of companies in the Company Law. The corporate interest of the group is not recognised as such in the Company Law and even if a notion of group exists, each company belonging to that group would still be considered as an independent legal entity from a corporate law perspective.

In the context of insolvency, in a pure national situation, the commercial court would consider each separate legal entity and would check whether or not the two cumulative conditions of bankruptcy are met which in practice would usually be the case for all the entities even if they are considered individually.

The proposal for a regulation of the European Parliament and of the Council amending Council Regulation (EC) 1346/2000 on insolvency proceedings (“Proposal amending the EIR”) is an important step and in a cross-border context, the notion of group of companies may be dealt with differently in the future. The Proposal amending the EIR explains that the evaluation of the EIR has identified five main shortcomings among which the insolvency of groups. Indeed, the EIR "*does not contain specific rules dealing with the insolvency of a multi-national enterprise group although a large number of cross-border insolvencies involve groups of companies*". The same applies as in a national context, i.e. separate proceedings must be opened for each entity of the group and "*these proceedings are entirely independent of each other*"[2]. The Proposal amending the EIR provides for a coordination of the insolvency proceedings concerning different members of the same group of companies by obliging the liquidators and courts involved to cooperate and communicate. The liquidators involved will also have the procedural tools to request a stay of the respective other proceedings and to propose a rescue plan for all the members of the group. This would certainly significantly provide a better approach to this type of insolvencies. The fact that the liquidators will be able to exchange relevant information and to coordinate with each other raises the question whether such increased cooperation could also increase the risk of liability for directors of several entities of the group.

Personal liability

Under Luxembourg law, in most bankruptcies, the directors are generally not personally bound by the decisions they make or have made, that is, if these decisions have been taken honestly, in the best interests of the company, and if they have a minimum standard of competence, the company is bound by their decisions even though such decisions might have led to the bankruptcy of the company.

It is nevertheless possible to look beyond the separate entity of the company and its corporate body and hold directors personally liable for their actions. A court may decide to extend the bankruptcy of the company to its directors. The rationale behind this principle is to prevent fraud. In this respect, the company's debts are merged with those of the director who has acted in his own interest. Article 495 of the Luxembourg commercial code envisages this when a director for example has undertaken commercial transactions for his own personal interest or has used the property of the company as his own property, or has improperly continued to work in his own interest with an operating deficit which could only result in the company suspending all of its payments.

This typically applies to directors who abuse their majority position in the company and direct the company in their own personal interest and are quite rare situations in group structures.

Serious and blatant fault

What could be more relevant in the context of a group facing difficulties is the action to bridge insufficient assets ("*action en comblement de passif*") provided for by article 495-1 of the commercial code. According to this article, if there are insufficient assets, the Commercial Court can decide on a motion that any shortfall in company assets is to be completed from the personal assets of the directors if they have committed a serious and blatant ("*caractérisée*") offence leading to the bankruptcy. The Court may condemn directors to contribute, wholly or partially, jointly or individually, to cover the deficit, under the condition that their serious misconduct has led to the company's bankruptcy.

A serious and blatant fault is seen as the act or the omission that has a causal link with the bankruptcy and of which the director was aware, or could not have been unaware that it could cause the bankruptcy. Such a fault, therefore, implies the concept of "*dol*" which is intentional fault or fraudulent gross negligence ("*faute dolosive*"). The fault becomes blatant if it surpasses the margin of error allowed under the circumstances.

Of course, examples in practice do not seem to apply in the context of a group as for example it has been held that a complete lack of awareness of or of diligence to the company's affairs constitutes a blatant fault. If directors failed in their duty to draw up annual accounts as envisaged by the Company Act, and there is evidence that this contributed to the insolvency, then this might also constitute such a blatant fault. Again, this is usually not the case in the context of insolvency of international groups of companies with several companies in Luxembourg.

It is however interesting to note that a serious and blatant fault could exist when directors intentionally or negligently incur debts while the company is insolvent or has no hope of being able to pay. In this last example, where the corporate interests of the various entities of the group are not the same, the directors, if they have several mandates for these various entities, may know that a specific company of the group has no hope of being able to pay. For example, the company has a subsidiary which is already insolvent but the directors may still incur debts in order to save other entities of the group. Obviously, there is no precedent yet and it must be proved that they have acted intentionally or negligently, which might still be difficult to prove but it cannot be entirely excluded.

In addition, it is important to note that the Luxembourg government filed a new bill of law (Bill n°6539, the "Bill") on the protection of undertakings and the modernisation of insolvency law on 1st February 2013. The Bill particularly intends to simplify the criminal provisions in order to allow easier prosecution. In this context, the amendment of article 495-1 may increase the potential liability of directors. Indeed, the current wording of the Bill intends to replace the notion of "*serious and blatant fault*" by the notion of "*management fault*" having contributed to insufficient

> **A SERIOUS AND BLATANT FAULT IS SEEN AS THE ACT OR THE OMISSION THAT HAS A CAUSAL LINK WITH THE BANKRUPTCY AND OF WHICH THE DIRECTOR WAS AWARE**

> "ENFORCEMENT IN MOST JURISDICTIONS IS CONFINED TO CASES OF FRAUDULENT CONDUCT AND PARTICULARLY SERIOUS BREACHES OF DIRECTORS' DUTIES"

assets. Such an amendment would indeed increase the stringency of the law and could increment the potential liability of directors as this can result in an extensive interpretation of the notion of "*management fault*" by the Courts. But, the Bill does not define what should be considered as a "*management fault*" and judges may be tempted, depending on the circumstances, to make an extensive interpretation of the notion.

EU study

The European Commission has not to date considered the question of liability of directors and a study has been prepared in order to provide the relevant information in a comprehensive manner for the 27 EU Member States and Croatia[3]. Such a study may help better understand how the question of liability of directors is dealt with in other European jurisdictions and may be a source of inspiration for Luxembourg.

What appears from the study is that there are gaps and deficiencies with regard to the substantive rules on directors' duties, especially in relation to enforcement of such rules. The authors of the study noticed that enforcement in most jurisdictions is confined to cases of fraudulent conduct and particularly serious breaches of directors' duties. It appears also from the study that in most Members States, judicial enforcement of directors' duties mainly or almost exclusively takes place after the company has filed for insolvency and that only a small fraction of claims against an insolvent company's directors are enforced in practice. This sounds quite relevant as far as Luxembourg is concerned.

In conclusion, what can be said is that even though enforcement of directors' duties and liabilities may not be so frequent, directors of several entities of a group of companies facing difficulties are in a very tricky situation. They must act prudently and diligently by taking into account the corporate interest of the group and the one of each individual entity of such group in which they have a mandate. In this context, directors should certainly seek appropriate legal and accountancy advice on a regular basis to ensure that all the entities are complying with their responsibilities. They should also be aware of the financial situation of the group and of the various companies and for such a purpose, they shall adopt a proactive approach and request to obtain on a regular basis (quarterly) an update of the operational entities.

In the case of cross collateralisation in a context of financing/refinancing, the directors shall pay particular attention to the corporate interest of the company to grant a cross stream interest/guarantee. When they are directors of several entities of the group, this assessment might be extremely difficult as it could be in the best interest of the entity receiving the financing but not in the one granting an upstream or cross stream guarantee. In this case, the directors need to consider with extreme attention whether they are caught in a conflict by being on a number of boards or by having dual roles that expose them to confidential information that they have a duty to share with the other co-directors. This happens especially with cascade structures where the director of the topco is also director of the holdco and both companies have different stakeholders. ■

Footnotes:

1 *Loi du 2 septembre 2011réglementant l'accès aux professions d'artisan, de commerçant, d'industriel ainsi qu'à certaines professions libérales.*

2 Proposal for a regulation of the European Parliament and of the Council amending Council Regulation (EC) n° 1346/2000 on insolvency proceedings.

3 Study on directors' duties and liability prepared for the European Commission DG Markt by Carsten Gerner-Beuerle, Philipp Paech, and Edmund Philipp Schuster (department of Law, London School of Economics, April 2013)

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RICHARD TURTON AWARD

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Insolvency Practitioners Association

Richard Turton had a unique role in the formation and management of INSOL Europe, INSOL International, the English Insolvency Practitioners Association and R3, the Association of Business Recovery Professionals in the UK. In recognition of his achievements these four organisations jointly created an award in memory of Richard. The Richard Turton Award provides an educational opportunity for a qualifying participant to attend the annual INSOL Europe Conference.

In recognition of those aspects in which Richard had a special interest, the award is open to applicants who fulfil all of the following:

- Work in and are a national of a developing or emerging nation;
- Work in or be actively studying insolvency law & practice;
- Be under 35 years of age at the date of the application;
- Have sufficient command of spoken English to benefit from the conference technical programme;
- Agree to the conditions below.

Applicants for the award are invited to write to the address below enclosing their C.V. and stating why they should be chosen in less than 200 words by the 1st July 2015. In addition the panel requests that the applicants include the title of their suggested paper as specified below. The applications will be adjudicated by a panel representing the four associations. The decision will be made by the 3rd August 2015 to allow the successful applicant to co-ordinate their attendance with INSOL Europe.

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Bond restructuring: A completely new legal regulation in Poland

Przemysław Wierzbicki reports on the new law, finally enabling the restructuring of bonds

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Completely new solutions on bond restructuring will come into force in Poland on 1 July 2015.

The change is crucial – so far, in principle, bond restructuring has been impossible, with the issuers having to resort to partial solutions or being unable to conduct any restructuring at all. The amendment arises from the new Act on Bonds of 15 January 2015 (the "Amendment"). The new rules introduce a number of solutions designed to allow "real" restructuring of bonds – by amending the terms of issue.

It is worth remembering that the new rules of bond restructuring may be applied before bankruptcy is declared or in parallel with bankruptcy proceedings (e.g. in the case of an arrangement with the creditors).

Today – problematic restructuring

In the current legal situation, the possibilities of changing terms of issue are very limited and, in principle, boil down to two situations:

a) a change in the terms of payment of claims arising from bonds under bankruptcy and the creditors' agreement in the insolvency proceedings with a possibility of entering into an arrangement; or
b) individual agreements between the issuer and all the bondholders.

Consequently in most cases, the above, very limited possibilities of changing the terms of issue could, in fact, be applied very late or were too complicated to be implemented (especially in case of bonds admitted to public trading). In our experience, for example, there have been situations where major bondholders acquired bonds from a new series and the yields from the new series repaid earlier series, in which the same bondholders also hold bonds, but alongside them, there were also individual bondholders, who could not be contacted to establish the rules of changing the terms of the bond issue. Additionally, the doctrine of the law questioned whether it was at all possible to change the terms of issue of bonds in the case of bonds which had already been acquired.

New legal instruments

The Amendment is intended to solve these problems. In particular, the Amendment contains provisions allowing for changes in the terms of issue and introducing the institution of bondholders' general meetings ("BM").

First of all, the Amendment confirms that it is possible to modify the terms of the issue after the acquisition of bonds by the bondholders (which was disputed to date), where:

a) a change of the terms of issue will require a resolution of a BM and the consent of the issuer (the terms of issue can, however, also be changed in identical agreements between the issuer and all the bondholders);
b) the issuer may decide to set up a BM in the terms of issue (this was not possible until now) – the bondholders' meeting can therefore only operate if this is decided by the issuer in the terms of issue;
c) A BM may be established for both privately traded bonds and bonds admitted to trading on a regulated market or in an alternative trading system ("listed bonds");
d) in certain cases of technical matters the terms of issue can be changed unilaterally by the issuer (e.g. change of the entity managing the bond register); and
e) if the content of the bond document becomes obsolete as a result of changes of the terms of issue, the issuer will call the bondholders, by means of a notice on its website, by registered post or by courier, to submit the "old" bond document in order to change its content or replace it with a "current" document, under penalty of the cancellation of the bond.

At the same time, the Amendment precisely regulates the institution of the bondholders' meeting, whereby:

a) such a meeting is a representation of all eligible holders of bonds from a given series or of the same code in the meaning of Art. 55, para. 2 of the Act on Trading of Financial Instruments (Journal of Laws No. 211, item 1384); this arises from the assumption that the effects of the decision of a BM are supposed to apply – in principle – to all bondholders;
b) the resolution of a BM may apply to:
   i. qualified terms of issue, e.g. the amount or the method of determining the amount of benefits

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arising from the bonds,

ii. other provisions of the terms of issue;

c) the rules of calling and holding a BM are very similar to those which apply to general meetings of shareholders in joint stock companies, in particular:

i. in principle, the issuer has the right to call a BM, acting on its own initiative, based on the cases referred to in the terms of issue when a BM needs to be called, or at the request of a bondholder/bondholders holding the appropriate nominal value of bonds,

ii. in the case of a lack of response by the issuer within 14 days of the request to call a BM, the registration court may authorise the bondholders who submitted the request in question to call a BM,

iii. A BM shall be announced at least 21 days before the date of the meeting – published on the issuer's website, or (occasionally) in a national daily newspaper; if all the bonds of a certain series are registered bonds, a meeting may be called by registered post or courier (with the consent of the bondholder – even by e-mail),

iv. A BM is held at the issuer's headquarters or, if the terms of issue so provide, in a different place in Poland (exceptionally in the EU);

d) the following do not authorise participation in a BM: bonds held by entities from the issuer's group and redeemed bonds (the remaining bonds are referred to as "adjusted total nominal value of bonds" - "ATNVB");

e) before the meeting, the bondholders who wish to attend, must:

i. submit a certificate from a financial institution or a deposit certificate

confirming that the bonds have been blocked, or

ii. submit the bond document to the issuer;

f) therefore, the bonds cannot be traded until the end of a BM;

g) A BM is valid if it is attended by bondholders representing at least half of ATNVB (unless the terms of issue require more), each bond gives the right to one vote and resolutions are passed by the bondholders' meeting (unless the terms of issue impose stricter requirements):

i. in principle – by a three-quarter majority in the case of amendments to the qualified terms of issue,

ii. exceptionally (for listed bonds and the above qualified changes) – he consent of all bondholders present at a BM is required,

iii. exceptionally (in the case of reducing the nominal value of the bonds) – also, the consent of all attendees at a BM is required,

iv. by an absolute majority – resolutions related to other issues;

h) the issuer must agree to changes in the terms of issue within seven days of a BM;

i) minutes of a BM must be drawn up, which, in the case of resolutions changing the qualified provisions of the terms of issue, must be drawn up by a notary public; and

j) a complaint may be filed against resolutions of a BM – in an action to annul the resolution (if grossly detrimental to the interests of the bondholders or contrary to good practices) or in an action to state the resolution invalid (if it is incompatible with the law).

It is worth remembering that the rules of the Amendment only apply to bonds issued after it becomes effective.

In addition, the Amendment introduces the principle that, after establishing those eligible to receive benefits from a paperless bond, the rights from this bond cannot be transferred – therefore, it will not be possible to sell paperless bonds after default.

"THE AMENDMENT CONFIRMS THAT IT IS POSSIBLE TO MODIFY THE TERMS OF THE ISSUE AFTER THE ACQUISITION OF BONDS BY THE BONDHOLDERS"

LDK Solar: Implementing a global restructuring of a China-based corporate family

Phillip Taylor reports on a cutting edge restructuring using a combination of US and European tools

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As the attention of restructuring experts moves east, the LDK Solar group ("LDK") has set a precedent as one of the first China-based groups to successfully restructure debt issued in the international capital markets through a court-based process.

LDK and its advisers used tools developed at the cutting edge of European and US restructuring to overcome a number of issues inherent in restructuring a financially and geographically diverse corporate group.

Background

LDK is a vertically integrated manufacturer of photo-voltaic (PV) solar panels and systems, largely based in China. Prior to the restructuring, LDK had been affected by a number of business issues, including a general decline in the European market: partly due to overcapacity and partly to European governments withdrawing subsidies for renewable energy. LDK was also affected by the dramatic fall in the price of polysilicon, a material used to produce solar panels, which its subsidiary LDK Silicon supplied to other panel companies. Following the decline in polysilicon market prices, there was no business reason for LDK Silicon to produce polysilicon for anything other than use by the group; consequently, some of LDK Silicon's plants were mothballed.

“

LDK USED TOOLS DEVELOPED AT THE CUTTING EDGE OF EUROPEAN AND US RESTRUCTURING TO OVERCOME A NUMBER OF ISSUES

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Group financing

The group parent: LDK Solar Co. Ltd. ("LDK Solar") was listed on the New York Stock Exchange, and had issued high yield debt in the capital markets. Some of its historic debt had been restructured through a series of bilateral agreements, but its Senior Notes (the "Senior Notes") had not, with $293 million outstanding when they matured in February 2014. LDK Silicon had also issued redeemable preferred shares, which, if redeemed, would constitute a secured liability of $390 million. In addition, LDK Solar had various project finance facilities and other smaller facilities.

In addition to this "offshore" debt, LDK's PRC (People's Republic of China) subsidiaries had borrowed over $2 billion of "onshore" debt in facilities secured and cross-guaranteed across the majority of its "onshore" assets (i.e., those incorporated or situated in the PRC).

It was clear from the outset that the continued support of LDK's onshore lenders depended largely on a successful restructuring of its offshore liabilities. If the offshore restructuring were to fail, the result would have been a messy liquidation of the group.

Restructuring support agreement

By the time the Senior Notes matured, negotiations with stakeholders had been underway for some months. An informal committee of Senior Note holders had been organised, and their advisers were discussing restructuring options with LDK. LDK was also in discussion with certain holders of preferred shares and their advisers.

The discussions resulted in a restructuring support agreement ("RSA"), which set out the key terms of the restructuring and a framework for its implementation. The agreed objectives of the restructuring were to extend the maturity and payment profile of LDK's offshore debt by converting Senior Notes and preferred shares into 2018 and 2016 Convertible Bonds, respectively. In addition to the Convertible Bonds, the Senior Note and preferred share holders agreed to exchange some of their debt for equity, which would ultimately reduce the offshore debt by around ten per cent.

Cayman provisional liquidation

When the notes matured in February 2014, LDK was concerned to prevent action being taken by creditors who were either unaware of the restructuring negotiations or who might seek to circumvent them. The directors of LDK Solar applied to the Grand Court of the Cayman Islands for the appointment of provisional liquidators: Eleanor Fisher and Tammy Fu of Zolfo Cooper were appointed (the "JPLs").

The JPLs set about concluding the negotiation of the RSA and it was signed by majorities of the Senior Note and preferred share holders on 28 March 2014. The RSA also envisioned a restructuring of LDK's ordinary unsecured liabilities ("Ordinary Claims") in addition to the Senior Notes and preferred shares.

The RSA originally allowed stakeholders who did not wish to receive equity and new convertible bonds elect to "cash-out"; however, the availability of the option depended on LDK raising sufficient funding. Although challenging, enough cash was raised to pay a cash-out amount to the holders of Ordinary Claims.

Implementation by schemes of arrangement

Despite the Senior Notes being governed by New York law, implementation of the restructuring was primarily based on schemes of arrangement. Schemes were selected over Chapter 11 of the US Bankruptcy code because they were sufficiently flexible to implement the restructuring agreed by the majority of the stakeholders in the RSA.

The schemes were conducted through the courts of the Cayman Islands and Hong Kong, and were linked and inter-conditional. The five schemes were essentially mirror images of each other, but applied to slightly different companies and creditors. The scheme creditors comprised three classes – the Senior Notes, the Preferred Obligations, and the Ordinary Claims, although it was not necessary for all three classes to approve each of the five schemes; for example the holders of Ordinary Claims were not creditors of two of the three scheme companies.

In Hong Kong, there was some uncertainty as to whether a scheme could be sanctioned for a company that is not incorporated in Hong Kong. Lam J. decided this in LDK's favour, holding that the Hong Kong court did have jurisdiction to sanction schemes in respect of the Cayman companies, and ought to exercise its discretion to do so based on a "sufficient connection" test similar to that which applies in English law schemes – see *LDK Solar Co., Ltd (in provisional liquidation)*[1]. The sufficient connection test was satisfied by the very reason for conducting a Hong Kong scheme: the schemes sought to compromise debt that was governed by Hong Kong law.

Chapter 15 recognition obtained

It was important to obtain US recognition of the scheme under Chapter 15 of the US Bankruptcy Code (the USA's enactment of the UNCITRAL Model Law on Cross Border Insolvency), because the Senior Notes were governed by New York law. This application was based on LDK Solar having its centre of main interests ("COMI") in the Cayman Islands. Cases such as *Bear Stearns*[2] had cast doubt on whether a Cayman Islands holding company could be said to have its COMI in the Cayman Islands for Chapter 15 purposes. However, in LDK's case, the JPLs conducted most of their activities from the Cayman Islands, putting the location of the COMI beyond doubt by the time they made the Chapter 15 application. The US Bankruptcy Court for the District of Delaware made the Chapter 15 orders shortly after the schemes were sanctioned.

Chapter 11 pre-packaged plans confirmed in one month

The Chapter 15 orders recognised and gave effect to the Cayman scheme as far as US law was concerned, but some uncertainty remained around the release of US-based subsidiary guarantors. Pre-packaged Chapter 11 cases were filed in order to ensure that the restructuring could not be circumvented by creditors seeking to enforce against assets of the US subsidiary guarantors. As the name suggests, pre-packaged cases can be limited to a matter of weeks and cost considerably less than full Chapter 11 proceedings, especially if they can take advantage of cost savings available from coordinating the documentation with the scheme documents. The pre-packaged Chapter 11 plan for the three LDK US subsidiary guarantors was confirmed by the Bankruptcy Court just one month after their cases were commenced.

European operations

LDK held a number of European interests, including a majority shareholding in Sunways, a German-based manufacturer and supplier of solar energy components. Sunways went into insolvency proceedings in Germany shortly after LDK filed for provisional liquidation. Schultz and Braun were retained by the JPLs to handle negotiations with the insolvency administrator and to advise as to German law. Other European assets were placed into solvent liquidations as part of the global restructuring.

Conclusion

LDK is an example of how a combination of restructuring proceedings can be used to achieve a successful restructuring of complex and cross-border financing arrangements governed by different laws and issued to creditors across the globe. Techniques developed in the UK, European and US markets were adapted and used effectively in other jurisdictions. As many corporate groups based in Asia are structured in a way similar to the LDK corporate structure, LDK's restructuring will be a model for future cases in a region where restructuring has become increasingly relevant.

LDK and the JPLs were advised by Sidley Austin LLP, Campbells and Schultze & Braun; as well as by barristers Michael Crystal QC, Adam Al-Attar; and in Hong Kong by Charles Manzoni SC and Clifford Smith SC. ■

Footnotes:

1 Unreported, HCMP 2215/2014, December 10, 2014, (LDK)

2 *In re. Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.* (in provisional liquidation) 2007 WL 2479483 (Bankr. S.D.N.Y. Aug. 30, 2007), amended and superseded by 374 B.R. 122 (Bankr. S.D.N.Y. 2007).

"TECHNIQUES DEVELOPED IN THE UK, EUROPEAN AND US MARKETS WERE ADAPTED AND USED EFFECTIVELY IN OTHER JURISDICTIONS"

Share your views!

Rights of trade creditors in the US

Dan Lowenthal explains the statutes concerning the rights of trade creditors in the US

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A trade creditor who supplies goods to a company that files for bankruptcy should seek to enforce certain rights in the Chapter 11 case.

For instance, the Bankruptcy Code Section 546(c) preserves a creditor's right of reclamation under state law. The applicable state law statute concerning reclamation is Uniform Commercial Code Section 2-702. The two statutes together permit a supplier of goods to reclaim goods provided to an insolvent debtor in the ordinary course of the debtor's business when such goods are identifiable.

BC Section 546(c) permits reclamation of goods supplied within 45 days before the bankruptcy petition date or, if the 45-days period expires after the case begins, no later than 20 days after the start. The trade creditor (or its counsel) should demand reclamation right after the Chapter 11 case is filed.

But trade creditors cannot always reclaim goods they provided prepetition. The goods might be subject to a secured creditor's lien or might not be identifiable. A carton of shoes might be identifiable, but oil flowing through a pipeline with other suppliers' oil might not be.

> "A CARTON OF SHOES MIGHT BE IDENTIFIABLE, BUT OIL FLOWING THROUGH A PIPELINE WITH OTHER SUPPLIERS' OIL MIGHT NOT BE"

BC Section 503(b)(9) gives suppliers a priority administrative claim for the value of goods they supply to debtors in the ordinary course of the debtors' businesses within 20 days before the filing date. Trade creditors that cannot reclaim goods under Section 546(c) can benefit by filing a claim under Section 503(b)(9).

A trade creditor might seek to stop delivering goods under the UCC Section 2-705. The automatic stay in BC Section 362 bars creditors from trying to obtain property from the debtors' estates. Even so, some courts have allowed creditors to invoke their delivery stoppage rights. The theory is that the creditor is not seeking to obtain estate property, but rather suspending its performance while the debtor considers if it wants to assume or reject an executory contract with the creditor/supplier.

The BC also provides that the seven largest creditors by claim amount can serve on the official committee of unsecured creditors, which is formed by the US Trustee's Office soon after a bankruptcy case is filed. Although a seven-member committee is the rule, the US Trustee has appointed committees with as few as three members and others with 11 or more. The size of a committee is influenced by the number of creditors willing to serve and the size of the case.

There are pros and cons to serving on a creditors' committee. Committee members gain access to a debtor's confidential information and receive cash flow forecasts, business plans, and more. They learn more about the debtor's reorganisation or liquidation goals than they would if they did not serve.

Yet committee members are fiduciaries for all unsecured creditors. Creditors want to maximise recoveries on their claims, but issues may arise in which an individual creditor's own interests differ from those of the other members. Bondholders or governmental agencies might pressure a committee to pursue goals on issues that differ from what trade creditors would want. As fiduciaries for all creditors, committee members must deal with those tensions.

If a debtor has secured debt, the creditors' committee investigates whether the security interests were properly perfected and other related matters concerning the validity of the secured creditor's priority claims. Committee members decide if litigation should be brought against the secured creditor.

Debtors' Options

Retailers in bankruptcy might seek court permission to pay their critical vendors pre-bankruptcy. Debtors identify which creditors they believe are critical to their business. A Debtor's Critical Vendor Motion includes the total amount the debtor wishes to pay those creditors. The proposed order approving the motion might require vendors to keep supplying a debtor according to certain specified business terms. Creditors that agree to the proposed supply terms are eligible to receive prepetition-owed amounts for which they otherwise might be paid a fraction on the dollar as unsecured claims in the bankruptcy case.

Trade creditors must also file timely proofs of claim. Typically, a debtor files a motion to set a filing deadline. Claims should identify prepetition-owed amounts and include supporting documentation. A separate deadline is set for creditors to file administrative expense claims – claims for goods and services provided to a retailer post-petition. Administrative expense charges are the actual and necessary costs and expenses a debtor incurs to preserve its bankruptcy estate through Chapter 11. Creditors with valid administrative expense claims are paid before distributions are made to unsecured creditors on prepetition-owed amounts.

Certain trade creditors have contracts with debtors that qualify as executory contracts. This means that both the creditor and the debtor still owe performance to one another, such that failure by either to perform would constitute a material breach. A debtor can assume, reject, or assume and assign an executory contract to another party (BC §365).

A debtor that assumes or assigns a contract (or the assignee) must pay the creditor the prepetition-owed amounts and give adequate assurance that the debtor or assignee can keep performing the contract (BC § 365(b)(1). Rejection of a contract constitutes a material breach and allows the creditor to file an unsecured claim for damages as of the petition date (BC § 365(g)(1). Creditors whose contracts are assumed or assigned recover more on their prepetition claims than do creditors whose contracts are rejected.

A bankruptcy estate might also have claims to assert against unsecured creditors. Debtors can seek to claw back payments that were made to trade creditors in the 90 days before the bankruptcy case was filed. The estate will have preferential transfer claims to assert under BC Section 547.

Payments are preferential if a debtor can satisfy a five-part test examining if the payment (1) was made to or for the benefit of a creditor; (2) was made on account of an antecedent debt; (3) was made while the debtor was insolvent; (4) was made within 90 days before the bankruptcy case was filed; and (5) enabled the creditor to receive more than it would in a Chapter 7 liquidation.

The fifth element applies when a trade creditor supplies goods on an unsecured basis. Payment in full for those goods would likely exceed what an unsecured creditor would receive in a Chapter 7 liquidation case. Thus, this preferred creditor would have received a greater amount in the 90 days before bankruptcy than it and other trade creditors would receive as distributions on their prepetition claims in the bankruptcy case.

The BC provides creditors with defences to preferential transfer claims. The most common defences are the ordinary course of business defence, the contemporaneous new value defence, and the subsequent new value defence. These defences prevent or reduce clawbacks of transfers because the creditors continued doing business with the debtor in the 90 days before bankruptcy in a manner that the BC says should be respected.

The ordinary course of business defence applies when a transfer was payment for an obligation incurred by the debtor in the ordinary course of its business or financial affairs, made in the ordinary course or financial affairs of the debtor and the transferee, or made according to ordinary business terms. The creditor must show a consistent history of invoices to and payments by the debtor both during and before the 90-day prepetition period.

The contemporaneous new value defence applies when a debtor makes a transfer to a creditor, and at or about the same time, the creditor supplies the debtor with new value. The subsequent new value defence applies when a debtor makes a transfer to a creditor, and the creditor subsequently supplies to the debtor new value that remains unpaid. If a preferential transfer claim is brought against the creditor, the subsequent new value supplied would reduce the amount the creditor would owe on the claim.

Being Prepared

Trade creditors face many challenges when dealing with retailers that might or do file for bankruptcy. Pre-bankruptcy, trade creditors must monitor and manage the credit risks and consider alternative business terms.

If a retailer does file, then trade creditors must consider possible remedies related to goods they delivered before the filing; protect and pursue recovery on their prepetition claims; review filings in the case to determine if critical vendor status is an option and whether service on a creditors' committee makes sense; determine if their contracts are executory and, if feasible, pursue assumption; and, assert administrative expense claims when applicable. Finally, trade creditors must be aware that the bankruptcy estate might have claims to assert against them for amounts they received prepetition and plan accordingly. ■

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> "THE SEVEN LARGEST CREDITORS BY CLAIM AMOUNT CAN SERVE ON THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS"

Share your views!

Bankruptcy law in the Republic of Macedonia

Dejan Kostovski brings us up to date with the history and developments of insolvency legislation reform

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“THE 1998 LAW WAS AMENDED THREE TIMES, STRONGLY INFLUENCED BY THE GERMAN AND AMERICAN BANKRUPTCY LAWS”

1997: A new law enacted

Insolvency legislation reform in the country began back in 1997 when the new bankruptcy law was enacted and published in the “*Official Gazette*” in October 1997. It entered into force on 6 November 1997 and came into effect on 5 June 1998. With the enactment of this new law, the former “*Law of Forced Settlement, Bankruptcy and Liquidation*”, as state regulation, used after the breakup from Yugoslavia, was replaced and not used anymore.

This 1998 law was amended three times, in July 2000, 2002 and 2004 and it was strongly influenced by the German and American bankruptcy laws. The most important innovations introduced are:

- the role of the creditors was changed from advisors into main decision-makers in the bankruptcy proceedings;
- a plan of reorganisation is now required, as an opportunity to extend the business and reorganise the debtor after the opening of bankruptcy proceedings;
- proceedings for personal bankruptcy; and
- special bankruptcy proceedings against the property of a sole proprietor.

Suma sumarum, the new law was quite complex, affecting both the case law and the role of creditors in bankruptcy proceedings, while generally creating a different perception of insolvency.

2006: Reforms continue

The reform continued with the enactment of the Law on Bankruptcy in 2006. This law was published in the “*Official Gazette*” no.34/2006 on 22 March 2006 and entered into force on the 30 March 2006.

In connection with the application of the Bankruptcy Law, Regulations were also published, affecting the programme and the manner in which the exam for obtaining a certificate as an authorised trustee will take place, the remuneration of IPs and the reimbursement of the bankruptcy procedure costs. The IPs’ professional standards were also detailed, especially the one concerning the sale of the debtor's assets. A code of ethics for trustees was also published. The enactment of the regulations, the professional standards and the Code of Ethics have finally completed the legal framework regulating insolvency in the country.

The most important changes consist of:

- the setting up of a Chamber of Trustees as a professional association of licensed trustees;
- the elaboration of the principle of urgency, with the introduction of time limits for taking procedural actions leading to the bankruptcy procedure, which is now supervised by a bankruptcy judge, as opposed to the former solution that proved quite inefficient in the absence of a specialised court;
- bankruptcy counselling can now be obtained from an appellate authority which deals with complaints and appeals, and can act against decisions made previously during the bankruptcy proceedings.
- the procedure for examining and approving the creditors’ claims was also shortened, by granting competence to the board of creditors and the creditors’assembly; and
- the conditions for the opening of bankruptcy proceedings and the creation of conditions for proposing a simpler reorganization plan were redefined, which was followed by the reduction of costs of the proceedings.

Very soon after the Law’s enactment (in December of the same year), the Law on Amendments to the Bankruptcy Law was changed. A group of MPs proposed that the amendment be removed and improved amendments added, which restricted the right of the bankruptcy trustee to be appointed to more than three bankruptcy proceedings.

The Law Amending the Law on Bankruptcy, published in July 2007, and enacted on the eighth day after the publication in the “*Official Gazette*”, was changed again, bringing in penal provisions similar to misdemeanor provisions in other laws.

The third revision of the Bankruptcy Law, or the Law on Amendments of the Bankruptcy Law, published in the “*Official Gazette*” in April 2011 and entered into force on the eighth day after its publication, changed certain duties of the bankruptcy trustee, and aimed at accelerating bankruptcy proceedings.

In fact, the greatest change introduced in this report is the duty of the trustees to enter all the changes and decisions made by the authorities dealing with bankruptcy proceedings in the registry for e-bankruptcy, which is kept in the Central Registry. The Ministry of Economics was supposed to prescribe the form and manner of keeping the insolvency register. That was what happened, and the Rule-book on the form, content and manner of keeping the registry of e-bankruptcy was published in November 2011. This created the conditions and the possibility for creditors and other stakeholders to monitor the electronically-opened bankruptcy proceedings.

For the fourth update of the Bankruptcy Law, published in May 2013, it can also be said that it contains most important amendments to the bankruptcy law.

The first segment amended the opening of bankruptcy proceedings. Prior general proceedings were implemented, and are now mandatory whenever the opening of bankruptcy proceedings is made by a constituent.

In addition to the general prior proceedings, two more separate preliminary proceedings were introduced. The first are the previous proceedings used when the opening is initiated by a debtor, while the second apply when wishing to implement pre-insolvency reorganisation.

This report developed the conditions, the ways and manner of opening insolvency proceedings without conducting preliminary investigation.

Now there is a possibility for appointing a bankruptcy trustee by using the method of random selection whenever a proposal for the opening of bankruptcy proceedings is made by the debtor. However, there is an exception to this rule when a creditor is the one who submits the proposal for opening bankruptcy proceedings: he can suggest the appointment of a certain trustee from the list published by the Ministry of Economics.

Another significant change that this revision brought is its providing much shorter deadlines up to which the judicial authorities of the bankruptcy proceedings should take certain procedural actions and bring a verdict. The bankruptcy judge's power to deal with complaints in litigation, arising from challenging the claims, and with legal actions in specific opened insolvency proceedings, is also enforced.

With this reform, the provisions regarding the composition, work and vote of the board of creditors were changed, by removing all inconsistencies observed in the case law.

Regarding the disposal of the bankruptcy estate, a new kind of sale was set: public electronic auction without starting price.

After this review, the possibility of the reorganisation of a debtor company should be mentioned, when a reorganisation plan was submitted, thus avoiding the legal consequences of bankruptcy proceedings The creditors have the right to submit comments and the plan can be accepted within 60 days, after voting..

Because this novelty brought such big changes, certain bylaws were also published in October 2014, about the expert training and the ways to acquire a certificate of expertise on preparing a reorganisation plan, as well as on the method and implementation of electronic asset sales and determining the bankruptcy trustee's fee. Rules for compiling the bankruptcy file, for keeping the register of trustees, for the form and content of the creditors' claims and for regulating the manner of appointing a trustee by the method of electronic election were also set up.

All the new amendments to the Bankruptcy Law were published in November 2013, article 23, for instance, which regulates the exam procedure in order to become an authorised trustee. In December 2014 the previous bylaw concerning the exam expired.

Also in June 2014 new amendments and changes to the bankruptcy law were published, which made it possible for this law to fall into compliance with the Law for locking the bankruptcy proceedings, partially regarding the provisions on the right to build a certain structure and the determination of the legal status of the property built, which all create the bankruptcy estate of the debtor.

2014: Concerning the conclusion of bankruptcy proceedings opened according to the law in force before 1997

This law was published in January 2014 and entered into force in March 2014. Its purpose is only the regulation of bankruptcy proceedings opened under the laws applicable before 1997. In fact this law allows for separate, undeniably extra-judicial proceedings, according to which buildings included in the bankruptcy estate, which were not sold or had no legal status, are to get that status, thus increasing their value and at the same facilitating the purchasing procedure and the registration in the public records. This law regulates the sale of such property by public auction, conducted electronically, without starting price. If the property is not sold its worth is distributed to the creditors, based on the distribution plan prepared by the bankruptcy trustee.

Finally, with this law, the deadlines which judges are obliged to observe while deciding upon civil cases in the Bankruptcy procedure, whether initiated or extended, were shortened.

To conclude, it can be said that the reform is still going on, and the goal is, on the one hand, to create conditions for the creditors to achieve a greater return on their claims through the incorporation of best practices as soon as possible, and, on the other hand, to allow the debtor company to overcome its financial difficulties through reorganisation, whenever possible, in order to avoid the legal consequences of bankruptcy proceedings. ■

"THE GOAL IS TO CREATE CONDITIONS FOR THE CREDITORS TO ACHIEVE A GREATER RETURN ON THEIR CLAIMS THROUGH THE INCORPORATION OF BEST PRACTICES AS SOON AS POSSIBLE"

Share your views!

Country Reports
Spring 2015

Updates from Italy, Portugal, Romania, Spain

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"ITALY HAS A MODERN AND COMPETITIVE LEGAL SYSTEM TO FACE NOT ONLY INSOLVENCY, BUT ESPECIALLY, THE FINANCIAL CRISIS"

Italy: Major amendments to insolvency and restructuring law

Italy has a modern and competitive legal system to face not only insolvency, but especially, the financial crisis.

In order to further improve the present regulations, on 28 January 2015, the Italian Ministry of Justice established a Commission which will study how to reform the Italian insolvency and restructuring proceedings.

By 31 December 2015, the Commission shall propose amendments to the present rules, aimed at:

a. evaluating the impact of the reform of the European Insolvency Regulation (EIR) no. 1346/2000, specifically providing general regulation of insolvencies of groups of companies;
b. coordinating the rules of insolvency and restructuring proceedings with those regarding telematics civil proceedings (*processo civile telematico*);
c. promoting an early approach to financial crisis;
d. revising the rules regarding preventive agreements with creditors (*concordati preventivo*) and, specifically those regarding restructuring the debtor's enterprise (*concordati preventivo in continuità aziendale*), in order to preserve employment agreements; make more simple and rational the rules regarding financing to companies facing financial distress; establish pre-preferential and secured creditors; define the classes of creditors;
e. making liquidation proceedings faster;
f. allowing the opening of procedures concerning liquidation of overindebted debtors upon request from the creditors;
g. reforming the rules regarding large insolvent companies (*amministrazione straordinaria*); and
h. simplifying the rules of secured claims, and allowing the granting of floating charges.

The Commission is made of academics, members of the ministry of justice and court judges, among whom is Luciano Panzani, head of the Rome court of appeal, a well known and long standing member of INSOL Europe.

Portugal: Recent amendments to the Portuguese pre-insolvency framework in the light of the European Commission's Recommendation on a new approach to business failure and insolvency

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The Decree-law No. 26/2015 of 6 February, 2015 entered into force on 3 March 2015. The new legislation is of great relevance to the Portuguese insolvency law, or rather to the Portuguese pre-insolvency framework.

It amends one provision of the Portuguese Insolvency Act concerning the special revitalisation proceedings (*processo especial de revitalização*, best known as PER), and a number of provisions of the Decree-law No. 178/2012 of 3 August 2012, which regulates the out-of-court restructuring proceedings (*sistema de recuperação por via extrajudicial*, also known as SIREVE). Both kinds of proceedings were designed to enable companies in difficulty to restructure at an early stage with a view to preventing their insolvency, the core distinction between them being that the PER are hybrid proceedings, hence involving a certain degree of judicial intervention, while the SIREVE are strictly out-of-court.

The amendments laid down by the Decree-law No. 26/2015 can be summed up under six main chapters;

1. the scope of applicability of the SIREVE (which has ceased to cover actual insolvency and is now exclusively reduced to pre-insolvency);
2. the assessment of the company's economic and financial situation (introduced as a mandatory requirement for the opening of the SIREVE);
3. the majority of creditors required for the adoption of the restructuring plan (which was facilitated both in the PER and the SIREVE);
4. the protection of new financing in the SIREVE (which was strengthened and harmonised with the corresponding provisions of the PER);
5. the rights of secured creditors against the debtors' guarantors in the SIREVE (which were limited due to a certain alignment of the guarantors and the debtor at the procedural level); and
6. the qualification of the SIREVE as confidential proceedings (which is at the origin of their exclusion from the scope of the Regulation on cross-border insolvency).

Notwithstanding the comments (rather, criticisms) that these amendments would certainly be subjected to, what should be underpinned is indeed what the legislator has left out, particularly considering the European Commission's Recommendation of 12 March 2014, that is, the minimum standards concerning preventive restructuring frameworks. Although, on the overall, it is arguable that the Portuguese pre-insolvency framework is not significantly distant from the model of pre-insolvency tools fostered in the recommendation, there is actually a number of "forgotten items" that demand attention. A couple of them are, so to speak, unforgivable, if we bear in mind that the regulating process implies considerable efforts and expenses, therefore should not be dealt with lightly (for example disregarding the European landscape on the subject matter at stake).

In the first place, failing to comply with recommendation no. 17, neither of the Portuguese pre-insolvency proceedings apply a division of creditors into separate classes, not even in its minimum form, that is, separate classes for secured and unsecured creditors. While this omission persists there is no possibility to have a rule allowing the restructuring plan to be adopted by the creditors' majority taken into account by the amount of claims in each class, as suggested in recommendation no.18.

In the second place, one cannot see in either of the Portuguese pre-insolvency proceedings any provisions expressly requiring the plan to contain detailed information on its potential to prevent the debtor's insolvency and ensure the viability of the business. Also, no provisions are to be found allowing the court to reject the restructuring plan whenever it is clear that it has no prospect of preventing the insolvency or ensure the viability of the business, in disregard of recommendations no.15 (e) and no.23, respectively.

One can also detect a third significant omission with regard to the second objective of the Recommendation related to natural persons, which is giving honest insolvent entrepreneurs a second chance (cfr. Recommendations no. 30 to 33). The Portuguese Insolvency Act (still) provides for a five year discharge period, whereas the Recommendation suggests that entrepreneurs should be fully discharged after at most three years, starting from the date of the opening of the insolvency proceedings or the date on which the implementation of the repayment plan started, depending on the type of ongoing proceedings.

As previously said, it is regrettable that the Portuguese legislator has not dealt with these issues in the Decree-law No. 26/2015. A good opportunity to modernise the national pre-insolvency framework to the full extent and to put it in line with the Recommendation and foreseeable sequels (most probably a Directive) was missed. Taking into account that, pursuant to recommendation no.34, the Commission expected that by March 2015 all Member States would have implemented the principles set out in the Recommendation, we may still rely on further legislative interventions in the near future.

"NEITHER OF THE PORTUGUESE PRE-INSOLVENCY PROCEEDINGS APPLY A DIVISION OF CREDITORS INTO SEPARATE CLASSES"

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Romania: Breaking new ground – Romania introduces Group of Companies provisions

One of the most hotly debated topics in the insolvency world in the last few years has been the insolvency of the groups of companies.

Romania introduced an entire chapter on the insolvency of groups of companies in the major overhaul of the insolvency legislation that took place in the summer of 2014 i.e. Law no. 85/2014 on prevention of insolvency and insolvency proceedings.

Taking its inspiration from the UNCITRAL Legislative Guide on Insolvency – Part III, Treatment of Enterprise Groups in Insolvency, from the working papers drafted for the revision of the European Insolvency Regulation no. 1346/2000, from the CoCo Guidelines for Cross Border Insolvency, as well as from the World Bank Principles for Effective Creditor/Debtor Regimes, the Romanian freshly enacted approach provides for the procedural coordination system.

The provisions aim to enhance the creditors' recovery prospects, as well as of the debtors', mainly by a number of both substantial and formal rules.

> THE PROVISIONS AIM TO ENHANCE THE CREDITORS' RECOVERY PROSPECTS, AS WELL AS OF THE DEBTORS', MAINLY BY A NUMBER OF BOTH SUBSTANTIAL AND FORMAL RULES

- Definitions were introduced for the group of companies*, members of the group, joint insolvency application, cooperation obligations.
- The competent Court should be located on the territory of the Mother company or of the one with the largest turnover (a particular interpretation of the COMI rule).
- Each insolvency proceedings is managed in a separate Court file; however, a single judge, a single representative of the debtor in possession and a single insolvency practitioner should be appointed or, if that is not possible, they are bound by the obligation to cooperate; if the composition of the list of creditors allows, the Creditors' Committee should be the same in each proceedings.

- Whenever a single insolvency practitioner is not an option, the insolvency practitioner appointed for the Mother company or the one with the largest turnover will act as a coordinating administrator, based on a cooperation protocol signed with the other practitioners.
- The threshold for opening the proceedings for each member of the group is of 40,000 lei (approx. €9,000) for the debtor as well as for the petitioning creditor.
- The possibility, for members the group, of submitting a joint insolvency application was introduced.
- A non-insolvent member of the group may adhere to the joint insolvency application. In this case the approval of the shareholders is mandatory.
- A coordinated approach must be observed when submitting a restructuring plan.
- The effect of suing over voidable transactions between members of the group is analysed by the insolvency practitioners before taking a decision to proceed.
- In order to stimulate intra-group financing, the member of the group granting a loan to another member will have a recovery priority similar to other creditors which ensure the continuation of activity.

As the provisions regarding the group of companies were so recently minted, there is no way to check how well they are functioning in real life yet. On the other hand, this type of provision requires the full cooperation and good will of the participants in order to succeed. Therefore, while I am confident these new rules respond to long standing needs, only time will tell whether the response is also effective.

* The group of companies is understood to mean two or more companies interconnected by control and/or qualified shareholding, where qualified shareholding is the ownership of a participation of 20% to 50% in another company.

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Spain: Enforcing foreign EU judgments in insolvency procedures

In order to obtain the recognition of foreign judgments in Spain as part of insolvency proceedings, Spain's Insolvency Law (Ley 22/2003 de 9 de Julio, Concursal) must be analysed together with the European Insolvency Regulation (EIR) nº 1346/2000.

After analysing the stated legislation, one can affirm that with the aim of enforcing a foreign judgment as part of proceedings in Spain the following steps must be taken.

Recognition of the Judgment which opens the insolvency proceedings

According to Articles 16 and 25 of Regulation nº 1346/2000, recognition is automatic in relation to the judgment which opens the insolvency proceedings and any other ruling which is part of the insolvency proceedings in any other Member State. Therefore, as long as a valid judgment is issued by a Court, the ruling will be automatically valid in all Member States.

In order to enforce these judgments, the Regulation refers us to the Brussels Convention of 1968 which contains the specific legal mechanisms to be followed when seeking the said enforcement. Therefore, enforcement in Spain of foreign EU judgments would have to be sought before the *Juzgado de Primera Instancia* in charge of the territory where the debtor has its place of residence. If the judgment ruled by the *Juzgado de Primera Instancia* is to be appealed, this process must continue before the Audiencia Provincial of the territory to which the *Juzgado de Primera Instancia* belongs to.

However, in accordance with Spain's Insolvency Legislation, this general rules do not apply if the judgment is related to a real property. Consequently, judgments regarding the following topics are not subject to be directly enforced:

1. Real rights and other Rights which are likely to be registered in a Public Registry.
2. Rights over financial securities.
3. The right to compensate a credit with a debt.
4. Any contract which allows the use over a real property.
5. Labour contracts and all legal relations with employees.
6. Claw-back actions.
7. Judicial processes which have already began.

Thus, secondary insolvency proceedings shall be initiated in Spain should these actions be pursued.

If this is the case, the trustee in charge of the foreign insolvency proceedings must seek to obtain the opening of Secondary Insolvency Proceedings in Spain, which will be conducted according to Spain's insolvency legislation. The new secondary proceedings will be conducted at the same time as the main ones and will have legal access to those assets of the debtor which are located on the Spanish territory. Thanks to this mechanism, those assets which the Spanish Insolvency Law initially kept away from foreign proceedings will now be included. The administrators named in the main proceedings and those named in the secondary one will work together by sharing all information.

At this stage of the analysis, the possibility of applying for an Injunction shall be examined (Article 38 of Regulation nº 1346/2000).

Then, the Court where the main insolvency proceedings were opened can, in order to preserve the debtor's assets, appoint a temporary administrator empowered to request any measures to secure and reserve any of the debtor's assets situated in another Member State. In Spain, those measures would take the form of injunctions, known as *Medidas Cautelares*.

According to the Spanish Law, they would have to be initiated before the local court of the place where the debtor has the assets which shall be secured. The Spanish courts which are empowered to hear about these preservation measures are the *Juzgados de lo Mercantil*. If the assets whose preservation is sought are not located on a territory over which a *Juzgado de lo Mercantil* has jurisdiction, the process will have to be initiated before a *Juzgado de Primera Instancia*.

In any case, if the judgment granting or dismissing the preservation measures is to be appealed, this would have to be done before the *Audiencia Provincial* of the territory to which the *Juzgado de Primera Instancia*, or the *Juzgado de lo Mercantil*, belongs to.

> THANKS TO THIS MECHANISM, THOSE ASSETS WHICH THE SPANISH INSOLVENCY LAW INITIALLY KEPT AWAY FROM FOREIGN PROCEEDINGS WILL NOW BE INCLUDED

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