eurofenix

The journal of INSOL Europe
Summer 2015

More options for financial institutions

EU Bank Recovery and Resolution Directive

Also inside this edition:

New opportunities in France
Defeating insolvency challenges
Views from the 11th EECC Conference
Previews, news and technical updates
South Africa, Slovakia and more...

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Welcome from the Editors


ANNEROSE TASHIRO


GUY LOFALK

Dear readers,

Summer has arrived and being a Swede, also the holiday season for me.

But I guess, even if on holiday, we have all followed the Greek drama in the news. It is striking how debtors' strategy and arguments are alike, no matter if it is a small company or a government. "You need to help me or you will lose a lot." So the choice is to get more involved into the debtors' problems or cut losses.

As it seems now, the rest of the population of Europe is paying Greece's taxes to keep them where they are without increasing taxes or cutting public spending. I guess the reason is to maintain the European Union as it is. I think the Baltic Countries have an opinion about that and the Spanish and Portuguese will have too, if the EU and others put more of taxpayers' money into Greece.

The problem will not end in Greece with more money but only by structural changes and efficient management of the country – same as many distressed companies. Anyway, we will see an increase of demand for insolvency expertise in Greece in the future, which will keep not only our Greek colleagues busy but many others too.

After this philosophical excursion I would firstly like to thank our sponsors who make it possible to produce a magazine with this variety of subject quality and design. The creator in design and most other aspects, Paul Newson, should be thanked in each issue for his splendid work.

As to the actual content of the magazine, we are once again happy to be able to present to you, as usual, such a variety and depth of subjects spreading all over Europe, with insights even from the US (*page 38*), and exceptionally for this issue, from South Africa (*page 40*), to broaden our views.

It is great to have a closer orientation of the content of the upcoming Berlin Congress later this Autumn (*page 18*), as well as the Country Reports (*page 42*), which give us an update of what is going on in Europe.

As you can read in the Technical Update (*page 10*) a striking thought is that harmonisation seems to be easier in good times rather than in bad times when it comes to the European Insolvency Regulation!

Another very interesting article is that by Evert Verwey and Erwin Bos about insolvency defence (*page 26*). This is technically interesting, not least when we are acting on the debtor's side.

We are very pleased with the article from Filip Takáč (*page 12*), one of our younger members, with his perspective of our organisation.

And, whilst saving the future is the task of our younger members, finally I hope this issue will be good reading for you during the relaxing times you might have during the Summer.

Guy Lofalk

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ROBERT VAN GALEN
INSOL Europe President

Robert van Galen reports on banks, the EIR and convergence

"IT IS CLEAR THAT THERE IS AN URGE TO BETTER FACILITATE THE RESCUING OF COMPANIES, INCLUDING SMEs"

As the economic crisis seems to wane, the lessons learned from recent events are converted into legislation and a stream of case law constitutes the fruit of recent cases. Especially at the European level we see much more legislative activity.

Protecting banks and their customers

An example thereof is the new system for the protection of banks and their customers in the Eurozone, which will enter into force in January 2016. As to early rescue attempts, on 12 March 2014 the European Commission issued a Recommendation to the Member States encouraging them to adopt legislation which should provide for rescue plans at an early stage of insolvency.

The Recommendation was prepared for by an INSOL Europe study involving participants from all EU-Member States. Many states have already enacted such laws and others are working on them. It is clear that there is an urge to better facilitate the rescuing of companies, including SMEs. It seems to me however, that we should not be overly optimistic about the number of businesses that can be saved this way. In a large number of cases the business simply cannot be rescued, in other cases such saving would entail damages inflicted on the creditors and on competitors, which cannot be justified.

Many jurisdictions apply a provision to the effect that, as a result of the rescue, individual creditors should not be forced into a situation where they are worse off than if no rescue plan were adopted. I think this rule is important for several reasons of which I will mention only one. This is that creditors at the time of entering into their legal relationship with the debtor should have the certainty that they would always receive at least that value. Tinkering with this axioma would therefore not only have effect on the case at hand, but could also affect the willingness of creditors to provide credit in general and could therefore be detrimental to the economy.

Re-cast EIR

Another major milestone is of course the adoption of the Recast European Insolvency Regulation, which contains many interesting new provisions, *inter alia* on synthetic proceedings, on the coordination of group of companies proceedings, on communication and on accessibility of data on insolvency proceedings. INSOL Europe has actively participated in this project and a substantial number of its ideas have found their way into the Recast.

Group of companies proceedings are also the subject of one of the studies that UNCITRAL's Working Group V is conducting (dealing with insolvency law).

Back to the European Union, I would like to draw your attention once again to the report that INSOL Europe made in 2012 in relation to the revision of the European Insolvency Regulation, which can be found in the Technical Content section of the INSOL Europe website (www.insol-europe.org/technical-content/european-insolvency-regulation).

In that report a proposal was included for a pan-European rescue plan which would make it possible to adopt a rescue plan under the supervision of one court, for all insolvent companies belonging to a group of companies. This tool would abolish the present situation in which rescue by way of a rescue plan for a group of companies can only be achieved if it is adopted separately in the insolvency proceedings of each of the companies in the group in the jurisdictions where each of the proceedings has been opened. Such plan would constitute a big step forward and bring us on a similar level as, e.g. the United States where, as a consequence of the venue rules, a plan including several companies in the group can be dealt with by a single court indeed.

Harmonisation

The next step that may be expected from the European Commission will probably be a proposal for the harmonisation of some aspects of the insolvency laws of the Member States. The University of Leeds is conducting a preparatory study now and INSOL Europe prepared a note for the European Parliament on the subject in 2010.

There are good reasons why, in the United States, Bankruptcy Law is one of the few private law fields which is deemed a federal matter. In Europe, full unification

Share your views!

of bankruptcy laws presently is not conceivable, because the systems of our laws and the policies of our Member States differ far too much. It should however be possible to achieve some kind of convergence, in particular where differences are primarily technical (how should a creditor file?) or give rise to undesirable arbitration (which transactions should be subject to avoidance?).

Striving for convergence where this is achievable and at the same time respecting our different policies and approaches must be the way forward, rather than shouting that our own system must be the best, when at the same time we don't even master the languages of the laws which we apparently condescendingly hold to be inferior.

Rescue, recognition, convergence

These are exciting developments and INSOL Europe is in the middle of them. Our Academic Forum provides numerous important technical papers, our Lenders Group, Turnaround Wing, Insolvency Office Holders Forum, Judicial Wing and Eastern European Countries' Committee (EECC) contribute to the exchange of ideas and development of law and practice.

Our role in Europe

Over the last five years INSOL Europe has intensified its connections with the European institutions both in personal contacts and by preparing numerous meaningful papers and reports. Over the same period, INSOL Europe has grown into the true and only representative pan European insolvency organisation.

This role however also poses challenges. Interests and views of members from different Member States and different professions cannot always be the same and as an organisation we will have to take these differences into account when taking a stance. So far I think the organisation has done well in coping with these issues. It is important to keep striving for the best possible solutions in general and not yield to pressures from any particular interests.

Developments in Eastern Europe are important and we try to support those, *inter alia* with the EECC conferences. This year's conference took place in Vilnius (Lithuania) and next year's conference will be in Cluj-Napoca (Romania). The conferences attract 100-130 delegates and the contents are outstanding. It was really a privilege to be in Vilnius. In addition a new project is now under development by Neil Cooper and Carlos Mack. It concerns multi-day courses to be given in Eastern European countries on issues of insolvency practice.

Finally, I hope to see many of you at our main conference in Berlin on 1-4 October 2015 or the Academic conference preceding it. Both programme and venue are very promising and, as the saying goes, the conference will provide you with an excellent opportunity to meet old friends and make new ones.

Hopefully, before then, you will have a good holiday! ■

> "INTERESTS AND VIEWS OF MEMBERS FROM DIFFERENT MEMBER STATES AND DIFFERENT PROFESSIONS CANNOT ALWAYS BE THE SAME"

Are you looking to become more involved in the work of INSOL Europe?

INSOL Europe is looking for an enthusiastic, young, dynamic and well-organised individual to take on the role of Secretary to the Conference Technical Committees, covering both the main Annual Congress and annual Eastern European Countries' Committee conference.

This is a voluntary position with no remuneration, although all reasonable expenses to attend these events will be reimbursed and the registration fees waived.

This role provides an excellent opportunity for the successful candidate to increase his/her own profile/visibility and that of their firm.

A full specification of duties can be obtained by contacting Caroline Taylor, Director of Administration, email: carolinetaylor@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!

Joint conference of INSOL Europe Academic Forum and ERA (Academy of European Law)

19–20 March 2015, Trier (Germany)

In sight of the only recent release of the EIR recast it was hard to think of a more topical conference on cross-border insolvency proceedings than this one in Trier, writes Professor Christoph Paulus, Chair of the INSOL Europe Academic Forum.

Taking place in the convenient location of the *Europäische Rechtsakademie* which had taken perfect care of the organisation, some 60 attendees from more than ten jurisdictions listened to and discussed with nine presenters. After a welcome from Robert van Galen, all speakers addressed certain aspects of the recast Regulation. Thereby, issues ranging from the new understanding of "insolvency" and COMI to the notorious group insolvency norms, from the new concept of an "undertaking" (synthetic insolvency procedure) or cooperation duties to annex proceedings and treatment of secured creditors were covered and intensely discussed with the audience. Pál Szirányi, as a legal officer of the Commission, not only presented details about the planned interconnectivity of insolvency registers; he also added valuable insights into the background of the new rules.

The conference ended with a round table discussion about an outlook into the next evolution of European insolvency law. Thereby, such interesting ideas as the question about the sustainability of the present insolvency laws' concept of a bipolar relationship between debtor and its creditors were addressed, as well as the dubitable practicability of a "one size fits all" attitude of the insolvency law.

It is fair to say that all those who had been present in Trier had the feeling by the end of the conference that they had learned something new. It was a successful event which demands repetition or continuation.

INSOL Europe 2015 Council Elections

This is the time of year when we consider retirements from and elections to our Council.

Countries with 30 or more members are entitled to a reserved seat on Council and in October this year, a vacancy will arise for the German reserved seat following the appointment of Steffen Koch as Vice President last year. In addition, the reserved seats for France and the United Kingdom will become available when Marc Senechal and Alastair Beveridge will have completed their first 3 year terms of office. They are however eligible to stand again for re-election against other nominations. In addition, a new vacancy will arise for both a Polish seat and a Spanish seat on Council.

In the meantime, a non-reserved seat vacancy on Council (which may be occupied by any country) will also become available as Piya Mukherjee from Denmark will have completed her first 3 year term of office in October. Piya is also eligible to stand for re-election against other nominations.

Members from all these countries should contact Caroline Taylor, email: carolinetaylor@insol-europe.org for a nomination form if they have not already received one.

Closing date for nominations: 21 July.

Dutch medical biotech company BBB-Therapeutics restarts

Dutch medical biotech company BBB-Therapeutics will restart after the private limited companies (to-BBB Technologies B.V. en to-BBB Holding B.V.) operating BBB-Therapeutics were declared bankrupt by the District Court of The Hague January 2015.

BBB-Therapeutics, affiliated to Leiden University, develops unique medicines for the treatment of brain diseases. The medicines enhance drug delivery to the brain by circumventing the so-called blood-brain barrier (BBB) consequently reducing adverse drug reaction. The company's medicines target multiple indications of brain cancers and neuroinflammatory diseases against which treatment is currently insufficiently effective. BBB-Therapeutics' medicines could potentially develop into a new standard in treating these diseases.

BBB-Therapeutics successfully raised €20 million since its incorporation in 2003. That money funded research and brought the medicines to first phase testing. To start successive testing the company required additional investments. In 2014 a flotation was considered while the company also tried to obtain the finance from (private) investors. The flotation did not happen, neither did investors provide the needed additional finance. As a result BBB-Therapeutics was left with a lack of liquidity which led to its bankruptcy.

BBB-Therapeutics' founder Pieter Gaillard, who left the company in 2014, along with a selection of BBB-Therapeutics' shareholders now bought the BBB-Therapeutics assets out of bankruptcy. The new owners aim at expanding the worth of BBB-Therapeutics' extensive international patent portfolio by entering into strategic partnerships and alliances within the industry. BBB-Therapeutics will restart downsized as 2-BBB.

Receiver in bankruptcy Marc Udink (Udink & De Jong Advocaten) expects the BBB-Therapeutics' assets full purchase price will cover all the preferential and ordinary creditors of *BBB Technologies B.V.* and *BBB Holding B.V.*

Turnaround Wing project: First phase concluded, second phase started

Over the past few months, numerous people have contributed to the Turnaround Wing project to design 'Guidelines for out-of-court turnaround professionals'.

In early April, The Leiden Law School (LLS) presented the first draft of report I, which is based on the reports of several country experts and an analysis of a number of international documents. This report contains a review of issues and topics which can be possibly covered by a system of principles and guidelines for restructuring and turnaround professionals.

A majority of the Review & Advisory Group members commented on this first draft. Thanks to their comments, the final draft, to be found at www.TRI-Leiden.eu and presented to the INSOL Europe Executive early in May 2015, forms a firm basis to enter the second phase. In this phase, LLS and the Turnaround Wing will actually formulate the principles and guidelines.

At the moment we envisage to formulate principles on appointment & assignment, professional attitude, ethical attitude, communication with the client, communication with the stakeholders and governance. We intend to involve the members of the Turnaround Wing at an early phase of the formulation process. They will shortly be informed by email.

LLS and the Turnaround Wing are convinced that, with the keen interest of so many, they are still on track and will be able to present valuable Principles and Guidelines for out-of-court turnaround professionals at the annual conference in Berlin.

Bernard Santen, Chair of the Turnaround Wing Guidelines project and Senior Researcher, Leiden Law School

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 RECAST OF THE INSOLVENCY REGULATION AIMS TO MAKE IT EASIER FOR BUSINESSES TO RESTRUCTURE AND FOR CREDITORS TO GET THEIR MONEY BACK

Share your views!

A CLOSER LOOK AT...

The Regulation (EU) 2015/848 of 20 May 2015 of the European Parliament and the Council of the European Union

On 20 May 2015, the European Parliament has adopted modernised rules on insolvency in view of creating a business-friendly environment in Europe.

The recast of the Insolvency Regulation aims at helping economic recovery in making it easier for businesses to restructure and for creditors to get their money back, while ensuring that procedures for cross-border insolvencies are effective and efficient.

The Regulation (EU) 2015/848 of 20 May 2015 of the European Parliament and the Council of the European Union ("new Insolvency Regulation") has been published in the official journal of the European Union (O.J. L 141/19 of 5 June 2015).

The Regulation (EC) No 1346/2000 will be repealed (Article 92) and the new Insolvency Regulation shall apply from 26 June 2017, subject to several exceptions, namely:

- Information on national and Union insolvency law that the Member States shall provide, within the framework of the European Judicial Network in civil and commercial matters (Article 86 - entry into force: 26 June 2016),
- Insolvency registers to be established and maintained by Member States (Article 24 - entry into force: 26 June 2018),
- Interconnection of insolvency registers (Article 25 - entry into force: 26 June 2019).

According to the European Commission: "*The modernised Regulation will bring:*

- **A broadened scope:** The rules will cover a broader range of commercial and personal insolvency proceedings, such as the so-called Spanish scheme of arrangement, the Italian reorganisation plan procedure or the Finnish consumer insolvency procedures.
- **Legal certainty and safeguards against bankruptcy tourism:** If a debtor relocates shortly before filing for insolvency, the court will have to carefully look into all circumstances of the case to see that the relocation is genuine and not abusive.
- **Interconnected insolvency registers:** Businesses, creditors and investors will have easy access to any national insolvency register on the European-Justice Portal. This system has already been piloted for seven Member States (IP/14/774).
- **Increased chances to rescue companies:** The new rules avoid secondary proceedings in other Member States being opened, while at the same time guaranteeing the interests of local creditors. It will be easier to restructure companies in a cross-border context.
- **A framework for group insolvency proceedings:** With increased efficiency for insolvency proceedings concerning different members of a group of companies, there will be greater chances of rescuing the group as a whole."

Source: http://ec.europa.eu/justice/newsroom/civil/news/20150520-1_en.htm

The official text is available at: *http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2015.141.01.0019.01.ENG*

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**

IOH Project

The Insolvency Office Holder-project ("IOH Project") is an initiative of The Leiden Law School, initiated in 2012 and commissioned by INSOL Europe.

It researches (the possibilities for) the development of a set of principles and best practices for insolvency office holders by comparing multilateral treaties and soft law recommendations and national legislation within Europe. It can, therefore, be considered as a next step in the possible harmonisation of insolvency laws within the European Union.

The INSOL Europe Statement of Principles and Guidelines for Insolvency office holders in Europe is available at: www.insol-europe.org/technical-content/insol-europe-studies

More information can also be found at: www.tri-leiden.eu/project/categories/ioh-project/

National Insolvency Statistics

Since our last column, we published updated national insolvency statistics for England and Wales (First Quarter 2015 published on 21 May 2015) and France (Year 2014 and First Quarter 2015).

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.

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.

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.

EIR Case Register Website

As at 6 June 2015, 467 abstracts are uploaded on the new LexisNexis/INSOL Europe European Insolvency Regulation Case Register platform including the abstract of the last CJEU case ("Lutz") delivered on 16 April 2015 (C-557/13).

In addition, 17 new abstracts on cases related to EIR and issued by Bulgarian Courts have been published.

INSOL Europe Academic Forum: Newsletters

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

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

The presentation slides are now available on the INSOL Europe website at www.insol-europe.org/events/past_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

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. ■

Links

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EIR Reform – Process
www.insol-europe.org/technical-content/european-insolvency-regulation

EIR Case Register
www.insolvencycases.eu

INSOL Europe Studies
www.insol-europe.org/technical-content/insol-europe-studies

EECC 11th Conference: Vilnius, Lithuania

Radu Lotrean, Co-chair of the EECC, reports on the proceedings of this year's EECC conference in Vilnius, Lithuania, and a young member's perspective is provided by Filip Takáč, junior associate of a law firm in Slovakia.

RADU LOTREAN
EECC Co-chair

INSOL Europe's 11th EECC Conference, 'Banks' Insolvencies, Investors and Harmonisation; a new insolvency era?' was held in Vilnius on 15 May 2015 supported by NVAA (Lithuanian National Association of Business Administrators) and AIJA (International Association of Young Lawyers).

The conference focused on present issues of insolvency in Europe, on the investors approach and moreover on making successful business stories out of distressed situations.

Vilnius received over 120 delegates from different countries. The beautiful weather was fully enjoyed during the networking pre-conference dinner held at a traditional restaurant terrace on the eve of the conference.

Next morning, the conference kicked off with an opening speech by Dr. Carlos Mack (Co-chair of EECC) and Robert van Galen (President of INSOL Europe). They thanked the conference sponsors dnp DEPPING (main sponsor), Kirkland & Ellis International LLP (sponsors of the conference material), and general sponsors CNAJMJ, CITR, Troostwijk, Sorainen and bnt attorneys-at-law.

The conference programme, coordinated by the Technical Committee Co-chairs Frank Heemann (bnt attorneys at law, Lithuania) and Dr. Rimvydas Norkus (President of the Supreme Court, Lithuania), together with Secretary to the Committee, Evert Verwey (Clifford Chance, The Netherlands) featured the input of 25 speakers from 11 countries across Europe. They included

> "THE CONFERENCE FOCUSED ON MAKING SUCCESSFUL BUSINESS STORIES OUT OF DISTRESSED SITUATIONS"

“KEYNOTE SPEAKER VITAS VASILIAUSKAS PRESENTED A VERY INTERESTING OVERVIEW ON THE LITHUANIAN BANKING / INSOLVENCY SYSTEM”

representatives from organisations such as The Bank of Lithuania, The European Central Bank, The World Bank Group, The Supreme Court and the Regional courts of Lithuania together with many leading insolvency practitioners.

The keynote speaker of the event, Vitas Vasiliauskas (Chairman of the Bank of Lithuania Board), presented a very interesting overview on the Lithuanian banking / insolvency system and on the causes behind the banking crisis.

The morning session, ‘Investors & Harmonisation’, started with the panel ‘Insolvency - a New Market for Investors?’ moderated in a very engaging way by Dr. Carlos Mack. The speakers presented the mechanism used in Romania, Germany and Italy for investing in a distressed business, the market of NPL across Europe and what the investors are looking for before investing in a distressed business.

Sessions 2 and 3, moderated by Robert van Galen and Erik Selander (Advokatfirma DLA Nordic, Sweden), dealt with the harmonisation of insolvency laws in general, drawing the attention to the Nordic-Baltic Insolvency Network as a good example of a regional approach to harmonisation.

The session moderated by Evert Verwey gave an interesting overview on the IOH appointment system in Germany, UK, France, The Netherlands and Lithuania. Lecturer Bettina Bognar from the University of Reading presented the assessment of IOH of EBRD 2014, a very valuable starting point for the countries that want to improve their insolvency system.

After a lovely networking lunch, the afternoon session started with the ‘Insolvencies of Financial Institutions’ panel moderated by Alastair Beveridge (AlixPartners, UK). We could see the causes behind banks’ insolvencies and learn how to perform successful bank insolvency proceedings by studying cases like SNORAS, Ukio Bankas (Lithuania) and Parex (Latvia).

A broader picture on the European Insolvency Regulation (EIR) and its impact was offered by the Judges’ panel, moderated by Professor Heinz Vallender (Cologne Bankruptcy Court, Germany). Dr. Rimvydas Norkus (Supreme Court, Lithuania) and the other judges presented the main themes “Extended scope of EIR” and “New rules on COMI examination”.

The last session about Directors’ liability was conducted by Frank Heemann (bnt attorneys-at-law, Lithuania) and focused on practical aspects of the topic.

The president of INSOL Europe, Robert van Galen closed the conference by announcing that Evert Verwey (outgoing conference committee technical secretary of INSOL Europe) will become the next Co-chair of EECC, with a three-year mandate, replacing Dr. Carlos Mack.

We address special thanks to the Organising Committee of this Conference: Caroline Taylor, Malcolm Cork, Florica Sincu, Hannah Denney, Emmanuelle Inacio, Wendy Cooper and Myriam Mailly.

We left the capital of Lithuania looking forward to the next EECC Conference in May 2016, Cluj-Napoca, Romania.

More photos from Vilnius can be viewed on our website: www.insol-europe.org/gallery/eecc-vilnius-2015

FILIP TAKÁČ
Junior Associate,
bnt attorneys-at-law, Latvia

A young participant's perspective

First of all, on behalf of the younger participants, I would like to thank the conference committee, the speakers and panelists for providing such a fruitful and varied conference programme in Vilnius.

The programme itself provided the most up-to-date topics and offered us all the opportunity to learn many issues in regards to the main theme, the "new insolvency era". Bringing together leading experts and practitioners from Eastern Europe and beyond, the conference proved an excellent opportunity for networking and sharing experiences in insolvency law, particularly focused on banks' insolvencies, investors and harmonisation.

For a young participant attending an EECC conference for the first time, it was a very enriching experience. What then was so special about this conference?

Since my legal practice is dealing in counseling in insolvency and corporate restructuring matters, while also working as insolvency office holders for both a Slovak and an international clientele, this conference provided a great occasion for enhancing my legal knowledge and meeting people with the same interests.

One of my objectives at the conference was to obtain a broader picture of the European Insolvency Regulation (EIR) and its impact. As the new rules are aimed at changing the focus away from liquidation to restructurings, making cross-border insolvency proceedings more efficient and limiting the current practice of "insolvency tourism", I was eager to hear the judges' view on the revision of EIR.

The panel was well presented and was of particular value to me. The main themes of this panel were "Extended scope of EIR" and "New rules on COMI examination". The EIR covers a broader range of commercial and personal insolvency proceedings and after the reform it will introduce 19 new national insolvency procedures. The EIR also strengthens the legal certainty against insolvency tourism. The presumptions for the existence of a COMI will be assessed separately for companies, businessmen and natural persons, and the court will have to examine all circumstances of the case in order to establish whether the relocation is genuine and not abusive. This was of particular importance for me because Slovakia is a very popular insolvency tourism destination, especially for Austrian and German citizens. Why? Because the conditions for discharging consumer debt are less burdensome, because of a short statutory three-year plan period for debt discharge and other particularities.

Therefore, I can say that my expectations in this regard were fully met. Of course, I do not want to omit other panels at the conference which were inspiring and full of useful information.

Share your views!

I would like to point out that I enjoyed the panel on Directors' liability very much. It was very engaging, conducted in a catchy tone.

One thing I would like to mention is that it would be a great contribution if these conferences could reach out to the student community, too. I am sure that law students would enjoy the conferences at least as much as I did.

I do not want to belittle the importance of the technical programme, but the programme provided for two other networking events that need to be mentioned: a pre-conference dinner on Thursday, sponsored by bnt attorneys-at-law, and a Young Members' meeting on Friday, sponsored by CITR. Lots of interesting people attended, people could meet and hook up with colleagues from all over Europe. It was really worth attending and an exquisite occasion for a nicely spent evening with a touch of business.

All in all it was a very enjoyable conference. I truly appreciate that I could be part of this conference and I would surely like to attend INSOL Europe conferences in the future. ■

> I WAS EAGER TO HEAR THE JUDGES' VIEW ON THE REVISION OF EIR AND MY EXPECTATIONS IN THIS REGARD WERE FULLY MET

Tour de force: R3/INSOL Europe Conference

Chris Laughton reports on the recent R3 & INSOL Europe joint conference held in London on 30 April 2015

CHRIS LAUGHTON
Mercer & Hole, London (UK)

The 12th of such one-day conferences, organised and co-chaired as usual by Glen Flannery of Nabarro, ably partnered on this occasion by Rein Philips of Resor, was a tour de force.

The ebb and flow of modified universalism in cross-border insolvency was analysed by Felicity Toube QC of South Square, by reference to *Singularis v PwC [2014] UKPC 36* and *Shell v Krys [2014] UKPC 41* and in contrast with the ECJ's more expansionist approach in *Schmid v Hertel [2014] CJEU C-328/12*. More contentiously, but with the greatest courtesy to continental lawyers who dislike the UK's latest canny mechanism for importing restructurings, Richard Fisher of South Square explained the expanding jurisdiction of English Schemes of Arrangement. *Apcoa [2014] EWHC 3849 (Ch)* illustrated that changing the governing law of a debt instrument may be sufficient, but the English court would always consider evidence that a court of the original jurisdiction, in this case Germany, would not view the steps taken to come within the English scheme jurisdiction as unfair or abusive. There is incremental acceptance by English judges of the boundaries being pushed and English schemes are not confined to this scepter'd isle.

Supporting EIR

John Willcock of Global Turnaround announced that with insolvency generally remaining steadfastly national in the face of ubiquitous globalisation, he is a born-again supporter of the European Insolvency Regulation. Touching on oil, hedge funds' voracious investment appetite and expected rises in German insolvency levels and in high yield restructuring, he predicted that the main risks to Europe were Ukraine/Russia, Grexit and UK politics (including Scots nationalism and an EU referendum). He urged continuing cross-border cooperation, citing huge value destruction on OW Bunker's collapse into a series of regional bankruptcies, and speculated on the potential for a wave of restructuring and insolvency in China, with a prospect of Western involvement.

The approach of Tomas Richter of Clifford Chance to the recast European Insolvency Regulation was *something old, something new, something borrowed, something blue!* The old was codification of judicial application in cases such as Eurofood and Deko Marty. The new includes online searchable registers and their interconnection. Synthetic secondary proceedings are borrowed from English practice (although their implementation in member states with less flexible systems and less experienced judges looks likely to be challenging). Indeed, Article 36 of the recast Regulation and its laborious approach to synthetic secondaries is enough to give any practitioner the blues.

American comparisons

Nico Tollenaar of Resor and Farrington Yates of Dentons debated the European Commission Recommendation on a new approach to business failure and insolvency *C(2014) 1500* by comparison with the American Bankruptcy Institute's Chapter 11 Reform Report. The EC Recommendation's key points for the minimum components of procedures it would like to see introduced in each member state were described as:

- a creditor arrangement process (outside formal insolvency) and with cram down;
- debtor in possession without an officeholder being required;
- specific stays of action being available on court application;
- no general publicity;
- procedural flexibility with limited formalities; and
- court involvement limited to confirmation, if possible.

Nico identified English Schemes and CVAs as two of the inspirations for the recommendation, procedures he described as "light touch precision instruments" that would limit value destruction. No general publicity is anathema in the US system, as it limits checks and balances and risks unfairness, especially in the absence of an officeholder. The consequence of no publicity would be a long and expensive confirmation hearing, with over-reliance on the quality and integrity of the parties and on the rigour of the court examination.

With that introduction, Mihaela Carpus of DG Justice, European Commission, chaired a discussion looking at a new procedure planned for the

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Netherlands (Emile Schmieman of the Netherlands Ministry of Justice), existing procedures in France (Joanna Gumpelsen of De Pardieu Brocas Maffei) and the German opposition to such procedures (Christian Bärenz of Görg). The discursive and interactive approach served the topic well. Conciliation, safeguard and accelerated safeguard in France are also, to an extent, models for the recommended procedure, although there is inflexibility in the classes of creditors and no shareholder cram down. The Netherlands' bill broadly follows the recommendations and has been reasonably well received. The German view is that much of what is proposed can be or is already incorporated into its insolvency system, but no publicity is as constitutionally difficult as it would be in the US and an officeholder would always be required, not least because of the limited relevant experience in many courts. A noteworthy conclusion was that Member States appear to have limited appetite for further insolvency harmonisation although (along with tax harmonisation, which will be even more difficult to achieve) it remains a key target for the EC in support of the Capital Markets Union.

Group provisions

The highlight of the day was the presentation and case study on the Group provisions of the recast European Insolvency Regulation – particularly how the group coordinator concept should work – from Jennifer Marshall of Allen & Overy, Robert van Galen of NautaDutilh and Stephen Taylor of Isonomy. Delegates were introduced to the distressed Cococo group, with companies, chocolate businesses, employees and creditors in Germany, France, the Netherlands and the UK. As the case study developed, the competing priorities of the insolvency officeholders were identified and the group coordinator strived to preserve the cohesion and value of the group as a whole using soft skills (and media and political pressure). In a neat reversal of historic precedent, synthetic secondary proceedings were used to placate the English creditors of an English company subject to main proceedings in France! A group coordinator is not some sort of super-IP to whom other IPs are answerable. He is rather a facilitator, assisting IPs to maintain and realise best value not only – as is their duty – for their own entities' creditors but also, through synergies the individual IPs may find difficult to access, for the group's creditors as a whole. ■

Next year's event will take place on Friday 22 April 2016 at Hilton Tower Bridge Hotel, London (UK).

"A NOTEWORTHY CONCLUSION WAS THAT MEMBER STATES APPEAR TO HAVE LIMITED APPETITE FOR FURTHER INSOLVENCY HARMONISATION"

Berlin: The plain truth

Technical Co-Chairs Piya Mukherjee and Renate Müller tell us what we can expect at the Annual Congress in Berlin later in the year

PIYA MUKHERJEE
Technical Co-Chair of the Annual Congress in Berlin

RENATE MÜLLER
Technical Co-Chair of the Annual Congress in Berlin

There has been some irritation around the upcoming Congress in Berlin and we thought it might be useful to have some clarification from the two Technical Co-Chairs Piya Mukherjee and Renate Müller.

We have heard of members that have scanned the wonderfully designed registration brochure raising questions such as why is INSOL Europe now all about suitcases and how in the world did they manage to get John F. Kennedy as a keynote speaker. The plain truth is that neither is true. Our upcoming Annual Congress bursts with challenging topics, all of them around harmonisation and innovation and as an add-on we do also feature a lot about creativity.

In a bit more detail

Our keynote speaker for the Friday morning will be Jim Hagemann Snabe, renown for his involvement with the World Economic Forum and a Member of the Supervisory Board of SAP, Siemens AG and other leading European enterprises. His keynote address will focus on innovation strategies.

Saturday morning's keynote address will be delivered by Professor Marcel Fratzscher. He is a senior advisor to the German Ministry of Economy and the President of the DIW, one of the leading German economic research institutions. His speech will be around the investment gap and the low interest rates prevailing in Europe and the challenges the two present.

The morning of day one is all around hot topics, putting the spotlight on IP-licenses in insolvencies and looking at creative approaches for the problems in industries that even in the current rise of the economies in Europe are struggling: oil and gas, shipping, retail and green energy. The topics will be presented by practitioners and experts with proven hands-on experience in those areas.

Afternoon debate

After lunch we will be in for a lively moot on the pros and cons, benefits and limitations of the harmonisation of insolvency

Share your views!

laws. Two legends, Berlin's Professor Christoph Paulus and Milan's Professor Alessandro Scarso will challenge each other on the topic. For the remainder of the day we will be listening to the presentations of the Turnaround Wing of their just released Best Practice Guidelines followed by the Insolvency Office Holder's Forum, just recently established, and their insights into the current state of the profession in today's environment.

The next day

Saturday morning, following our keynote speaker, there will be a panel on out of court restructuring. Mark Robinson, the newly appointed president of INSOL International will afterwards give us an update on the current developments at that organisation. Next in line is a panel on how insolvency and the internet can or could interfere or interface.

Closing the course of events, a look at the new EIR and the potential impact on rescue and restructuring in our future practice.

After lunch you will have ample time to join the crowds for the 25th anniversary of German Reunification, before gathering again with friends, new and old, for the evening's usual gala dinner.

We trust this does enhance your understanding of what INSOL Europe's Annual Congress in 2015 is all about and that it is an event not to be missed.

Be assured that the entire Technical Team will continue to work hard to meet and exceed your expectations in our technical programme and we do look forward to see all of you in Berlin. ■

For more information about the Annual Congress or to register, visit: www.insol-europe.org/events

"OUR UPCOMING ANNUAL CONGRESS BURSTS WITH CHALLENGING TOPICS, ALL OF THEM AROUND HARMONISATION AND INNOVATION"

On a spree in Berlin: Follow the bear!

Paul Omar previews the technical programme for the forthcoming Academic Forum Annual Conference in Berlin in October

PAUL OMAR
Professor in International Insolvency Law at the Nottingham Law School and Secretary of the INSOL Europe Academic Forum

It is said that Berliners fondly recall the visit by JFK in the 1960s, on which occasion he allegedly declared his solidarity with jam doughnuts (also called Berliners)![1]

The repertoire of Brandenburg cuisine has, in the intervening years, expanded to include the currywurst, which is fêted with its own Museum in the city. Something of this eclectic and seemingly random quirkiness imbues the spirit of the city where the Academic Forum will stage its 11th Annual Conference. The overall theme of the agenda at this event will be "Banking and Financial Insolvencies", with a particular focus on the following topics: "Adapting Insolvency to Sectorial Needs"; "The Challenges of Managing Large-Scale Insolvencies"; "What does "Rescuing" a Financial Institution mean?"; and "The Coordination of Group Insolvencies".

Coordination

Opening the session will be Professor Christoph Paulus, Chair of the Academic Forum, whose own institution, the Humboldt, is at the heart of Berlin academic life. The flavour of the first session that follows appears to be coordination. Papers will cover the coordination of financial institution insolvencies in the European Union (Vallar, Milan) and SADC (Stander, NWU), the applicability of the EIR coordination rules to large-scale insolvencies (Schmidt, Bayreuth) and the role of the judiciary in such insolvencies (Haentjens, Leiden). The second session later in the afternoon moves the debate on to the mechanics of bank rescue with contributions examining the core elements of banking resolution (Burkert, Bayreuth), the role of ring-fencing arrangements (Campbell, Leeds and Moffatt, NLS), AMCs and "bad banks" (Lynch-Fannon, Cork) and the application of insolvency principles in bail-ins (Xie, Dundee). The day's events will then conclude with a reception and the Academic Dinner, where undoubtedly culinary treats will abound!

Younger academics

The second day will see discussions resuming with the first session devoted to the younger academics. At the time of writing this, spaces remained to be filled, but speakers will provide, *inter alia*, papers on virtual corporate structures and the insolvency connexion (Plaček, Prague UE) and how the laws in candidate countries are being influenced by European Union initiatives in the banking and financial arena (Djuric, Belgrade IES). The final session of the morning will round off the conference theme with presentations on directors in the insolvency context (Hargovan, UNSW) and whether rescue via the pre-pack has any relevance to banking rescue (Kastrinou, NLS and Vullings, NLS/RUN). In the afternoon, concluding proceedings, the annual lecture, sponsored this year by SGH Martineau, will be given by Professor Axel Flessner (Humboldt).

It is anticipated that the conference agenda and the many papers that will be delivered over the two days will stimulate discussion about banking and financial rescue, particularly apt given the topicality of the subject matter and its relevance to the future direction of the European Union. The range of jurisdictions represented by speakers will also give this event a truly international and comparative feel. We look forward to Berlin and to its many delights! ■

For more information about the Academic Forum Annual Conference or to register, visit: www.insol-europe.org/events

Footnote:

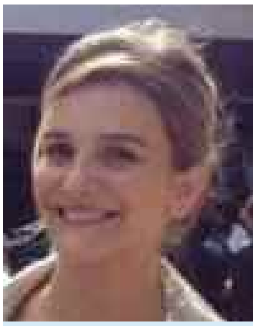
1 Alas, apparently an urban myth, according to Wikipedia!

Share your views!

New trends and opportunities in France

Nicolas Theys and Diane Ricaud discuss how new legislation in France affects the pre-insolvency and insolvency proceedings available to companies facing difficulties

NICOLAS THEYS
Partner, Dentons (France)



DIANE RICAUD
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The year 2014 was when the new reform of French insolvency law entered into force, giving creditors more power and protection.

As a reminder, up until 30 June 2014, French insolvency law offered companies facing difficulties the choice between two types of proceedings i.e.,:

- out-of-court restructuring proceedings, which are confidential preventive voluntary corporate arrangements (generally in chronological order: *ad hoc* mandate and conciliation proceedings); and
- judicial proceedings, which are public and organised to a much greater extent by law, under the strict supervision of the Court, (namely safeguard proceedings, accelerated financial safeguard proceedings, judicial reorganisation (*redressement judiciaire* – proceedings similar to administration process, and liquidation proceedings).

The grounds for the implementation of any of these proceedings is the company's cessation of payments ("*cessation des paiements*") i.e., when the company cannot pay its outstanding liabilities with its available assets (cash plus assets that can be immediately cashed).

The 2014 reform in French insolvency law introduces measures that are favourable to companies, notably under *ad hoc* mandate and conciliation proceedings e.g.:

- the conciliator's assignment is extended to the sale of the business (this is an acknowledgement of what already took place in practice, also known as the "*pre pack cession*"); and
- any clause, which (i) amends the terms and conditions of an ongoing contract by reducing the company's rights or by increasing its undertakings as a result of the opening of *ad hoc* mandate or conciliation proceedings or, (ii) obliges the company to bear a percentage of the fees of the creditor's counsel during proceedings, are prohibited.

However, the major modifications introduced by the 2014 reform cause a shift towards more power and protection for creditors. Indeed, since the reforms of 1955 and 1964, French insolvency law really focused on protecting the debtor, as highlighted by its 3 purposes set out below, ranked by order of importance: (i) favour the continuation of the business, (ii) maintain employment and lastly (iii) repay the creditors. It is only very recently that, under Anglo-Saxon influence and the growing financing needs of companies, that insolvency law has increased protection offered to creditors.

As such, certain creditors are allowed, in safeguard and court-ordered reorganisation proceedings, to submit draft plans as an alternative to the company's plans. However, this ability will be limited, in practice, as changes in capital provided in the plan will be subject to the approval of the company's shareholders.

Three other main changes to French insolvency law will have more of an impact, i.e., (1) the extension of the new money privilege from which companies can benefit ("*privilege d'argent frais*"), (2) the creation of accelerated safeguard proceedings, and (3) the ability for the court-appointed receiver ("*administrateur judiciaire*") to

"CONCILIATION PROCEEDINGS ARE A PREVENTIVE ARRANGEMENT WHICH GIVE THE DEBTOR THE OPPORTUNITY TO VOLUNTARILY RESOLVE ITS DIFFICULTIES"

request that the Court appoint an ad hoc representative to force the reconstitution of the company's equity to a certain extent.

Extension of the new money privilege

Conciliation proceedings are a preventive arrangement which give the debtor the opportunity to voluntarily resolve its difficulties by negotiating with its main creditors.

One of the specificities of conciliation proceedings is the new money privilege granted to creditors who, as agreed in the conciliation agreement, provided new money, goods or services to the company to ensure the continuation of its business activity, thus securing the payment of this new debt in the event of subsequent insolvency proceedings involving the company (before unpaid post-filing claims and pre filing claims but after certain employee related liabilities and post-filing procedural fees).

The 2014 reform extends this new money privilege to creditors who provided new money, goods or services to the company to ensure the continuation of the business activity during conciliation proceedings (and not only after proceedings have ended when a conciliation agreement is reached). It also provides that in the event of subsequent insolvency proceedings, creditors who benefit from this privilege cannot be subject to a moratorium or cram downs in relation to this new debt. Therefore, their claims will be paid when due, unless otherwise agreed between the parties.

Creation of accelerated safeguard proceedings

These proceedings are an extension of accelerated financial safeguard proceedings created in 2012 and solely reserved for financial creditors.

The main purpose of accelerated safeguard proceedings is to impose on reluctant creditors, within a short time frame, a pre pack restructuring plan accepted in the course of conciliation proceedings by a majority of the creditors.

The 2014 reform (i) extends accelerated financial safeguard proceedings to all creditors (not only financial creditors), (ii) reduces the eligibility thresholds for such proceedings and (iii) maintains the possibility for the company to limit these accelerated proceedings to its financial creditors (and bondholders).

Accelerated safeguard proceedings are opened provided that the following two conditions are met.

Condition No.1

The company must be engaged in on-going conciliation proceedings and be able to provide evidence that it has entered into a pre pack restructuring plan that will ensure the continuation of its business and that is likely to gain widespread support from its creditors (most likely at least 66% of the amount of debt) in order to make the adoption of the agreement likely within a short time frame; and

Condition No. 2

- either the company establishes consolidated annual accounts; or
- the company has its accounts certified by a statutory auditor (or established by a chartered accountant) and has (i) over 20 employees, or (ii) a turnover exceeding 3 million euros, or (iii) a balance sheet total exceeding 1.5 million euros.

These proceedings are said to be accelerated because the Court adopts a pre-pack restructuring plan within a maximum of three (3) months under accelerated safeguard proceedings and one (1) month, renewable once, under accelerated financial safeguard proceedings.

Prior to being formally submitted to the Court, the pre-pack restructuring plan (which can include namely cram downs, debt-to-equity swaps and/or installments) is submitted to two creditor committees (one being made for financial creditors and the other for the company's main suppliers), and a third committee, if applicable, grouping together bondholder creditors. The main suppliers' committee, however, will not be formed in case of accelerated financial safeguard proceedings.

A decision is taken by each committee by the majority of its members representing at least two thirds of the amount of debt held by voting members. As such, the propositions included in the plan will be imposed on all members of the committees, even those who voted against them.

Therefore, as of 1 July 2014, there are 3 types of safeguard proceedings i.e., (i) accelerated financial safeguard proceedings, (ii) accelerated safeguard proceedings and (iii) safeguard proceedings.

Forced reconstitution of equity

This provision can only be enforced when the company is undergoing an administration process.

During the court-ordered reorganisation proceedings, the court appointed receiver ("*administrateur judiciaire*") can request the appointment of an ad hoc representative in order to "convene a shareholders meeting" and vote the reconstitution of equity up to one-half of the capital in lieu of opposing shareholders when the reorganisation plan provides for the modification of the company's capital in favour of one or more persons that undertake to respect the plan".

Therefore, this provision might lead to the exclusion of shareholders in certain cases. However, this provision raises practical issues with respect to its implementation and interpretation notably regarding the notion of "opposing shareholder".

A new debate was introduced in 2014 whereby the Court could force the exit of shareholders (by a shareholders' meeting or by a forced sale of their shares) to the benefit of creditors who agree to inject money into the company's restructuring plan. However, this possibility was not included in the final reform for fear of it being deemed unconstitutional, as an infringement of the right of ownership. This measure has been reintroduced in the "Macron" bill, named after Emmanuel Macron, the Minister of Economy. This bill is designed to liberalise the economy and boost growth in early 2015. This measure would apply in certain circumstances and provided certain thresholds are met. The bill has been adopted by the National Assembly and the Senate but is yet to be discussed in joint meetings between the National Assembly and the Senate. Who knows what will happen next. ■

A NEW DEBATE WAS INTRODUCED IN 2014 WHEREBY THE COURT COULD FORCE THE EXIT OF SHAREHOLDERS TO THE BENEFIT OF (CERTAIN) CREDITORS

Establishing interpretation in the Collective Redundancies Directive

Jennifer Gant comments on the implications in the UK of a recent ECJ ruling

JENNIFER L. L. GANT
Nottingham Trent University, Centre for Business and Insolvency Law

"DURING THE WOOLWORTHS INSOLVENCY, REDUNDANCIES WERE MADE AT A NUMBER OF INDIVIDUAL STORES, BUT NO CONSULTATION WAS UNDERTAKEN"

The CJEU has recently ruled in the case of *USDAW and B. Wilson v VW Realisation 1 Ltd (in liquidation), Ethel Austin Ltd, and the Secretary of state for Business, Innovation and Skills*[1] on how the meaning of "establishment," as used in the Collective Redundancies Directive,[2] should be interpreted in the EU. The Directive is aimed to approximate Member State laws on procedures for making large scale redundancies to afford greater protection to workers through consultation obligations when at risk of redundancy due to an employer's financial problems. However, the Directive is also designed to take into account the need for balanced economic and social development within the EU.[3]

Collective redundancies are often required in corporate rescue and insolvency situations; as such, the application of the Directive is a relevant consideration for insolvency practitioners. Its effects can impact on insolvency outcomes due to the social costs of the Directive and, at times, compensation for failure to comply with its obligations required from the company in financial distress.

The Directive allowed for two different frameworks in implementation. Most Continental jurisdictions have chosen to implement the Directive by utilising some version of Article 1(1)(a)(i), in which case the Directive would apply if at least 10 redundancies were to be made over a period of 30 days in establishments employing between 20 and 100 workers; at least 10% of the workers in establishments employing between 100 and 300 workers; or at least 30 workers in establishments employing 300 or more workers. In the other option provided in Article 1(1)(a)(ii), the Directive would apply if over a period of 90 days at least 20 employees were to be made redundant, regardless of the number of employees at the establishment in question. The UK opted for the second version of the Directive's provisions.

The Directive was implemented in the UK through the Trade Union and Labour Relations (Consolidation) Act of 1992 and it specifies that for the provisions to apply, the relevant redundancies must occur at one establishment. The single establishment requirement was added in the UK implementation and has come to cause controversy in the meaning of "establishment." In the *Woolworths Case*,[4] a UK Employment Appeal Tribunal (EAT) sought to mitigate the restrictive nature of the UK implementation in the light of what it perceived were the purposes of the Directive.

During the *Woolworths* insolvency, redundancies were made at a number of individual stores, but no consultation was undertaken. An Employment Tribunal (ET) application was made for a protective award for failure to consult with the affected employees. The ET found that the individual stores were "establishments" for the purpose of the collective redundancies provisions. However, as many of the individual establishments were small, fewer than 20 redundancies were made, so that collective consultation provisions would not apply. The result was that the redundancy of approximately 4,500 Woolworths and Ethel Austin employees would be deemed not to require consultation and would not benefit from a protective award.

The EAT found that the ET definition of establishment was too restrictive and led to results that failed to satisfy the purposes of the Directive to protect employees at risk of redundancy, applying the *Marleasing*[5] interpretative requirements. The EAT proceeded to define "establishment" in such a way as to ensure that the Directive would have the broadest effect. It aggregated the establishments of a company, ignoring the "one establishment" wording in the Act, thereby bringing more employees under the protection of collective consultation and satisfying the purposes of the Directive as the EAT perceived them.

The opinion of the Advocate General (AG)[6] in three cases dealing with the definition of "establishment," including the broad interpretation the UK took in *Woolworths*, was that it must have a consistent meaning regardless of the impact that this may have on the Directive's effectiveness to protect employees. The AG noted that "establishment" had previously been defined in the *Rockfon* case[7] and followed in *Athinaiki*,[8] as the unit to which the redundant employees are assigned to carry out their duties, a definition that benefitted the affected workers in those cases.

The AG noted that while this previous case law has only considered Article 1(1)(a)(i), a different approach to (ii) should

> "EU MEMBER STATES RETAIN VERY DIFFERENT VIEWS ON HOW MUCH SOCIAL PROTECTION SHOULD EXIST IN CORPORATE INSOLVENCY"

not be necessary, and would indeed create legal uncertainty. Following the AG's opinion, the CJEU also opted in favour of coherency over perceived fairness. Uniformity of interpretation aids in increasing transparency and foreseeability for employers who choose to restructure. The CJEU also determined that if a different definition were applied, this would cause a major difference between jurisdictions opting for different implementation frameworks, which would be contrary to the need to promote approximation of Member State laws in this area. The diverse interpretation of establishment would result in worker protection that was not comparable among other Member States.

The UK Court of Appeal is expected to overturn the EAT decision and revert back to the original ET decision. Thus the Woolworths and Ethel Austin workers will be left with no recourse under the Collective Redundancy Directive. While these companies and their administrators and liquidators may be breathing sighs of relief at this result, this brings into the spotlight the fact that EU Member States retain very different views on how much social protection should exist in corporate insolvency. Many jurisdictions have implemented the Directive within the first framework, but with far lower thresholds which, were they applied in the UK cases, would bring those employees within the remit of the Directive.

Thus while the CJEU decision adds legal certainty to the definition of establishment, it may also mean quite different outcomes for workers depending on their jurisdiction's choice of implementation. The UK has been given great flexibility on how to apply its collective redundancy provisions, pending the result of the Court of Appeal. For cross border insolvencies, particularly for large retail companies, those jurisdictions that have implemented the Directive according to Article 1(1)(a)(ii), or otherwise have higher thresholds for the Directive's application than other Member States, will benefit from greater flexibility in the dismissal of employees during restructuring.

The thresholds of the Directive were also intended to offer some relief for SMEs. It would be difficult to classify either Woolworths or Ethel Austin as an SME. Thus there is a question as to whether or not the thresholds have been used to benefit the wrong entities. If the underlying aim is to strike a balance between the protection of employees and reduced social costs for smaller businesses, is it not unfair to allow large companies to benefit at the expense of thousands of employees?

Differences in implementation affect procedural matters relating to employees in different jurisdictions, but can also negatively affect employee morale and cooperation, leading to potential obstacles to what might otherwise be smooth restructuring processes. A more cohesive EU law of collective redundancies may indeed be called for to mitigate these potential adverse effects on the Common Market, as well as the potentially unfair use of the available thresholds to protect large retail establishments who happen to have small shops under their wing that can sneak under those thresholds. ■

Footnotes:

1 Case C-80/14.
2 Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies.
3 Recital 1, Preamble of the
4 *USDAW v Ethel Austin (in administration)* UKEAT/0547/12/KN and *USDAW and Mrs B Wilson v (1) Unite the Union, (2) WW Realisation 1 Ltd, and (3) Secretary of State for Business Innovation and Skills* UKEAT/0548/12/KN.
5 Case C-106/89.
6 Opinion of the Advocate General WAHL delivered on 5 February 2015 in Case C-182/13 *Lyttle and Ors v Bluebird Bideo 2 Ltd, Case C-392/13 Cañas v Nexea Gestión Documental SA and Case C-80/14 USDAW and B Wilson v (1) WW Realisation, in liquidation, (2) Ethel Austin Ltd, and (3)Secretary of State for Business Innovation and Skills*.
7 C-449/93, EU:C:420, at paragraph 32.
8 Case C-270/05 *Athinaiki Chartopoiia* EU:C:2007:101, paragraph 25..

Share your views!

Article 13 of the EIR: The double test

Evert Verwey and Erwin Bos report on the recent decision Lutz [2015] EU ECJ C-577/13 in which the European Court provides insights into defences available to defeat insolvency challenges

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Share your views!

Recently the European Court of Justice (ECJ) provided useful guidance on how to interpret Article 13 of the European Insolvency Regulation (EIR).

Before this decision, the ECJ had already decided that if insolvency proceedings have been opened, the court where these insolvency proceedings are pending has jurisdiction in cases where the insolvency office holder wants to challenge a transaction based upon Article 13 of the EIR.[1] The ECJ decided that this is also the case if a defendant is domiciled in a non-Member State.

The case of *Lutz v Bäuerle* ([2015] EU ECJ C-557/13) considers the position of a creditor or a third party in respect of a commercial transaction in the event that such commercial transaction is later challenged by a insolvency office holder. In particular, the case discusses to what extent such parties can rely on the defence that the detrimental transaction could not be challenged by the law governing that transaction. The case itself might not be very unusual, but the interests of numerous non-parties who submitted observations to the court, including the European Commission and the German, Greek, Spanish and Portuguese governments, shows that many awaited the outcome.

Article 13 of the EIR

In accordance with Article 13, the law of the Member State where insolvency proceedings are opened (*lex concursus*) does not apply where the beneficiary of an act detrimental to all the creditors provides proof that:

1. the act is subject to the law of another Member State (*lex causae*); and
2. that law does not allow any means of challenging that act in the relevant case.

The application of Article 13 entails a 'double test'. An act is only subject to annulment because of prejudice to creditors if this is the case according to both the *lex concursus* and the *lex causae*. If pursuant to one jurisdiction the act is not contestable, the claim of the insolvency office holder cannot be granted.[2]

The case

ECZ Autohandel GmbH (**ECZ Germany**) was a German company which sold cars. Through an Austrian subsidiary of ECZ Germany (**ECZ Austria**) Mr Lutz purchased a car, but the car was never delivered to him. Lutz commenced legal proceedings before the District Court of Bregenz (Austria) against ECZ Austria to recover the purchase price. The Austrian court issued an enforceable payment order against ECZ Austria in favour of Lutz. Subsequently the Austrian court also authorised Lutz to enforce the payment order and three Austrian bank accounts of ECZ Austria were attached. Thereafter the Austrian company went into insolvency proceedings in Germany and a German insolvency office holder was appointed (**Insolvency Office Holder**). Although the Insolvency Office Holder instructed the Austrian bank not to pay out the cash balance to Lutz, the bank did pay out the sum to Lutz that was previously attached.

More than one year after the opening of the insolvency proceeding, the Insolvency Office Holder brought proceedings in the German District Court and challenged Lutz's attachment of the bank accounts. The Insolvency Office Holder sought to set aside the payment made from ECZ Austria's bank accounts in Austria which had arisen as a result of the enforceable payment order in Mr Lutz's favour awarded before the insolvency proceedings had been opened. It should be noted, however, that the payment from the accounts was made after the German court had commenced insolvency proceedings in respect of ECZ Austria.

If German law applied (*lex concursus*) to the challenged

attachment and payment, Lutz's original attachment of the bank accounts would have been invalid due to the opening of the insolvency proceedings. Under German law, the limitation period for bringing an action to set a transaction aside is three years. However, if Austrian law applied (*lex causae*), then the Insolvency Office Holder's challenge could potentially be barred by the Austrian law. Austrian law states a limitation period of one year from the date when the insolvency proceedings were opened for commencing an action to set aside. The referring court notes that that period was not respected in the case in the main proceedings. This could mean that the Insolvency Office Holder would have been too late with his action.

The question of which law applied depended on the interpretation of Article 13 of the EIR. After appeal, the Bundesgerichtshof (Federal Court of Justice) in Germany referred the following questions to the ECJ:

1. Is Article 13 of the EIR wide enough to enable the beneficiary of the act to rely on limitation periods or other time-bars available under the law which governs the challenged transaction?
2. Are the relevant procedural requirements for asserting a claim for the purpose of Article 13 of the EIR also to be determined according to the law governing the transaction or by the law governing the insolvency proceedings?

The decision

Article 13 of the EIR does also apply to a situation in which a payment, challenged by a Insolvency Office Holder, of a sum of money attached before the opening of the insolvency proceedings, was made only after the opening of those proceedings.

Moreover, it means that the defence which it includes also applies to limitation periods or other time-bars relating to actions to set aside transactions under the *lex causae*. This is in accordance with article 12 (1) (d) Rome I Regulation (EC) No 593/2008 and article 15(h) Rome II Regulation (EC) No 864/2007.

The ECJ decided that both the procedural and substantive provisions of the law governing the act complained of (i.e. not the law of the insolvency proceedings) would be available to provide a defence to a challenge brought by the Insolvency Office Holder in the context of the insolvency proceedings. In this particular case, Mr Lutz relied upon a limitation defence that was available to him as a matter of Austrian law, namely that the application to challenge the payment had not been made within the appropriate time limit. The European Commission argued that if procedural aspects were excluded from Article 13 of the EIR it would result in an arbitrary approach, because it would be driven by how individual Member States categorised whether something was procedural or substantive. It was noted that the wording of Article 13 draws no distinction between the type of defences available under that provision. Likewise, in relation to question 2, the ECJ held for similar reasons that the law governing the detrimental act also determined the procedural requirements needed to assert the defence in Article 13 of the EIR.

Choice of law

In conformity with the principle of party autonomy, Article 3 of the Rome I Regulation gives parties the opportunity of choosing the applicable law to an agreement. This could involve a choice of law by parties for a more friendly (Member) State with the purpose of making the transaction more immune against avoidance actions by a future insolvency office holder.

It is difficult for an insolvency office to contest such choice of law as parties are free to choose an applicable law. Some authors argue that a choice of law should be legally invalid if it has been made after the act has taken place or if the choice of law is only made exclusively to reduce or eliminate the risk of a challenge by a (future) insolvency office holder.[3,4] ■

Footnotes:
1 Seagon - Deko Marty (C - 339/ 07) and H. vs. H.K. (Case C-295/13)
2 Asser/Kramer & Verhagen, 10-III, no. 402.
3 Asser/Kramer & Verhagen, 10-III, no. 405.
4 Bertrams & Kruisinga, Overeenkomsten in het internationaal privaatrecht en het Weens Koopverdrag, 2014, p. 63.

"TO WHAT EXTENT CAN PARTIES RELY ON THE DEFENCE THAT A DETRIMENTAL TRANSACTION COULD NOT BE CHALLENGED BY THE LAW GOVERNING THAT TRANSACTION?"

The ebbs and flows of judicial cooperation in the common law

Paul Omar reports on a recent judgement limiting the extent of judicial cooperation

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The Privy Council, final court of appeal for a number of countries and territories in the Commonwealth, has brought an end to the saga begun in the case of Cambridge Gas.[1]

The case of *Singularis*,[2] on appeal from Bermuda, has set a limit on the permissible extent of judicial cooperation in the absence of a domestic cooperation provision or an international text (convention or Model Law). While the judges in that case accepted that the common law should evolve tools to assist in instances of cross-border insolvency, they said that judges should be careful not to trespass on the prerogatives of the legislature by fashioning rules beyond their permissible constitutional role as interpreters of the law. As such, judges should be cautious in seeking to create rules except where there is a sound and pragmatic need for intervention to assist the management of cases with an international element.

"CASES INVOLVING JUDICIAL COOPERATION IN INSOLVENCY FIRST APPEARED IN THE COMMON LAW IN THE 1700s"

Principled approaches

These issues are not new. Cases involving judicial cooperation in insolvency first appeared in the common law in the 1700s.[3] Over the intervening centuries, it has been possible at common law to achieve a number of things to render assistance in cross-border matters and to make the task of administering a debtor's estate easier. Often, these developments have rested on principled approaches to comity, including theories of unity and universality espoused by the judges. As examples, there can be cited cases in which recognition of the existence of foreign proceedings and of the office-holder's capacity as representative of the estate has been given.[4] Recognition has also been given to the office-holder's title to assets and/or to pursue debts due to the estate.[5] Viewing that management of the estate may be more appropriate elsewhere, courts have also authorised stays or discharges of local proceedings,[6] particularly where foreign proceedings are afoot.[7] The judges have also assisted in the procedural management of foreign instances by restraining actions by creditors within their jurisdiction[8] and by requiring the examination of debtors or third parties, together with the production of documents.[9] Giving support to the idea of a single efficient insolvency procedure, courts have mandated the remittance of funds for the purposes of overseas proceedings[10] and given effect to a reconstruction scheme voted on by the creditors in another jurisdiction.[11]

Ancillary assistance

Furthering the precepts of assistance, the courts also developed at an early stage the doctrine of ancillary assistance, which enabled the opening of liquidations, termed "ancillary" or assisting, so as to deal with issues that could not simply be solved by the making of the above orders.[12] Such ancillary liquidations were deemed to exist so as to assist foreign procedures and allowed for the full panoply of domestic law to come to the aid of the foreign office-holder. Care would be taken to ensure that domestic procedures would not come into conflict between the courts involved, while keeping costs down and ensuring that the interests of creditors were protected.[13] Ancillary liquidation has subsequently become regulated by statute[14] and has been joined by specific assistance provisions.[15] Together, these have allowed for the continued making of orders such as those mentioned above as well as to permit the bringing of vulnerable transaction actions under domestic law[16] and to allow for proceedings against directors to recover a deficiency in the insolvent debtor's assets.[17] Furthermore, the judges have also been able to be creative under the umbrella of the statute, including by interpreting the assistance provisions to allow for the application of rescue proceedings to overseas companies.[18]

International frameworks

In the modern age, the emphasis on creating international frameworks for regulating insolvency matters, a process that has led to the adoption of texts such as the UNCITRAL Model Law on Cross-Border Insolvency 1997 and the European Insolvency Regulation 2000, appeared to have side-lined the common law as a source of developments in judicial cooperation, albeit section 426 (and related provisions in other jurisdictions) continued to generate a modest amount of decisions. However, the advent of *Cambridge Gas* seemed to have given fresh impetus to judicial creativity in the way it sought to reinvigorate the precept of "active assistance", a methodology traced back to early case-law in South Africa.[19] The decision, which stated that a presumption of assistance should exist in furtherance of the principle of universality, was rapidly taken up as precedent in a number of cases across the common law world, including in Australia,[20] Bermuda,[21] the Cayman Islands,[22] Ireland,[23] Jersey,[24] New Zealand[25] and the United Kingdom.[26] Here too, one case went so far as to suggest it was desirable that the common law, whether in furtherance of judge-made cooperation or in decisions interpreting the extent of domestic cross-border statutory

"IN THE MODERN AGE, THE EMPHASIS ON CREATING INTERNATIONAL FRAMEWORKS FOR REGULATING INSOLVENCY MATTERS APPEARED TO BE SIDE-LINED"

> **JUDICIAL CREATIVITY CONTINUES TO OCCUR OF NECESSITY IN A NUMBER OF JURISDICTIONS ACROSS THE COMMON LAW WORLD**

provisions, should ensure that the same types of assistance were available in both systems.[27]

It seemed as if the common law had found, with *Cambridge Gas*, a new sense of purpose. This was particularly timely and useful, given the limitations on the applicability of those frameworks that existed and that, by no means, ensured global coverage in matters of cross-border insolvency. Despite strong doubts being emitted as to the correctness of *Cambridge Gas* as to its subject matter, the enforcement of a foreign judgement non-compliant with the traditional common law rules on jurisdiction in *personam* and *in rem*,[28] its insistence on "active assistance" continued to find echoes elsewhere. In 2013, an attempt in the *Tambrook* case to limit the assistance forthcoming under section 426 to only those situations where pre-existing proceedings were afoot was rejected with the *Cambridge Gas* articulation of those principles receiving mention.[29] "Active assistance" in that case was to be furthered by allowing for the "passporting" of a request for proceedings to be opened in the United Kingdom to avoid unnecessary duplication of effort in the home jurisdiction, which would only be purposeless and wasteful of effort and costs.[30]

Cooperative precepts

The limitations, if any, on what "active assistance" might mean, however, have recently been aired in the case law. The line of jurisprudence inaugurated by *Re Phoenix*, where, in reliance on *Cambridge Gas*, assistance was provided at common law to extend a domestic statutory power to enable proceedings to be brought by the foreign office-holder within the jurisdiction, has been tested in the Caribbean and North Atlantic jurisdictions. The 2013 decisions in the Cayman Islands[31] and Bermuda[32] signalled a desire to adhere to the cooperative precepts in *Cambridge Gas*, in the first case to allow the pursuit of transaction avoidance claims by the foreign office-holder, while, in the second, facilitating the summons of persons to be examined and to order the production of documents. The steps in either case were to be achieved by the extension of domestic statutory rules to a situation in which neither an ancillary nor a domestic liquidation were envisaged.

Both cases also attempted a reconciliation between *Cambridge Gas* and *Rubin*, the judicial enthusiasm apparently being for the views expressed in the former. Nonetheless, this preference did not remain without challenge. Both decisions were taken to appeal, with the Bermudian appellate court holding the expansive views of the judge at first instance to be wrong,[33] while the Caymans appeal court reversed the trial judge, holding that the domestic statutory provision did indeed confer the powers the judge sought to provide at common law.[34] A decision on whether the judge also had the powers at common law was stayed pending the further appeal in the Bermudian case that was heard before the Privy Council in April 2014. As a result of the decision that the Privy Council has now come to in *Singularis*, its earlier views in *Cambridge Gas* have been repudiated and firm boundaries have now been set in respect of the meaning of "active assistance".

Summary

In summary, judicial creativity continues to occur of necessity in a number of jurisdictions across the common law world, particularly those where domestic cross-border mechanisms may not exist or may be deficient. While in some instances, the attempts by judges to push the law further are later rejected, as appears to be the case with the decision in *Singularis*, in others they may be successful. In time, these more forward views may be adopted elsewhere, illustrating the incremental approach to the construction of the common law through the development of precedent. The guidance of the higher courts is vital in this process to ensuring the common law does not stagnate and that the principles of unity and universality serve as precepts to guide its continued development. While *Singularis* appears to have closed the door on one set of developments, undoubtedly it will not be the end of the story. ■

Share your views!

Footnotes:

1 *Cambridge Gas Transportation Corp v. Official Committee of Unsecured Creditors of Navigator Holdings plc* [2006] UKPC 26 *("Cambridge Gas")*.
2 *Singularis Holdings Ltd v PwC* [2014] UKPC 36 *("Singularis")*.
3 *Solomons v Ross* (1764) 1 Hy. Bl. 131n; 126 ER 79; *Sill v Worswick* (1781) 1 H. Bl. 665.
4 Idem; *Macaulay v Guaranty Trust Company of New York* (1927) 40 TLR 99.
5 *Bergerem v Marsh* (1921) B&CR 195.
6 *Re Queensland Mercantile Agency* (1888) 58 LT 878.
7 *Banque Indosuez SA v Ferromet Resources Inc* [1993] BCLC 112.
8 *Re Vocalion (Foreign) Ltd* [1932] 2 Ch 196.
9 *In re Impex Services Worldwide Ltd* [2004] BPIR 564.
10 *Re BCCI (No 10)* [1997] Ch 213.
11 *Re English, Scottish and Australian Chartered Bank* [1893] 3 Ch 385.
12 *Re Matheson Brothers Ltd* (1884) 27 Ch D 225.
13 *Re: Commercial Bank of South Australia* (1886) 33 Ch D 174.
14 Sections 221 and 225, Insolvency Act 1986 (United Kingdom).
15 Ibid., section 426.
16 *Re BCCI International (Overseas) Ltd* [1988] 1 WLR 708.
17 *Re BCCI* [1993] BCC 787.
18 *Re Dallhold Estates (UK) Pty Ltd* [1992] BCC 394 (administration); *Re Television Trade Rentals Ltd* [2002] EWHC 211 (corporate voluntary arrangements).
19 *Re African Farms Ltd* [1906] TLR 373.
20 *Bank of Western Australia v Henderson (No 3)* [2011] FMCA 840 (obiter).
21 *Re Founding Partners Global Fund Ltd (No 2)* [2011] SC (Bda) 19 Com.
22 *Re Lancelot Investors Fund Ltd* (2008) (unreported), cited in S. Dickson, "The Quick March of Modified Universalism: Rubin v Eurofinance SA" (Mourant Ozannes Briefing, June 2010).
23 *Fairfield Sentry Ltd (In Liquidation) & Anor v Citco Bank Nederland NV & Ors* [2012] IEHC 81.
24 *Re Montrow International Ltd* 2007 JLR Note 40.
25 *Williams v Simpson Civ 2010-419-1174* (12 October 2010) (High Court, Hamilton).
26 *Rubin & Anor v Eurofinance SA & Ors* [2010] EWCA Civ 895; *New Cap Reinsurance Corp Ltd & Anor v Grant & Ors* [2011] EWCA Civ 971.
27 *Re Phoenix Kapitaldienst GmbH, Schmitt v Deichmann & Ors* [2012] EWHC 62 (Ch) (*"Re Phoenix"*).
28 *Re Flightlease (Ireland) Ltd (In Voluntary Liquidation)* [2012] IESC 12; *Conjoined Appeals in (1) Rubin & Anor v Eurofinance SA & Ors and (2) New Cap Reinsurance Corp Ltd & Anor v Grant and others* [2012] UKSC 46 ("Rubin").
29 *HSBC Bank v Tambrook Jersey Limited* [2013] EWCA Civ 576 (22 May 2013).
30 Ibid., at paragraph 39.
31 *Picard and Anor v Primeo Fund (In Official Liquidation)* (unreported) (14 January 2013).
32 Re Saad Investments Company Ltd (In Official Liquidation) and Re Singularis Holdings Ltd (In Official Liquidation) [2013] SC Bda 28 Com (15 April 2013).
33 Ibid., reported as: [2013] CA (Bda) 7 Civ (18 November 2013).
34 Judgment in CICA 1/2013 and 2/2013 Appeals delivered on 16 April 2014.

Update: More options for financial institutions

Paul Durban and Sabina Khan report on the further expansion of reorganisation and winding-up measures for financial institutions through the EU Bank Recovery and Resolution Directive (BRRD) and other potential reforms

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In the Summer 2014 edition of eurofenix (in an article entitled "A New Regime for Bank Crisis Management"), we reported on the EU Bank Recovery and Resolution Directive 2014/59/EU (the "BRRD"), a minimum harmonisation directive which aims to establish a common framework for the recovery and resolution of failing credit institutions and larger investment firms in the European Economic Area (EEA).

The BRRD complements the EC Directive on the Reorganisation and Winding-Up of Credit Institutions (2001/24/EC), the "Directive", implemented in the UK in 2004, which is broadly aimed at determining the state within the EEA that should oversee insolvency proceedings for certain financial entities and determining the extent to which that state's laws govern the administration of the financial entity's interests in other EEA states.

While the objective and status of the Directive remain the same, the implementation of the BRRD has led to certain aspects of the Directive being amended to ensure harmonisation with the new legal framework.

Recap on main features of BRRD

By way of reminder, our previous article summarised the tools and powers that EEA Member States must now equip themselves with as a minimum pursuant to the BRRD. The BRRD makes significant changes to the operation of certain credit and investment firms and the extent to which regulatory authorities will have powers to intervene when certain conditions have been met. These include:

Prevention: The BRRD requires institutions to develop robust recovery plans or "living wills" at both individual entity level and group level. These plans can be used by resolution authorities to construct credible resolution plans.

Early intervention: Resolution authorities will be able to appoint "special managers" to help restore failing institutions as a form of early supervisory intervention. Special managers will have far-reaching powers including corporate reorganisations, increasing capital and considering potential takeover options.

Resolution: Subject to certain conditions being met, resolution authorities will be able to adopt certain "resolution tools" such as the sale of all or part of the business, the transfer of all or part of the business to a temporary publically controlled entity (bridge bank), the transfer of 'bad' assets to an asset management vehicle and the more controversial bail-in tool, which enables resolution authorities to restructure the liabilities of a distressed institution by writing down debt or converting it to equity.

Expansion in the scope of the Directive

As mentioned above, the Directive sets out an EEA regime whereby the administrative or judicial authorities of the home Member State of a credit institution are empowered to decide on the implementation of reorganisation measures and winding-up proceedings for the credit institution and its branches in other EEA Member States. Such reorganisation measures and winding-up proceedings will be recognised and effective across the

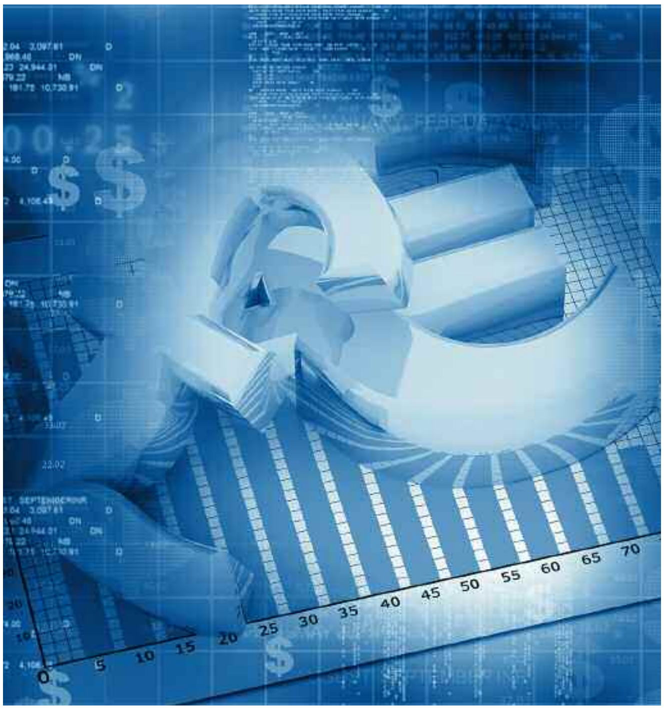
EEA and are governed, subject to certain exceptions, by the law of the home Member State. While the general purpose and operation of the regime created by the Directive has not been affected by the BRRD, the BRRD has necessitated certain significant amendments being made to the Directive. *Key changes include:*

Enhanced Scope

1. The Directive now not only applies to credit institutions but also to "investment firms". "Investment firms" means "*any legal person whose regular occupation or business is the provision of one or more investment services to third parties and/or the performance of one or more investment activities on a professional basis*". Significantly, firms having less than €730,000 of capital are expressly excluded from the definition of investment firms. This recognises that the BRRD is aimed at the mid-high end of the market, so as to address institutions whose financial difficulties or insolvency could cause systemic risk.

2. Further, the Directive has also been extended to apply to financial institutions, firms and parent undertakings within the scope of BRRD. This change reflects the fact that the BRRD contemplates measures being taken in respect of groups of companies with their head offices in the EEA. Accordingly, proceedings for such groups of companies will fall within the scope of the Directive and will be recognised and effective in all EEA Member States. This is a significant development in cross-border insolvency as although pan-European legislation has historically been well equipped to deal with single entities in self-contained proceedings, it often fell short when dealing with more complex group structures operating in multiple jurisdictions. This sometimes gave rise to inconsistent decisions being handed down with respect to different entities within the same group company. The aim is that these inconsistencies should now be minimised.

"SIGNIFICANTLY, FIRMS HAVING LESS THAN €730,000 OF CAPITAL ARE EXPRESSLY EXCLUDED FROM THE DEFINITION OF INVESTMENT FIRMS"



3. The definition of "reorganisation measure" has been revised so that it is clear that the application of the resolution tools and the exercise of the resolution powers in BRRD will be "reorganisation measures" for the purpose of the Directive. Such an amendment should be welcomed as the types of resolution actions which fell within "reorganisation measures" were not always previously clear (for example there has been debate about whether certain types of good bank/bad bank splits were reorganisation measures) giving rise to uncertainty as to whether such an action would be automatically recognised and effective across the EEA. The revision to the definition of "reorganisation measure", so that it refers specifically to those actions available under the BRRD, should go some way to removing these uncertainties for future financial institution rescues.

Applicable law

The exceptions to the general choice of law rule which provide protection for netting agreements and repurchase agreements have been amended so that the provisions in the BRRD which give the home Member State resolution authority the power to suspend termination rights and impose temporary stays (for a limited period of 48 hours) should override netting and repurchase agreements that are governed by the laws of other EEA Member States. The exceptions to the general choice of law rule which provide protection for set-off and third party rights *in rem* have not been similarly amended, presumably on the basis that such rights benefit from the general safeguards, and would be dealt with in due course under the resolution process.

Domestic implementation of BRRD

On the domestic front, the implementation of the BRRD raises the issue of how the UK's existing regime for the resolution and recovery of financial institutions should be adapted to ensure compliance with the BRRD.

Large parts of BRRD formally came into force in the UK on 1 January 2015 via the Bank Recovery and Resolution Order 2014 (the "Order"). The

Order amends the Banking Act 2009 (the "Act") in order to bring the UK's own special resolution regime ("SRR"), which applies to banks, building societies, systemically important investment firms, recognised central counterparties (CCPs) and banking group companies) into alignment with the BRRD.

Overview of the main amendments to the SRR

Some of the principal amendments to the SRR resulting from the implementation of the BRRD include:

Asset separation tool: The asset separation tool embodied in the BRRD has been added to the stabilisation options available to the UK authorities pursuant to the SRR. Broadly, it enables the Bank of England (which is the entity responsible for the operation of the SRR, including the decision of which SRR tool to use and the mechanism for that tool's implementation) to use property transfer powers to transfer assets, rights and liabilities of a failing bank to asset management vehicles.

Government stabilisation options: The BRRD sets out two government stabilisation tools: the public equity support tool and the temporary public ownership ("TPO") tool. The TPO was already available as part of the SRR, however, the public equity support tool is a new addition to the Act. The Act has also been amended to reflect the BRRD requirement that government stabilisation options can only be used once there has been a contribution to loss absorption and recapitalisation of at least 8% of the total liabilities of the institution under resolution.

Write down of capital instruments: New provisions have been inserted into the Act to reflect the BRRD requirement that before any resolution tools can be used (i) capital must be used to absorb losses, and (ii) relevant capital instruments should be written down or converted (this may be done by way of cancelling shares and other instruments of ownership, transfers made to bailed-in creditors or substantial share dilution).

Bail-in: The Financial Services (Banking Reform) Act 2013 has amended the Act to introduce the controversial bail-in tool. Indeed, the amendments have established the bail-in option as a new stabilisation option available to the Bank of England as lead resolution authority under the SRR. This option is available in respect of failing banks and investment firms and will also be made available, with modifications, to building societies using secondary legislation. It should be noted that it is still not clear when these particular amendments will take full effect and, given their nature, these particular reforms are still subject to some ongoing consultation.

What next?

By setting out a common framework for a pan-European bank recovery and resolution regime, the EEA authorities have sought to facilitate a more orderly and concrete legal framework aimed at reducing the potential public costs of future bank failures. While the BRRD (and its consequential amendments to the Directive) has on paper created a new, flexible regime for dealing with the rehabilitation of failing banks, it also carries elements of legal uncertainty, including fundamental concerns about loss of proprietary rights.

Moreover, while the BRRD in tandem with the Directive may go some way to resolve certain of the harmonisation issues relating to cross-border insolvencies of credit/financial institutions in the EU, it is likely that a more international approach will need to be adopted with respect to institutions with an increasingly global presence and this will likely need to be addressed at an international level, not just at an EEA level.

Consequently, whether the BBRD (and the harmonisation of the Directive) results in a safer and more disciplined European banking system remains to be seen. It is likely that the BRRD's success will ultimately depend on whether interaction between the relevant authorities (and statutory instruments) proves to be effective and most importantly, whether the measures prove to be sufficiently robust to allay the fears of creditors of a failing bank and to mitigate the potential risks of non-recovery.

Other proposed pan-European reforms

European Union finance ministers also very recently agreed on a new draft law aimed at tackling the problem of "too-big-to-fail" banks and shielding taxpayers from having to bail out large lenders. The planned legislation would apply to banks whose trading activities exceed €100 billion (approximately 30 of the biggest banks in Europe would be within this scope) and could force these banks to rein in proprietary trading and give national regulators the power to split off risky trading activities from safer lending operations.

The planned reforms seek to harmonise laws that have already been adopted in several EU countries to deal with "too-big-to-fail" institutions but the law would exempt countries if they already have similar legislation in place. This would exempt the United Kingdom who has its own rules (the Vickers reforms) which call for UK retail banks to ring-fence their retail banking businesses from investment-banking activities and cushion them with additional capital.

Even though it has the backing of the 28 EU countries, the European Parliament still has to approve the final version of the law and further changes are possible as many banks are concerned that any radical move to break them up might harm their ability to support Europe's economic recovery, and spark an exodus of business toward more favourable jurisdictions. It therefore could take several months before the new law is formally adopted. ■

"THE PLANNED REFORMS SEEK TO HARMONISE LAWS THAT HAVE ALREADY BEEN ADOPTED IN SEVERAL EU COUNTRIES TO DEAL WITH "TOO-BIG-TO-FAIL" INSTITUTIONS"

Share your views!

Slovakia: Quick and (un)reasonable reaction?

Filip Takáč reports on the recent amendment of The Slovak Bankruptcy and Restructuring Act

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Váhostav – SK, a.s. (“Váhostav”), the largest Slovak construction company, is currently undergoing court-supervised restructuring.

Under the pretext of helping certain of Váhostav’s unsecured creditors, and in response to related developments, on 23 April 2015 the parliament adopted significant amendments to the Bankruptcy and Restructuring Act (**“Bankruptcy Act”**) and to the Commercial Code (**“Commercial Code”**).

The amendments have already been dubbed “Lex Váhostav”. Váhostav owes millions of euros to hundreds of unsecured creditors, many of them small and medium-sized companies that are subcontractors of Váhostav in its public procurement contracts with the government. Váhostav first offered an 85% haircut to its unsecured creditors. The subsequent uproar of both the creditors and the general public awakened the authorities.

The government tried to cool down the situation with a rapid solution to bail out creditors. On 14 April, the government proposed buying the debt, which would lead to the government obtaining Váhostav shares. Although the unsecured creditors welcomed this solution, the opposition and legal experts were lukewarm about it.

Because of the ongoing public debate, the government and parliament reacted rapidly to the situation, in an effort to find a quick political and populist solution to a long-term problem that would also be acceptable to experts.

However, the proposed amendments may not have the desired effect. In fact, not only does Lex Váhostav not solve the current problems of Váhostav’s restructuring, it introduces changes which will negatively affect all entrepreneurs. It is almost certain that the “knee-jerk” Lex Váhostav will not provide a useful and systematic solution.

Lex Váhostav presents a brushed-up amendment to the Commercial Code which is connected with amendments to other laws. The amendment to the Commercial Code introduces several new legal provisions, to wit:

(i) a registry of disqualifications to include persons who are forbidden to act as statutory bodies or members of supervisory boards in business companies and cooperatives;
(ii) a definition of a company in crisis, that is, a company with a debt to equity ratio of less than 4 to 100 (in 2016), 6 to 100 (in 2017) and 8 to 100 (from 2018);
(iii) prohibition of repayment of shareholders’ contributions; and
(iv) introduction of liability of shareholders for certain acts.

All these changes should lead to greater responsibility of statutory bodies and shareholders for the company’s economic situation by increasing financing from the equity capital of shareholders. But the collateral effects of these changes are unclear, since, in some cases, they can lead to lower investment in the development of a company and to complicating business activity. On the other hand, these changes might free the business sphere from undercapitalised companies and make statutory bodies more responsible for company decisions. This aspect of Lex Váhostav seems to offer positive changes for business in Slovakia. However, as we will see, it raises more interesting topics for discussion when considering its effects on restructuring.

Lex Váhostav’s restructuring issues

Under the proposed amendment, after successful completion of the restructuring, the debtor can distribute profit or other equity among its shareholders only if the creditors with unsecured claims (unrelated parties) are satisfied to the full amount of their acknowledged claims, i.e., up to 100%.

The worst aspect of this is that the Parliament seems to have opened the door for “corrupt behaviour” by legalising arrangements where a company might use future profits to satisfy current claims in exchange for approval of the plan. If the debtor makes a profit, it has to be distributed among the creditors who requested it proportionally to the amount of the claims of other creditors in their group. There is no specific key ensuring fair distribution that leaves room for agreement. It seems impossible for a creditor to prove disproportionality in the payment of claims to individual creditors.

This most clearly illustrates how hastily the amendment was drafted. The wording is insufficient, easy to circumvent and does not give creditors security that they will ever see a

part of their claim, even if the company is successful in the future.

To ensure greater protection, especially for small, unsecured creditors, specifying a limit of xx% and x months in order to ensure that a minimal part of the claim must be satisfied within a maximum period would be helpful. Minimal satisfaction of creditors would be specified by law (or decree of the Ministry) according to the restructuring plan. The designation of limits and whether the limits themselves should be specified in the opinion or only in the plan should be left for expert discussion and not be decided behind closed doors by the government or the Ministry.

Provisions on an exchange of creditors' claims for shares in the company, the so-called "debt-to-equity swap", are quite usual. However, in the case of Lex Váhostav, entrepreneurs clearly stated that they did not want shares in the company but cash. It is probable that all the small creditors took the one-time offer of the government and sold their claims against Váhostav to the state Slovak Guarantee and Development Bank (**"SZRB"**) in return for 50% of their nominal value. The SZRB will then collect payments from future Váhostav profits. Small creditors said that they preferred receiving 50% immediately to collecting the full amount from future Váhostav profits.

The possibility of a debt-to-equity swap especially protects unsecured creditors and is used in various legal systems, including Germany and Austria. However, its introduction to our legal system was not prepared in a detailed and systematic way, especially with regard to sustainability and an acceptable debt burden for the debtor. As such, the new regulation can cause more harm than good. The supervisory administration of the debtor and its new earnings as well as the sustainability of the plan must be specified in more detail. Questions regarding the debtor's current shareholders and their participation as well as the shares of creditors after satisfaction of their entire claim also need to be addressed.

Other significant changes

Possibility of employees to file a petition for bankruptcy

At least five employees represented by a trade union can file a petition for bankruptcy against their employer for a relatively small administrative and financial burden. This is mainly in response to practical situations in which employees are not paid their wages. On the one hand, this provision looks fair, but on the other hand it could be abused, for example, by former employees filing a petition for bankruptcy as revenge and causing a company substantial damage.

Merger or demerger of a company

An agreement on the merger or demerger of a debtor company must be approved by the trustee. Although the courts would

"ENTREPRENEURS CLEARLY STATED THAT THEY DID NOT WANT SHARES IN THE COMPANY BUT CASH"

> **SEVERAL CHANGES HAVE BEEN ADOPTED WHICH SHOULD SPECIFY THE REQUIREMENTS FOR TRANSPARENT BOOK-KEEPING BY THE DEBTOR**

probably see through speculative acts by a debtor, the Parliament played it safe and conditioned the possibility of registration in the companies register on the trustee's consent.

Reservation of title

Before Lex Váhostav, if someone owned an item of property which the debtor had unjustly retained, their only recourse was to file a motion to exclude the item from the bankruptcy estate. Now, they can also claim this right similarly to a security right, such as a lien. However, the benefit of such a claim is doubtful since not everyone wants their property to be sold and converted into money, even if they get to keep the proceeds. We take the view that such items should not be sold, but returned to their rightful owner instead.

Granting voting rights (also in bankruptcy and restructuring)

Although voting rights in bankruptcy could be granted before, Lex Váhostav enables:

- creditors whose claims are contested by other creditors, or
- creditors with claims already adjudicated by the court or another authority, and
- secured creditors

to be granted voting rights by preliminary decision of the court. Lex Váhostav correctly applies this possibility in restructuring, though insufficiently, i.e., only to adjudicated and secured claims.

Preparation and requirements for a restructuring opinion and petition for a restructuring permit

In this respect, several changes have been adopted which should specify the requirements for transparent book-keeping by the debtor and provide a true and precise picture of its financial situation. The trustee has new obligations to thoroughly assess the acts of the debtor in regard to related parties, which could lead to the debtor's "doom". This should allow the court and, especially creditors, to evaluate the amount of satisfaction of their claims offered in restructuring as compared to bankruptcy.

Conclusion

Lex Váhostav grants some increased protection to creditors and introduces new measures to increase their protection, but the essential parts of restructuring law remain unchanged. Assessing whether a specific case of restructuring or bankruptcy is illegal remains mainly with the court, the Ministry of Justice, and the criminal authorities. The responsible authorities need to accept responsibility for bankruptcy and restructuring matters and start to apply the provisions they have at their disposal. Even the best amendment to the Bankruptcy Act is only a piece of paper unless supported by actual results and actions. Exemplary sanctions might potentially discourage speculators. ■

A detailed analysis of Lex Váhostav can be found at: www.bnt.eu/en/country-news/slovakia/1944-quick-and-un-reasonable-amendment-of-slovak-bankruptcy-and-restructuring-act

Share your views!

Managing the risk of involuntary bankruptcy

David Conaway writes a cautionary tale for creditors contemplating the filing of an involuntary petition under Section 303 of the US Bankruptcy Code

DAVID H. CONAWAY
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Many lawyers have written articles about a February 27, 2015 US Court of Appeals (11th Circuit) ruling (In re Maury Rosenberg) against petitioning creditors of an involuntary Chapter 7 proceeding.

Introduction

Creditors owed over $5 million filed an involuntary bankruptcy petition against Maury Rosenberg, a Philadelphia businessman who ran a group of radiology screening centers. As reported by Law360 (an online publication), not only did Rosenberg get the petition dismissed, he obtained a judgment of over $1 million against the petitioning creditors for costs and attorneys' fees as well as compensatory and punitive damages of $360,000, based on a complaint he filed against US Bank and others for $50 million over the "bad faith" involuntary filing.

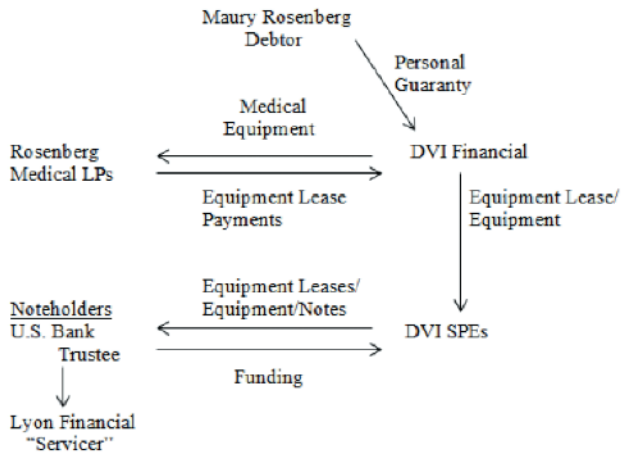
Not surprisingly, the articles written cite the *Rosenberg* case as a cautionary tale for creditors contemplating the filing of an involuntary petition under Section 303 of the US Bankruptcy Code. Yet, a deeper dive into the facts of the case indicates it was a flawed filing from the get-go.

Background

The Rosenberg case was based on asset-backed securitisation transactions in 2000 gone wrong. Maury Rosenberg's affiliated limited partnerships (the **"Rosenberg LPs"**) entered into equipment leases with DVI Financial Services, Inc. (itself a Chapter 11 debtor), for a $27 million financing of the acquisition of medical equipment. DVI Financial bought the equipment, leased it to the Rosenberg LPs, which made lease payments to DVI. As a security, Rosenberg signed a personal guaranty to DVI.

As part of various asset securitisation transactions, DVI Financial transferred the leases and equipment to various DVI SPE's (special purpose entities), who obtained loans from and issued notes to various lenders, for whom the agent was US Bank. Lyon Financial Services, Inc. became the "loan servicer" for US Bank and the noteholders (*see diagram 1 above*).

Diagram 1



In 2003, the Rosenberg LPs defaulted on the equipment leases, Lyon filed suit in state court, and in 2005 the parties restructured the debts. Lyon signed the settlement agreement, not any of the DVI entities. As part of the settlement, Maury Rosenberg issued a superseding $7.7 million guaranty to "the Agent", defined as "Lyon Financial Services, Inc. d/b/a US Bank Portfolio Services as successor servicer for the DVI Entities …."

In 2008, the Rosenberg LPs defaulted on the restructured obligations, and Lyon obtained a judgment against the Rosenberg LPs and on the Guaranty in the amount of $4.7 million.

Later in 2008, Lyon's Director of Operations, *on behalf of the DVI Entities*, signed and filed an involuntary Chapter 7 petition against Maury Rosenberg in Pennsylvania. The petitioning creditors were listed as the DVI entities, whose claims totalled about $5.4 million. The involuntary Chapter 7 petition was transferred to the Southern District of Florida, where Rosenberg was a resident.

Lyon's Director of Operations signed and filed the involuntary petition in name of the DVI entities, without the DVI Entities' knowledge and without obtaining their authorisation for the filing.

Share your views!

In 2009, the Bankruptcy Court granted Maury Rosenberg's motion to dismiss the involuntary petition because, among other reasons:

- The DVI Entities were not creditors of Rosenberg… the guaranty was in favour of Lyon.
- The DVI Entities were not "real parties in interest", rather they were "pass through" entities to facilitate the asset securitisation transactions.
- A demand for payment was not made on Rosenberg.

Initially, Rosenberg won trial verdicts of $1.1 million for costs and attorneys' fees, and for compensatory and punitive damages in the amount of $6.1 million. The trial judge later reduced the $6.1 million award to $360,000. As for the $1.1 million of costs and attorneys' fees, the 11th Circuit generally upheld the award of attorneys' fees but remanded the case to District Court (still pending) with the implication being the amount of the reward could be reduced.

Takeaways and remaining questions

This case is not about the inherent risk of three creditors filing an involuntary petition.

Rather, it illustrates how asset-based securitisation transactions can obscure who owns the claims against a debtor and thus who has the right and authority to file an involuntary petition.

Consider a "normal" vendor-customer transaction (*diagram 2, below*).

When creditors are suppliers to a customer, there is normally little risk of a dismissal of an involuntary filing on the basis that such creditors do not have authority to file the petition, which was the case in the Rosenberg dismissal. In any Section 303 involuntary petition, creditors must establish that (1) 3 or more creditors have claims against the debtor in the aggregate over $15,325 (in 2015), (2) the claims are not contingent as to liability, (3) the claims are not subject to a bona fide dispute, and (4) the target debtor is not paying its debts generally as they come due.

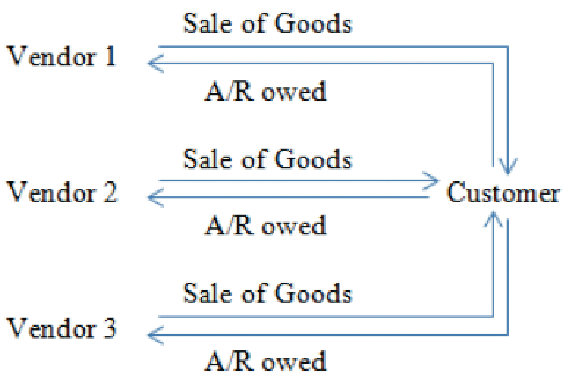
What will Rosenberg ultimately recover on the attorneys' fee claim? How much has he spent in legal fees since 2003?

How much has US Bank, *et al* recovered on the original $27 million financing?

How much has US Bank spent on legal fees?

Despite the Rosenberg ruling, an involuntary petition remains a viable remedy for creditors in appropriate circumstances. With all legal action, an involuntary petition should be pursued carefully, in compliance with the clear requirements of Section 303, and with a sound strategy for recovery for unsecured creditors. ■

Diagram 2



> "THIS CASE ILLUSTRATES HOW ASSET-BASED SECURITISATION TRANSACTIONS CAN OBSCURE WHO OWNS THE CLAIMS AGAINST A DEBTOR"

Dealing with assets in South Africa

Hillary Plaatjies reports on the recognition of foreign representatives by South African courts to deal with assets In South Africa

HILLARY PLAATJIES
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Due to the increase in international trade and investments on the worldwide markets, trade and movement of assets across borders are now more frequent. As a result thereof, cross-border insolvencies are becoming more frequent.

Cross-border insolvency law primarily deals with situations where an insolvency procedure is initiated in one jurisdiction, in relation the property of a debtor who is situated in another jurisdiction.[1] The law of insolvency on the one hand, and the conflict of laws on the other, (Private International law) must be considered.

A question which is increasingly imposed is whether an order made by a foreign court, appointing a foreign representative, will be recognised by a court in South Africa and what steps must be taken by the foreign representative to deal with assets of the debtor in South Africa.

In South Africa, the common law system dealing with Private International Law and precedent must be applied in cross-border insolvency matters. The statutory position will come into effect, once the cross-border Act[2] comes into full effect. The Cross-border Insolvency Act was enforced on 28 November 2003.[3] This Act is based on the UNCITRAL Model Law on cross-border Insolvency. Its purpose is to provide an effective mechanism and to create a modern legal framework to address cross-border insolvency proceedings and to regulate co-operation between foreign courts. South Africa also built an element of reciprocity into the cross-border provisions. No countries have been designated whose insolvency court orders would be reciprocally recognised in South Africa and the Act[4] cannot be implemented until the Minister of Justice has designated the foreign states to which the Act will apply.

Cross-border insolvency is invoked by States using either a territoriality approach or the universality approach. The territoriality approach seeks to protect local assets for the benefit of local creditors. It confines the insolvency proceedings to the jurisdictional limits of the country in which the assets and debts are located[5]. The universality approach supports co-operation between states when dealing with multinational corporations. The universality approach treats cross-border insolvency as a single matter to ensure equal treatment to creditors from different jurisdictions and to which the courts of other countries would give their assistance.

South Africa is not a party to any international convention or treaty on Cross-border insolvency. Unless the situation is governed by a treaty or legislation, the common law principles and precedent regarding recognition of a foreign representative in South Africa is applicable. The common law regulates recognition of foreign representatives by South African courts.

Property as defined in the Insolvency Act[6] includes all types of movable and immovable property situated in South Africa. In South African Insolvency Law, the property is vested in the trustee by a sequestration as provided for in section 20 of the Insolvency Act[7]. In a liquidation, the company remains owner of its property and the liquidator obtains control of that property.[8] The common law draws a distinction between immovable and movable assets. In the case of movable assets, the principle is that the foreign representative may claim any movable property without first having to obtain recognition. The movable assets are deemed to be vested in the foreign trustee and recognition is deemed to be a formality.

A foreign representative who wants do deal with immovable property must first obtain recognition by the courts. The law of location of the property (*lex rei sitae*) applies in respect of immovable property and recognition must be obtained by the court where the property is situated.

In *Ward v Smit: In re Gurr v Zambia Airways Corp Ltd*[9] the court held that a foreign representative of a legal person who wants to deal with movable property, immovable property or incorporeal property in South Africa must apply for recognition to the High Court of South Africa. The court held that a recognition of a foreign liquidator is in the discretion of the court but dependent on considerations of comity, convenience and equity. The South African courts exercise their discretion when hearing such an application based on comity, convenience and equity. If recognition is refused by a South African court, a foreign creditor may apply for a sequestration or winding-up of the estate in the jurisdiction.

Share your views!

Request for recognition by foreign representatives to South African courts

Foreign representatives have no *locus standi* to deal with any property in South Africa belonging to a debtor, or sue, or defend actions for the company under provisional or final liquidation unless they apply to the South African court for recognition.

It has been submitted that a foreign representative who seeks recognition from a court must satisfy the court of his appointment, but this will not be done by just submitting a letter of request as required by previous legislation. Application must be made by the foreign representative to a division of the High Court in South Africa having the necessary jurisdiction, where the assets are situated.

The discretion of the court as to whether it should grant recognition of a foreign representatives is absolute. However, in practice, the discretion is granted in the interest of comity, convenience and equity. In *Ward v Smit: in re: Gurr v Zambia Airways Corporation Ltd*[10] it is stated that the court has wide discretion to recognise or not and would strive to protect local creditors if desirable to do so.

In practice, application for formal recognition has been put into a principle. The recognition order in these instances is a declaratory order regarding the foreign representative entitlement to administer the assets as if they were in the relevant jurisdiction where his authority derives from. It is also submitted that a foreign provisional representative should not be recognised where it is uncertain if his appointment will become final but the court has a discretion in these instances. In some instances, the court will be reluctant to grant recognition to a foreign representative if he is a provisional trustee and not sure if he is going to be the final trustee. South African courts lean towards the territoriality approach and will protect the interest of local creditors.

The court may impose conditions, for example a notice to interested parties to be published in the Government Gazette and local newspapers. The court may also request the foreign representative to provide appropriate security to the Master of the High Court.

Conclusion

The Cross-border Insolvency Act 42 of 2000 cannot come into effect because of the Minister of Justice's failure to designate certain states which are to enjoy its terms. This act does not provide assistance to a South African insolvency representative or agent who institute insolvency proceedings against a debtor who also has assets or business in a foreign jurisdiction. To achieve such reciprocity, the foreign state would need a similar act in which South Africa is a designated state.

The Cross-border Insolvency Act, when implemented, will only be applicable to designated countries. Due to this system of designation, the South African law will in future follow a dual approach to recognition of foreign bankruptcy orders[11] in that the foreign representatives of designated countries will follow the procedure of the Cross-border Insolvency Act, whilst those representatives from non-designated countries will still have to follow the general route that is based on common law and precedent. ■

Footnotes:
1 Meskin Insolvency Law 17.1
2 Cross-Border Insolvency Act 42 of 2000
3 By proclamation no R73 of 2003 published in GG 25768 of 27 November 2003
4 Cross-Border Insolvency Act 42 of 2000
5 Smith & Ailolo (1999) 11SA Merc LJ192
6 Section 2 of Insolvency Act, Act 24 of 1936
7 Act 24 of 1936
8 Section 361 of the Companies Act
9 1998 (3) 175 (SCA)
10 1998 (3) SA 175
11 Michele Oliver and Andre Boraine, University of Pretoria

> "THE SOUTH AFRICAN LAW WILL IN FUTURE FOLLOW A DUAL APPROACH TO RECOGNITION OF FOREIGN BANKRUPTCY ORDERS"

Country Reports
Summer 2015

Updates from Poland, Cyprus and Latvia

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Poland: New restructuring law to avoid liquidation

In 2014, Poland was listed at 32nd place in the Doing Business Ranking with respect to insolvency because of the long duration of the insolvency proceedings, their high costs and the average recovery to creditors. The new Restructuring Law seeks to remedy this situation.

On April 9, 2015, the lower house of the Polish parliament adopted a new Restructuring Law. The main goal of the new law is to introduce an effective mechanism to restructure a debtor's business and prevent its liquidation. Generally, the continuation of a business is more favourable to creditors; it preserves jobs and allows the uninterrupted execution of contracts.

> "THE MAIN GOAL OF THE NEW LAW IS TO INTRODUCE AN EFFECTIVE MECHANISM TO RESTRUCTURE A DEBTOR'S BUSINESS AND PREVENT ITS LIQUIDATION"

The Restructuring Law has three components:

(i) an amendment to the Bankruptcy and Reorganisation Law, which after entry of the new statute, will apply only to liquidation proceedings;
(ii) a new statute regarding restructuring; and
(iii) various regulations implementing the changes.

Companies in financial difficulties will be able to use the following proceedings to restructure:

- procedure for approval of a plan after creditors' vote;
- accelerated arrangement procedure;
- ordinary arrangement procedure; and
- rehabilitation proceedings.

We will focus on the procedure for approval of a plan after the creditors vote on such a plan and the rehabilitation proceedings.

The procedure for approval of a plan subject to creditors' votes is a simplified procedure where the debtor lists its claims and liabilities, obtains creditors' consents for a plan and cooperates with the supervisor of the plan. This procedure is short and the court has a limited role because it either approves or rejects the plan adopted by the creditors.

The debtor who fails to agree on a plan with the creditors may

use the rehabilitation proceedings. This proceeding allows the use of various tools such as: (i) the possibility to reject contracts unfavourable to the debtor, (ii) the ability to adapt the employment level to the debtor's needs, and (iii) the possibility of sale of redundant assets. In this type of proceedings, the court appoints an administrator – usually, a highly qualified restructuring advisor who has obtained an appropriate licence. Such powers will be automatically granted to current official receivers but lawyers can also obtain the licence.

In order to accelerate and simplify the procedures, unified forms will be introduced and those forms will be submitted electronically. In addition, a central restructuring and bankruptcy register will be created. It will include a search engine for all the bankruptcy cases, official receivers and experts. Using the registry will be free of charge.

Some commentators have criticized the new regulations. Some believe that bankruptcy cases should be within the jurisdiction of the regional courts (the higher level courts) where judges are more experienced as opposed to the district courts (the lower level courts) which usually resolve simple cases. Experts are concerned that the debtors may not receive enough support during their restructurings because the restructuring advisor and the judge of the district court may be insufficiently prepared to manage such large and complex proceedings.

Whether the new law will lead Polish companies to restructure rather than liquidate will only be assessed in a few years. The Restructuring Law, however, is certainly a step in the right direction.

> **WHETHER THE NEW LAW WILL LEAD POLISH COMPANIES TO RESTRUCTURE RATHER THAN LIQUIDATE WILL ONLY BE ASSESSED IN A FEW YEARS**

MARIA KYRIACOU
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"THE CHANGES ARE UNDOUBTEDLY BOLD BUT THEY HAVE BEEN CRITICISED AS A CHARTER FOR UNSCRUPULOUS DIRECTORS"

Cyprus: New insolvency laws

In April the Cyprus Parliament approved a new package of insolvency laws, aimed at streamlining and modernising the existing system and promoting a rescue culture.

Reform of the insolvency framework forms part of the adjustment programme agreed between the Cyprus government and international lenders at the time of the 2013 banking crisis, and is essential for the resolution of non-performing debt, which is currently estimated to account for almost 50% of gross loans in the banking sector.

The new insolvency laws, which were extensively amended by the Parliament in the course of its debate, have not been promulgated and there is uncertainty concerning the detail, but the following summary highlights the most noteworthy changes.

Companies

The majority required for a proposed voluntary arrangement to be binding on all creditors has been lowered from a majority in number representing three quarters in value to a simple majority in value of those voting. The majority required for votes of members to be binding on all members has also been reduced to a simple majority. The sanction of the court is required for the proposal to become effective.

The Companies Law has been amended to introduce a process called "examinership", which is akin to the United Kingdom administration process. This provides for the appointment of an insolvency practitioner as "examiner", whose role is to develop restructuring proposals and propose them for agreement to the stakeholders during a four-month moratorium in which the company is protected from creditor action.

The Companies Law has also been amended to make the following changes regarding liquidation:

- the minimum debt required for a creditor to petition for winding up on the basis of a statutory demand has been increased from €854 to €5,000;
- compulsory liquidations must be completed within eighteen months from commencement unless the court grants an extension;
- a liquidator can be appointed by the court as well as by existing means, and the Official Receiver can be appointed as the permanent liquidator in a compulsory liquidation;
- a liquidator must be a licensed and regulated professional insolvency practitioner;
- the liquidator can apply to the court for an order bringing the liquidation to an end and dissolving the company if the assets are insufficient to cover the cost of liquidation; and
- a court can make an order authorising the liquidator to dispose of the assets subject to a charge if it is satisfied that this would be advantageous.

Individuals

The court has the power to order a 95-day moratorium on enforcement action by creditors for the debtor to agree to an arrangement (known as a personal repayment plan) with them. If approved by the necessary majority of creditors and the court, the arrangement will be binding on the debtor and all creditors, subject to dissenting creditors' right to be heard before the court. No proceedings can be commenced to enforce a guarantee within two years after the date of implementation of a personal repayment plan by the primary debtor.

The court can impose a rescheduling in small cases where aggregate liabilities are no more than €350,000 and individuals with minimal assets and income may apply to the court via the government insolvency service for an "order for debt relief" of up to €25,000.

Discharge from bankruptcy is automatic after 3 years on the condition that all the debtor's assets are sold and the proceeds are distributed to the creditors. There are new criminal sanctions against fraudulent alienation of assets prior to bankruptcy and non-disclosure of assets.

A change for the better?

The changes are undoubtedly bold but they have been criticised as a charter for unscrupulous directors, given the lack of an established insolvency profession and all the regulatory infrastructure that goes with it. Furthermore, proceedings in the Cyprus courts are beset with delays, usually taking years to complete, and judges have little experience in insolvency matters. Increasing the courts' involvement in the insolvency process therefore seems more likely to aggravate delays than to streamline proceedings.

Latvia: Further reforms

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As the author has foreseen in the Winter edition of eurofenix, restructuring and insolvency have remained hot topics in Latvia with both the public debate and the legislative process on the high tide.

Concerning the legislature's application, since last September the Insolvency Law alone has been amended three times. The second wave of amendments was mostly designed to postpone the entry into force of the initial package of amendments (adopted on 25 September) from 1 January to 1 March. The third wave provided for more changes in the mentioned package of amendments shortly before its entry into force. This is to say nothing of amendments in a few other legal enactments.

Compared to the initial package of amendments of 25 September, the idea to liberalise the personal bankruptcy regime has now been mostly overturned, eliminating the so-called non-recourse loans,[1] thus making life a bit easier for mortgage creditors and raising the threshold for applying a shorter discharge procedure. Now, only those individuals whose outstanding liabilities after the sale of assets by an IP do not exceed €30,000 will be eligible for a discharge procedure lasting for one year, whereas individuals with outstanding liabilities ranging from €30,001 to €150,000 will qualify for a discharge procedure lasting two years, and the rest, having unsettled liabilities exceeding €150,000 – for a three year-long discharge procedure.

The reform of the status of the IPs has been a hot potato for a while, as well. As of 1 March, all IPs are regarded as public officials. The radical status reform was aimed at ensuring more effective control over IPs. However, its true implications in practice remain to be seen, as well as how several theoretical and practical problems are going to be solved, among them the possibility to combine this status with the profession of an attorney-at-law. One of the cornerstones of the reform is to ensure that IPs are supervised by the Corruption Prevention and Combating Bureau. Nonetheless, according to another recent decision by the Parliament, certain amendments to the Law on the Prevention of Conflict of Interest in Activities of Public Officials, that would empower the Bureau to supervise IPs as regards corruption risks, will enter into force only on 1 January 2016, instead of 1 July 2015. At the same time, several IPs have challenged the status reform in the Constitutional Court which will say its word on the feasibility of the reform in the nearest future.

Footnote:

1 Providing for a discharge of a secured claim immediately after the sale of a mortgaged dwelling, irrespective of the applicability of the discharge procedure.

“ONE OF THE CORNERSTONES OF THE REFORM IS TO ENSURE THAT IPS ARE SUPERVISED BY THE CORRUPTION PREVENTION AND COMBATING BUREAU”

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2016

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21–22 September	**INSOL Europe Academic Forum Conference** *Cascais, near Lisbon, Portugal*
22–25 September	**INSOL Europe Annual Congress** *Cascais, near Lisbon, Portugal*

2017

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5–8 October	**INSOL Europe Annual Congress** *Warsaw, Poland*

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