eurofenix

The journal of INSOL Europe
Autumn 2015

Reaching out to Europe and beyond...

From Puerto Rico to Greece, USA to the Baltics, UK to Italy, Spain, France, Germany, Hungary and Ireland...

Also inside this edition:
Schemes of arrangement
Academic Conference report
Money laundering, Group insolvencies
Secondary proceedings and more...

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Correspondence, including ideas for articles, should be sent to:
Paul Newson, PNDesign
pndesign@icloud.com

Eurofenix Français:
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Editor/enquiries: Florica Sincu
Translation: Gabrielle Allemand

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Edward Taylor
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Jubilee House, Nottingham Road,
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Welcome from the Editors

ANNEROSE TASHIRO

GUY LOFALK

Dear readers,

Watching the news these days with migrants and refugees fleeing from war and terror and coming to Europe, and being applauded when arriving at the Munich main station, I cannot help remembering the moment, 26 years ago, when Europe's East block collapsed.

Thousands fled from East Germany via the embassies of West Germany in Prague or Warsaw and via the loosened borders in Hungary. Many, many refugees stayed and waited for days on the premises of the embassy in Prague, until the then Foreign Minister, Hans-Dietrich Gentscher, after his discussions at the United Nations with fellow foreign ministers on the refugee crisis, declared – famously, from the balcony – that they were allowed to go to West Germany. 26 years later – still goose bumps. As the train went through the territory of East Germany a lot of other people tried to jump on the train to reach freedom. When the Berlin Wall went down, the Easterners were more than warmly welcomed.

Europeans certainly felt reluctant about a bigger Germany when reunification talks started, but visionary politicians nonetheless took that on to form the new Germany with the so-called Two Plus Four Agreement (the Treaty on the Final Settlement With Respect to Germany). The other former communist countries likewise changed dramatically and have all joined the European Union with its overarching common principle as an area of freedom, security and justice. We live now in a much stronger, sustainable and rich – in every sense of the word – European Union of 28 Member States.

How will we look back in another 25 years and think of the year 2015?

Starting with the horrible Charlie Hebdo attack in Paris, which – I felt – made Europeans reassess their values, at least some. Then, over the spring and summer of this year we were constantly dragged into the discussion of Greece's sovereign debt

crisis and we felt very close to losing one member of the European fiscal union, maybe even the European Union. Democracy versus fiscal rules? Sustainability versus individual tragedies? Capital controls versus debt service ratio? Haircut versus new liquidity? Beyond all these hot debates, my impression was that the solidarity with so many Greek people who were and are suffering because of austerity and issues left by former governments was unbroken and that it led to the political decision to conclude a third bailout programme to save Greece from bankruptcy. Albeit, serious doubts were raised about the economic feasibility. Merkel kept saying that if the Euro fails, the European Union fails.

However, after the resolution of the third programme, she instantly added that the issue of so many refugees and migrants heading for Europe since several months will be the bigger task after all.

And this is where we are now and it's only October. Hundreds of thousands refugees long for what the European Union stands for – freedom, security and justice. With no doubt that we will be facing various challenges of integration of an estimated million of refugees trying to find a new home in Europe this year, Europe can demonstrate again its stability in values and prove its raison d'être that it successfully reinforced over the last 25 years.

How will the European Union look like in 25 years? The way we spend 2015 seems to be the clue to answer this question.

Annerose Tashiro

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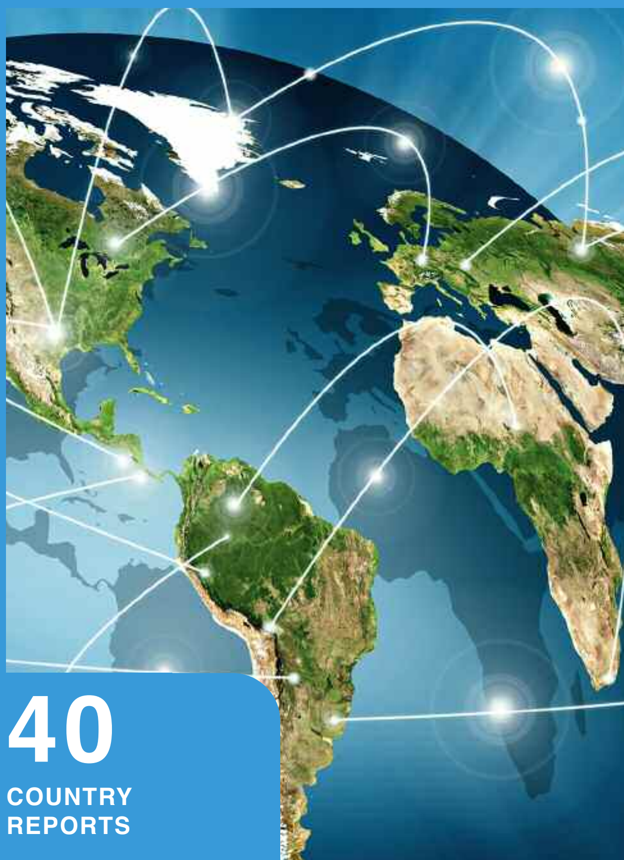

Welcome from the President

ROBERT VAN GALEN
INSOL Europe President

Robert van Galen evaluates the year past and looks into the future

> "INSOL EUROPE OWES ITS SUCCESS TO A LARGE NUMBER OF VOLUNTEERS AND A RELATIVELY SMALL AND DEDICATED STAFF"

The time has come for a brief evaluation of this year and a look into the future.

INSOL Europe owes its success to a large number of volunteers and a relatively small and dedicated staff. It is not possible to thank them all individually here without losing the reader along the way, but a few people I would like to mention nevertheless.

When you receive this copy of *eurofenix* the Berlin Congress will be well underway or may be just about to start. It promises to be a very successful Congress. After last year's record in Istanbul, we will have a new record of attending delegates. At the time of this editorial the counter is at 414. Moreover the programme is very diverse and promises to be very exciting. We owe a lot of gratitude to our technical committee chaired by Renate Müller and Piya Mukherjee, assisted by Evert Verwey. Evert and Francisco Patricio will, by the way, be the co-chairs of next year's conference in Lisbon (Cascais).

This year also saw a very interesting and well attended EECC conference in Vilnius. After that conference one of our EECC co-chairs, Carlos Mack, stepped down after many years of inspiring leadership to this wing. What started as a small venture has now grown into a very substantial activity. Radu Lotrean, the other co-chair of the EECC will continue the work, joined by Evert Verwey, who will succeed Carlos. We will not have to do without Carlos's talents, because he and Neil Cooper will be in charge of an educational EECC project.

Another person who steps down is David Buchler. David has acted as treasurer for 12 years and has contributed substantially to our organisation becoming financially very healthy. Our reserves are now robust and we are able to withstand the seven biblical meagre years if they would occur. David Buchler will be succeeded by Jim Luby. After the latest amendment, our constitution now provides that the treasurer has to be appointed for a definite period of time. Jim has been appointed for two years. We are very grateful to David for his efforts and achievements.

The Academic Forum, chaired by Christoph Paulus has been very active. There was a joint conference with R3 in London, a separate conference in Nottingham and we have the usual conference preceding the main conference, in Berlin. We owe enormous gratitude to Paul Omar who has organised these activities for so many years and who will also be stepping down in his role as Secretary to the Academic Forum after the Berlin conference. His successor will be Anthon Verweij.

Our new Insolvency Office Holders Forum, chaired by Daniel Fritz, Stephen Harris and Marc André has started its activities this year. It has advised on the Insolvency Office Holders Guidelines and has prepared for an extensive slot during our Berlin congress.

I should also mention that our efforts to get more members from under-represented European countries has seen new successes. Steffen Koch has made considerable efforts and Poland will now for the first time have a representative on the Council. Thanks to Alberto Nuñez Lagos' efforts, Spain will again have a reserved seat as well.

I would also like to express a special word of thanks to Caroline Taylor, Paul Newson, Malcolm Cork, Wendy Cooper, Hannah Denney, Myriam Mailly, Emmanuelle Inacio and Florica Sincu. To a large extent their contributions take place behind the scenes, but the organisation of conferences, our newsletters, technical papers and Eurofenix, to mention only part of what they achieve, could not be realised, and certainly not at the present level, without their dedication and enthusiasm. And finally I would like to thank the other members of the Executive Committee and in particular Alberto Nuñez Lagos, our next president, for their continued support. I very much enjoyed working closely with Alberto and Caroline.

Where are we now?

Our financials are in good shape, our conferences are popular, we have members in virtually all European countries and a large part of the membership is involved in the activities. In last year's editorial Catherine Ottaway mentioned our policy of rotation. Officers should not stay too long in a function and we look for young people: "*La valeur n'attend point le nombre des années*". I think that policy has now been implemented thoroughly.

Share your views!

INSOL Europe has been developing its footprint with the European institutions over the last few years. Michael Thierhoff, our European projects coordinator, has been very active in this field. We have submitted several reports, some of them at our own initiative, some at the request of the European Commission and the European Parliament and have spoken at several occasions organised by the European institutions. INSOL Europe is the only truly European insolvency organisation and is well placed to provide meaningful input for the European projects and contribute to the development of European law and practice. As the interest of the European institutions is increasing and new projects appear overnight like mushrooms or tulips, it is important to remain focussed and to entertain our relations with Brussels. In times when the European Union is subject to various causes of stress, it is very important to cement its cohesion by law.

Another initiative is our participation in the UNCITRAL Model V project. Rita Gismondi, Catherine Ottaway, Alberto Nuñez-Lagos and Ilona Aszódi have enthusiastically participated in this venture. One UNCITRAL project concerns the recognition of insolvency related judgments, another one assistance to insolvency proceedings of group companies. I think that I can say that our participation is well received by the UNCITRAL Member States and UNCITRAL itself and we have been invited to contribute to one of the proposals.

So one focus is our contribution to cross-border developments in relation to institutions, another one is education and assistance to the insolvency community in Eastern European countries. As our EECC conferences gain in attendance, we are now also looking at specific projects, possibly summer camps for practitioners, possibly something else. This will be developed in more detail over the coming year. The committee responsible for this project is chaired by Neil Cooper and Carlos Mack.

Our new president, Alberto Nuñez Lagos will therefore have a full and exciting agenda. I think we are lucky to have him.

I am very grateful for having had the opportunity to be involved in this organisation as your president for the last year. *It has been a tremendous joy.* ■

"AS NEW PROJECTS APPEAR OVERNIGHT LIKE MUSHROOMS OR TULIPS, IT IS IMPORTANT TO REMAIN FOCUSSED AND TO ENTERTAIN OUR RELATIONS WITH BRUSSELS"

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

Linked in

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!

Congress App updated for Berlin 2015

We are pleased to announce that we have improved and updated our bespoke mobile App for the Annual Congress in Berlin.

This is for access by all attendees at the Congress, and will have details of the programme, speakers and delegates allowing them to interact with each other via the App's built-in messaging service. Congress materials will be available for download as well as floorplans and local information.

The App will be available to download from the major App stores just prior to the Congress.

We are grateful to CITR (www.citr.ro) and Schultze & Braun (www.schubra.de) for sponsoring our Berlin Congress App.

ANNUAL CONGRESS
BERLIN
1-4 OCTOBER 2015

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RICHARD TURTON AWARD, 2015

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

In recognition of those aspects in which Richard had a special interest, the award for 2015 was open to applicants who fulfilled all of the following:

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

Applications for the award were invited to write a statement detailing why they should be chosen in less than 200 words. A panel representing the four associations adjudicated the applications. The panel members are as follows: Stephen Adamson – INSOL Europe, Neil Cooper – INSOL International, Patricia Godfrey – R3 and Maurice Moses – IPA. The committee received outstanding applications for this year's award and it was a very close run decision. We are delighted that the award has attracted such enthusiasm and response from the younger members of the profession and know that Richard would also be extremely pleased that there had been such interest.

The Committee is delighted to announce that the winner is Waiswa Abudu Sallam from Uganda. Waiswa works for the Uganda Revenue Authority in the Debt Collection Department. He is currently studying for a Master of Laws in Corporate and Insolvency Law at Nottingham Trent University, UK (by distance learning). This is the first time we have had a winner from Uganda: Previous winners have come from Belaruse, India, Latvia, Lithuania, Poland, PRC, Romania, Russia and Serbia.

As part of the award, Waiswa is invited to attend the INSOL Europe Conference which will be held on the 1-4 October in Berlin, Germany. He will be writing a paper that will be published in summary in one or more of the Member Associations' journals and in full on their websites. We would like to congratulate Waiswa for his excellent application and also thank all the candidates who applied for the award this year. There were many excellent submissions and the judges task was very difficult this year.

Sponsored by:

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Insolvency Practitioners Association

R3 Association of Business Recovery Professionals
Rescue Recovery Renewal

TRI-Leiden projects update

INSOL Europe is involved in research projects with Turnaround, Rescue & Insolvency Leiden (TRI Leiden), a team consisting of legal and business scholars and master students from the Leiden Law School (Leiden University). It is managed by Professor Jan Adriaanse and Dr. Jean-Pierre van der Rest. Professor Bob Wessels is a consultant to TRI Leiden.

TRI Leiden
TURNAROUND, RESCUE & INSOLVENCY

Insolvency Protocols Project

During international training sessions for judges on the JudgeCo project at the end of 2014, the TRI Leiden research team received several questions on the meaning of a protocol within the framework of international insolvencies. The text of the protocol appeared to be somewhat obscure.

The TRI Leiden research team promised to conduct a study on the subject with disclosure of materials and other relevant studies on the TRI-Leiden website. The 'Leiden-protocol project' was thus born.

In various sources, for example INSOL Europe's "*European Communication & Cooperation Guidelines for Cross-Border Insolvency*" (2007), the American Law Institute and the International Insolvency Institute publication: "*Transnational Insolvency: Global Principles for Cooperation in International Insolvency Cases*" (2012), the 2015 text of the EIR Recast, and both the Leiden Law School IOH Project and the JudgeCo Project, we find referrals to '*agreements and protocols*'. In the meantime, a survey of digital literature concerning protocols and a collection of protocols we found on the internet are made available on: www.TRI-Leiden.eu.

We request all readers of our website to comment on our findings, in order to complete and update the databases. If you have any new protocols or other information which you want to share with other international insolvency adepts, please send your information to info@tri-leiden.eu.

Turnaround Wing Guidelines

The project to design Guidelines for out of court restructuring and turnaround is in its final phase.

The six Guidelines, available on www.TRI-Leiden.eu are currently subject to a questionnaire circulated amongst the members of INSOL Europe. The Turnaround Wing of INSOL Europe and The Leiden Law School are looking forward to being in a position to present and discuss the final Guidelines at the Annual Congress in Berlin, 1-4 October 2015.

Leopoldo Pons

Leopoldo Pons, President of the *Registro de Economistas Forenses de España (REFor)*, the main Spanish insolvency practitioners organisation, and member of INSOL Europe, passed away last August.

Leopoldo was a very reputed economist in Spain, with relevant clients not only throughout the country but also abroad. He joined in 1981 the State Tax Inspectorate under the Spanish Ministry of Finance. He has held responsibility positions in the Ministry of Finance (Deputy Director General of the Institute of Fiscal Studies in 1986 and director of its Library).

In addition to being author of many publications on Economic Analysis and Business Economics, with special reference to the Spanish Tax Systems and other tax systems and macroeconomics, Leopoldo has held throughout his career the positions of Chairman of the Registry of Economists and Tax Advisors (1996); International representative in the European Fiscal Confederation General Council of Colleges of Economists of Spain since 1998; Treasurer and member of the CIRIEC Scientific Committee since 1990.

Within his academic life, he has been a visiting professor and researcher at forums such as the London School of Economics, the Brookings Institution in Washington DC, the US Treasury Department, and Spanish universities such as the Universidad Politécnica de Valencia, Universidad de Alcala de Henares and the Universidad de Valencia. He has also been Director of the Master in Taxation of the *Colegio de Economistas de Valencia* since its establishment in 1981 until 2008.

Technical Update

Emmanuelle Inacio reports on the new technical content and other updates available on the INSOL Europe website. If you would like to contribute please contact Emma on: technical@insol-europe.org

EMMANUELLE INACIO
INSOL Europe Co-Technical Officer

> **"THE FIRST MEETING OF THE IOH FORUM WILL TAKE PLACE IMMEDIATELY BEFORE THE START OF THE INSOL EUROPE ANNUAL CONGRESS IN BERLIN"**

Share your views!

National Insolvency Statistics

Since our last column, we have published updated national insolvency statistics for England and Wales (Second Quarter 2015 published on July 2015), Scotland (First and Second Quarter 2015), Northern Ireland (First and Second Quarter 2015), Germany (First and Second Quarter 2015) and France (First and Second Quarter 2015).

We are grateful to Michael Thierhoff from Thierhoff Müller & Partner Rechtsanwälte Wirtschaftsprüfer Steuerberater (Germany) for his precious help.

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 updating current national statistics, please do not hesitate to contact us.

Glossaries

If you are interested in contributing for the missing jurisdictions of the European Union (**Malta and Slovenia**), please contact us and we will send two templates accordingly.

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 four countries should be available soon (Serbia, Sweden, Romania (update) and Cyprus).

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

INSOL Europe Academic Forum Newsletters

The INSOL Europe Academic Forum Third Quarter 2015 Newsletter (July-September) is now available at: www.insol-europe.org/academic-forum-news

INSOL Europe Technical Series Publications

INSOL Europe offers two new publications for 2015 in the Technical Series, arising from events organised by the INSOL Europe Academic Forum:

International Insolvency Law: Future Perspectives

The Edwin Coe Lectures delivered at the INSOL Europe Academic Forum Annual Conferences 2008-2014 – In commemoration of the 10th Anniversary of the Academic Forum; and

Teaching and Research in International Insolvency Law: Challenges and Opportunities

Papers from the INSOL Europe Academic Forum and NACIIL Joint Insolvency Conference Leiden, The Netherlands, 14-15 April 2014).

To order your copies please contact wendycooper@insol-europe.org

INSOL Europe Academic Forum and Nottingham Law School Joint International Insolvency Conference, 25 & 26 June 2015, Nottingham

The final technical programme as well as presentation slides and photographs of the event are now available.

EIR Case Register

As at 28th August 2015, 467 abstracts are uploaded on the new Lexis Nexis INSOL Europe European Insolvency Regulation Case Register platform.

During the summer period, the CJEU case "Nortel" delivered on 11 June 2015 (C-649/13) is being reviewed. It will be published soon.

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.

A CLOSER LOOK AT...

The profession of Insolvency Office Holders and Out-Of-Court Restructuring and Turnaround Professionals throughout Europe

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 ("IOH") 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.

Principles

It is to be expected that the principles and best practices might increase public confidence in IOHs, their work quality, and in the way they are monitored and supervised. The draft INSOL Europe Statement of Principles and Guidelines for insolvency office holders in Europe containing 7 Principles and 33 Guidelines is available at: www.insol-europe.org/technical-content/insol-europe-studies

New forum

The Council of INSOL Europe has seen a growing interest from the association's members to reflect and react on current issues and challenges facing the profession of IOHs throughout Europe. Therefore, Catherine Ottaway, Past-President of INSOL Europe announced, during the 2014 Annual Congress in Istanbul, the decision of INSOL Europe to create a new forum focused on IOHs; the "Insolvency Office Holders Forum" ("IOH Forum").

Three practising IOHs have agreed to co-chair the forum in the first instance and support and steer the forum though its initial stages: Stephen Harris (Ernst & Young, UK), Marc André (France) and Daniel F. Fritz (hww hermann wienberg wilhelm, Germany).

The first meeting of the IOH Forum will take place immediately before the start of the INSOL Europe Annual Congress in Berlin on Thursday 1 October 2015.

There will also be a panel session as part of the programme on Friday 2 October 2015 when, together with the audience, they will debate the current state of affairs of European insolvency practitioners asking whether the profession is under pressure and fits for innovation. The IOH Forum will also conduct a poll asking the audience how the guidelines, protocols, law reforms and harmonisation suit the European insolvency practitioners.

Turnaround Wing

The Turnaround Wing Project ("TW Project") was assigned to The Leiden Law School by INSOL Europe during the 2014 Annual Congress in Istanbul. The Turnaround Wing of INSOL Europe chaired by Dr. Steffen Koch (hww hermann wienberg wilhelm, Germany) and The Leiden Law School are working on the design of guidelines for out-of-court turnaround professionals.

By setting professional and ethical standards including disciplinary procedures for the profession in Europe, the guidelines aim: (a) to offer leadership to turnaround practice in Europe, (b) to promote out of court restructuring rather than in court reorganisation or liquidation, (c) to provide the basis for a long-term sustainable future for the business by ascertaining the quality of turnaround professionals, and (d) to enhance the trust in the profession in the market place.

The final draft of the Principles and Guidelines for Out-of-Court Turnaround Professionals ("TW Guidelines") will be presented during the Annual Congress in Berlin on Friday 2 October 2015. The meeting of the Turnaround Wing will also take place during the Congress on Friday.

We invite all members and other interested parties to join the debate and help the IOH Forum and the Turnaround Wing to understand how they could assist the professionals in the most appropriate way. Members having suggestions concerning matters worthy of debate or pursuit within the IOH Forum and the Turnaround Wing should kindly send a note via Caroline Taylor, carolinetaylor@insol-europe.org.

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EIR Case Register
www.insolvencycases.eu

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Joint International Insolvency Conference

Dr Paul Omar reports on the proceedings of the conference held in Nottingham (UK) on 25-26 June, while a younger academic's perspective is provided by Jennifer L. L. Gant.

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

"PROFESSOR WARNER CHALLENGED THE DELEGATES TO BE CONTROVERSIAL, A CHALLENGE THAT WAS CONSISTENTLY MET THROUGHOUT THE CONFERENCE PROCEEDINGS"

Nottingham has many pasts: a travelling past, with itinerant Vikings and Mercian kings; an industrial past, featuring textiles, bicycles and chemicals; but particularly, a romanticised past, with the Robin Hood legend and the less-well known coup d'état that brought Edward III into his inheritance.

The modern day city is more a hive of merchants, reputed to contain more shops and more pubs, clubs and restaurants *per capita* than many other metropolitan centres in the United Kingdom.

It was here that the Joint International Insolvency Conference was set, hosted in association with the Nottingham Law School Centre for Business and Insolvency Law and the Faculty of Law at Radboud University Nijmegan. Conference guests had an opportunity to gain insight into something of the eclectic spirit of Nottingham.

Re-Imagining rescue

"Re-Imagining Rescue" was the overall theme of the conference, with a particular focus on the following topics: "A Critical Analysis of the Current Approaches to Corporate Rescue"; "Corporate Rescue: Experiences and Insights from the Bench"; "Corporate Rescue and the Practitioner"; "Pre-Insolvency Arrangements: A Comparative Perspective"; and "Re-Imagining Cross-Border Rescue in the EU".

Following an introduction from Robert van Galen, President of INSOL Europe, the recently appointed Dean of Nottingham Law School, Janine Griffiths-Baker, offered thanks to a number of groups for their presence, involvement, and organisation. Thanks were given to a delegation from Zimbabwe who, hosted by the World Bank, had been visiting British insolvency organisations to learn what they could of the UK system to aid them in their overall reform agenda.

Thanks were also given to representatives of the World Bank, a contingent of LLM students from the Netherlands who had only recently completed the inaugural course of the dual LLM with Radboud University, Nijmegan, a contingent of South African professionals and academics, and of course the many European representatives who took the time to attend.

Reform & rescue

The keynote speech was made by Professor G. Ray Warner of St. Johns University, School of Law in New York at the beginning of the first day that criticised current approaches to the reform of insolvency and corporate rescue as being repetitious and lacking in innovation. Professor Warner challenged the delegates to be controversial, a challenge that was consistently met throughout the conference proceedings.

The substance of the first session contained criticisms of current approaches to the rescue imperative. Chaired by Neil Cooper (NLS), speakers included Dr Irit Mevorach (Nottingham), Jenny Clift (UNCITRAL) and Dr Sarah Paterson (LSE). Criticisms included a lack of transparency in management rescues, economic problems associated with dumping debt, the lean toward liquidation in emerging markets, the undervalue of the rescue culture, the stigma that is often still associated with insolvency, rescue passivity, and redistributive fairness having a negative impact on capital investment, among many others.

"THIS EVENT HAD A TRULY INTERNATIONAL AND COMPARATIVE FEEL, PROVIDING AN EXCELLENT FORUM FOR DEBATE, DISCUSSION AND, PERHAPS, INNOVATION"

Corporate rescue

The second session that afternoon moved the debate to a judicial perspective. Eminent judges from a range of international jurisdictions shared their experiences and insights on corporate rescue. Chaired by Hamish Anderson (Norton Rose Fulbright, London; NLS), panellists included Mrs Justice Desiree Staal (The Netherlands), Mr Justice Heinz Vallender (Germany), Mrs Justice Jeanette Melchior (Denmark) and Mr Justice David Richards (United Kingdom).

The day was capped by a reception and dinner at the Riverbank Restaurant on the Trent, where attendees had the opportunity to enjoy traditional Nottingham hospitality in modern surrounds. The after-dinner entertainment was provided by Neil Cooper, who stepped in at the last minute, giving an amusing speech that carried forward Professor Warner's challenge to not be "boring".

Practitioner's perspective

The first session of the second day focussed on corporate rescue from the perspective of the practitioner, particularly on what practitioners require for a successful rescue. Chaired by Professor Frits-Joost Beekhoven van den Boezem (ING Bank; RUN), the panel presented debates on controversial topics that were then voted on by the audience. Excellent arguments were made by Nicolaes Tollenaar (RESOR, Netherlands), Adrian Thery (Garrigues, Spain), Mark Fennessy (Proskauer, UK) and Michael Nienerza (Goerg, Germany).

Comparative perspective

The second session provided a comparative perspective of pre-insolvency arrangements in selected jurisdictions. Chaired by Professor Paul Omar (NLS), insights came from Professor Juana Pulgar Ezquerra (Complutense Madrid), Professor Melissa Vanmeenen (Antwerp), Dr Alexandra Kastrinou (NLS) and Lézelle Jacobs (Free State University).

The last session provided an international focus that featured a critical analysis of the recently amended European Insolvency Regulation, due to come into force in 2017. Chaired by Richard Sheldon QC (3/4 South Square; NLS), views came from Professors Gerard McCormack (Leeds), Francisco Garcimartin (Autónoma Madrid) and Michael Veder (RUN). Concluding remarks were made by Professor David Burdette, co-organiser of the conference.

Challenging preconceptions

The conference agenda and the many papers, presentations, insights and views over the two days stimulated discussion about the relevance and meaning of rescue in the modern day and challenged our preconceptions. This is particularly appropriate given the continued topicality of the subject matter and its relevance to the future direction of the European Union. The range of jurisdictions represented by speakers gave this event a truly international and comparative feel, providing an excellent forum for debate, discussion and, perhaps, innovation.

More photos from Nottingham can be viewed on our website: www.insol-europe.org/gallery/nottingham-academic-2015

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

A Younger Academic's view

Re-imagining rescue: the theme tells the story.

The Joint International Insolvency Conference provided a wonderful forum for the experienced and the novice insolvency devotee to explore ideas, new and old, and to gain insight from the varied perspectives of practitioners, academics and judges from a variety of jurisdictions inside and outside of the EU. The presentations and round table discussions showcased a number of important themes and trends in insolvency law in the EU and beyond, and benefitted from the participation of some of the greatest minds in the field.

Controversial approach

The keynote address given by Professor Warner provided a framework for exploring controversy in the area of corporate rescue and insolvency law. He challenged the EU to look beyond the US system, the EU's current approaches in the European Insolvency Regulation, and indeed the known purposes and functions of insolvency law, in order to create something that was different, exciting and new, and according to Professor Warner, not "boring". He set the scene by suggesting the nearly unthinkable – that in order for the EU to successfully integrate its common single market, a single insolvency system would also be necessary!

> "THIS FORUM PROVIDED AN EXCELLENT OPPORTUNITY FOR THE YOUNGER MEMBERS TO IDENTIFY AREAS WHERE THEY COULD POTENTIALLY IMPLEMENT CHANGE"

Outside of the box

The focus of this conference on looking beyond the traditional and the comfortable known approaches in insolvency law was a perfect theme to encourage younger members to think "outside of the box" in their own areas of expertise. Why should reforms tend to look only laterally at other jurisdictions whose systems are deemed "better" or more effective? Is there not an option open to innovate?

Professor Warner's exhortation was adopted by each panel and presenter as more controversial, challenging, and uninhibited arguments were offered, which were often outside the scope of what one might normally expect.

Innovative ideas

The panel hosted by Neil Cooper took Professor Warner's challenge to heart and presented a number of significant criticisms to the current approaches to corporate rescue. This forum provided an excellent opportunity for the younger members to identify areas where they could potentially implement change.

These discussions are excellent sources of ideas for both academic projects and innovative practical ideas. Sarah Patterson's criticism of insolvency's social aims of distributive fairness was particularly controversial, especially in view of this writer's primary academic focus!

However, her theoretical approach also provided alternative arguments that will help to fine-tune those that arise on the other side of the argument. For younger members, it is precisely this type of discussions that provide some of the best sources of tangential thinking – a very useful exercise for those working through early career research projects!

Discussion & debate

The second day of the conference carried Professor Warner's challenge even further in a panel that presented statements meant to divide the audience, such as: "*In case of financial distress, a company should have complete freedom to cherry-pick and dismiss employees*." This and other statements encouraged discussion and debate, and will no doubt lead to many new ideas on how to approach the conflicting goals of the various other areas of law that intersect with insolvency, such as employment law.

Developing networks

In addition to the panels provided during the conference programme, the networking opportunities were myriad. Ample coffee breaks, after conference social gatherings, and the conference dinner provided excellent opportunities to meet like-minded (or not!) members and to further discuss those things that were particularly striking during the day.

The inclusion of LLM students, PhD students and young academics in the crowd of such fabulous expertise and intellect will no doubt help to carry forward the knowledge and enthusiasm in the area of insolvency and corporate rescue for years to come which, after all, is its legacy. ■

Group insolvencies under the EIR recast

Jessica Schmidt explains the new rules and definitions in the revised EIR Chapter V

PROF. DR. JESSICA SCHMIDT, LL.M
Bayreuth University, Germany

With the new Chapter V on group insolvencies, the EIR recast has finally filled an often moaned about gap in the EIR.

But the new rules have been deliberately confined to the procedural level – they do not provide for any substantive consolidation. This is a sensible approach, because substantive consolidation would not only frustrate the legitimate expectations of creditors, but would be tantamount to completely abandoning the fundamental cornerstone principles of separate legal entity and limited liability at the very moment when they are most important: insolvency.[1]

Scope: the definition of "group of companies"

Of fundamental importance is, firstly, the definition of the term "group of companies". Art. 2(13) EIR recast defines it as meaning "*a parent undertaking and all its subsidiary undertakings*". The term "*parent undertaking*" is then defined in art. 2(14) EIR recast as an undertaking which controls, either directly or indirectly, one or more subsidiary undertakings; an undertaking which prepares consolidated financial statements in accordance with the EU Accounting Directive[2] shall be deemed to be a parent undertaking. Hence, in contrast to the Commission proposal[3], where the definition in art. 2(1)(j) had been limited to subordination groups, the adopted definition also encompasses the so-called *Gleichordnungskonzerne* (i.e. where undertakings are managed on a unified basis within the meaning of art. 22(7) EU Accounting Directive).[4]

Despite its complexity[5], the approach of building on the well-established group concept of accounting law undoubtedly has the great advantage of systematic consistency and coherency in EU law.[6]

The two pillars of procedural coordination

The concept of procedural coordination in the EIR recast rests on two pillars: (1) group-specific duties of cooperation and communication (art. 56 – 60 EIR recast), and (2) the option of special group coordination proceedings (art. 61 – 77 EIR recast).

Group-specific duties of cooperation and communication

The first pillar consists of specific duties of cooperation and communication between (i) the insolvency practitioners appointed in proceedings concerning group members (art. 56 EIR recast), (ii) the courts before which insolvency proceedings concerning group members have been opened or are pending (art. 57 EIR recast), and (iii) all the insolvency practitioners appointed and all the courts involved (art. 58 EIR recast). These rules have been deliberately shaped in similar form to art. 41-44 EIR recast on cooperation and communication between those involved in main and secondary proceedings relating to the same debtor.[7] In addition, art. 60(1) EIR recast grants the insolvency practitioners of the group members mutual rights of participations in the proceedings opened with respect to other members of the group; these include: (a) the right to be heard, (b) the right to request a stay in order to ensure the proper implementation of a restructuring plan, and (c) the right to apply for the opening of group coordination proceedings.

Group coordination proceedings

The second pillar is the option of special group coordination proceedings, which are regulated in section 2 of Chapter V EIR recast (art. 61-77).

The concept

The concept of group coordination proceedings was only introduced into the EIR recast in the course of the legislative procedure in the European Parliament and the Council. The original Commission proposal[8] had favoured a different approach: it had wanted to achieve coordination only via extensive mutual participation rights of the insolvency practitioners of the individual group companies. But this approach immediately met with severe criticism: on the one hand, it was widely perceived as too cautious and not far-reaching enough[9]; on the other hand, there were concerns that it would have led to severe difficulties and frictions and ultimately even a mutual logjam of the proceedings[10]. Given these disadvantages and risks associated with the Commission's approach, Germany lobbied successfully both in the European Parliament and in the Council for an alternative concept, which the

> "THE NEW RULES HAVE BEEN DELIBERATELY CONFINED TO THE PROCEDURAL LEVEL – THEY DO NOT PROVIDE FOR ANY SUBSTANTIVE CONSOLIDATION"

> THE EUROPEAN LEGISLATOR HAS IMPLEMENTED AN "OPT-OUT" MODEL WHICH IS INTENDED TO ENSURE THE VOLUNTARY NATURE OF THE GROUP COORDINATION PROCEEDINGS

German government had also favoured for the insolvency reform on the German national level[11]: the concept of group coordination proceedings.[12]

Basic elements of the concept of group coordination proceedings

The concept of group coordination proceedings consists of three key elements: (a) a coordination court, (b) a coordinator, and (c) a group coordination plan.[13]

Group coordination proceedings may be requested before any court having jurisdiction over the insolvency proceedings of a member of the group by an insolvency practitioner appointed in insolvency proceedings opened in relation to a member of the group (art. 61(1) EIR recast). If multiple requests are filed at different courts, art. 62 recast establishes the priority rule. This has the clear advantage of providing a simple and precise criterion.[14] However, given that the priority principle also has some well-known drawbacks[16], the EIR tries to counterbalance them by allowing the choice of another (more appropriate) court by agreement of a two-thirds majority of the insolvency practitioners involved (art. 66 EIR recast).[16]

A court seized of a request to open group coordination proceedings first executes a kind of preliminary examination whether the three conditions for the opening of group coordination proceedings laid down in art. 63(1)(a)-(c) EIR recast are fulfilled.[17] These conditions are that: (a) the opening of such proceedings is appropriate to facilitate the effective administration of the insolvency proceedings relating to the different group members; (b) no creditor of any group member expected to participate in the proceedings is likely to be financially disadvantaged by the inclusion of that member in such proceedings; and (c) the proposed coordinator fulfils the requirements laid down in art. 71 EIR recast. If the court is satisfied that these conditions are fulfilled, it shall give notice as soon as possible to the insolvency practitioners appointed in relation to the members of the group and offer them the opportunity to be heard (art. 63(1), (4) EIR recast).

Given that there had apparently been concerns with respect to a "*coercive nature*" of the group coordination proceedings, the European legislator has implemented an "opt-out"-model which is intended to ensure the voluntary nature of the group coordination proceedings.[18] Pursuant to art. 64(1)(a), (2) EIR recast, an insolvency practitioner appointed in respect of any group member may object to its inclusion in the group coordination proceedings within 30 days of receipt of the notice. The consequence of such a "veto" is that the respective insolvency proceedings shall not be included in the group coordination proceedings (art. 65(1) EIR recast). However, this "opt-out" does not necessarily have to be the "final word": art. 69 EIR recast establishes the possibility of a subsequent "opt-in" under certain conditions.[19]

After the 30-day-period for objections has elapsed, the court may open group coordination proceedings when it is satisfied that the conditions of art. 63(1) EIR recast (see above) are met; in the opening decision, the court appoints a coordinator, and decides on the outline of the coordination, the estimation of costs and the share to be paid by the group members (art. 68(1) EIR recast).

The **Coordinator** shall be a person eligible under the law of a Member State to act as an insolvency practitioner; the coordinator shall not be one of the insolvency practitioners appointed to act in respect of any of the group members, and shall have no conflict of interest in respect of the group members, their creditors and the insolvency practitioners appointed in respect of any of the group members (art. 71 EIR recast). Under the conditions laid down in art. 75 EIR recast, the appointment of the coordinator can be revoked.

The two essential tasks of the coordinator are: (a) identifying and outlining recommendations for the coordinated conduct of the insolvency proceedings, and (b) proposing a group coordination plan (art. 72(1) EIR recast). Art. 72(2) contains an indicative list of five additional tasks and powers of the coordinator.

The **group coordination plan** shall identify, describe and recommend a comprehensive set of measures appropriate to an integrated approach to the resolution of the group members' insolvencies (art. 72(1)(b) 1 EIR recast). Art. 72(1)(b) 2 EIR recast sets out an indicative list of potential contents.

The function of the group coordination plan is that of a mere "reference plan": its implementation is not effected centrally, but within the framework of the individual insolvency proceedings.[20] As art. 70(2) subpara. 1 EIR recast explicitly stipulates, the group coordination plan is not binding upon the insolvency proceedings, which are not obligated to follow it either in whole or in part. In fact, the EIR relies on a "comply-or-explain"-mechanism: If an insolvency practitioner does not follow the group coordination plan, he/she shall give reasons for not doing so to the persons or bodies that he/she is to report to under its national law, and to the coordinator (art. 70(2) subpara. 2 EIR recast).[21] Moreover, if an insolvency practitioner does not follow a sensible group coordination plan because of a valid reason, this may constitute a violation of his/her duties and lead to (civil or even criminal) liability for damages or even the revocation of his/her appointment.[22]

Possibilities of coordination apart from group coordination proceedings

Since it was clear to the European legislator that the concept of group coordination proceedings has yet to pass the test of practice, it has been deliberately designed as a mere option.[23] Important other options are: (i) restructuring plans outside group coordination proceedings (cf. art. 56(2)(c), 60(1)(b) EIR recast), and (ii) the concentration of all proceedings in one single forum if the COMI of all group members is in the same Member State (but it should be noted that COMI shifts and "creative modifications" geared at achieving a certain COMI have been made much harder by the reform of art. 3(1) and recitals 27 ff. EIR recast).[24]

Conclusion

The new group coordination proceedings certainly provide an interesting option. However, it remains to be been seen whether the system will work in practice (especially the reliance on a "comply-or-explain"-mechanism and the "opt-out"-model raise some concerns).[25] In a way, the EIR recast can be perceived as a large-scale "field trial" in this respect; yet, given the almost endless variety of group structures, it may ultimately depend on the individual group which of the ("new" or "old") options is "the best".[26]

Footnotes:

1 *Cf. J. Schmidt* KTS 2015, 19, 35 with further references.
2 Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC, OJ 2013, L 182/19.
3 *Cf.* COM(2012) 744.
4 *Cf. J. Schmidt* KTS 2015, 19, 36 with further references.
5 Critically *Mock* GPR 2013, 156, 164; see also K. Schmidt KTS 2010, 1, 12 ff.
6 *Cf. J. Schmidt* KTS 2015, 19, 36.
7 *Cf.* recital 52 sentence 2 EIR recast; J. Schmidt KTS 2015, 19, 36.
8 COM(2012) 744, art. 42(d).
9 *Cf.* JURI report, A7-0481/2013, p. 48; *Eidenmüller* (2013) 20 MJ 133, 148; *Kindler* KTS 2014, 15, 43; *Mock* GPR 2013, 156, 165.
10 *Cf.* doc. 15657/13, p. 5; *Kindler* KTS 2014, 25, 43; *Reumers* ECFR 2013, 554, 586.
11 *Cf.* German reform draft, BR-Drs. 663/13. See in detail on this *J. Schmidt* KTS 2015, 19, 46 ff.
12 *Cf. J. Schmidt* KTS 2015, 19, 38.
13 *Cf. J. Schmidt* KTS 2015, 19, 38.
14 *Cf. J. Schmidt* KTS 2015, 19, 39 with further references.
15 See on these *Cf.* Jessica Schmidt 'Groups of companies in German autonomous insolvency law: The lex lata, its application and proposals for reform' in Bob Wessels and Paul Omar (eds), *Insolvency and groups of companies* (INSOL Europe 2012), 37, 46.
16 *Cf. J. Schmidt* KTS 2015, 19, 39.
17 *Cf. J. Schmidt* KTS 2015, 19, 39.
18 *Cf.* recital 53 subpara. 1 sentence 1; *J. Schmidt* KTS 2015, 19, 39 f. with further references.
19 *Cf. J. Schmidt* KTS 2015, 19, 40.
20 *Cf. J. Schmidt* KTS 2015, 19, 41.
21 *Cf. J. Schmidt* KTS 2015, 19, 41.
22 *Cf. J. Schmidt* KTS 2015, 19, 41.
23 *Cf. J. Schmidt* KTS 2015, 19, 42.
24 *Cf. J. Schmidt* KTS 2015, 19, 42.
25 See in more detail *J. Schmidt* KTS 2015, 19, 42.
26 *Cf. J. Schmidt* KTS 2015, 19, 43.

"THE CONCEPT OF GROUP COORDINATION PROCEEDINGS HAS YET TO PASS THE TEST OF PRACTICE: IT HAS BEEN DELIBERATELY DESIGNED AS A MERE OPTION"

Opening secondary insolvency proceedings in the EU

Bernard P.A. Santen, Fabian A. van de Ven and Gert-Jan Boon provide a concise survey of what judges should consider before opening secondary proceedings in an EU Member State after Burgo/Illochroma

BERNARD SANTEN
Senior Researcher in International Insolvency Law, Leiden Law School (The Netherlands)

Bernard Santen was assisted in the writing of this article by Fabian A. van de Ven (student preparing a Master degree in business law, Leiden Law School, intern at TRI Leiden) and Gert-Jan Boon (Researcher, Leiden Law School, TRI Leiden)

1. Introduction

This article aims to offer a concise survey of what judges should consider before opening secondary proceedings in an EU Member State.

This theme was triggered at the training sessions of the EU/III Judicial Cooperation ("JudgeCo") project[1] organised for judges on the European Insolvency Regulation ("EIR") and its then upcoming revision ("EIR Recast")[2] in the last quarter of 2014 in Istanbul[3], Riga[4] and Amsterdam.[5] In all, over sixty mostly 'first-instance' insolvency judges from over 15 EU countries were involved. When the concept of 'synthetic secondary insolvency proceedings' was introduced,[6] a number of judges were opposed to the construction as being impractical and not executable in their daily line of work. They expressed interest in having a survey of the necessary considerations to take into account before opening secondary insolvency proceedings. This article intends to make good on that promise.

Section 2 of this article presents a brief introduction of the concept of the synthetic secondary proceedings. Section 3 discusses two related judgments of the Court of Justice of the European Union ("CJEU"). Section 4 concludes with a list of observations to be made by a Court when having to decide on the opening of secondary proceedings.[7]

2. Secondary proceedings versus synthetic secondary proceedings

Article 3(2) EIR defines secondary proceedings as any proceedings opened subsequently after main insolvency proceedings have been opened under paragraph 1.

According to Articles 3(3) and 27 EIR these secondary proceedings must be winding-up proceedings as listed in Annex B to the EIR. Chapter III (Articles 27-35) of the EIR describes the secondary proceedings and the role of the insolvency office holder (IOH) in both the main and in the secondary proceedings.[7]

The opening of secondary proceedings may be requested by the IOH in the main proceedings or by anyone empowered to request the opening of insolvency proceedings in that Member State (Article 29 EIR), usually a creditor. Mutual assistance between the IOHs managing the main and secondary proceedings is provided for in three ways.[8] Article 31 EIR provides a duty for the IOHs in the main and secondary proceedings to *communicate* any information which may be relevant to the other proceedings. It relates in particular to the progress made in lodging and verifying claims, and all measures aimed at terminating the proceedings. Moreover, all IOHs are duty bound to cooperate with each other (Article 31(2) EIR). Finally, Article 31(3) EIR requires the IOHs in secondary proceedings to give the IOH in the main proceedings an early opportunity to submit proposals on liquidation or use of the assets in the secondary proceedings. For further information on secondary proceedings we refer to literature.[9]

One does not have to be clairvoyant to forecast that opening secondary proceedings will cause additional costs and complexity, that are, depending on the case, e.g. if the assets or the creditors are few in value or in number, better avoided. That is essentially what the concept of synthetic secondary proceedings aims to do. 'Synthetic', 'virtual' or 'as if' secondary proceedings[10] are no separate proceedings at all. Instead, the concept encompasses an engagement by the IOH in the main proceedings to creditors in a country where the debtor has an establishment. The IOH in the main proceedings provides assurances to individual creditors in countries where secondary insolvency proceedings could be opened, that their local priority rules will be respected, as far as possible, within the on-going (main) proceedings, "provided that no secondary proceedings were opened."[11]

Article 36 EIR Recast contains as many as 10 paragraphs to introduce the concept into the new Insolvency Regulation, and it codifies current English practice, as in 2006 this way of handling has been sanctioned in two British cases, i.e. MG Rover[12] and Collins & Aikman.[13] In the latter case, the Court observed that treating creditors in other Member States according to the Joint Administrators' proposals as if secondary proceedings have been opened there, would be the best alternative because doing so would avoid delay, expense, and undesirable complication and uncertainty. But there is more to this. Legally, secondary proceedings are a winding-up procedure. Many times this is inconvenient, as continuation of trading is often necessary.[14] Moreover, an important economic advantage of synthetic secondary proceedings is that of synergy.[15] As said, the concept of 'synthetic' proceedings will be available as a matter of sound EU law as of June 2017.

3. The court's role in opening secondary proceedings

In the CJEU case of Bank Handlowy/Christianapol,[16] the main proceedings opened in France were a '*procédure de sauvegarde*'. The question was raised whether such a procedure with a 'protective purpose' could be aligned with secondary proceedings, to be opened in Poland, which by law have a winding-up purpose.

The CJEU considered that "*secondary proceedings, although intended to protect local interests, may also serve other purposes, which is why they may be opened at the request of the liquidator in the main proceedings, when the efficient administration of the estate so requires.*"[17]

Interestingly, the CJEU uses "*may be opened*" and "*when the efficient administration so requires*". By some this consideration was interpreted as a first sign of letting the court decide when dealing with a request to open secondary proceedings.[18]

A second and recent case was that of Burgo/Illochroma.[19] Illochroma, a Belgian company with its COMI in France, was placed in liquidation by a French court. According to the French liquidator, Burgo (an Italian creditor of Illochroma) presented its statement of liability to Illochroma too late. Since Illochroma had an establishment in Belgium, Burgo subsequently requested the opening of secondary proceedings in Belgium. The referring court observed that Article 29 EIR does not state whether "*the opening of secondary proceedings is a right that must be recognised by the court having jurisdiction in that regard or whether that court enjoys a discretion(..)* ."

The CJEU points out that "*(..) it should be borne in mind in that context, first, that the Member States must, when establishing the conditions to be met for secondary proceedings to be opened, comply with EU law and, in particular, its general principles as well as the provisions of the EIR.*"[20]. The CJEU continues: "*Second, the court before which the action seeking the opening of secondary proceedings has been brought must have regard, in applying its national law, to the objectives underlying the possibility of opening such proceedings (..).*" In short, these objectives are 'to protect the diversity of interests'

> "BY SOME THIS WAS INTERPRETED AS A FIRST SIGN OF LETTING THE COURT DECIDE WHEN DEALING WITH A REQUEST TO OPEN SECONDARY PROCEEDINGS"

> **THE CJEU LEAVES OPEN WHAT THE IMPLICATIONS OF "EU LAW AND, IN PARTICULAR, ITS GENERAL PRINCIPLES" MIGHT BRING**

i.e. 'the protection of local interests', and more generally to serve 'different purposes' as mentioned in Recital 19. Thirdly, the court which has opened the secondary proceedings must have a regard to the objectives of the main proceedings and take into account the overall EIR scheme.[21]

Surprisingly, the CJEU leaves it open what the implications of "*EU law and, in particular, its general principles as well as the provisions of the EIR*", "*to protect the diversity of interests*" and "*objectives of the main proceedings*" might bring. One line of thought could flow from the EIR's aim as laid down in Recital 2 EIR: "*cross-border insolvency proceedings should operate efficiently and effectively*".[22] Another flows from the principle of "*sincere cooperation*" between Member States, implying their public institutions such as courts, as formulated in Article 4(3) TEU and applicable through Article 81 TFEU.[23] These would be of useful guidance in considering opening secondary proceedings.

4. Observations to be made by the Court

The previous analyses on the CJEU case law means that a court called to open secondary proceedings should observe:

(1) Whether it has jurisdiction pursuant to Article 3(2) EIR ('without the debtor's insolvency being examined in that other State', Article 27 EIR); if so, the national law is applicable (Article 28 EIR);

(2) Whether the national law provides for court discretion to open secondary proceedings or not, any such decision having (a) to comply with EU law, (b) in particular with its general principles, as well as (c) the provisions of the EIR.[24] The general principles refer, e.g., to 'sincere cooperation' (Article 4(3) TEU) and to the protection of the fundamental human rights (Article 6 TEU), such as that of non-discrimination as mentioned in the Burgo/Illochroma case, and various others, as mentioned in CJEU case law;

(3) If the national law is applied, the court must see if the objectives of the opened proceedings, such as the protection of local interests, are respected (Recital 12), because such openings might serve a different purpose as well (Recital 19), for instance, when the estate of the debtor is too complex to administer as a unit or when differences in the legal systems concerned are so great that difficulties may arise.[25]

Moreover, either as part of the deliberations sub (2) or sub (3) we feel that the court should also observe the general objective of the EIR, which is according to Recital 2 "*that cross-border insolvency proceedings should operate efficiently and effectively.*"

In 2017 the EIR Recast will enter into force. This will provide for interesting new issues on the opening of secondary proceedings. The effect of the EIR Recast will be discussed in the next issue of *eurofenix*. ■

This article is a shortened version of a larger study, available at www.TRI-Leiden.eu

Footnotes:

The authors would like to express their gratitude to the participants of discussion and training sessions organised in Istanbul, Riga and Amsterdam in 2014, for their involvement and frankness in the discussions.

1 On the JudgeCo-project, see: www.eujudgeco.eu and www.TRI-Leiden.eu.

2 Regulation (EU) 2015/848, as published on 5 June 2015 in O.J. L 141/19. The EIR Recast comes into force on 26 June 2017 (Article 92, as published).

3 At the occasion of the INSOL Europe 2014 annual conference (10 October). Admittance for INSOL Europe Judicial Wing members only. There were 14 judges present.

4 On 3 November 2014, 13 judges present, 5 EU nationalities.

5 On 1 and 2 December 2014, 39 judges present, 16 nationalities.

6 The concept will be explained in section 2 of this article.

7 The abbreviation 'IOH', coined by the EBRD in their 2007 report: *Office Holder Principles* (2007), is used throughout this article to indicate the 'liquidators' mentioned in Annex C of the EIR and the 'insolvency practitioners' of Annex B of the EIR Recast.

8 Paul J. Omar, The European Insolvency Regulation: Current Structure and Issues (2014) (course material for the EU JudgeCo training sessions, p. 170).

9 See Signe Viimsalu, The Meaning and Functioning of Secondary Insolvency Proceedings, Doctoral Thesis, University of Tartu, 2011, available via: http://dspace.utlib.ee/dspace/bitstream/handle/10062/18512/viimsalu_signe.pdf?sequence=1 Bob Wessels, 2012, *International Insolvency Law*, Deventer: Kluwer, 3rd ed.; Christoph Paulus, 2013, Europäische Insolvenz-verordnung, Frankfurt Am Main, 4th ed.

10 See e.g. Bob Wessels, Contracting out of Secondary Insolvency proceedings: the main Liquidator's Undertaking in the meaning of Article 18 in the proposal to Amend the EU Insolvency Regulation, *Brooklyn Journal of Corporate, Financial & Commercial Law*, Brooklyn Law School, Fall 2014, Vol. 9, Number 1, , p. 75 and for 'synthetic' and 'virtual' p. 81.

11 Omar, *op.cit.* p. 27. See also Antonio Leandro, Amending the European Insolvency Regulation to Strengthen Main Proceedings, in *Rivista di diritto internazionale privato e processuale*, 2014, p. 317-340; Bob Wessels, Contracting out of Secondary Insolvency proceedings: the main Liquidator's Undertaking in the meaning of Article 18 in the proposal to Amend the EU Insolvency Regulation, *Brooklyn Journal of Corporate, Financial & Commercial Law*, Brooklyn Law School, Fall 2014, Vol. 9, Number 1, pp. 63-110.

12 *In re* MG Rover Benelux SA/NV (In Administration), [2006] (High Court of Justice Chancery). EWHC (Ch) 1296. See also Bob Wessels, *International Insolvency Law*, Deventer: Kluwer, 2012, para. 10616a; Wessels, 2014, p. 77.

13 *In re* Collins & Aikman Europe SA, [2006] EWHC (Ch) 1343.

14 See Wessels, 2014, p. 70 sub iv on Nortel.

15 See the MG Rover case at 8 and 9, and also Omar *op.cit.* p. 28.

16 Bank Handlowy/Christianapol, CJEU 22 November 2012, C-116/11, ECLI:EU:C:2012:739.

17 At 58.

18 Leandro, *op. cit.* presents a detailed analysis of the case.

19 Burgo Group SpA/Illochroma SA in liquidation, CJEU 4 September 2014, C-327/13, ECLI:EU:C:2014:2158, at 18.

20 At 64.

21 Burgo Group SpA/Illochroma SA in liquidation, CJEU 4 September 2014, C-327/13, ECLI:EU:C:2014:2158, at 66.

22 In the EIR Recast this can be found in Recital 3. Note, that in the Bank Handlowy/Christianapol case, the CJEU refers to 'efficient administration'.

23 The EIR Recast refers in Recital 3 to Article 81 TFEU.

24 Burgo Group SpA/Illochroma SA in liquidation, CJEU 4 September 2014, C-327/13, ECLI:EU:C:2014:2158, at 64.

25 At 65 and reiterated at 67.

Share your views!

Forging the connection: Foreign companies & English schemes of arrangement

James Watson reports on recent developments in this ever-evolving area

JAMES WATSON
Stephenson Harwood LLP,
London (UK)

For a process enshrined in a few brief sections of the English Companies Acts, the meteoric rise in recent years of the scheme of arrangement to become one of the world's most renowned debt restructuring tools is quite a story.

A scheme allows a statutory majority of creditors (comprising a majority in number and 75% by value of those voting in each class) to vary the rights of the entire class and to "cram down" any dissentients, subject to the oversight of the court. In financial restructurings, schemes are typically used to make fundamental changes to the debt documents and/or capital structure that would otherwise contractually require the consent of a super-majority of all lenders (including extending maturity dates, writing off or capitalising debt and releasing security).

Having become a staple in UK deals, schemes have also increasingly been used to restructure the debts of foreign borrowers. In some cases, there has been no analogous process in the borrower's home jurisdiction that would allow it to implement a viable restructuring, while some borrowers have simply decided there are benefits in using a UK scheme over a local process.

Recent developments suggest the trend is set to continue, albeit subject to certain caveats.

When can a foreign company use an English scheme?

The English court will only accept jurisdiction to sanction a scheme of arrangement in respect of a foreign-incorporated company if it is satisfied that there is a "sufficient connection" with England.

> THE METEORIC RISE IN RECENT YEARS OF THE SCHEME OF ARRANGEMENT TO BECOME ONE OF THE WORLD'S MOST RENOWNED DEBT RESTRUCTURING TOOLS IS QUITE A STORY

> EVEN IF A DISTRESSED BORROWER INITIALLY HAS NO CONNECTION WHATSOEVER TO ENGLAND, RECENT CASES HAVE HIGHLIGHTED TWO WAYS IN WHICH ONE MAY BE CREATED

It is now well established that a company will have such a "sufficient connection" if:

- it has substantial assets in England;
- its centre of main interests (COMI) is in England; or
- the liabilities subject to the scheme are governed by English law (whether or not coupled with an English jurisdiction clause).

English judges have grappled with whether their jurisdiction is limited by the Judgments Regulation but, to date, satisfied themselves in each case that it is not an issue on the facts (though this is a complicated point which has not, to date, been definitively resolved).

The court will also only sanction a scheme if the debtor can show it is likely to be recognised in the jurisdiction in which the company is incorporated and any other relevant jurisdictions. Market practice is for the company to obtain, and produce to the court, independent expert evidence from foreign counsel to this effect.

What about a foreign company without an existing connection to England?

Even if a distressed borrower initially has no connection whatsoever to England, recent cases have highlighted two ways in which one may be created, and accepted by the English court, for the purposes of pursuing a scheme.

(i) COMI-shift

One option is to move the COMI of some or all of the obligors to England. This technique has been used in many restructurings including, recently, the *Magyar Telecom*, *New World Resources* and *VGG* transactions.

The court will need to be satisfied that COMI has moved to England by reference to factors that are objective and ascertainable by third parties. Typical steps include moving the group's head office, principal operating address, books and records, day-to-day administrative activities and tax residency to England, holding board meetings in England and appointing UK-resident directors, and notifying all creditors and interested parties.

Though the EC Regulation on Insolvency Proceedings (in its present form and recast) contains no prescribed "look-back" period in assessing COMI, companies will need to take the steps in good time before the first scheme hearing.

(ii) Amend governing law / jurisdiction clauses

Another option is to amend the governing law clause in the company's (foreign law) debt documents to English law. This will depend on whether the documents can be contractually amended with less than 100% lender consent.

This approach came to prominence in the *Apcoa* scheme last year, where German governing law and jurisdiction clauses were amended with the consent of at least 66.66% by value of the lenders for the purposes of pursuing a scheme. Though a dissentient lender challenged whether this could constitute a sufficient connection, the court ultimately sanctioned the scheme.

The judge concluded that it did not matter in principle whether the debt documents were originally governed by English law, or subsequently amended to provide for this, as long as the amendment was effective as a matter of local law. He warned that the court should be wary if the new choice of law "*appears entirely alien to the parties' previous arrangements and/or with which the parties had no previous connection*", has no discernible purpose other than to favour the majority at the expense of the dissentients or is otherwise a "*step too far*". However, a number of factors persuaded him that this was not the case, including the fact that creditors had been told expressly that the purpose of changing the governing law was to pursue an English scheme.

(iii) "Belt-and-braces" approach

The more recent DTEK scheme (like the Mobile-8 scheme some years before) combined both a COMI-shift to England and an amendment to the governing law of the company's New York law bonds, establishing separate bases for a sufficient connection.

However, it is notable that the court followed *Apcoa* and confirmed that the change of governing law alone sufficed. Further, the judge swiftly concluded that English law was not alien to the arrangement, given that it is commonly used in debt obligations in the capital markets.

The future: opportunities and limitations

The *Apcoa* and *DTEK* schemes are undoubtedly significant milestones in the continuing expansion of the English courts' scheme jurisdiction.

However, their impact in the European loan market may be tempered by the fact that, since 2012, the Loan Market Association has recommended in its leveraged finance standard loan documentation that an amendment to governing law should require all-lender consent. There may therefore be only limited numbers of loans in the coming years that open the door for a scheme through a governing law amendment.

Given the increasing prevalence of bond financing in recent years, the decisions may have a greater impact in this market. However, an amendment to governing law alone will not suffice if recognition of the scheme and associated relief under Chapter 15 of the Bankruptcy Code are required (as it may well be in cases involving bonds governed by New York law); if so, the debtor will need to have its COMI, or at least an establishment, in England. But given that a COMI-shift to England will establish a sufficient

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connection in itself, will amending the governing law be much more than a secondary issue (added as a *belt-and-braces* measure to add greater certainty that the English court will accept jurisdiction)?

More generally, COMI-shifting is tried and tested and seems likely to remain the main focus for foreign borrowers wishing to establish a sufficient connection with England. However, while it may be straightforward to take the necessary steps when dealing with a holding or finance company borrower, this may not be viable for an operating company. There may also be situations where there are other obstacles to moving COMI or establishing with sufficient certainty that this has been achieved.

Creativity amongst legal advisers (coupled with a commercial and pragmatic approach by the court) has underpinned the expansion of the English scheme jurisdiction, and it is possible that other, novel ways will be found to forge a connection. For example, in the recent *AI Scheme Limited* decision, the court blessed a structure involving the voluntary assumption of liabilities by a special purpose orphan vehicle for the purposes of pursuing a scheme that released claims against the original debtors. This was in a domestic context involving consumer creditors, and the court cautioned that any such structure would need a "*solid grounding in commercial necessity*", but it raises interesting questions as to its potential application in the context of a cross-border financial restructuring.

As a closing remark, it should be noted again that some foreign borrowers have historically used English schemes due to the absence of equivalent local law processes. Several European jurisdictions have sought to address this in recent years by modernising their legislation to embrace out-of-court restructuring tools. In time, this may stem the tide of borrowers coming to England. However, for now, the versatility and track record of the English scheme and the consistency of the English courts means England remains an attractive destination for implementing a financial restructuring. ■

> **CREATIVITY AMONGST LEGAL ADVISERS (COUPLED WITH A COMMERCIAL AND PRAGMATIC APPROACH BY THE COURT) HAS UNDERPINNED THE EXPANSION OF THE ENGLISH SCHEME JURISDICTION**

Puerto Rico: Is the Sovereign in or out of the Dollar Zone?

Claude D. Montgomery and Mark S. Kaufman[1] take us through a simplified review of Puerto Rico's Debt Crisis

CLAUDE D. MONTGOMERY
Partner, Dentons US LLP

MARK S. KAUFMAN
Partner, Dentons US LLP

On 1 July 2015, the Commonwealth of Puerto Rico published a report authored by former World Bank chief economist Anne O. Krueger analysing its bond and other public debt ("Krueger Report").

The Krueger Report concludes Puerto Rico and its governmental enterprises owe $73 billion to their bond creditors. Not surprisingly, the Krueger Report also concludes that the Caribbean island sovereign with a declining population of 3.5 million residents, a declining GNP of $72 billion and trading activity closely linked to the US mainland cannot sustain its debt burden.[2] According to the Federal Reserve Bank of New York ("NY Fed"), Puerto Rico's public debt burden is more than 100% of its GNP, even excluding any federal debt. As the NY Fed observed, "*Puerto Rico is a high debt jurisdiction relative to most of the United States…[and]…looks more like a nation than do any of the mainland states….*"[4]

Sovereign debt

There are some striking similarities between the Greek debt crisis and the sovereign debt crisis of Puerto Rico. Both economies are tied by a common currency and through a voluntary political union to a much larger and stronger economy borders. Both also had long histories under the non consensual rule of foreign empires. Both have had ballooning debt obligations tied to strong currencies and no ability to cut prices or reduce relative costs through currency devaluations. Fourteen years after joining the Eurozone, the Greek public debt burden has ballooned to €320 billion,[5] spread over 11 million citizens with a 2014 GDP estimated by the World Bank at $237.6 billion.[6] As observed by the NY Fed, "*it is unlikely to be a coincidence that the other countries (excluding Japan and the United States) with debt levels as large as Puerto Rico's are also members of a currency union that has run large structural deficits.*"

There are, however, significant differences between the two situations relating to sovereign status which limit the analytical usefulness of any direct analogy. Greece has been a recognised sovereign nation since 1830,[8] a member of the European Union since 1981,[9] and within the Eurozone since 2001.[10] By contrast, Puerto Rico has never been an independent sovereign nation. Its participation in the dollar zone arises from its status as a territory of the United States, initially acquired through a treaty with Spain ending the 1897 Spanish America War. The US Congress has declared all residents born in Puerto Rico after 1898 and all individuals born in Puerto Rico after 1941 to be US Citizens.[11] It was not until 1952, that the citizen residents of Puerto Rico voted to adopt a constitution accepting Puerto Rico's role as part of the United States.[12]

Sixty three years later, Puerto Rico's citizens have garnered a public debt burden that, according to the NY Fed is on the surface far higher than that of the residents of any other single state or territory.[13] The disconnect between public revenues and public expenditures has been building rapidly since 2002. According to the NY Fed, sluggish revenue growth began in 2002 while government expenditures did not slow. Public expenditures doubled during the ten year period ending 2012, while government revenue only grew 45%.[14] On top of this, government pension liabilities have grown beyond mere crisis proportions, resulting in an average actuarial funding ratio of merely 8.5%.[15] Unfortunately, the private economy has not fared much better. The GNP has been on a downward trend since 2005,[16] overall investment has been falling steadily since 2005 and housing prices have not recovered since the bubble burst in 2007.[17] With classic paternalistic foresight, Congress phased out mainland manufacturing investment tax breaks by 2006 and eliminated the Commonwealth's unique growth stimulant. That stimulus phase out coincided with the 2005-2013 oil price surge rendering the petroleum dependent Islands[18] trapped energy import losers and unable to pass on the variable cost increases.[19]

Common ground

Like most sovereigns, including Greece, there is no recognised procedure for the Commonwealth or any state within the US to adjust its direct bond or other indebtedness. However, Puerto Rico's citizens peculiarly lack the ability to authorise their insolvent municipalities and public enterprises to participate in federal bankruptcy court supervised municipal debt

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adjustment proceedings. In 1984, the US Congress expressly excluded the Commonwealth from such rights,[20] which exclusion was not regarded as political news.[21] Given the NY Fed's 2014 estimate that the Island's municipal and enterprise debt was $39.4 billion or 55% of its total public debt,[22] the absence of that legislative ability is both economically and culturally significant.

Good faith

For creditors, the distinction between the Commonwealth and its agencies and enterprises is quite important. Indebtedness authorised by the Commonwealth as general obligation ("GO") bonds is backed by the sovereign's "good faith and credit" under the Island's Constitution. GO bonds are subject to constitutional annual debt issuance and payment limitations, and appear entitled to a first priority on expenditures in the event of budget shortfalls.[23] By contrast, agency debt may only be protected by identified revenue, if any. For example, the Government Development Bank of Puerto Rico is only an agency of the Commonwealth, but it issued over $11 billion of debt between 2006 and 2014.[24] Other major Puerto Rico agency and enterprise issuers during that same time frame include: Employees Retirement System ($2.95 billion); Puerto Rico Aqueduct and Sewer Authority ($3.7 billion); Puerto Rico Electric Power Authority ($7.6 billion); and Puerto Rico Highway and Transportation Authority ($2.5 billion).[25]

At the bottom of the financial totem pole are the so called "moral obligation" or "budgetary appropriation" bonds. Such bonds are entirely dependent upon legislative enactment of spending authorisation. The Public Finance Corporation has issued such bonds and skipped its August 2015 debt payment, because the Governor did not ask the legislature to appropriate any funds for the debt payment.[26]

Civil rights

Puerto Rico's inability to access Chapter 9 is reflective of long running tensions within the Congress and the Judiciary regarding the US's relationship with its largest remaining territory.[27] The Spanish Treaty gave Congress the right to "*determine the civil rights and political status of native inhabitants*" of Puerto Rico,[28] and early on the US Supreme Court ruled only Congress could make the US constitution applicable to Puerto Rico, and its determination need only be rational.[29]

Some recent cases appear to assume that the US Constitution applies to all territory under the extended complete and total

> "THERE ARE SOME STRIKING SIMILARITIES BETWEEN THE GREEK DEBT CRISIS AND THE SOVEREIGN DEBT CRISIS OF PUERTO RICO"

> **TODAY, THE QUESTION OF PUERTO RICO'S ACCESS TO FEDERAL DEBT ADJUSTMENT PROCEDURES IS ONE OF SERIOUS LEGAL AND POLITICAL DEBATE**

control of the US, unless properly excluded by Congress.[30] Similar tensions lead to Puerto Rico's 2014 passage of its own legislation to permit restructuring of both Commonwealth and public enterprise debt, sponsored by its current Governor Alejandro Garcia Padilla. However, the US Court of Appeals in Boston unanimously ruled the Island's legislation was preempted by the federal bankruptcy legislation, which expressly precludes Puerto Rico's access to Chapter 9.[31] Notwithstanding unanimity in the result, one appellate judge questioned whether Congress'' 1984 refusal to include Puerto Rico within the ambit of Chapter 9 lacked rationality and therefore was itself an unconstitutional exclusion of territorial citizens from the uniform application of the Bankruptcy Clause of the US Constitution.[32]

Political debate

Today, the question of Puerto Rico's access to federal debt adjustment procedures is one of serious legal and political debate. The Republican controlled House of Representatives, with the ardent support of many in the US bondholder and mutual fund manager communities, appears opposed to any extension of Chapter 9 to Puerto Rico's public enterprises.[33] The current Democratic Administration through the Treasury Secretary Jacob Lew has decided to support the extension of Chapter 9 to Island municipalities.[34] Also, there appears to be growing support for the imposition of a federal review and financial oversight board with the power to make operating, tax and contract changes for both enterprises and perhaps the Commonwealth itself.[35]

These debates also reflect deep disagreements over whether tax increases and major public expenditure reductions (austerity in Greek debt debate terms) or the return of targeted tax incentives and economic growth combined with enhanced infrastructure investment are necessary preconditions to sustainability of debt repayment.

In response to the Krueger Report, a former IMF Deputy Director published a report putting forward a classic austerity plan.[36] Citing IMF statistics showing significant GDP growth in the years following fiscal deficit reductions equating to 2% or more of a country's GDP[37], the Centennial Report argues for (a) fiscal reform by increasing property taxes, increasing personal income taxes, increasing sales and use taxes (b) reduced government expenditures by reducing the number of teachers to reflect declining enrollments, reducing subsidies to University of Puerto Rico and reducing government health care benefits for the poor.[38] The Centennial Report argues, that its projected $5 to 6.5 billion of annual benefits from such changes could lead to fiscal surpluses. If combined with structural business registration and labor law reforms the plan would stimulate growth and avoid debt relief with continued access to the credit markets.[39]

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Greek drama?

There are many sophisticated and well funded players in the Puerto Rico drama on all sides of every issue. The drama sounds Greek in nature: austerity versus democracy, capital vs. people and above all what is the meaning of shared sacrifice? With the Administration firmly in the "no bailout" camp, but favouring Island access to Chapter 9 for enterprises, creditor oversight of Puerto Rico's independently minded and pro debt relief Governor is possible. But only a Delphic Oracle would know which bonds will be exchanged for less than par and where all of this tragedy will end. ■

Footnotes:

1 Claude D. Montgomery and Mark S. Kaufman are partners in Dentons US LLP respectively residents in the firm's New York and San Francisco offices. The authors' views expressed in this article are strictly their own and are not those of Dentons or any of its clients.
2 *Krueger Report* at 3.
3 *An Update on the Competitiveness of Puerto Rico's Economy,* Federal Reserve Bank of New York (July 31, 2014) (*Update* at 16).
4 *Update* at 17.
5 http://www.bbc.com/news/world-europe-33407742
6 http://data.worldbank.org/country/greece
7 *Update* at 19.
8 London Protocol of 3 February 1830, http://www.kingscollections.org/exhibitions/specialcollections/greece/british-involvement-in-the-war/london-protocol
9 http://europa.eu/about-eu/countries/member-countries/greece/index_en.htm
10 *Id.*
11 8 U.S.C. §1402
12 Act of July 3, 1952, 66 Stat. 327. See also, *Torres v. Puerto Rico*, 431 U.S. 465 (1979)
13 *Update* at 16.
14 *Update* at 18.
15 *Update* at 18.
16 *Krueger* at 3.
17 *Krueger* at 5.
18 http://www.eia.gov/state/analysis.cfm?sid=RQ
19 *Krueger* at 6
20 The Bankruptcy Amendment and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333
21 "The term municipality…does not include the District of Columbia or any territories of the United States." *S. Rep. 95-989, 95th Cong 2d Sess. 25* (1978).
22 *Update* at 16.
23 See, Puerto Rico Constitution, Article VI, section 7.
24 Quarterly Report, Government Development Bank of Puerto Rico, http://www.gdbpr.com/investors_resources/government_development_bank.html
25 Id.
26 http://www.gdbpr.com/documents/GDBStatementonPaymentofPFCBonds080315.pdf
27 Except for the original thirteen colonies which formed the United States in 1784[?], all other US states were once US territories. The Philippines is the only former US Territory to become an independent republic.
28 Art II, *Treaty of Paris,* 30 Stat. 1754 (1899).
29 *E.g., Downes v. Bidwell,* 182 U.S. 244 (1901).
30 *Boumedienne v. Bush,* 553 U.S. 723 (2008).
31 *Franklin California Tax Free Trust v. Commonwealth of Puerto Rico,* --F.3rd.-- (Slip Op. July 6, 2015).
32 *Franklin v. Puerto Rico*, --F.3rd.-- (Slip Op. at 51-52)
33 http://judiciary.house.gov/index.cfm/press-releases?ContentRecord_id=73F4990C-4D3D-4BD8-B360-D642875054AC
34 Letter dated July 28, 2015 to Senator Orin Hatch from Treasury Secretary Jacob Lew. l
35 *Puerto Rico in Perspective,* National Public Finance Guarantee (August 10, 2015) ("NGFP" at 12)
36 Centennial Group International Report dated July 2015 by Joel Faigenbuam ("*Centennial Report*").
37 *Centennial Report* at 13.
38 *Centennial Report* at 5-6
39 *Centennial Report* at 5-6

> "THE DRAMA SOUNDS GREEK IN NATURE: AUSTERITY VERSUS DEMOCRACY, CAPITAL VS. PEOPLE AND ABOVE ALL WHAT IS THE MEANING OF SHARED SACRIFICE?"

Espirito Santo controlled management: a flash in the pan?

Martine Gerber writes a sequel to last year's contribution as the case moves forward, and explains the details of the claw-back mechanism

MARTINE GERBER-LEMAIRE
OPF Partners, Luxembourg

It took decades for the Espirito Santo family to build a multinational financial group that was worth about €8 billion and whose fortune was swept away in just a year.

Espirito Santo's financial collapse is one of the worst 21st century banking failures, which has left thousands of creditors stranded and pushed many trustees to find their way through the tangle of cross-funding within the group. Many entities, from the Bank of Portugal to public prosecutors, are currently investigating the causes of the group's failure and the stakes of being condemned for fraudulent practices or the misuse of company assets are quite high. Unfortunately, Espirito Santo's Luxembourg holding companies have played an important role in the group's financial disaster. The controlled management procedures initiated by the Luxembourg entities in 2014 did not prevent their bankruptcy but even paved the way for their inevitable demise.

Unsuccessful use of controlled management to rescue Luxembourg holding companies

Controlled management[1] did not succeed in avoiding the initiation of bankruptcy proceedings for Espirito Santo's Luxembourg holding companies.

Although the Luxembourg Court initially accepted some of the holding companies' petitions for controlled management, the court appointed expert, further to examining the companies' financial standing and whether they were already under cessation of payments, apparently and unequivocally deemed their applications impossible.[2]

Consequently, the initiation of the controlled management procedure does not prevent a business entity or the court from initiating bankruptcy proceedings if the following two cumulative conditions are met: the inability to pay one's creditors and the inability to raise credit. If, under such circumstances, the company's directors fail to file bankruptcy proceedings, they may be held liable.[3]

As for ESI, ESFIL, ESFG and ESC the bankruptcy conditions were fulfilled, the court rejected their controlled management application and bankruptcy proceedings were opened within one week.

For Rio Forte a first judgment rejected the controlled management application on 17 October 2014, whereas bankruptcy was declared on 8 December 2014. As more than one month elapsed between the two decisions, it is possible to suppose that the directors and shareholders of Rio Forte were reluctant to file a petition for bankruptcy and have tried by all possible means to find an alternative.

Once the various Luxembourg Espirito Santo entities were declared bankrupt, several trustees were appointed. The Luxembourg District Court appointed different trustees for ESFIL and ESFG, then for ESI, ESC and Rio Forte, whose mission was to realise the assets of the bankrupt companies and to pay off their debts to the largest extent possible.

The trustees attempted to provide information and cooperate by means of a common website that was created on this occasion (www.espiritosantoinsolvencies.lu). The way the court has handled these bankruptcies may raise some questions and concerns. As a matter of fact, the court appointed an expert who investigated the financial standing of ESI, ESC and Rio Forte and upon the acceptance of their controlled management petition he was also appointed as their trustee. Rather than opting for a time saving and effortless choice, if the court had appointed a new trustee, perhaps matters could have been investigated differently.

In addition, despite the creditors' various informal requests, within 15 days as of the declaration of bankruptcy the court did not appoint a creditors' committee composed of three members chosen amongst the debtor's main unsecured creditors in order to assist the trustee and monitor the bankruptcy operations. The creditors' committee carries out a purely advisory role. Moreover, so far the trustees have only communicated through their website and still have not organised a sort of general assembly of creditors with a Q&A session as it was done for the Madoff cases. The trustees are obviously trying to understand the numerous facets of these highly complicated cases; however, modern justice in Luxembourg is certainly not being reflected by this sort of behaviour.

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To claw-back or not to claw-back?

The courageous trustee of ESFG filed two lawsuits with the Lisbon Administrative Court on 30 November 2014, which challenged, among others, the creation of Novo Banco and the resolution measure applied to BES by the Bank of Portugal. Obviously, in Portugal the separation of bad debts was the stumbling block of the BES restructuring which saved the unsecured creditors with cash in the bank and purely applied the principle "too big to fail". Nevertheless, for creditors of the Luxembourg entities the separation of bad debts implies the loss of assets and more problems in challenging operations during the claw-back period.[4]

In principle the claw-back period (*période suspecte*) is fixed, at the judge's sole discretion, six months plus ten days before the date of the judgment declaring the bankruptcy. Further to the trustee's requests and the pressure put on by the creditors, by means of a second judgment, the court changed the beginning of the claw-back period to January 2014 for ESFIL, ESFG and ESI.

It will be interesting to observe whether the trustees of the Espirito Santo case will avail themselves of their right to declare null and void certain preferential transfers or fraudulent conveyances that a debtor could have made to a creditor during the claw-back period. In this regard, some transactions must be declared null and void, if they were undertaken during the claw-back period. Upon the trustee's request other transactions may be declared null and void by the commercial court, if enough evidence is brought forth to prove that the persons receiving payment from the debtor or entering into a transaction with the debtor had known of the suspension of payments. In the case at hand, this might be what likely happened as quite often the intermediaries worked for BES. Finally, there is a general principle that all acts or payments made to defraud the creditors will be declared null and void, regardless of the date when they were made.

At the time being, in Luxembourg, the creditors are primarily focused on the claw-back actions that have not yet been launched by the trustees. It is not possible to determine when they will be launched as trustees are not bound by any time-limits imposed by law. For Rio Forte, the claw-back actions might be the sole means to recover assets spread in various entities of the group. The trustees should, however, be cautious and fully evaluate the final consequences of setting aside some particular transactions due to the domino effect that could be triggered by the claw-back actions along with international private law provisions.

Claim declaration: the creditors' Gordian Knot

The most peculiar aspects of the Espirito Santo case consist in the fact that (i) the vast majority of creditors are unsecured creditors and that (ii) many distressed investors have brought forth several assignments of claims, whose original claim could not always be proved valid due to the systematic lack of supporting documentation.

The bankruptcy judgment instructs creditors to file and prove their claims within a short determined period, in principle 20 days. The judgment also fixes a closing date for the verification of claims and a date for a hearing when the submitted claims will be examined by the court.

Creditors shall file and evidence their claims at the Clerk's office of the Commercial Court. In practice, creditors are allowed to declare their claims until the closure of the claims verification process. In the bankruptcy judgments of ESI and Rio Forte, the trustees postponed the closing date of the claims verification process twice. Finally, given the numerous claims, the fact that creditors are not based in Luxembourg and the multiplicity of assignments, the trustees fixed the time-limit to 30 September 2015. However, this date is not a foreclosure date.

The trustees shall thereafter send a notice to the creditors communicating the date fixed by the court to discuss their claim. In principle, all claims may be disputed in a sole judgment. If the latter is impossible, the court pronounces the disjunction, i.e. separates the disputes, in order to examine those which could be pleaded. The court, through the trustees, can set a new date to proceed to a second claims verification process.

At this stage, it is impossible to predict the outcome of the case.[5] Assignors should file a new claim with the assignment attached thereto and be prepared to be challenged. Therefore, the closure of the Espirito Santo bankruptcy proceedings might still take several years.

In the meantime, the International Monetary Fund reported that the Espirito Santo case raises a number of questions about regulatory and supervisory arrangements and banking group structures in the European Union. It highlights the fact that, contrary to the United States, the regulation and supervision of banking groups in the European Union does not have a dual focus on both banks and their holding companies. Even on the basis of consolidated accounts, the financial problems of the three BES holding companies fell through the cracks and were not detected at an early stage. Therefore, the IMF proposes to introduce the direct regulation of ultimate bank holding companies.

Unfortunately, the episodes of Espirito Santo's financial saga might still be numerous and we will do our best to update you on its complicated evolution in the near future! ■

"THE SEPARATION OF BAD DEBTS IMPLIES THE LOSS OF ASSETS AND MORE PROBLEMS IN CHALLENGING OPERATIONS DURING THE CLAW-BACK PERIOD"

Footnotes:

1 Governed by the Grand Ducal Decree dated May 24, 1935 see *Eurofenix Autumn 2014*
2 It is not possible to assess the content of the expert's report as it is never communicated to third parties.
3 For an application see *Tribunal d'Arrondissement de Luxembourg*, case 192/05, 18/02/2005.
4 The Wall Street Journal Europe.
5 Country Report June 2015

How the French are fighting money laundering & financial terrorism

Hervé Ballone outlines the specific obligations of the French specialists in restructuring & liquidation

HERVÉ BALLONE
Insolvency and Bankruptcy Officer, Official Liquidator office in France

The fight against illicit financial flows is a priority for the French authorities. Money laundering is at the heart of criminal activities and represents a threat to the economic and political stability of States.

Faced with this reality, political action has significantly improved the tools to fight against fraud, money laundering and terrorist financing. France also has a legal arsenal and therefore is actively involved in improving standards in this field, both internationally, within the framework of the Financial Action Task Force work (FATF), and at regional level, taking part in the legislative work undertaken by the European Commission and in the conventions of the Council of Europe.

The main actors in the fight against money laundering and terrorist financing are, according to Article 561-2 of the French Monetary and Financial Code, the financial institutions (banks, manual exchange offices, insurance companies, investment firms), as well as the accountants, auditors, bailiffs and certain non-financial professionals (notaries, real estate agents, casino managers, auctioneers and dealers in high value goods). At the end of the transposition process of the third Money Laundering Directive of 26 October 2005, new business areas were integrated in the device, such as lawyers, bailiffs, directors and legal representatives.

"POLITICAL ACTION HAS SIGNIFICANTLY STRENGTHENED THE TOOLS TO FIGHT AGAINST FRAUD, MONEY LAUNDERING AND TERRORIST FINANCING"

Reminder about money laundering and terrorist financing

The French system for fighting against money laundering and terrorist financing is primarily based on the definition of a general laundering offence in the French Penal Code (art. 324-1), applicable to revenues related to a crime and to the financing of terrorism.

Thus, money laundering is an intentional offence (*mens rea*): "*the act of facilitating by any ways the false justification of the origin of property or income of the perpetrator of a crime or offence that has provided him/her direct or indirect profit. Money laundering also means providing assistance to investing, concealing or converting the direct or indirect product of a crime or misdemeanor*"(*actus reus*).

Money laundering is punished by five years of imprisonment and a €375,000 fine. In special cases, however, money laundering is punished by ten years of imprisonment and a €750,000 fine:

- If it is committed habitually or by using the facilities afforded by the exercise of a professional activity,
- If it is committed by an organised gang.

Attempted offences provided under this section is are subject to the same penalties.

The French system

During the Arche Conference of 14-16 July 1989, the G7 had recommended the creation of financial intelligence units able to fight against money laundering and terrorist financing. France has chosen to adopt a financial intelligence unit called TRACFIN.

TRACFIN is a national service, under the supervision of the Ministry of Finance and Public Accounts. It is an administrative financial intelligence processing service. Its mission is to fight against clandestine financial circuits, money laundering and terrorist financing.

To this purpose, this unit collects, analyses, puts together and processes all information leading to establishing the origin or the destination of criminal financial transactions, starting from the statements made by tax-paying professionals.

Upon receipt of the information, TRACFIN first analyzes, then starts an investigation and finally sends the information, in under the form of notes, to the judicial authorities (Prosecutor) and to foreign financial intelligence units.

The obligations imposed on AJs / MJs (Insolvency Office Holders)

1. Vigilance

Insolvency Office Holders (IOH) have a duty of vigilance concerning the assets, liabilities, number of employees, real beneficiary, transactions, and potential buyers of the debtor company they are dealing with. Thus, appropriate procedures and internal control measures must be carried out for purposes of identification.

Three types of vigilance duty can be implemented by these professionals, depending on the nature and the level of risk:

- normal vigilance exercised when appointed, focusing on identification elements concerning the debtor and the potential buyer, and on the procedure applied or the proposed transactions;

- lightened vigilance if the risk is considered low during the relationship with the debtor company;
- reinforced vigilance if the risk is considered high. Additional vigilance measures must be taken if the debtor company's manager is not physically present for identification, or is politically implied, a.s.o.

2. Reporting to TRACFIN

The IOH are obliged to declare to TRACFIN the amounts or transactions which they "know, suspect or have reasonable grounds to suspect that are coming from an offence punishable by a term of imprisonment exceeding one year, or that they are financing terrorism".

The declaration must be made prior to the execution of the suspect transaction in order to allow Tracfin to exercise its right of opposition in advance.

However, the IOH's declaration may be made after the end of the transaction in the following three cases:

- a stay is impossible to grant,
- a postponement is recommended, which could hinder the smooth running of ongoing investigations,
- suspicion is arising after the end of the transaction in question.

Note that the number of declarations made by the IOH has exploded in 2014, that is to say 100 statements were made and a 22% increase was seen compared to 2013.

Warning criteria & several examples of risks

Suspected fraud in judicial liquidation

Following the liquidation of Company A, the production equipment, the stock and the brand were sold in favour of Company B. The investigation showed that the manager of Company B was actually one of the shareholders of a new entity, Company C, set up by the former manager of Company A, under liquidation proceedings. Thus, the assets are in fact put at the disposal of Company C.

The alert criteria:

- liquidation proceedings which seem to aim at the continuation of the activity through another structure;
- purchase of the assets by a newly set company,
- purchase of the assets by a person connected to the former manager.

Suspicion of misuse of company assets following an asset disposal plan

Following the insolvency proceedings of Company A, the Court approved an asset disposal plan for one symbolic euro in exchange for maintaining employment and the continuation of the activity. The buyer receives a government grant. Following poor results, the company is forced to make redundancies only a few months after the first release of the said grant.

Following the insolvency proceedings of Company B, the Court approved an asset disposal plan for a symbolic nominal amount to the benefit of Company C, in exchange for maintaining employment and the continuation of the activity.

A few months later, Company C sells the assets to Company D. Companies C and D have both the same managers.

A few months later, Company D resells the assets to Company E with a high added value.

A few days after the receipt of the sale price, Company D performs a transfer to an account held abroad in the name of its manager, without any identified reason.

The alert criteria:

- the takeover of a company for a token amount,
- obtaining a state aid,
- resale of the assets in a short time with a high added value.

Fraud to the "A.G.S." (The Employee Claim-Guarantee Management Association)

A.G.S. aims to guarantee the payment of debts due to employees under the employment contract in the event of restructuring or liquidation proceedings and, under certain conditions, in case of sauvegarde (rescue) proceedings. A.G.S. may challenge the payment asking for proof that the contractual basis of the debt is the result of fraud.

Recurring scenarios:

- fictitious employment contract or the absence of subordination,
- massive hiring of temporary employees previous to the opening of insolvency proceedings,
- increase of the reference wages previous to the opening of the insolvency proceedings,
- disproportionate wages in comparison to the size of the company and the kind of job performed,
- lack of economic activity of the company.

No doubt that the fight against money laundering and financing of terrorism is the struggle of the 21st century. Indeed, the 4th Directive about the fight against money laundering and financing of terrorism, launched on February 5, 2013, was passed by the European Parliament on May 20, 2015. It includes several legal innovations, including the creation of a national central register. Its application is likely to be effective in 2017. ■

> **"TRACFIN'S MISSION IS TO FIGHT AGAINST CLANDESTINE FINANCIAL CIRCUITS, MONEY LAUNDERING AND TERRORIST FINANCING"**

Share your views!

The Baltics:

Corporate insolvency and restructuring proceedings compared

Edvīns Draba, Ignas Dargužas and Albert Linntam provide a brief comparative insight into corporate restructuring and insolvency regulation of the three Baltic states

EDVĪNS DRABA
Associate, SORAINEN (Latvia)

IGNAS DARGUŽAS
Senior Associate, SORAINEN (Lithuania)

ALBERT LINNTAM
Legal Assistant, SORAINEN (Estonia)

This overview provides a brief comparative insight into the corporate restructuring and insolvency regulation of the three Baltic states of Latvia, Lithuania and Estonia (excluding corporate subjects like credit institutions or insurance companies).

In Latvia both corporate insolvency and restructuring proceedings are mainly governed by the Insolvency Law adopted in 2010. The law was drafted taking into account recommendations of international creditors of Latvia at that time.

In Lithuania insolvency proceedings are regulated by the Law on Insolvency of Companies of the Republic of Lithuania adopted in 2001. Restructurings are regulated by the Law on Restructuring of Companies of the Republic of Lithuania adopted in 2001.

Corporate insolvency proceedings in Estonia are regulated by two separate acts of law: a) the Bankruptcy Act adopted in 2004, and b) the Reorganisation Act adopted in 2008.

Proceedings available

Latvia

In essence, Latvia follows the single entry model: there are insolvency proceedings as liquidation, whereas restructuring proceedings and out-of-court restructuring proceedings serve as restructuring. Information concerning restructuring and insolvency proceedings can be found on the Insolvency Register web site.

Insolvency proceedings

Corporate insolvency proceedings can be initiated by the debtor, a creditor (or a group of creditors), an insolvency practitioner in restructuring and a liquidator in the main insolvency procedure (to initiate secondary insolvency procedure).

In case of a creditor's insolvency application the illiquidity test is used to establish the debtor's insolvency. However, some features of the balance sheet test have been used in court practice to dismiss fraudulent insolvency applications.

The law prescribes that the debtor's property must be sold within six months. Secured creditors are not excluded from the insolvency proceedings and security must be sold by an insolvency practitioner as any other debtor's property.

The legal framework provides for a possibility to sell the debtor's business as a going concern. However, this option is rarely used in practice.

Restructuring proceedings

Restructuring proceedings are of the debtor-in-possession type under the supervision of an insolvency practitioner and can roughly be compared to US Chapter 11 proceedings. They grant full stay of enforcement and cram-down applicable to all creditors' claims (the only exception being administrative and criminal fines).

Restructuring proceedings must ensure that the creditors will gain more or at least as much as in the case of liquidation proceedings.. There are no specific entry criteria for restructuring proceedings except for showing that the debtor is facing financial difficulties or is about to face them. However, there is no requirement to prove these circumstances to the court. Only the debtor may apply for restructuring proceedings.

The debtor is then given two months to present a restructuring plan to the creditors, obtain their approval and submit the approved plan to the court. The voting takes place within two classes of creditors – secured and unsecured, with the required majority for the approval of the plan being simple majority among unsecured creditors and two thirds of secured creditors (considered by the amount of principal claims). This term can be further extended for another month, upon consent of the same majorities of creditors.

It is possible to envisage super priority for fresh money in case restructuring fails.

The maximum length of such proceedings is two years; however upon creditors' approval this term can be extended for another two years.

Out-of-court restructuring proceedings

A company has also the possibility to apply for out-of-court restructuring proceedings. Unlike regular restructuring proceedings, the debtor should negotiate with creditors and obtain their approval for the restructuring plan confidentially, prior to filing a restructuring application with the court.

It should also be noted that a debtor already implied in insolvency proceedings may apply for a transition to restructuring.

Lithuania

Insolvency proceedings (serving as liquidation) can be executed in a judicial (formal) or a non-judicial (non-formal) way and in some cases simplified insolvency proceedings can be commenced. Restructuring proceedings are available as well.

Judicial insolvency

A judicial insolvency petition can be filed with the court by (i) a creditor/creditors; (ii) an owner/owners; or (iii) the head of the company's administration. A balance sheet test is used to establish the debtor's insolvency.

Non-judicial insolvency

When insolvency is commenced in a non-judicial way the court does not have legal powers to revise the creditors' decisions and they have ultimate control of insolvency proceedings. Non-judicial insolvency proceedings commence with a decision of a qualified majority (3/4) of creditors. If the consensus is reached, all issues in the course of insolvency proceedings are decided by the creditors' committee. However, this is an extremely rare case because (a) in order to initiate insolvency in a non-judicial way, there shall not be any ongoing property disputes where the debtor is involved; and (b) disputes are usually unavoidable during insolvency and it is particularly difficult to reach unified agreement by all creditors.

Simplified insolvency

Simplified insolvency proceedings are initiated by the court in case the debtor does not own enough assets to cover the costs of insolvency proceedings. The proceedings cannot last longer than one year from the date when an order to institute simplified proceedings has come into force. The court decides on all issues in the course of such insolvency proceedings. The creditors do not control the proceedings and meetings of creditors are not organised.

Restructuring

Restructuring proceedings aim at allowing companies with financial

difficulties and which have not yet discontinued their economic and commercial activities, to maintain and develop these activities, settle their debts and avoid insolvency. Only the debtor and his shareholders may file for restructuring. Prerequisites for restructuring are: existing financial difficulties or a real possibility for the onset of financial difficulties within three upcoming years. The debtor has to draft and present a restructuring plan to the creditors. The plan has to be approved by a majority of creditors and presented for the court's approval within six months after initiation of the restructuring case.

An insolvency practitioner performs supervisory function, whereas the debtor's management remains in charge of the debtor's business.

Estonia

Insolvency proceedings

According to the Bankruptcy Act, insolvency is the debtor's permanent inability to satisfy the claims of the creditors declared by a court ruling.

After the initiation of insolvency proceedings an interim insolvency practitioner is appointed by the court to assess the debtor's financial situation and preserve his assets.

If the insolvency petition is filed by the debtor, insolvency is to be presumed and the court will usually declare it. In the case of an insolvency application submitted by a creditor, insolvency can be established either by applying a cash flow or by a balance-sheet test.

In case the debtor's assets are insufficient for covering the costs of the insolvency proceedings and it is impossible to recover or reclaim the assets, a court shall terminate proceedings by a ruling without declaring insolvency. The creditors can avoid this scenario by paying a deposit covering the costs of the insolvency proceedings.

Insolvency proceedings commence with a declaration of insolvency by a court ruling, a notice on the debtor's insolvency is immediately published in the Official Notices. Insolvency proceedings exclude the possibility

> **LATVIA FOLLOWS THE SINGLE ENTRY MODEL: THERE ARE INSOLVENCY PROCEEDINGS AS LIQUIDATION, WHEREAS RESTRUCTURING PROCEEDINGS AND OUT-OF-COURT RESTRUCTURING PROCEEDINGS SERVE AS RESTRUCTURING**

IN LITHUANIA, SINCE 1 JANUARY 2015 AN INSOLVENCY PRACTITIONER IN INSOLVENCY PROCEEDINGS IS SELECTED RANDOMLY BY A COMPUTER PROGRAM

to apply for restructuring proceedings.

Restructuring proceedings

The restructuring proceedings are initiated by a court ruling if an application for restructuring has been submitted by the debtor. A prerequisite for restructuring is that sustainable management of the debtor is likely to be possible in the future. Upon commencement of the proceedings the court shall appoint a restructuring adviser. The main responsibility of the adviser is to assist the enterprise and its creditors in the restructuring proceedings, whereas the control of the enterprise shall be retained by the existing management.

Insolvency practitioners

Latvia

Insolvency practitioners are a regulated profession. They are licensed by the Association of Certified Insolvency Practitioners. There are certain prerequisites for licensing, including formal training conducted by this association and a professional exam.

In insolvency proceedings, insolvency practitioners are appointed according to a roster. The Insolvency Administration (state institution performing supervision of restructuring and insolvency proceedings) juxtaposes the list of debtors in respect of which insolvency proceedings have been initiated with the list of insolvency practitioners and nominates a candidate to this position. The purpose of this system is to ensure the accidental nomination of insolvency practitioner candidates. Therefore, experience and other qualities are not evaluated.

In restructuring, the debtor may propose an insolvency practitioner who must obtain approval of the same majorities of creditors required for the approval of the restructuring plan. If the creditors do not approve the insolvency practitioner proposed, the Insolvency Administration nominates another candidate according to a roster. In out-of-court restructuring, the approval of an insolvency practitioner is mandatory for the commencement of restructuring proceedings.

Lithuania

Insolvency practitioners are a regulated profession in Lithuania, as well. In order to obtain an insolvency practitioner's license certain requirements (education, qualification exam, professional indemnity insurance, good reputation, etc.) have to be fulfilled.

Since 1 January 2015 an insolvency practitioner in insolvency proceedings is selected randomly by a computer program, taking into account: (i) the size and activities of the debtor and (ii) the work experience and track record of the insolvency practitioner etc.

Estonia

Only licenced members of the Chamber of Bailiffs and Insolvency Practitioners may fulfil the duties of insolvency practitioners in insolvency proceedings. After granting the right to act as an insolvency practitioner, the management board of the Chamber shall enter information on the person in the list of insolvency practitioners.

Approval of an insolvency practitioner appointed by the court ruling shall be decided by the first general meeting of creditors. If none of the creditors appear at the meeting, the insolvency practitioner appointed by the court is deemed to be approved by the meeting. Alternatively, the general meeting of creditors may appoint a new insolvency practitioner, whose approval shall be decided by a court ruling.

Share your views!

Submission of creditors' claims

Latvia

In insolvency proceedings, creditors may submit their claims to the insolvency practitioner within one month of the entry regarding the company's insolvency recorded in the Insolvency Register. The insolvency practitioner does not have a duty to inform creditors on the commencement of insolvency proceedings (except for known creditors located in other EU Member States) and the creditors have to check the Insolvency Register website.

A creditor can submit his claim after the deadline, although not later than six months from the date of the entry in the Insolvency Register, but no later than the day when a plan for satisfaction of creditor's claims is prepared (whichever of these dates occurs earlier). After expiry of this term the creditor loses his rights to claim.

In restructuring, the debtor must include all creditors' in the restructuring plan himself and the creditors do not have to claim.

Lithuania

The court sets a deadline of no less than 30 days, but not exceeding 45 days from the entry into force of the court ruling to initiate insolvency proceedings within which the creditors have the right to file their claims. The court shall have the right to accept for confirmation creditors' claims which have been submitted late provided that the court recognises the reasons for missing the deadline as important.

The same rules and deadlines apply in respect of restructuring proceedings.

Estonia

Creditors are required to submit their claims within two months after the publication of the notice on the debtor's insolvency in the Official Notices. Claims shall be defended at a general meeting of creditors which shall be held no later than six months after the publication of the notice on insolvency.

A claim is deemed to be accepted at the creditor's meeting if neither the insolvency practitioner nor any of the creditors have any objections thereto.

A restructuring plan is accepted if at least one-half of all the creditors who represent at least two-thirds of the total amount of claims vote in its favour. The time limit for creditors to submit objections to the restructuring plan is stipulated in a court ruling but shall not exceed sixty days.

Avoidance actions

Latvia

The general period for transactions concluded by the debtor prior to insolvency is three years. Prerequisites for a transaction being avoided are losses incurred by the debtor (such as in case of undervalue transactions) and knowledge of the losses by the counterparty. (There is no requirement to prove knowledge of the losses if the transaction has been concluded within four months prior to insolvency.)

Knowledge is presumed in case of transactions concluded with related persons. In addition, the law vests with the insolvency practitioner rights to reclaim payments made by the debtor prematurely within six months prior to insolvency, if, at the same time, other payment obligations were not honoured in time.

Lithuania

An insolvency practitioner must examine transactions entered into by the debtor within a period of at least 36 months before the initiation of insolvency proceedings and challenge the transactions which are contrary to the objectives of the debtor and/or which could have led to its insolvency. If the court establishes that the insolvency is fraudulent, the insolvency practitioner must review all transactions concluded within 5 years prior to the initiation of insolvency proceedings.

Estonia

A transaction can be avoided if it was concluded within one year prior to the appointment of an interim insolvency practitioner and provided that the other party knew or should have known that the transaction damages the interests of the creditors. In turn, the period for transactions is three years if the debtor intentionally damaged the interests of the creditors by the transaction and the other party to the transaction must have been aware of the damage.

Knowledge of the damage to the creditors' interests is presumed in case the other party to the contract was a related person to the debtor. Furthermore, a transaction can be set aside if it was concluded within five years and if the other party to the transaction was a person related to the debtor. The Bankruptcy Act establishes special rules for avoidance of gratuitous contracts, contracts dividing joint property, real estate transactions etc. ■

> "IN ESTONIA, A TRANSACTION CAN BE AVOIDED IF IT WAS CONCLUDED WITHIN ONE YEAR PRIOR TO APPOINTMENT OF AN INTERIM INSOLVENCY PRACTITIONER"

Italy moves forward amending bankruptcy law

Giorgio Cherubini and Giovanna Canale explain the good intentions of the new Italian restructuring laws

GIORGIO CHERUBINI
Partner, EXPLegal, Rome (Italy)

GIOVANNA CANALE
Associate, EXPLegal, Rome (Italy)

Share your views!

Since 2005, the focus of the Italian Bankruptcy Law has moved from liquidation to restructuring of distressed companies through the introduction of new insolvency proceedings, among which restructuring plans and debt restructuring agreements have to be mentioned, with a view to preserving the value of the business and allowing it to possibly make a fresh new start.

Most recently, in August 2012, Law no. 134, conversion of the Law Decree No. 83/2012 so called " Decree on Development" has been deeply impacted the existing system introducing several new rules aimed at simplifying the access to proceedings alternative to bankruptcy with an appreciable attempt to fill the regulatory gaps.

The concept of rescue of the business, previously unknown in Italian bankruptcy legislation, has been strengthened with the "*Decree Justice For Growth*" (hereinafter Decree Law) dated June 27th 2015, published in the Official Gazette no 147, which has amended many rules of the existing Bankruptcy, Civil and Civil Procedure Codes and the organisation and functioning of the judiciary.

The above must be converted into law by the Italian Parliament within sixty days from its enactment, i.e. by August 26 2015 although some of its provisions are immediately effective, like those concerning the access to credit and those related to pre-packaged plans, while those related to the restructuring agreements will become effective after the conversion into law of the Decree Law.

The first title of the Decree Law specifically concerns some changes to the Bankruptcy law and consists of ten articles. In the press release issued by the Government it is stated that "*All measures taken move from a common principle: a company with problems risks to drag with it other companies, for example suppliers of goods and services and financial institutions continuing to assume obligations which cannot be satisfied. Promptly addressing the cases of corporate crisis can limit the losses of the economy, both concerning the business and financially, or allow the restructuring of the company with benefits in terms of employment and, more generally, in protecting the entrepreneurial activities*".

The changes, aimed at facilitating restructurings by granting more powers to the creditors, concern mainly the in Court restructuring proceedings (*concordato preventivo*) and the restructuring agreements (*accordi di ristrutturazione*) provided by Article 182 bis of the Italian bankruptcy law.

Requisites for the appointment as receiver

Among the main innovations, some new rules have been introduced for the appointment of insolvency receivers. Firstly, the spouse, relatives and relatives-in law up to the fourth degree of the bankrupt, the creditors and anybody else who has contributed to the bankruptcy of a business in the previous five years, cannot be appointed as insolvency receiver; it must be noticed that the previous provisions foresaw the term of two years, now extended to five.

Moreover, the professional who has previously been appointed Judicial Commissioner in a *concordato preventivo*, should such proceedings be converted into a bankruptcy (*fallimento*), cannot be appointed as insolvency receiver.

Access to credit

Another main innovation is the possibility of access to credit during a corporate crisis. The Court may authorise temporary funding even if a special form of Court restructuring proceedings have been commenced. These are proceedings where the debtor files for admission without enclosing the business plan, considering the urgency to rescue the business, without the requested certification of a professional confirming the feasibility of the plan. This may be a way to avoid the bankruptcy of a company and promote an agreement with creditors.

Court restructuring agreements

The Decree Law also introduces the innovations regarding the rules of Court restructuring proceedings. Before it the creditors could only approve or reject the plan, but not amend it, while now the creditors representing at least 10% of overall indebtedness of the debtor can put forward an alternative restructuring plan, provided that the proposed payment of unsecured credits is lower than 40% of the respective claims.

The creditors vote on all plans, which must be filed in advance at the bankruptcy Court, and the plan approved with the highest majority, in terms of total amount of claims, prevails. In case of equality of votes, preference will go to the plan filed by the debtor and, in case of equality of votes among alternative plans, to the plan that was filed the first.

Should none of the plans reach the required majorities, the bankruptcy Court submits again to the creditors' vote the plan that reaches the highest number of votes.

Pre-packaged plans

Another innovation regarding the Court restructuring proceedings is the so called "*pre-packaged plan*". In Italy, frequently the debtors file pre-packaged plans, i.e. providing for the sale or lease of the debtor's assets to a third party investor, based on agreements reached by the debtor and the third party investor prior to filing. This practice has been materially affected by the Decree Law with the aim at mitigating the risk of the pre-packaged deals prejudicial to creditors.

According to the Decree Law, the insolvency receiver may ask the bankruptcy Court to authorise a competitive procedure for the sale of the debtor's assets whenever he/she believes that, based on non binding offers received, the pre-packaged deal filed by the debtor is not in the best interest of the creditors.

Should the assets be sold to a third party different from the original investor as a consequence of the competitive procedure above mentioned, the latter has the right to be reimbursed for the costs incurred in connection with the agreement reached with the debtor up to an amount equal to three per cent of the price of the assets agreed therein.

Restructuring agreements

The Decree Law also introduces changes relevant to article 182 bis of bankruptcy law, a proceedings partly in-Court regulated, based on the debt restructuring agreements between the debtor and at least 60%, in terms of amount of claims, of its creditors.

The agreement cannot bind creditors non part of it. Due to the fact that they have a consensual nature, these proceedings are often complicated or even blocked by the minority creditors who do not accept to adhere to the restructuring agreement.

The Decree Law has addressed this issue by creating a special procedure with respect to debt restructuring agreements involving mainly financial creditors.

Following the Decree Law, the debtor can claim the extension of the effects of an executed debt restructuring agreement over the minority dissenting/non-adhering financial creditors, provided that:

- at least fifty per cent of the debtor's overall indebtedness is of a financial nature and
- the financial creditors that have executed the restructuring agreement represent at least seventy five per cent of the debtor's overall financial indebtedness.

In addition to the above, the Decree Law provides for a similar procedure to extend to dissenting/non-adhering financial creditors also the effects of any out-of-Court agreement between the debtor and the majority of its financial creditors.

Finally, the Decree Law extends to 182 bis proceedings carried out pursuant to the new rules regarding the dissenting/non adhering financial creditors above the criminal liability regime applicable to debtors in the context of in-Court restructuring proceedings in connection with past wrongdoings or illicit behaviour in the course of the proceedings.

The reforms that have taken place in the last decade in the bankruptcy/insolvency area were the result of legislative intervention without structural planning; however, having the objective to be, especially the last two interventions, namely Decree Law no. 83/2012 and Decree Law no. 83/2015, the protection of the value "business", perhaps it would be desirable to find a different way to reform the system.

It can be concluded that the attitude to be taken towards the reform is to recognise the effort made by the legislature and to grasp the good points, i.e., the consideration that the procedures to avoid bankruptcy are more affordable and feasible for the debtor who wishes to benefit of them. ■

> "THE REFORMS THAT HAVE TAKEN PLACE IN THE LAST DECADE WERE THE RESULT OF LEGISLATIVE INTERVENTION WITHOUT STRUCTURAL PLANNING"

Country Reports Autumn 2015

Updates from Spain, France, Germany, Hungary, USA and Ireland

J. VICENTE ESTRADA
Senior Partner, Forest Partners, Madrid (Spain)

Spain: La Seda de Barcelona

The sale of a supranational business unit implied in insolvency proceedings in different European countries under the common jurisdiction of a Barcelona Commercial Court.

La Seda de Barcelona, S.A. (LSB), a company listed on the Madrid and Barcelona Stock Exchanges, was the parent of a multinational plastic packaging group integrating the whole value chain from the industrial production of PET right through to manufacturing of the preforms used by customers to hold their products, whether soft drinks, water, yoghurts, cleaning products or any other of countless possibilities. LSB's Packaging Division (known as Artenius PET Packaging Europe or APPE) operated 14 plants in Europe, Turkey and North Africa.

LSB was, however, saddled with debts of €476 million to financial creditors under a Senior Facility Agreement (SFA) and a PIK Loan, both of which were guaranteed by its affiliates.

> "LSB WAS SADDLED WITH DEBTS OF €476 MILLION TO FINANCIAL CREDITORS UNDER A SENIOR FACILITY AGREEMENT (SFA) AND A PIK LOAN"

Despite the dependable earnings of the Packaging Division on annual revenues of some €600 million and Ebitda of around €50 million, LSB began to experience serious cash flow problems in 2012 given the negative margins of the PET business and the continuous outgoings needed to service its debt.

Recognising that it would not be able to stave off default on the SFA loan, LSB sought unsuccessfully to renegotiate and refinance its debt with the lenders – being most of them, special situation funds – who demanded capitalisation of a part of the loans made.

In these circumstances, LSB filed for voluntary insolvency in the commercial courts of Barcelona on 17 June 2013 together with twelve of its affiliates, seven of them established in other Member States of the European Union.

On 4 July 2013, Barcelona Commercial Court No. 1 declared LSB and its twelve affiliates insolvent, at the same time confirming the international jurisdiction of the Barcelona courts under article 3.1 of Council Regulation (EC) No. 1346/2000, of 29 May 2000, on insolvency proceedings, insofar as the centre of the LSB Group's main interests was situated in Barcelona.

After failing in its endeavour to reach an arrangement with the creditors, LSB entered liquidation on 29 January 2014.

The court-appointed Insolvency Administrator, Forest Partners, designed a liquidation plan based on the sale of the APPE Packaging Division as the principal means to maximise recovery for the Group's creditors.

The sale was never going to be easy for three reasons. To begin with, the shares of the affiliates could not be sold without first obtaining a waiver from the lenders under the SFA and PIK loans, because the debt was secured against guarantees extended by these companies. This proved impossible, however. Meanwhile, LSB was already in liquidation, but its affiliates were still at an earlier stage in the insolvency process. Finally, the Packaging Division's assets were spread among numerous companies located in different countries.

In these circumstances, Forest Partners requested the Court to approve the public, open and competitive sale of the Business Unit formed by the

Supranational APPE Packaging Division, comprising a) the industrial property used by APPE in its manufacturing process, an asset owned by LSB; b) the business units owned by the affiliates APPE UK, APPE Iberia, APPE France, APPE Benelux and APPE Deutschland; and c) the shares of APPE Polska, APPE Turkpack and APPE Maroc.

The Court finally approved the sale process for the Supranational APPE Business Unit on 29 July 2014, and Forest Partners proceeded to set up a Virtual Data Room and contact leading industrial and financial players worldwide in order to initiate an M&A process consisting of a first round of indicative bids followed by two further rounds for binding offers.

A key differentiating factor compared to other sales of business units in Spain was the application for the first time of the urgent insolvency measures enshrined in the Royal Decree 11/2004, which allows the acquirer of a business unit to assume certain liabilities of the debtor and claims against the insolvency estate. In the case of the Packaging Division, the acquirer would take on debts with employees, trade payables and borrowings arranged to finance the working capital, thereby ensuring the continuity of the businesses transferred by allowing the creditors concerned to recover their claims, which would otherwise have been diluted with those of LSB's financial creditors, whose claims were secured against the guarantees issued by the APPE Division affiliates.

The sale process was swiftly concluded, and on 5 November 2014 Forest Partners was able to announce the selection of the bid made by the US concern Plastipak Holdings Inc., which consisted of a price of €360 million for the Supranational Packaging Unit's assets payable net of the liabilities assumed by the acquirer at the completion date. The Court authorised the sale under the agreed terms on 26 January 2015.

Meanwhile, Forest Partners was able to obtain waivers for the guarantees granted by APPE Turkpack and APPE Maroc allowing for the sale of these companies, and a Master Agreement was made with Plastipak on 31 March 2015, subject to approval by the European competition authorities, which gave the green light. The transaction was finally completed on 1 July 2015.

Given its characteristics, this whole operation sets a pattern for both Spain and Europe as a whole, not only for the complexity of its structure, which involved assets, shares, properties and rights situated in different countries, but also for the way in which the sale process was handled and the first-time application of new legislation, enabling the seller to fetch a higher price than it otherwise could have for the APPE Business Unit to the benefit of the Group's creditors.

“THIS WHOLE OPERATION SETS A PATTERN FOR BOTH SPAIN AND EUROPE AS A WHOLE”

France: New rules for the biggest troubled companies and their shareholders

The Law called “Loi Macron” (according to the name of the French Minister of Finance and Economy) has been passed on 6 August 2015. It is meant to amend the Commercial Code on two relevant points.

1. The French legislator has created a new level of commercial courts called “Specialised Commercial Courts”.

These courts will have jurisdiction to deal with the insolvency of the biggest companies with at least 250 employees and a turnover of €20 million. They will also have jurisdiction over companies having a turnover of at least €40 million and over any other company which, together with its subsidiaries, meets the above criteria. The Courts will be chosen by the Government in main economic areas (labour and business pools).

Moreover, the new Law sets a rule of jurisdiction based on the centre of main interests of the parent company so that the pending proceedings concerning insolvent subsidiaries will have to be transferred to the competent Specialised Commercial Court.

Finally, these Courts will be entitled to appoint a common insolvency practitioner in order to facilitate the coordination of the different proceedings (as Commercial Courts can already do).

These new rules will enter into force on 1 March 2016. They will have to be in harmony with the EU Regulation 2015/848, which disposes of several new mechanisms for coordination and contains detailed measures for cooperation between practitioners.

2. Another significant reform concerns the rights of the shareholders who are opposed to the rescue plan: the new law gives the commercial courts the right to impose a capital increase which can facilitate such a rescue plan.

Several conditions have been defined: (1) the modification of the capital has to be proved necessary in order to protect the company from winding up; (2) it must be shown that such a winding up would seriously trouble to local economy; (3) a specific application will have to be filed by the administrator or by the public prosecutor to the Court, which will appoint a practitioner for voting in favour of a plan; and (4) the shareholders opposing the plan will have the possibility to withdraw from the company.

Sources: Commercial Code, Art. L.721-8 and L.662-8 (“Specialised Commercial Courts”); Art. L.233-1 and L.233-2 ((Definition of control and subsidiaries); Art. L.631-19-2 (forced sale of shares).

JEAN-LUC VALLENS
Judge, Colmar Court of Appeal

DANIEL F. FRITZ
Lawyer (Rechtsanwalt), Partner
hww hermann wienberg wilhelm,
Frankfurt am Main (Germany)

> **ESUG MADE A CHANGE, AT LEAST FOR THE BIG AND INTERNATIONALLY RELEVANT CASES. THE PREJUDICE THAT GERMAN PROCEEDINGS TAKE TOO LONG IS OBVIOUSLY NOT TRUE FOR THE NEW DIP PROCEEDINGS**

Germany: New insolvency laws

Three years of "ESUG": Wind of change or same procedure under new label?

The German law to facilitate the restructuring of enterprises ("ESUG") entered into force three years ago. Now several studies are at hand assessing the impact of this insolvency law reform in Germany. ESUG's goal was not merely to modernise the insolvency regime in Germany generally, but was clearly focused on three goals:

(i) Enhancing the legal framework for debtor-in-possession proceedings ("DIP"),
(ii) granting more power and influence to the creditors, and
(iii) making the insolvency plan more efficient by introducing means for a debt-equity swap.

This was aimed at bringing German insolvency law back on a level-playing field to other jurisdictions and avoid further forum shopping cases.

Although there is still much debate about the ESUG, the first look at the number of new proceedings does not seem to indicate that much has changed. According to a study from BCG (The Boston Consulting Group, "*Drei Jahre ESUG, Höherer Aufwand lohnt sich*", 2015) only 2.7% of the insolvency proceedings were DIP-proceedings. However, this is including all classes of proceedings and when looking at the big cases the picture clearly changes: Here, the BCG study points out that a third of the 50 biggest insolvency cases were now "ESUG-procedures". Within the ESUG procedures, all being still only modifications from the uniform and court lead insolvency proceedings, one must distinguish between regular DIP-proceedings under the new law (Sec. 270a Insolvency Code, "InsO") and the so-called "protective shield" proceedings (Sec. 270b InsO). The latter type is only available for early filings, where the debtor is only imminently insolvent and the restructuring ability is vouched for by a neutral expert. In such Sec. 270b proceedings the debtor can, generally speaking, install an insolvency office holder of his choice as "custodian" and is required to present an insolvency plan within three months regularly.

As a study by hww hermann wienberg wilhelm reveals ("*hww radar ESUG*", 2015) both types of proceedings can be finished at very short notice. The shortest Sec. 270a and Sec. 270a proceedings were finished in 80 days only, while the longest lasting went to approx. two years and three months. In any case the new proceedings are regarded by the hww study as being significantly swifter than regular proceedings as Sec. 270a proceedings are now lasting 245 days on the average, whereas Sec. 270a proceedings are only lasting 251 days on average.

Other studies assessed what the market players are thinking about the new law. According to a study by Roland Berger (Roland Berger Strategy Consultants, "*Polarisierung der Meinungen*", 2015) 58% of the respondents believe that the complexity of the new procedures is higher. As the main reason for this, the increased number of players in a proceeding was identified. Nevertheless, this study shows that 31% of the respondents confirm that ESUG met their expectations and 58% agree that it met at least partially their expectations. In detail: 59% believe that the number of forum shopping cases has been reduced by ESUG; 69% state that the new proceedings help facilitating DIP proceedings, whereas 64% welcome the strengthened influence of creditors. Another study, provided by Noerr and McKinsey (Noerr and McKinysey & Company, InsO Study, 2015, "*Are German insolvency statutes internationally competitive after 3 years of ESUG?*"), concluded that 81% of the respondents were not of the opinion that the modification of shareholders' rights in the insolvency plan (e.g. debt-equity swap) is too much of a disadvantage to shareholders. As this study was generally looking at the competitiveness of the "new" German insolvency law, it addresses the shortcomings of the German insolvency regime as follows:

(i) no group insolvency law (71% tend to agree),
(ii) German claw back law (70%),
(iii) no pre-insolvency restructuring procedure (64%), and
(iv) no limitation to specific groups of creditors (54%).

In summary it can be said that ESUG made a change, at least for the big and internationally relevant cases. The prejudice that German proceedings take too long is obviously not true for the new DIP proceedings. Insofar, the new law may help avoid forum shopping. However, it is still necessary to look at the points of criticism, but the German Federal Ministry of Justice already provided the next level of law reform introducing an insolvency law for groups, now debated at the *Bundestag*, and passed another bill limiting now the possibilities of claw-back actions, that were deemed to be getting out as it was allegedly made "too easy" for the insolvency office holder to establish such a claim.

What remains is the question whether Germany needs a real pre-insolvency proceedings or proceedings only involving part of the creditors. This debate, now only started by the "New Approach" of the European Commission, has just begun in Germany.

"THERE IS A VERY HIGH RATIO OF REAL ESTATE OWNED BY INDIVIDUALS IN HUNGARY COMPARED WITH THE COUNTRIES OF WESTERN EUROPE"

Hungary: Personal bankruptcy law

There is a very high ratio of real estate owned by individuals in Hungary compared with the countries of Western Europe, but most of the owners are indebted because of mortgage loans.

Nowadays a lot of these mortgage loans are unpaid. By estimation approx. 1244 billion HUF is the total debt of the population to the banks. Furthermore there is another 100 billion HUF debt to the public utilities.

The legal consequence of the permanent insolvency is eventually the official real estate auction and the eviction. For solving it the legislative body incorporates the insolvency law for indebted individuals or families. The act will enter into force on 1 September 2015.

The procedure is in fact a debt restructuring. The aim of it is to pay the debts and to re-establish the liquidity of the debtors. As personal bankruptcy is a new element in the Hungarian insolvency law it is available for individuals who are unable to pay their mortgage loans for 90 days, but they have properties and, with help, they are able to keep the mortgaged real estates. This is a special feature of the law that is aimed to ensure the debtor's right to occupancy.

The bankruptcy trustees will be employed by the regional Government Offices and they will be supported by a special legal-financial-psychological team. They can be a lawyer, an economic specialist or a social worker.

The main provisions of the law are:

1. It is the debtor's choice.
2. In the first year it will be only available for the debtors who took a mortgage loan, then for all the others.
3. The debt amounts to from 2 to 60 million HUF.
4. The debt installment was not paid for 90 days and it amounts to at least 500,000 HUF.
5. The debtor shall owe only to a limited number of creditors according to the law, but at least one has to be a mortgagee.
6. The debt shall represent between the 100% and 200% of the debtor's properties.
7. Under personal bankruptcy proceedings, the debtor will pay smaller amounts than usual and at the end a portion of the debt will be waved, so that he will pay only about 95 % of the total amount owed.
8. The procedure will take five to maximum seven years and it will only be allowed once.
9. With the permission of the bank, the property in question could be considered apart from the other assets.

The goal is that after a successful bankruptcy the debtor can settle his debt in a short time and could keep his property. At the same time, for creditors it is more interesting to count on the recovery of the debt as the law guarantees a minimum recovery.

Thus, the Government expects to reduce the amount of unpaid debts and the number of new debtors.

BEATA ADAM
Lawyer, Hungary

DAVID H. CONAWAY
Shumaker, Loop & Kendrick LLP (USA)

USA: The US Supreme Court rejects attorneys' fees in Chapter 11

On 15 June 2015, the US Supreme Court ruled that a law firm could not recover fees it incurred in defending its own fee application.

The ASARCO Case

The case involved the copper company ASARCO LLC that filed for Chapter 11 protection in 2005 to deal with cash flow and environmental issues, among others.

ASARCO retained Baker Botts ("law firm") to represent it in the Chapter 11 case. Among other services, the law firm pursued fraudulent transfer claims against ASARCO's parent, obtaining a judgment for $7 billion – $10 billion, arising from the parent's forced sale of another subsidiary.

The judgment facilitated a successful Chapter 11 reorganisation, where creditors were paid in full.

The law firm filed a fee application for $120 million, and the parent-controlled debtor objected to the fees. The Bankruptcy Court overruled the Debtor's objections and approved the law firm's fee application, as well as $5 million in fees incurred defending the law firm's fee application.

On appeal, the District Court affirmed the approval of the law firm's fee application. However, the Court reversed approval of the $5 million of fees for defending the fee application. The US Supreme Court agreed.

Takeaways

The ruling no doubt evokes a visceral satisfaction as fees in Chapter 11 cases have come under fire recently as often disproportionately high compared to the value generated for the estate. However, the facts of the ASARCO case indicate that the value generated for the estate was substantial, apparently a multiple of the fees incurred.

The US Supreme Court's ruling was based on and highlights the "American Rule" regarding legal fees, that litigants shall be responsible for their own legal fees, unless a statute or a contract provision shifts the risk to one party. For example, most states have adopted some form of an unfair and deceptive trade practices statute, which normally provide for the plaintiff to recover attorneys' fees for pursuing such claims from the defendant, as well as damages.

It is also common for commercial contracts (including sales contracts, loan agreements, license agreements, leases, etc.) to contain a provision shifting the responsibility for attorneys' fees to the party who breaches a contract. For example, a commercial sales contract often provides:

"in the event this contract or the obligations of the buyer in the contract must be enforced against the buyer, the seller may recover its reasonable attorneys' fees from the buyer."

State and Federal courts generally enforce such provisions against a buyer without hesitation.

Shifting responsibility for attorneys' fees can have material impact on litigation and the incentives of the parties involved in litigation. If a buyer in a commercial sales contract knows that it will be liable for not only the obligation owed to the seller for goods or services sold or provided, but also for the seller's attorneys' fees (especially when coupled with a robust default interest), the buyer has incentive to resolve the litigation. Merely asserting defences to delay payment of obligations owed will cost the buyer if it is responsible for the seller's attorneys' fees, not to mention its own attorneys' fees.

In the competitive global business environment, companies are challenged to deliver value to stakeholders. Minimising risks and shifting costs where possible helps this challenge. It is prudent for companies to maximise the business opportunities presented by the "American Rule" by reviewing their contracts to ensure appropriate attorneys' fees provisions are included.

"SHIFTING RESPONSIBILITY FOR ATTORNEYS' FEES CAN HAVE MATERIAL IMPACT ON LITIGATION AND THE INCENTIVES OF THE PARTIES INVOLVED IN LITIGATION"

Ireland: Major changes in company and insolvency legislation

At long last, the much awaited Companies Act 2014, the largest reform of company law in Ireland in over 50 years, has come into force.

The Companies Act 2014 ("the Act") was signed into law by the President of Ireland on 23 December 2014 and entered into force on 1 June 2015. The aim of the Act is to incorporate the provisions of the existing Companies Acts and the law set out in regulations into one single companies code. The Act contains 25 parts (1448 sections) and provides for a transition period of 18 months from commencement. The Act will impact all Irish companies and all insolvency procedures.

Private companies

There will now be two types of Private Company – a private company limited by shares ("LTD") and a designated activity company ("DAC"). All current Irish private companies limited by shares must convert to either of the new company types and prepare a new constitution to replace its memorandum and articles of association before 30 November 2015.

The key features of an LTD include:

- An LTD will not need to hold a physical Annual General Meeting of shareholders and can instead adopt written procedures.
- An LTD will not need a minimum of two directors – one is now sufficient. Companies with one director are required to have a separate company secretary.
- An LTD will not have an objects clause and there is no legal limit on the company's capacity to engage in different activities.
- An LTD's name will not change after conversion and it can continue to use the suffix "Limited" or "Ltd" (or the Irish language equivalent "Teoranta" or "Teo").

The key features of a DAC include:

- A DAC will not be entitled to discontinue holding a physical AGM unless it is a single member company.
- A DAC must have two directors and a company secretary.
- A DAC must have an objects clause in its constitution and its legal capacity will be limited by the scope of that objects clause.
- A DAC must change its name to include the suffix "Designated Activity Company" or "DAC" (or the Irish language equivalent "*Cuideachta Ghníomhaíochta Ainmnithe*").

The other company types permitted under the Act are Unlimited Companies, Public Limited Companies, Companies Limited by Guarantee and Investment Companies.

Insolvency

The Act retains the three existing types of liquidation – members' voluntary liquidation, creditors' voluntary liquidation and court liquidation. In order to be appointed as a liquidator or examiner, there is now a statutory obligation for a person to have certain qualifications, such as membership of a prescribed accountancy body or a practising solicitor etc.

The Act provides that once a company is wound up by order of the Court, the liquidation will be carried out as a creditors' voluntary liquidation, thus reducing the involvement of the Court, the Court Examiner and ultimately the costs of the process.

The notice to be sent to creditors, advising them of the convening of the initial creditors meeting, must include a list of the creditors of the company, or set out their right to inspect the list of creditors and must state the name and address of the proposed liquidator, if any.

Members' voluntary liquidations must now use the Summary Approvals Procedure, which is a new streamlined approval procedure introduced in the Act to permit a range of restricted activities/transactions.

Receiver's powers are set out in the Act for the first time. There are no explicit requirements regarding professional qualifications for those appointed as Receivers.

Small and medium enterprises can now apply directly to the Circuit Court for the appointment of an examiner (introduced by the Companies (Miscellaneous Provisions) Act, 2013).

Insolvency practitioners await with interest the impact of the new legislation on their work in the coming months and years.

ENDA LOWRY
Director, McStay Luby, Dublin (Ireland)

"THE MUCH AWAITED COMPANIES ACT 2014, THE LARGEST REFORM OF COMPANY LAW IN IRELAND IN OVER 50 YEARS, HAS COME INTO FORCE"

INSOL Europe *Contacts*

INSOL Europe, PO Box 7149,
Clifton, Nottingham NG11 6WD
Enquiries: Caroline Taylor
(carolinetaylor@insol-europe.org)
Tel/Fax: +44 (0) 115 878 0584
Website: www.insol-europe.org

The Executive

President: Robert Van Galen (robert.vangalen@nautadutilh.com)

Deputy President: Alberto Núñez-Lagos (alberto.nunez-lagos@uria.com)

Vice President: Steffen Koch (steffen.koch@hww.eu)

Immediate Past President: Catherine Ottaway (ottaway@hocheavocats.com)

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EU Liaison: Michael Thierhoff (Michael.thierhoff@tmpartner.de)

Case Register: Chris Laughton (chrislaughton@mercerhole.co.uk)

Academic Forum: Christoph Paulus (chrpaulus@t-online.de)

Prof. Paul Omar (Secretary) (khaemwaset@yahoo.co.uk)

Glossaries: Marc Udink (mcudink@udink.nl)

Judicial Wing: Heinz Vallender (hvallender@t-online.de)

Turnaround Wing: Chris Laughton (chrislaughton@mercerhole.co.uk)

Steffen Koch (steffen.koch@hww.eu)

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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

4 & 5 October	INSOL Europe Academic Forum Conference *Warsaw, Poland*
5–8 October	INSOL Europe Annual Congress *Warsaw, Poland*

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