eurofenix

The journal of INSOL Europe

Spring 2016

Stormy Seas

The impact of the oil market

Harmony in Europe

Is there an answer?

Also inside this edition:

- The French "Pre-Pack" Solution
- Mediation & Arbitration
- Refinancing in Spain
- NPLs in Greece

€30 ISSUE 63

ISSN 1752-5187

eurofenix

Spring 2016

Eurofenix is published by PNDesign on behalf of INSOL Europe. Correspondence, including ideas for articles, should be sent to:
Paul Newson, PNDesign
pndesign@icloud.com

Eurofenix Français:
Sponsored by CNAJMJ – France
Editor/enquiries: Florica Sincu
Translation: Gabrielle Allemand

Printed by: MRP Print
www.mrp.uk.com

NEXT ISSUE PUBLISHED: July 2016
Copy deadlines available on request.

Welcome from the Editors


ANNEROSE TASHIRO


GUY LOFALK

Harmonisation versus hostility

INSOL Europe has already played an important role in the recasting of the European Insolvency Regulation by submitting its proposal resulting from the work of numerous members that played important roles in the evaluation, discussion or commenting process.

Now that the Recast is in force, since its passing by the European Parliament last May, INSOL Europe's members are again engaged in analysing and commenting on it, and also in criticising it because they will be working with it from June 2017. Books and articles are written about it, like the one by Judge Csöke, who thankfully left the bird's eye view and contributes a detailed look on certain individual questions of the new Regulation. This should be an invitation to INSOL Europe's members to send us their views and open further discussion, thus helping improve our working tool – the European Insolvency Regulation.

But that's not the only relevant project. There is the Commission's Recommendation to the Member States on a preventive restructuring framework and there is the Commission's intention to issue a legislative initiative during 2016 on insolvency reform, with the purpose of harmonising the insolvency regimes of the Member States. Paul Omar explores the route of the harmonisation initiative and the task of the workforce that started in January 2016.

In addition, INSOL Europe's President, Alberto Núñez-Lagos, imparts to us his ideas about how to tackle both initiatives. I would like to draw your attention to this President's Column in which the possibility to combine the harmonisation drive with the Commission's Recommendation on the preventive restructuring framework is explored. Our readers should take this as a trigger to actively discuss concepts, share opinions and analyse consequences. And please, do so here: in ***eurofenix***.

But, what is that all good for if Europe falls apart?

Britain is seriously considering the "Brexit" with the referendum on 23 June. Further, Finland's Parliament must hold a debate over the next weeks on a possible referendum to leave the Eurozone after receiving a citizens' initiative petition signed by more than 50,000 Finns. Since yesterday, the EU-Turkey Deal to shuffle refugees through Turkey to Europe is in place, but it is still relying on the Member States' willingness to comply with the tasks of the European Convention on Human Rights and the European law concerning refugees seeking asylum.

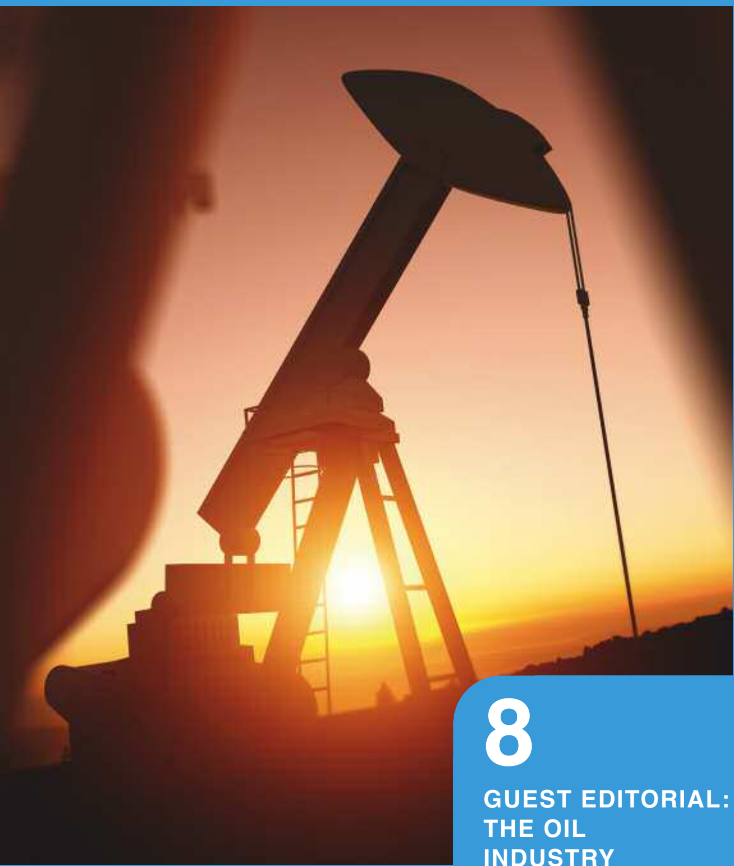
Before our next copy of ***eurofenix*** we will know how European the Brits are*. We will know how many of the in-hurry raised fences are taken down now that the Schengen Agreement is – supposedly – live again. We will know whether Finland can fix it or whether we will see a move towards a "Finexit".

This recently expressed hostility towards the idea of Europe, not just anonymously, somewhere through social media, but also directly by politicians, frightens us.

Let us all hope that Europe re-considers its values and achievements and finds its way to harmonisation in all aspects.

* *Nick Fraser: "Being European: what does it mean?", The Guardian, 20 March 2016.*

Annerose Tashiro



8
GUEST EDITORIAL: THE OIL INDUSTRY

16
THE FRENCH “PRE-PACK” SOLUTION

eurofenix
Edition 63 Spring 2016

CONTENTS

CONTENTS

Harmonisation in Europe

ALBERTO NÚÑEZ-LAGOS
INSOL Europe President

Alberto Núñez-Lagos presents his proposal for the harmonisation of the European Preventive Restructuring Framework, to which we welcome feedback from our readers

"INSOL EUROPE HAS BEEN, AND CONTINUES TO BE, READY TO CONTINUE CONTRIBUTING ANY TECHNICAL AND PROFESSIONAL KNOWLEDGE TO THOSE WHO HAVE TO TAKE THE POLITICAL DECISIONS"

The European Commission has the intention to issue a legislative initiative during 2016 on insolvency reform with the purpose to harmonise the insolvency regimes of the Member States.

The task is huge. It would probably make sense to have the insolvency regimes harmonised in several stages. Not everything or every situation in an insolvency regime has the same importance and effects. Also, there are parts of the insolvency regimes which are so different in each Member State (mainly due to historic reasons) that their harmonisation is very difficult to be accepted and thus has to be imposed and previously intensively negotiated. What is certain is that businesses across Member States have the same characteristics and that businesses operating across borders would like to enjoy the same rules in each Member State. Thus the problem is not a business problem but rather a political one which would probably need a political solution.

INSOL Europe has been, and continues to be, ready to continue contributing any technical and professional knowledge to those who have to take the political decisions. Our contribution to this ongoing process through INSOL Europe's (2010) "*Study on a new approach to business failure and insolvency – Comparative legal analysis of the Member States' relevant provisions and practices*" (commissioned by the Directorate-General Justice of the European Commission, October-December 2013) shows that a technical approach is possible.

The proposal I will be making is very simple: first focus on the harmonisation of the preventive restructuring framework, either out of court or with very limited court intervention, or the "PRF" (as named by the Commission Recommendation of 12.3.2014 on approach to business failure and insolvency, paragraph 6.) while continuing negotiating in parallel the harmonisation of the in-court classical insolvency systems.

This proposed solution leads to several questions. The first question is: can a PRF be harmonised without harmonising the rest of the insolvency regime? The answer is yes, if the PRF can be structured as a stand-alone framework. This leads to the second question: what characteristics should a stand-alone PRF have?

Full, temporary and automatic stay

The preventive restructuring and the consequential stay can be requested by the debtor unilaterally in any distressed situation, but not necessarily when the debtor is insolvent. If the debtor is too aggressive and requests the stay only for the purpose of renegotiating existing terms without being in a distressed situation, the debtor risks reaching no agreement with the relevant majority of creditors. Due to the stay, this situation would normally lead to a breach of agreement with the creditors and thus, because of the absence of a creditors' agreement for restructuring, to insolvency.

By filing for a preventive restructuring ("PR") the debtor would obtain:

i. a stay in respect to all legal situations (a full stay) which could jeopardise a negotiation with the creditors;
ii. suspension (a temporary stay) of the directors with the obligation to file for in-court insolvency and suspension of the creditors' right to file for in-court insolvency of the debtor; and
iii. suspension of the enforcement of claims, security and assimilated actions or situations such as set off, acceleration of claims, and any provision or clauses by contract or law. This situation of non-payment, or of becoming the debtor who negotiates with the creditors in order to reorganise the debt, can be invoked for the application of this kind of suspension (including swaps).

The stay is granted to the debtor without any investigation by the court and without any evidence of the existence of negotiations or future negotiations with the creditors. Experience shows that debtors try to negotiate on a confidential basis with key creditors, who normally are sophisticated and have restructuring technology (e.g. banks, hedge funds). Such creditors are willing to participate and monitor the process confidentially in order not to destroy any working capital credit the debtor still has in the market while negotiations take place.

Such a confidential scenario is extremely effective and productive. Only when the restructuring agreement has been reached with such key creditors a PR protection

Share your views!

would be filed in order to achieve (in addition to the referred stay):

i. additional votes/support to the pre-agreed restructuring agreement with such key creditors and eventually the cram-down of dissenting creditors; and
ii. the safe harbour protection of such a restructuring agreement for the transactions contemplated thereunder against future claw back or challenge in the event the borrower finally becomes insolvent (new money, new security, assets disposals, etc.).

In order to avoid fraud, there are two mechanisms:

i. The stay is temporary, e.g. four months extendible for two additional months in given circumstances (complexity of the restructuring, coordination issues with foreign PR or even insolvency proceedings) and if a restructuring agreement with a very significant amount of creditors in each class is not reached in court, insolvency would be mandatory.
ii. If a blocking majority of creditors agree that negotiation on a creditors' agreement will not start or has been cancelled, the court shall automatically end the stay.

Universal

The stay should be applied to the claims the debtor chooses. It can be universal but does not have to. Thus the stay is for the benefit of the debtor. No *pari passu* rule should be applied during the stay if the debtor does not intent to include in the restructuring agreement a specific type of claims (e.g. financial debt is stayed but not the revolving facilities which provide for bonds and guarantees to third party contractors).

Flexible creditors' agreement

The sole aim of a PRF is to enable the debtor to avoid insolvency or if already insolvent, to exit insolvency. Paragraph 6(a) of the Recommendation phrases this situation differently, namely "*the debtor should be able to restructure at an early stage, as soon as it is apparent that there is a likelihood of insolvency*". No matter if it is one way or the other the only important element is that the debtor should have total and absolute freedom to convince or agree with a very relevant majority of creditors, any restructuring including not only a financial restructuring (haircuts and deferrals with or without new money), but also other agreed solutions such as asset disposals, entire business unit disposals, mergers, asset hive downs, debt for asset, debt for equity, etc.

Therefore, I disagree with the Recommendation that a Restructuring Plan, be it formal, structured and probably validated by an expert as described in the Recommendation (see paragraph 8 and following) is the expected product of a PRF. The flexible, informal and consensual Restructuring Agreement I propose will enable debtors and creditors to adapt to any type of restructuring needs and circumstances with the necessary flexibility which will lead to high efficiency. The mechanisms to avoid fraud and abuse are:

i. A high majority of creditors (calculated by classes, basically secured creditors, trade creditors, financial creditor and employees), tax authorities and Social Security should not be classed separately.
ii. A voting power by secured creditors based on the market value of their security in order to avoid under-secured creditors voting for the face value of their claims.
iii. The court control of any formal (i.e. majority requirements), the *pari passu* rules (among classes) and the conflict of interest situations (i.e. a creditor should vote based on an objective and standard interest and not taking into account other interests in other deals (basically the objective test will be to compare the recovery within the Restructuring Agreement with a liquidation within in-court insolvency proceedings).

Court intervention

Court intervention should only be sought for the purposes described above in iii (and indeed for the registration and cancellation of any stay filings) and such sanctioning of a Restructuring Agreement should have the effect of safe-harbour as regards to claw back actions in relation with any agreements reached in the Restructuring Agreement. Appeals should be limited to the same court in order to avoid lengthy processes like in in-court proceedings. Recognition should be automatic. Having these proceedings harmonised would avoid forum shopping and make it very easy to restructure European corporates across Europe with cross border affiliates.

Conclusion

PRF should be easy to harmonise due to the reasons explained. PRF would basically act as an opportunity to restructure by suspending any in-court insolvency proceedings rules which if unsuccessful would lead to insolvency. For the EU, a harmonisation of a piece of the insolvency framework during 2016 or early 2017 would be a tremendous success.

> **"FOR THE EU, A HARMONISATION OF A PIECE OF THE INSOLVENCY FRAMEWORK DURING 2016 OR EARLY 2017 WOULD BE A TREMENDOUS SUCCESS"**

Oil price: the stormy seas

Some time ago we decided to invite personalities from outside the insolvency profession to explain the evolution of an industry, to discuss a point of economy or to impart an experience in a different field than ours, from their own viewpoint. Here is Sandy Shaw's take on the impact that the current oil prices are having on the economy at large.

SANDY SHAW
Non Executive Director, Velocys plc

Sandy Shaw qualified as a US attorney-at-law before moving to the UK where, whilst working in the oil and gas industry, she also qualified as a UK barrister. With nearly 40 years in the energy industry Sandy's experience spans from large multinational corporates to small start-ups, listed companies and private equity, including Mobil, Marathon, Exxon, LASMO and Consort. She was a founder of Valiant Petroleum.

"THE INDUSTRY AT LARGE IS FACING REDUNDANCIES, PAY CUTS AND BUDGET CUT-BACKS IN ALL AREAS"

It was 1978. Demand for oil was high, supply appeared tight and governments were beginning to stockpile supplies in order to avoid a repeat of the supply crisis of 1973 when Saudi Arabia cut production to support oil price. That was the year that this (then) newly married, newly qualified US attorney-at-law relocated to England and took up her first oil industry employment. The oil price was around $14 per barrel.

The industry I joined was young, vibrant and growing rapidly. By 1981 the oil price reached $35 per barrel following the Iranian Revolution and further OPEC production manipulation, before the price stabilised in the mid-$20's per barrel. Since that time, over a 38-year career in various companies and positions, I have 'surfed the waves' of oil price rises and falls and the consequent effects of volatile oil prices on the industry generally and the individual companies in different sectors within the industry. Whilst supply and demand played their part, politics and perception played an even larger one. Therefore, oil prices were never certain or predictable: the only certainty was that any prediction of a future oil price was likely to be wrong.

Seasoned oilies

The recent, rapid plummet in oil prices is not unique. Like the stories my parents told of the Great Depression, seasoned 'oilies' recall the oil price collapses of 1985/86 and 1998/99 and more recently the short-lived but nearly as severe price drop in early 2009. The current collapse is all the more significant because of the extremely low oil prices reached (not seen since the end of the last century) compared to the unprecedented high prices generally prevalent since 2008, and the potential duration of a low-price environment.

Industry scars

Industry commentators are comparing the severity of the current situation to that of 1985/86. The industry's scars and my own experiences of that period are still obvious and painful; the concern is that there will be a repeat, perhaps an even more severe re-enactment, of that trauma.

I clearly recall an oil price of $8.50 and resulting massive redundancies; slashed budgets including those for research, development, exploration, training and recruitment; the delaying/cancellation of projects; the sales of assets, both core and non-core; corporate restructuring; hiving off of shipping, refining and other less lucrative but previously linked businesses, and major re-financing initiatives.

Those understandable industry reactions to the rapid shrinking of income resulted *inter alia* in the disappearance of new projects/developments, which took years to cure and a major lack of skills/personnel with the consequent 'ageing' of the industry, which has never been fully remedied. This did not affect only the oil companies, but also the myriad service and related companies that depended upon oil and gas work.

Crashing prices

The current price crash is already having a similar effect in the United Kingdom Continental Shelf (UKCS) oil and gas production projections. Last year, the exploration and appraisal of the number of wells dropped to its lowest level since 2001, just a quarter of the levels seen at peak time around the turn of the century. The industry at large is facing redundancies, pay cuts and budget cut-backs in all areas. Albeit inevitable and necessary, it begs the question of where tomorrow's technical expertise will be found and whether there will be available drill ships and other capital intensive plant and equipment to support future development.

Increasing costs

More so, due to the increased costs basis of exploration, extraction and operation in the UK, particularly for offshore, deep water and other non-conventional reserves, many existing developments will no longer be economic to produce. Already in 2016 announcements have been made that several UKCS and Norwegian fields will be shut down and their infrastructure abandoned, in at least one case citing poor profitability at current oil prices. Whilst it is not clear if these fields are being abandoned "prematurely", the permanent removal of existing potential host infrastructure will add costs to any future developments and there is already concern that UKCS offshore reserves will never be fully exploited.[1]

Financial stress

Whilst merger and acquisition activity happens in all cycles of oil prices, the sale of assets and take-over activity rises at times of financial stress and significantly higher levels of M&A have been reported for 2015 compared to the previous two years. Those companies with funding capability and the courage to act counter-cyclically will take advantage of the fall in share prices that inevitably results from an oil price decline. More such activity is likely if and when the oil price begins to recover, as share price recovery generally lags behind. The positive here though is that buyers remain interested in oil and gas assets at the right price.

Financially, even the most robust and far-sighted oil companies are suffering, including the majors. Those producers who hedged their forward sales can only be protected for a limited time and volume and will be waiting with some concern on the duration of this market. Low oil prices affect more than the balance sheet; they can have an even more severe, negative correlation to share price, particularly for smaller, independent, listed companies. This jeopardises the satisfaction of loan-to-value covenants in existing financing arrangements and the ability to renew or increase borrowings will consequently be hampered notwithstanding that current obligations may be met on an ongoing basis.

Insolvencies rising

Saliently, for the insolvency practitioners who read this publication, the number of restructurings, re-financings and insolvencies in the energy industry has sky rocketed. At least 28 UK oil and gas services companies declared insolvency in 2015, up from 18 the previous year and just six in 2013[2] and, almost unheard of in my youth, oil and gas exploration and production companies have not been spared.

In upstream oil and gas activities, where interests are generally held as jointly operated licences, the insolvency of a participant is a major risk for the other, solvent, participants who will be liable for increased costs in a default, including decommissioning liabilities at which point the upstream asset becomes a liability. In the worst case, because of the licence obligations, participant insolvency could result in the loss of the licence assets and/or create solvency issues for other participants, in a domino-effect.

Making progress

Yet, all is not doom and gloom. At a recent industry function in London, amidst the dour faces were some more up-beat attendees, people who reported that the oil companies and service contractors were working together to establish the 'real cost' of development and operations and were making good progress in bringing costs in line with current oil prices.

Finding more cost efficient ways to work with suppliers would be a good thing. Even some media commentators, whose effects on perceptions are often as influential as supply and demand actualities, have been reporting that the industry is resilient enough to weather the storm. After all, petroleum has always been a 'boom and bust' business. Let's hope they are right. ■

Footnotes:

1 16 February 2016 reports cite statements made to the British government by John Swinney, Scotland's finance minister and deputy first minister, urging tax cuts on oil and gas companies to avoid early field shut-downs and more job losses, and voicing concern that some of Britain's remaining North Sea oil will never be recovered as companies active in the area have scaled down investments due to the weak oil price.

2 According to Moore Stephens, the accountancy group.

> "OIL COMPANIES AND SERVICE CONTRACTORS WERE MAKING GOOD PROGRESS IN BRINGING COSTS IN LINE WITH CURRENT OIL PRICES"

Share your views!

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!

Arin Octav Stănescu (1950–2015)

It is with sad news that we report the passing away of Arin Octav Stănescu, President of The National Professional Association of the Romanian Insolvency Practitioners (UNPIR), Vice-President of the World Union of the Liberal Professions (UMPL).

Emilian Radu, UNPIR Honorary President writes: "Arin Stanescu was a powerful personality, full of energy and efficiency. We have not always seen eye to eye on all the subjects we discussed but we always reached a compromise or one of us yielded when the other's arguments were convincing. Although strong willed, he had this capacity to accept others' points of view when presented with solid reasoning. It seems normal but there are few leaders accepting that sometimes they might be wrong – this lends value to a relationship as well as to the decisional process.

He was a truly free person when it came to expressing his beliefs, which he did convincingly and in a straightforward manner, disregarding the institutional turbulences he may have caused as long as the cause he was pleading for was served. Nevertheless, he was tactful enough to censor his personal opinions when the interest of the guild required it, especially in discussions with the state institutions.

He was a long-standing president, imprinting his style over several mandates and one thing is certain: he dedicated


Arin Octav Stănescu (1950–2015)

time and energy to the development of the IP profession well in excess of what other colleagues were willing to.

Pragmatic and with a great commercial instinct, he was equally generous and supportive to those in need. His strong personality leaves a managerial void for now and the new president, whoever that might be, will be surely compared with what Arin has left behind.

My good thoughts will always be with him. With sadness for parting but also glad that we crossed paths and destinies."

Arin Stănescu was a Council Member and the representative of the Romanian IPs at INSOL Europe. He was among the first to see the importance of the European organisation and the benefits local practitioners could have by joining INSOL Europe.

Arin promoted our first EECC conferences (Budapest 2005 and Warsaw 2006) in Romania, bringing a whole team of speakers and participants to both. His example was followed and nowadays the Romanian membership is the strongest from an Eastern European country, giving Romania the right to have a permanent representative on the Council.

Eastern European Countries' Committee Conference 2016

New Trends in Insolvency: Distressed Investing and the evolution of Personal Insolvency across Eastern Europe, *12 & 13 May, Cluj-Napoca, Transylvania*

After the great success with last year's conference in Vilnius, which had guests from all over Europe, this year's conference will include sessions with extremely interesting approaches on today's evolving situation and current insolvency developments.

Subjects to be approached shall include "Non-Performing Loans", "Transporters and food manufacturers face to face with insolvency", "Update on the EIR and the Revisited EIR", "The pitfalls of cross-border insolvency", "A comparative approach to personal insolvency", and "The impact of the personal insolvency law on the banking system".

Moreover, bearing in mind that the main purpose is to try to enlarge the perceptions and awareness of the audience with respect to such important matters, all sessions will be open to a debate which is expected to be highly prolific and plenteous.

In order to achieve this goal, the panellists are accredited and skilled experts in their field and include among others, Bogdan Olteanu (National Bank of Romania), Mgr. Slavomír M. Čauder (Giese & Partner s.r.o., Czech Republic and Slovakia), Dr.iur. Veronika Sajadova (Latvia), Crispin Daily (Proskauer, UK), Mirona Dolocan (BCR Corporate recovery, Romania), Rudolf Vizental (CIT Restructuring, Romania), Giuseppe Scotti Macchi di Cellere Gangemi (Studio Legale, Italy), Daniela Deteșan (judge, Romania), George Covacz (EOS KSI, Romania), Mihai A. Pop (APS Holding, Czech Republic).

There will also be a welcome address by Radu Lotrean (CITR, Romania), Co-Chair of the EECC along with Evert Verwey (Clifford Chance LLP, The Netherlands) and Alberto Núñez-Lagos Burguera (President, INSOL Europe), with the closing remarks undertaken by Vasile Godîncă-Herlea (CITR, Romania).

The conference will be conducted in English with simultaneous translation in Romanian and Hungarian.

Conference Venue

The conference will be held at the Grand Hotel Italia, Str. Vasile Conta nr 2, 400478 Cluj-Napoca, Romania.

For further information visit www.insol-europe.org/events

Sponsors: INSOL Europe would like to thank the conference sponsors listed below for their generous support. If you are interested in sponsoring an event at this conference, please contact Hannah Denney: hannahdenney@insol-europe.org

Conference Main Sponsor

BDO RESTRUCTURING

www.bdo.de/dienstleistungen/restructuring/

Sponsor of Conference Material

CITR

www.citr.ro

Conference Sponsors

STP Informationstechnologie AG: www.stp-online.de
Schiebe und Collegen: www.schiebe.de
EOS Group: www.eos-solutions.com
Troostwijk: www.troostwijkauctions.com

With thanks to our Conference Supporters

AIJA (International Association of Young Law): www.aija.org
UNPIR: www.unpir.ro

Can you host a local seminar?

Members are invited to host a small local seminar at their workplace with the aim of attracting more members from their jurisdiction.

Such seminars have previously been held by URÍA MENÉNDEZ in Lisbon (Portugal) and Gianni Origoni Grippo Cappelli & Partners in Rome (Italy). Both events started early evening and consisted of a short presentation by the President and Deputy President of INSOL Europe, along with speakers from the hosting firms. The events were followed with light refreshments and a networking opportunity for the delegates.

If you are interested in hosting a similar event in 2016, please email Caroline Taylor (carolinetaylor@insol-europe.org) for further information and we will be happy to provide assistance.

Insolvency in Europe: Tackling the key obstacles to cross-border markets

Chris Laughton (Mercer & Hole, London) reports from the Institute of Chartered Accountants in England and Wales/R3 Seminar in Brussels on 7 December 2015

The purpose of the seminar was to discuss how changes to European insolvency regimes might reduce barriers to capital and trade, which is an issue currently being considered by the European Commission.

The seminar was chaired by Samantha Bewick, who chairs the Insolvency Committee of the ICAEW (Institute of Chartered Accountants in England and Wales), the largest of the UK's insolvency regulators. The principal speaker was Ondréj Vondráček, Civil Justice Policy, European Commission. Panel members representing different Member States were Marie Luise Graf-Schlicker, Director General, German Ministry of Justice for Consumer Protection; Werner Derijke, Counsel, Jones Day (Belgium); and Graham Rumney, Chief Executive of R3, the UK insolvency practitioners' trade association.

A key issue to come out of the discussion was "What is Harmonisation?" The answer is probably in shades of grey, but the Commission identifies the treatment of creditor claims as an example of harmonisation. Whether a little more attention might have been given to harmony lessons at the Conservatoire is an open question, but common procedures across Member States appear to be much more akin to unison than to harmony. True harmony may very well be acceptable to and even be the wish of Member States, each insolvency regime playing after its own score in a way that works well with the others, but with the individual registers and timbres of the instruments being heard considered as necessary.

There was an apparent inference by each Member State that the Commission's approach was indeed seeking unison. But Germany's preference is for step by step convergence. Belgium urges proper assessment of individual countries' insolvency outcome statistics (which are not always available) before determining how individual fine tuning might encourage harmony. The UK emphasis is simply on identifying and rectifying individual countries' shortcomings.

The Commission is seeking to determine a proposal on harmonisation by the end of 2016. It justifies "harmonisation" by the high level of non-performing loans (NPLs) in Europe – the implication being that harmonising insolvency is the only way to address that issue. The suggestion that debt trading would reduce NPLs was met with a response that investment will be facilitated by harmonisation. It appears to be Commission dogma that harmonisation is necessary, without any recognition that there may be alternative solutions and, therefore, without seeking to address the Member States' individual issues. While it may be difficult for the Commission to deal individually with each state on the insolvency reform, a blanket response to a perceived but unmeasured problem is unlikely to engender the best level of support throughout the Union.

As a footnote, there appears to be universal disappointment with the World Bank rankings of countries' insolvency procedures. More rankings from other sources and more reliable models were called for.

INSOL Europe Academic Forum Mid-Year Symposium, Berlin

Credit Institutions' Recovery and Resolution: Lessons to be learned by commercial insolvencies, *29 April, Humboldt-University Berlin, Germany*

The INSOL Europe Academic Forum is organising a free half-day conference at the Humboldt-University in Berlin on 29 April 2016.

The overall topic ties in with the Academic Forum Conference held last October in Berlin during the INSOL Europe Annual Congress – recovery and restructuring in the banking sector. This is not meant to be repetitive but rather to underline the enormous importance of this area of insolvency and restructuring law. After all, what can be observed here is a fundamental shift of the underlying paradigm: from a debtor-creditor driven procedure towards a state-controlled one where supervision is determining the entire life cycle of financial institutions. It is a not an entirely unlikely assumption that these developments will have far reaching implications – including impact on the commercial insolvency law.

The speakers, who are all acknowledged experts in their field, include:

Monica Marcucci from the Banca d'Italia in Rome will speak about "Shareholders in times of distress: from veto powers to write down?"

Thorsten Höche, General Counsel of the German Banking Association, addresses "BRRD – Implementation in Germany – Goodbye to Insolvency law for Banks?"

Thomas Bauer, Chair of the FINMA Board of Directors (the Swiss banking supervisory body), is going to speak about "The DNA of the Financial Market Insolvency Regulation: Waiving the traditional principles? – The Swiss perspective."

Prof. Ignacio Tirado, Universidad Autónoma de Madrid, will broaden the perspective with "The problems of the holdings of sovereign debts in the balance sheets of banks."

We look forward to seeing you at this symposium.

Visit our website: www.insol-europe.org/events for further information and a technical programme, or email Wendy Cooper: wendycooper@insol-europe.org to register your place. The conference is a non-ticketed event.

The YANIL News Spot

The primary aim of the Young Academics Network (YANIL) is to act as a forum for younger academics to express their views on matters of International, European and Comparative insolvency law and share their ideas

At the INSOL Europe Academic Forum Conference in Berlin back in October 2015, YANIL elected an almost entirely new board from among the members coming from all over Europe.

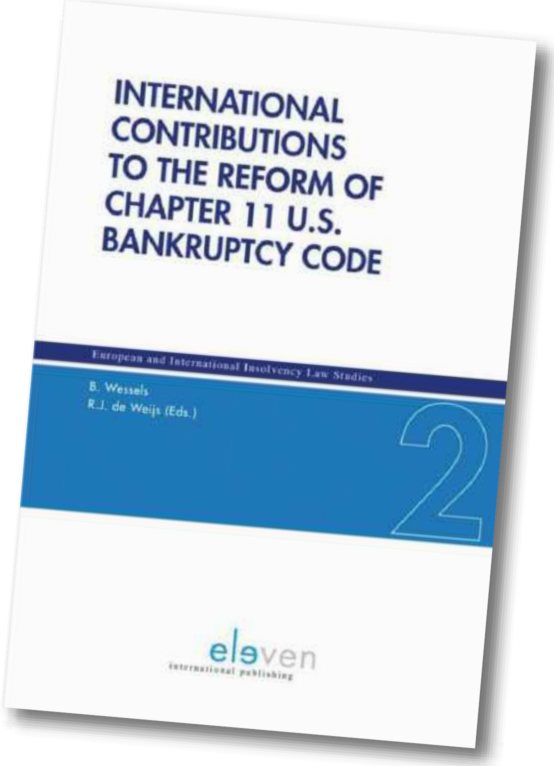
Jennifer L. L. Gant of Nottingham Trent University in the UK was appointed Chair, Jochem Hummelen of Houthoff Buruma and lately of the University of Groningen in the Netherlands the Co-chair. Jan Plaček, Assistant to the Deputy Mayor of the City of Prague will be managing our online presence, David Ehmke, a PhD Candidate of Humboldt-University of Berlin is our "youngest YANIL member", and finally Giulia Vallar, a Post-doc Research Fellow at the University of Milan, will kindly resume her role on the board to lend her experience to those new to the job.

The purpose of this small spot in Eurofenix is to give credit to those younger members of the profession and academia who brought significant touches to our profession and to announce important events that might be of interest to YANIL and its prospective members. It is also hoped that our presence in this journal will better outline our profile among the less experienced of our profession who may be interested in joining our merry gang.

One of our own new board, Jochem Hummelen, has quite recently successfully defended his PhD thesis at the University of Groningen on 12 November 2015 and published it in a book entitled Distressed Dynamics: An Efficiency Assessment of Dutch Bankruptcy Law. On behalf of YANIL's executive board and the members of our Group we extend our sincere congratulations to Jochem.

If membership of YANIL is of interest to you, or if you are new to insolvency academia and have ideas to share, please contact Jenny Gant: jenniferl.l.gant@gmail.com for further information on our membership or visit our website: www.insol-europe.org/yanil-introduction-and-members.

Book Review



International Contributions to the Reform of Chapter 11 U.S. Bankruptcy Code

Editors: B. Wessels & R.J. de Weijs
2015, 320pp, €75.00/£69.00, ISBN 978-94-6236-606-0

Reviewed by Prof. G. Ray Warner.
St. Johns University School of Law, New York

International Contributions to the Reform of Chapter 11 U.S. Bankruptcy Code is, as its title suggests, a compilation of the various jurisdiction-by-jurisdiction reports prepared for the recently released report of The American Bankruptcy Institute's Commission to Study the Reform of Chapter 11. The reports focus on seven aspects of business rescue practice and describe the state of the law in 13 important commercial jurisdictions. Each of the national reports was prepared by local experts, most of whom are well known and highly respected in international insolvency circles.

The book is actually two works, joined together by a common theme. The national reports, which make up the bulk of the book, are preceded by a thoughtful and well-written critique and explanation of the ABI Report. The editors, both experts in comparative insolvency law, approach the ABI Report from a non-U.S. perspective. Since Chapter 11 is a model for many rescue systems around the globe, American concerns about its operation and proposals for its reform are of interest to anyone practicing in a system with similar rules or considering the adoption of a rescue procedure. While the political landscape in the U.S. makes it unlikely that many of the recommended reforms in the ABI Report will become law in the U.S., several of the recommendations propose truly novel approaches to issues that are common to all rescue systems and that should be considered by anyone involved in insolvency law reform.

A major difficulty for non-U.S. practitioners is that much of the 396 page ABI Report deals with minor issues and reforms that address local U.S. practices that are of little interest to the global insolvency community. This book does a great service by condensing the report to a 40 page summary that highlights those recommendations of the Commission that might be of interest to a non-U.S. audience. While the ABI Report is an excellent work, most non-U.S. practitioners could safely read the editors' summary and miss very little of importance.

In a few areas the summary is too cursory and does not provide enough detail to fully understand the Commission's recommendation. An example is the discussion of the fairly radical proposal to provide the "redemption option value" to the class of creditors just below the point where the last distribution of value is made. The summary does cite to the relevant pages of the Report, so the interested reader can obtain a more complete explanation. This is more than offset, however, by the editors' insightful critique of that proposal. Sometimes only someone who views a system from a distance can see it clearly and this is one of those occasions. Essentially, this Commission's proposal is designed to insure that the unsecured creditors share part of the going concern value that is preserved by the rescue process, rather than allowing a senior secured class to capture all of that value for itself. While the redemption option value proposal is a wonderfully interesting idea for academics to debate, the editors rightly criticise the complexity of the proposal and suggest that both conceptually and practically a better option would be to adopt a carve-out or "prescribed part" approach that reserves for the unsecured creditors a fixed percentage of value.

The editors' most insightful critique of the Commission's work probably also requires the distance that only an outsider can provide. They rightly point out that the Commission's proposal for new rules for small and medium-sized debtors is not a mere exception to Chapter 11's "one size fits all" approach, but rather a repudiation of it. Since the vast majority of U.S. Chapter 11 cases involve SMEs, the editors suggest that the Commission should have treated the SME rules as the norm and the large debtor rules as the exception, rather than the other way around.

In a few areas, like the discussion of fiduciary duties, the summary goes into too much detail about issues that are of little interest to the global insolvency community. However, on other topics the editors do an excellent job of relating the Commission's recommendations to problems facing other jurisdictions. For example, the editors compare the Commission's proposals regarding the U.S. practice of quickly selling the distressed business as a going concern free and clear of liabilities without confirming a plan of reorganisation to the current English and Dutch debates about the reforms to their pre-pack procedures. Thus, despite a few missed opportunities, the summary portion of the book is a very useful contribution to the professional literature and an important resource to anyone interested in comparative insolvency law.

The compilation of national reports similarly provides a useful resource to anyone interested in comparing the practices of various jurisdictions on the covered issues of insolvency. They are informative and generally well-written. There are, however, two limitations that are common to most comparative law projects. The first is that the summaries are frozen in time so and thus they provide a snapshot view of the status of the law as it was in 2013 and 2014. This is a helpful resource, but in light of the on-going reform efforts around the world, including the current push towards harmonisation by the European Commission in its 2014 Recommendation on a New Approach to Business Failure and Insolvency, these summaries may become dated quickly.

The other issue is that the reader must approach the summaries with caution, since the different perspectives of the reader and the writer may result in a misunderstanding about how the particular jurisdiction addresses the relevant issue. For example, one of the areas explored by the summaries is the extent to which the managers of a distressed business remain in control during the formal restructuring process (i.e., as "debtors in possession"). The ABI Commission drafted the question with Chapter 11 in mind and thus phrased it in terms of the features of the jurisdiction's insolvency laws. However, since the English do not consider schemes of arrangements to be part of their insolvency laws, the answer by the English experts does not address the existing management's ability to remain in control during that process.

Nonetheless, the summaries provide a very interesting and educational survey of the different approaches taken by various jurisdictions to common restructuring issues.

Book Launch

Cross-border insolvency proceedings

(2nd revised and extended edition)

Author: Andrea Csöke, Judge at the Supreme Court (Kúria), Budapest, Hungary
Published in 2016 by the HVG-ORAC Publishing House, Budapest
Price: 8000 HUF (€26 approx.)

The first part of the book explains the UNCITRAL Model Law which the author translated into Hungarian in 2008. (The translated text is included at the end of the book). Many cases, mostly from the UK and the USA are mentioned and discussed.

The second updated part deals with the old and the new regulations applied to famous old cases (ISA, Parmalat, PIN) and some new ones (collected from Eurofenix, the internet and other sources, such as the International Corporate Rescue Journal, ILO – The International Law Office and the International Insolvency Law Review).

Many translations accompany the Model law at the end of the book, among which the European Communication and Cooperation Guidelines for Cross-border Insolvency – CoCo Guidelines, the EU Cross-Border Insolvency Court-to-Court Cooperation Principles – EU JudgeCo Principles, the EU Cross-Border Insolvency Court-to-Court Communications Guidelines - EU JudgeCo Guidelines.

The book was intended not only for lawyers, but also for the insolvency practitioners who met for the first time with international issues, which were explained, followed then by a suggested solution.

The 1st edition was published in 2008 and the author also used it as teaching material for insolvency practitioners who were searching to obtain a degree. Some examples were imagined for better explaining the situations, but the book also serves for the "teach yourself" method, much needed in Hungary.

Book news and reviews can be submitted to Paul Newson, paulnewson@insol-europe.org. Please include full details of the book and good quality image of the front cover.

The FRAM case and the French "Pre-Pack" solution

Didier Bruère-Dawson and Charles Moulette report on a very interesting "pre-pack" case, involving a 60-year-old group of companies, historically prominent and profitable and employing more than 3,000 people in France and overseas

DIDIER BRUÈRE-DAWSON
Partner, Bankruptcy and Corporate Restructuring, Brown Rudnick, Paris (France)

CHARLES MOULETTE
Counsel, Bankruptcy and Corporate Restructuring, Brown Rudnick, Paris (France)

On 25 November 2015, the Commercial Court of Toulouse ordered the "pre-pack" sale of the assets of a major French tour operator, FRAM, to the leading online travel specialist, Karavel-Promovacances.

The sale will lead to the creation of the biggest French tour operator and is one of the most important "pre-pack" sales to be completed following the 2014 reform of the French Insolvency Law.

Introduction to the French "pre-pack" proceedings

Whilst the "pre-pack" was a tool already informally used by French insolvency practitioners, the Order of 12 March 2014 reforming the French Insolvency Law officially introduced the concept of "pre-pack" sales into the French law.

The insolvency proceedings now available in France include preventive proceedings such as the *mandat ad hoc* and the *conciliation*, where debtors and creditors can negotiate the debt, but also now the "pre-pack" proceedings. There are also the more formal insolvency proceedings, the *sauvegarde* and the *redressement judiciaire,* which provide a structure in which a formal reorganisation can take place, while offering various protections for debtors against enforcement measures by their creditors.

Prior to the 2014 reforms, the aim of the French preventive proceedings was exclusively to renegotiate debts between a debtor and the principal creditors in order to reach an agreement between them.

However, the economic crisis and the increased use of preventive proceedings showed that solely renegotiating the debts of a distressed company was sometimes insufficient and that often the only effective method to save a distressed company was to contemplate a partial or a total sale of its assets.

The concept of a "pre-pack" will be familiar to many practitioners but let us remind that in "pre-pack" proceedings the sale of the debtor's assets is negotiated between the relevant parties during the preventive proceedings and completed either:

(i) before the end of the preventive proceedings (thus keeping the financial difficulties of the debtor confidential) or
(ii) during insolvency proceedings.

The "pre-pack" tool has long been an important restructuring tool in England and Australia but is now also being applied to some major French group-of-companies restructurings.

The French proceedings preserve goodwill and tend to retain corporate value as they take place outside the formal insolvency proceedings context and only requires the consent of the main creditors. Time is of the essence in the procedure: it encourages "business as usual" while confidential negotiations are ongoing, thus avoiding the "insolvency stigma", preserving brand integrity and preventing attrition of key customers, employees and strategic assets in a takeover. Of course it is essential to address the balance sheet and to ensure that all parties adhere to a swift and seamless handover of the business according to the plan, under the conciliator's supervision.

In the French "pre-pack", shareholders cannot be compelled to embark in pre-pack proceedings and/or to give up their equity and/or to sell a debtor's asset as a going concern, but the conciliator's capacity to inform the court of a viable plan for business in the absence of another sustainable solution may turn the shareholders favourable

> **FRAM WAS NOT PRESENT ON MANY ONLINE PLATFORMS AND PERSISTED WITH FACE TO FACE BOOKINGS THAT CONSUMED ITS MARGINS AND MADE IT LOSE MARKET SHARE AND REVENUE**

to a plan. For if conciliation fails and the debtor goes into formal insolvency proceedings, the court would bear in mind that a viable offer had been proposed and was refused by the company's shareholders. The restoration of the debt-equity ratio[1] and/or the sale of the going concern could also be imposed by the court if the shareholders' plan is not considered viable or is criticised by creditors who can propose an alternative recovery plan.

The FRAM "pre-pack" sale

FRAM is a very interesting "pre-pack" case, involving a 60-year-old group of companies, historically prominent and profitable and employing more than 3,000 people in France and overseas.

The first difficulties and the 2013 restructuring

In 2011 FRAM faced financial difficulties, partly due to the political turmoil and violence caused by the Arab Spring in FRAM's main tourist destinations of Egypt, Morocco and Tunisia. However, in reality, many of FRAM's problems were caused by difficulties in adapting to the digital revolution which swept the tourism industry.

Unfortunately, FRAM had failed to keep up with the growth in online trends and lacked a sophisticated digital interface. FRAM was not present on many online platforms and persisted with face to face bookings that consumed its margins and made it lose market share and revenue. Moreover, FRAM suffered from a dispersion of its business, being involved both in tour operating activities and the hotel business.

These difficulties led the Group to apply for the opening of several preventive proceedings. Following the end of the first preventive proceedings opened in 2012, a conciliation agreement was executed and homologated by the Commercial Court of Toulouse in 2013. According to this agreement, banks and shareholders agreed to contribute new money to the Group and were granted a "new money privilege"[2] in this respect. Moreover, because of persistent cash difficulties in the FRAM group, the agreement provided that a sale mandate could be signed with an investment bank.

Between 2013 and 2015, FRAM sold several of its main assets (hotels in Spain, Tunisia and Morocco, and its head offices near Toulouse) to cover its liquidity requirements and to refocus its activities under the control of the conciliator. These sales, amounting to several million euros, did not allow FRAM to finance the necessary digital investments as all the income deriving from such sales was used to cover the liquidity needs. Unfortunately, this lack of investment in an online platform and also the political turmoil and attacks in North Africa had a devastating impact on FRAM's business.

The 2015 restructuring and the "pre-pack" sale

During the preventive proceedings, several purchasers were approached and Karavel quickly emerged as the most serious one.

In the summer of 2015, following a due diligence process, Karavel submitted an offer to acquire FRAM's French assets within the framework of a "pre-pack" sale, to be executed during the judicial recovery proceedings ("*procédure de redressement judiciaire*"), which would be opened subsequently. This solution offered more certainty to the purchaser than a sale realised during the preventive proceedings, especially both as regards the financial security package, and the collective employee-layoff and tax regime. The investments meant to restructure the business of FRAM (more than €20m) did not allow Karavel to incur additional expenses. Moreover, and contrary to a sale process in the course of conciliation proceedings, this solution allowed the purchaser:

(i) to select the assets and agreements to be transferred;
(ii) to renegotiate the agreements entered into by the FRAM Group; and
(iii) to be subject to accelerated proceedings concerning the authorisation of the sale by the European or French Competition Authorities and the financing of social restructurings.

> "FRAM HAD FAILED TO KEEP UP WITH THE GROWTH IN ONLINE TRENDS AND LACKED A SOPHISTICATED DIGITAL INTERFACE"

The Chinese HNA Group, associated with AFAT/Selectour, was reportedly interested in a share-deal transaction, to be finalised during the preventive proceedings negotiations, thus avoiding the detrimental economic consequences of a large publicity caused by the opening of formal insolvency proceedings. The Chinese Group's proposal aimed at being preferred to Karavel's offer, since it presented an out-of-court solution (which is always encouraged by the French Insolvency Law). However, HNA never submitted a binding offer and eventually renounced.

By the end of October 2015, FRAM had to declare its state of "cessation of payments" (its available assets had become insufficient to cover its due liabilities), and the Commercial Court of Toulouse ordered the opening of insolvency proceedings for FRAM's four main French companies.

However, as Karavel had made an offer for a purchase of the assets during the conciliation proceedings as a "pre-pack" solution and since such an offer was compliant with the conditions prescribed by the law (preservation of the business, of the jobs and payment of the creditors), the Commercial Court of Toulouse applied the new provisions of the French Insolvency Law and ordered a simplified bidding process (although allowing any other potential purchaser to send its offer to the judicial receiver) and an accelerated time schedule (in fact, only three weeks elapsed between the opening of the proceedings and the final decision of the Court on the bid selection).

Five other potential purchasers submitted offers for the company's assets during this short time-frame. These offers were made available to the public and to the other competitors, and led Karavel to make an improved offer, at a higher price and with more jobs being saved.

Karavel's improved offer was definitely the best offer, complying with all the three aforementioned main objectives of the French Insolvency Law.

Doctegestio, another bidder which had presented a sale plan, came forward with a continuation plan, supported by a number of shareholders who had agreed to sell their shares to Doctegestio. The aim of this continuation plan was to beat the sale plan proposed by Karavel. Indeed, the French law prefers a continuation plan over a sale plan, unless the former is not viable.

Pursuant to Doctegestio's plan, all the jobs were to be preserved (Karavel only offered to retain 85% of the personnel) in exchange for a very low price. In comparison, Karavel offered the highest price, taking into account the need to pay part of the company's debts.

Operating in the same sector as FRAM, Karavel presented ideal synergies to reassess FRAM's business and had already purchased and restructured other distressed companies. Doctegestio, in comparison, only ran clinics, retirement homes and hotels and had no experience in running travel agencies.

Consequently, the judicial receiver ("*administrateur judiciaire*"), the judicial liquidator ("*mandataire judiciaire*"), the prosecutor, as well as the employees' representatives supported Karavel's offer. The transfer of the assets of the four main French companies to Karavel was therefore ordered by the Commercial Court of Toulouse.

Conclusion

Since the 2014 French Insolvency Law Reform, FRAM and NEXTIRAONE have been the most significant examples of cases solved by a "pre-pack" solution.

The FRAM case clearly evidenced the advantages of "pre-pack" sales by insolvency professionals in France and can be seen as an early success for the French Reforms, whose main purposes were:

- to enhance transparency towards creditors which are not party to the conciliation proceedings;
- to maximise the sale price; and
- to limit the duration of insolvency proceedings which can last from 6- 18 months and usually lead to the company being wound up.

The FRAM case also demonstrates the ability of the French courts to preserve an international group with multiple assets and numerous employees working outside of France by finding the best solutions.

The CIRI (the French Treasury division in charge of restructuring cases) played a pre-eminent role in the FRAM case, helping to find a viable and long-term solution. They were in charge of the negotiations with the French tax and social authorities, and closely followed the bid process with the conciliator during the preventive proceedings. Indeed, FRAM's difficulties threatened not only the business of some of its co-contractors and/or main players in the travel business, but also the guarantee system of the travel agency operators.

Therefore, the pre-pack sale of FRAM succeeded in safeguarding one of France's main tour operators, and beyond that, in preserving the travel agency business in France. ■

Footnotes:

1 Pursuant to French law, when a company's equity is less than half of its share capital, the company must either be dissolved, or reduce/restore its share capital.

2 A priority in the creditor payment waterfall should the debtor become subject of insolvency proceedings, which was eventually the case.

> "KARAVEL SUBMITTED AN OFFER TO ACQUIRE FRAM'S FRENCH ASSETS WITHIN THE FRAMEWORK OF A "PRE-PACK" SALE, TO BE EXECUTED DURING THE JUDICIAL RECOVERY PROCEEDINGS"

Share your views!

The Legal Framework for Non-Performing Loans in Greece

Yiannis G. Sakkas and Yiannis G. Bazinas report on the new Law 4354/2015 in Greece

YIANNIS G. SAKKAS
Scientific Advisor,
Bazinas Law Firm, Athens (Greece)

YIANNIS G. BAZINAS
Attorney-at-law,
Bazinas Law Firm, Athens (Greece)

Introduction

The Greek Parliament has passed legislation (Law 4354/2015) to govern the assignment and/or the transfer of Non Performing Loan claims (NPLs), including provisions on:

- Obtaining a license from the Bank of Greece for Debt Management Companies and Debt Transfer Companies (DTCs) for Non-Performing Loans;
- The agreements assigning the management of claims; and
- The sale and transfer of claims from non-performing loans and credit agreements.

The growing rate of non-performing loans in the Greek financial system represents one of the major obstacles in the country's effort for economic recovery. Since the beginning of the financial crisis, the NPL rate has increased dramatically, from 9.1% in 2010 to 35% in 2015[1]. In absolute terms, non-performing exposures in the domestic banking system currently amount to €107b[2], undermining the capacity of banks to lend in the recovery. As a result, the Third Economic Adjustment Program for Greece naturally placed NPL resolution at the epicentre of attention and identified it as a key reform, necessary to unlock the disbursement of subsequent tranches of economic assistance[3].

So far, the effort to tackle the ever growing NPL problem of the Greek economy revolved around management policies within balance sheet and off-balance sheet. These measures however failed to slow down the rise of NPLs and when in 2015 banks began facing serious threats to their viability, a new approach was required. In this respect, Law 4354/2015[4], which came in force on 16 December 2015, represents the country's first attempt to foster a secondary market, regulating the management, disposal and refinancing of NPLs through Asset Management Companies (AMCs) and DTCs.

The definition of NPLs: exclusion of certain categories of bad debt

The law adopts a 90 day past due threshold to define Non-Performing Loans. This falls in hand with the universal understanding of impairment and default according to the International Financial Reporting Standards (IFRS) and Regulation (EU) No 575/2013 (CRR). However, law 4354/2015 provides for an express carve out, excluding from its ambit certain categories of bad debt. The legislation does not apply to Small and Medium Sized Enterprise[5] loans, state guaranteed debt as well as consumer and primary residence loans. These categories of NPLs were left to be regulated separately. The deadline to enact the corresponding framework was initially set for 15 February 2016 but was subsequently deferred for 15 April 2016.

Incorporation and licensing requirements

Assets Management and Debt Transfer Companies could be either *sociétés anonymes* seated in Greece or in a Member State of the European Economic Area, acting through a local branch. The law also provides for a minimum paid up capital of €100,000 but only for companies acquiring debt receivables. Legal entities managing claims will have to put together a minimum share capital of €24,000, the amount provided for *sociétés anonymes* incorporated in Greece. Otherwise, companies seated in a Member State of the European Economic Area will need to satisfy the company law requirements at their place of origin.

The entry share capital is admittedly miniscule compared to the exorbitant amount of bad loans in the country. However, a reduced paid up capital requirement lowers the cost of access to the NPL market and allows for greater specialisation, a crucial component in the operation of the distressed debt framework, which can only proceed as far as the market infrastructure allows[6].

To conduct the activity regulated under the NPL law the companies will need to obtain a license from the Bank of Greece (BoG)[7]. The statute provides for a decision within twenty (20) days as of the submission of a complete file. The information required includes a record of all direct or indirect participators to the applicant company, a list of all shareholders holding ten percent (10%) or more of its share capital, as well as details of all BoD members[8].

As part of the licensing process, the above named persons will also need to complete and submit suitability assessment questionnaires based on criteria formulated by the Bank of Greece[9]. To determine eligibility, the BoG further requests a special

committee to opine within the above prescribed period. The short time limits provided clearly purport to expedite and disentangle the process from procedural delays. However, the law is not explicit on all matters pertaining to licensing, which are left to be determined by an Act of the Bank of Greece. Two months after the voting of the law, the BoG has prepared an Act with the particulars on the establishment and operation of the regulated companies, issued on 10 March 2016 (Act No.82/8.3.16).

Management of Claims

Once duly established and licensed, AMCs and DTCs can focus their activities on the three main pillars of the NPL law: management or transfer of debt receivables and refinancing. Only claims from loan and/or credit agreements are eligible for assignment. Nevertheless, the 90-day delinquency period is not an absolute criterion, given that the law permits AMCs to also service performing loans. This is on the condition that the management company will also be assigned non-performing loans of the same debtor. All assignment agreements are notified to the BoG and should contain at the minimum provisions on the legal and accounting monitoring of debt receivables, collection, negotiations with the debtors, settlement agreements as well as the applicable fee for servicing the loans, which cannot be passed on to the debtor. Upon receipt of a copy, the agreements are subject to the prudential supervision of the Bank of Greece before entering into force.

The management company is further empowered by law to proceed to all judicial actions necessary for the collection of claims as well as to take part in pre-insolvency corporate turnarounds, pure insolvency proceedings or para-insolvency emergency measures recently introduced to offer out of court and simplified in-court solutions for distressed debtors[10], with *res judicata* also applying to the beneficiary of the claims and not just the AMC. However, by express reference in the law, the substantive and procedural position of debtors and guarantors cannot be worsened by the assignment or sale of the corresponding NPLs.

Transfer of Claims

Law 4354/2015 also provides for the disposal of debt receivables[11]. Claims eligible for transfer will need to be *in arrears* for 90 days, a deviation from the corresponding wording for the assignment of management which requires that claims have to be *"non-performing"* for 90 days.

As an additional condition, NPLs may be offered for sale only after inviting the relevant borrower and any guarantors to

> **THE LAW ADOPTS A 90 DAY PAST DUE THRESHOLD TO DEFINE NON-PERFORMING LOANS**

> **THE LAW ALLOWS THE TRANSFER OF CLAIMS UNDER LOANS THAT ARE STILL PERFORMING ON THE CONDITION THAT NPLS ARE ALSO INCLUDED**

restructure or settle their outstanding obligations within twelve (12) months prior to the disposal. This is a very crucial provision, given the practical significance in the screening of qualifying NPLs. Nevertheless, the relevant article 3 (3) is not stipulated with the utmost clarity required to determine whether the twelve (12) months period will have to expire in full for the notice to be effective or an invitation at any point within a year prior to the proposed disposal will satisfy the condition imposed.

In any case, the said notice is not a prerequisite for disputed or adjudicated claims as well as claims against *non-cooperative debtors* in the meaning of the Banking Code of Conduct[12]. This is very much expected to increase the number of debtors for which the notice requirement is waived, given that the definition of a *cooperative debtor* is rather onerous, requesting the prompt production of documents and the furnishing of information within strict deadlines.

The Debt Transfer Companies can acquire both individual claims or claims in groups, with the NPL law expressly forbidding the application of article 479 of the Greek Civil Code. This is a provision that applies to the disposal of asset pools and provides that the transferee is liable for obligations relating to the assets transferred for an amount equal to the value of the transaction.

This is a substantial deviation from the civil code provisions that could otherwise dissuade participation of DTCs. In the same line of enticing investments and precipitating further involvement in the secondary market, the law also allows the transfer of claims under loans that are still performing on the condition that NPLs are also included in the pool. Security rights are also transferred with the receivables they secure.

Refinancing NPLs

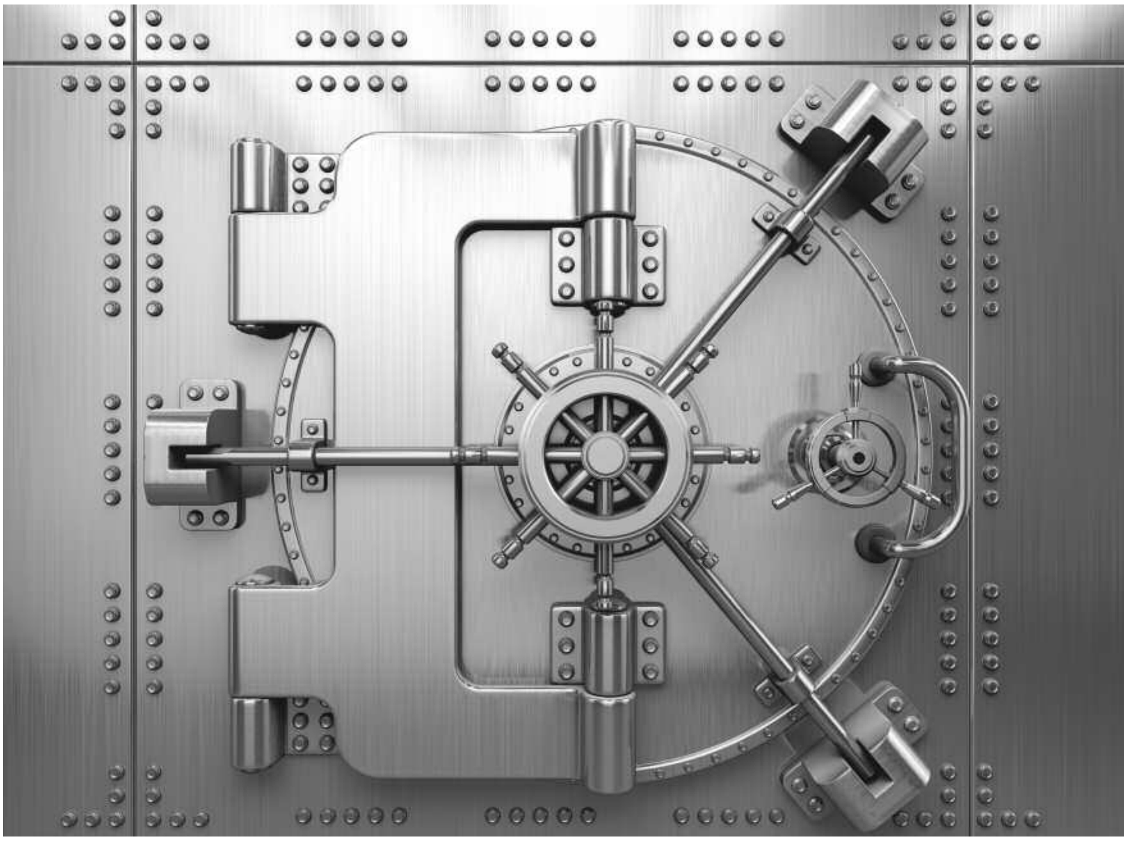
Finally, both AMCs and DTCs can have a more active role in the funding of NPLs. A license will have to be issued by the Bank of Greece for the specific activity, upon which DTCs could provide loans and credit only for the purpose of refinancing the NPLs they have acquired, whereas AMCs could grant new loans provided that the owner of the claim consents. Therefore, rather than just removing the bad debt from the balance sheets of credit institutions, AMCs and DTCs can look to turn around distressed companies by investing directly in the firm, restructuring their debt, and reorganising their operations[13].

However, before a secondary market financing regime is up and running there are some tax issues involved that need further consideration, particularly the applicable duties and taxes for such lending, a pivotal factor in determining the cost of funding for investors and borrowers alike. The NPL legislation does not contain provisions on the matter at this stage.

Conclusion: The importance of a comprehensive approach to NPL resolution

Unlike similar attempts in southern European countries, Greece did not follow a "bad bank" model to deal with the problem of non-performing loans[14]. Instead of assigning NPL resolution to a central body, the current law adopts a more decentralised approach and seeks to attract private investors, specialised in distressed loan management, to resolve NPLs. By facilitating asset disposals, the new law could provide a solution to the pressure that the banking system has experienced over the past years and allow banks to free up valuable capital and resources to support new lending. Considering the ability of AMCs and DTCs to refinance NPLs, a liquid secondary market for distressed debt could also expand non-bank sources of financing thereby increasing access to credit.

In short, the new legal framework holds promises for improving the stability of the banking system and supporting a faster economic recovery by facilitating the exit of non-viable firms and encouraging the growth of viable ones. The legal and institutional framework for insolvency and specifically on how quickly and cost effectively NPL companies will be able to recover their investment is crucial in this perspective. The Greek insolvency law offers tools to facilitate this, including early restructuring opportunities with a pre-pack route and debt-equity swaps but there is room for improvement especially in the field of expediting proceedings, reducing the cost of enforcement and emphasising on a framework to support out-of-court arrangements. Within such comprehensive regime the new law could prove vital in the resolution of distressed debt and in strengthening the banking system and the credit environment in the country. ■



Footnotes:

1 World Bank Databank, World Development Indicators, available online at http://data.worldbank.org/data-catalog/world-development-indicators. The Bank of Greece reports a 43.6% NPE rate, which includes NPLs as well as loans that, even though performing, are considered unlikely to be repaid.
2 Bank of Greece "Report of the Governor of the Bank of Greece", 2015, p., 186.
3 After the conclusion of the recapitalisation of the banking system at the end of 2015, the introduction of Law 4354/2015 was the essential next step to ensure the viability of the banking system and restore its ability to finance economic growth, on the *recapitalization see Y. Bazinas, Y. Sakkas, The Creditor Participation in the Recapitalization of the Greek Banking System—Part I*, Banking Law Journal Volume 133, Number 3, March 2016, p., 153 (in print).
4 Law 4354/2015, State Gazette A' 176, 16.12.2015, for complete English translation see, http://www.bazinas.com/_uploads/c3f413925345eb7c234cf72f03d98346.pdf
5 As defined by Recommendation no. 2003/361/EC of European Commission of 6th May 2003 (Official Journal L 124 of 20.05.2003).
6 Euro Area Policies: IMF Country Report No. 15/205, July 2015, p., 70.
7 The BoG also has a supervisory role and can suspend or revoke licenses for infringements including fraud or money laundering etc.
8 A Report on the basic principles applied for the management of debt receivables is also required, making a special reference to socially vulnerable debtors in accordance with the provisions of the Banking Code of Conduct, article 1 para 2 of L. 4224/2013 (A' 288) and the law on consumer bankruptcies, see law 3869/2010 (A'130).
9 These will be based on the guidelines of the Committee of the European Banking Supervisors and the assessment criteria for the suitability of members of the management body and key function holders of the European Banking Authority, as provided in an Act of the BoG.
10 See article 61 et seq. of law 4307/2014 often touted as para-insolvency proceedings given that they are not regulated by the insolvency code.
11 The sellers of debt receivables are exclusively listed in the law and include entities with a banking license in Greece, local branches of foreign credit institutions, SPVs of the law on securitisation of claims (3156/2003) as well as DTCs under the NPL legislation. The transfer is effective upon registration of a summary of the sale agreement, see article 3 of law 2844/2000.
12 Law 4224/2013 and BoG Act dated 27/08/2014, as in force.
13 N. Jassaud, K. Kang, *A Strategy for Developing a Market for Nonperforming Loans in Italy*, IMF Working Paper, WP/15/24, p., 25.
14 International Monetary Fund, *Policy Options For Tackling Non-Performing Loans In The Euro Area"* in "Euro Area Policies, IMF Country Report No. 15/205, July 10, 2015 available online at http://www.imf.org/external/pubs/cat/longres.aspx?sk=43127

"

THE NEW LEGAL FRAMEWORK HOLDS PROMISES FOR IMPROVING THE STABILITY OF THE BANKING SYSTEM

"

Share your views!

Mediation in Restructuring and Insolvency

Prof. Bob Wessels explains mediation, the role of the mediators, the grounds for introducing such a person and their tasks... and asks who appoints, pays and supervises the mediator?

BOB WESSELS
Em. Professor of international insolvency law, University of Leiden; Mediator at the INSOL International College of Mediation; Deputy Judge, Court of Appeal, The Hague

“THE EUROPEAN COMMISSION’S RECOMMENDATION OF MARCH 2014 ON A NEW APPROACH TO BUSINESS FAILURE AND INSOLVENCY INTRODUCES A ‘MEDIATOR’”

USA: mediation in corporate insolvency is rising

In the world of rescue and insolvency a mediator is not a stranger. In the USA mediation is frequently used in insolvency procedures, including Chapter 11 cases.[1] In 2015, for complex multi-party restructurings it has been contended that in the USA ‘*… the use of mediation to reach consensual plans of reorganisation, while not standard protocol in cases, has become common and is no longer controversial*’.[2]

Areas of deployment of mediation include creditors’ meetings (to have creditors negotiate and agree regarding their voting on a plan of arrangement) or structured negotiating to manage and resolve a large number of claims.

A much talked-about mediation concerns the Lehman Brothers liquidation Chapter 11 cases, where hundreds of disputes arising from derivative contracts due to Lehman’s filing for bankruptcy were negotiated.

From a January 2016 report it follows that 495 ADR-processes[3] have resulted in a sum above the $3b mark for the various Lehman estates. Settlements have been achieved in 424 ADR matters involving 541 counter-parties. Until 13 January 2016, 245 ADR matters have reached the mediation stage and have been concluded, 232 have been settled in or subsequent to mediation; only 13 mediations have terminated but remain unsettled.[4]

So recently, in the USA, mediation has been used in larger, multi-party reorganisations, the costs, including the compensation of the mediator, being paid by the estate.[5] The purpose is for all parties to find common ground while protecting their interests: ‘*Its ultimate success in large and complex Chapter 11 cases stems from facilitating parties’ goals rather than simply evaluating the merits of their positions … and the interests of all creditors for an expeditious resolution, rather then years of deadlocked litigation.*’[6]

Esher submits that in the EU mediation in insolvency ‘*… may be problematic without some form of Court or regularly compulsion.*’[7]

Mediation in the EU in civil and commercial law matters

In Europe, mediation is rather young in years. A Directive on certain aspects of mediation in civil and commercial matters entered into force in 2008.[8] The Directive does not concern mediation in national cases, but only in cross-border disputes, in which at least one party is domiciled or is habitually a resident in a Member State other than that of any other party on the date on which e.g. the parties agree to use mediation after the dispute has arisen.[9]

In the Directive ‘mediation’ is defined as ‘*… a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a Court or prescribed by the law of a Member State.*’[10]

Recital 6 to the Directive clarifies that mediation should be promoted because: ‘*Mediation can provide a cost-effective and quick extra-judicial resolution of disputes in civil and commercial matters through processes tailored to the needs of the parties. Agreements resulting from mediation are more likely to be complied with voluntarily and are more likely to preserve an amicable and sustainable relationship between the parties. These benefits become even more pronounced in situations displaying cross-border elements.*’

Many EU Member States do not seem to be convinced, however. A recent study submits that its implementation generates only mixed feelings. The study shows for instance that the Directive’s minimum common legal framework for mediation in the Member States has not been enacted at all in Belgium; in Finland it is only in relation to court-annexed mediation; whilst the Netherlands and the UK only have implemented the Directive in relation to cross-border mediation.[11]

Revision of the Mediation Directive is underway.[12] Although within the scope of the Mediation Directive, the study mentioned does not reveal, and I have not found evidence, that the European Commission also had in mind disputes in matters of restructuring or insolvency. It is submitted that ‘*civil and commercial matters’ include matters of ‘rescue and insolvency.*’[13]

Insolvency mediation in the EU

In the EU, mediation in matters of restructuring and insolvency is used in some Member States, including Belgium, England[14], France (in the *mandataire ad hoc* and *règlement amiable/conciliation* proceedings an out-of-court workout is enhanced), Greece, and since 2013, Spain (*'mediator concursal'*).[15] In the Netherlands, since 2012, a pilot project called 'Mediation in Bankruptcy Liquidation Cases' has been initiated by the District Court in Amsterdam in 2012, but its results have not been evaluated yet. In other EU Member States mediation in insolvency has not come (yet) from the ground.

Rather unnoticed, the European Commission's Recommendation of March 2014 on a new approach to business failure and insolvency[16] introduces a 'mediator'. Debtors themselves should be able to restructure their business, but on a case-by-case basis the Court could appoint '… *a mediator, in order to assist the debtor and creditors in the successful running of negotiations on a restructuring plan.*'[17]

There's work to be done!

To make the Recommendation's suggestion work in practice, further study is needed. It would, obviously, need a focused approach on the status of 'mediation in restructuring and insolvency' in the EU Member States and the role and professional qualifications of such an 'insolvency mediator' in a national setting.

It should include study and proposals regarding the general civil/procedural framework necessary to function fully satisfactory as such a mediator, such as the basics of a mediation agreement, including the mediation procedure to be followed, addressing issues such as commencement of mediation, opting-out, timetable; choice and appointment of the mediator, compensation, immunity, as well as the confidentiality of the process.[18]

Other issues to address would be the criteria for referrals by Courts to mediation, the legal effect of mediation on prescription terms and pending proceedings. Such a study should be comparative in nature (between the EU Member States), should include the USA as well, and should also concentrate on the question of which topics should be subjected to a form of regulation on EU level and which ones can be left to the EU Member States.

Who will take the first step? ■

> TO MAKE THE RECOMMENDATION'S SUGGESTION WORK IN PRACTICE, FURTHER STUDY IS NEEDED

Footnotes:

1 See already I. Meier, 'Mediation and Negotiation in a Court or in an Out-of-Court Reorganization Procedure' in: H. Peter, The Challenges of Insolvency Law reform in the 21st Century: Facilitating Investment and Recovery to enhance Economic Growth, Zürich: Schulthess 2006, 292ff.
2 Jack Esher, 'Recent Use of Mediation for Resolution and Effective Management of Large Case Insolvencies', in: International Corporate Rescue 2015-6, 349ff.
3 ADR = Alternative Dispute Resolution.
4 Letter to Honorable Shelley C. Chapman Regarding Seventy-third ADR* Status Report, see http://dm.epiq11.com/LBH/Document/GetDocument/2717939.
5 Cases included Residential Capital LLC, Cencage Learning Inc., Nortel Networks, Radio Shack and Energy Future Holdings Corp. In many instances in the USA judges act as mediator, see Janice Miller Karlin, 'The "M" Word: Mediation Musings', in: ABI Journal 26 November 2015, 26ff.
6 So Benjamin D. Feder and David Hahn, http://www.abi.org/committee-post/mediation-in-large-chapter-11-cases.
7 Jack Esher, 'Recent Use of Mediation for Resolution and Effective Management of Large Case Insolvencies', in: International Corporate Rescue 2015-6, at 351.
8 Directive 2008/52/EC of the European Parliament and of the European Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters ('Mediation Directive').
9 Article 2(1) Mediation Directive.
10 Article 3(a) Mediation Directive.
11 Carlos Esplugues Mota (ed.), 'Civil and Commercial Mediation in Europe. Volume II: Cross-Border Mediation', Cambridge-Antwerp-Portland: intersentia 2014, 769ff.
12 See Guiseppe De Palo et al., 'Rebooting" the Mediation Directive: Assessing the Limited Impact of Its Implementation and Proposing Measures to Increase the Number of Mediations in the EU', Report to the European Parliament 2014, see http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI_ET(2014)493042_EN.pdf. In May 2016 the European Commission has to report on the application of the Directive and, if necessary, propose amendments to the Mediation Directive. The consultation process started late September 2015. See http://ec.europe.eu/justice/newsroom/civil/opinion/ 150910_en.htm.
13 Also see Horst Eidenmüller and David Griffiths: 'Mediation in Cross Border Insolvency Procedures' (2009), www.gforensics.com/resources/CrossBorderMediation.
14 Chancery Court Guide 2013, article 3.1, provides that Courts should '…accommodate mediation or any other form of settlement negotiations', see www.justice.gov.uk/downloads/courts/chancery-court/chancery-guide.doc.
15 Also listed in Annex C to the EU Insolvency Regulation Recast. See Laura Ruiz, 'Spanish Insolvency Act: the legislation created by the crisis', in: Insolvency and Restructuring International, September 2015, 25ff; Alberto Núnez-Lagos Burguera, 'Recently Enacted Spanish Out-of-Court Debt Restructuring Laws Join the Current European Trend for Efficient Restructuring and Lead Innovation for Restructuring Solutions', in: International Corporate Rescue 2015, 216ff. In 2015 some amendments to the mechanisms of the ESP and the role of the mediator have been introduced. See Pilar Galeote, *Mediación Concursal El acuerdo extrajudicial de pagos y el mediador concursal*, available at http://ssrn.com/abstract=2659255.
16 See http://ec.europa.eu/justice/civil/files/c_2014_1500_en.pdf
17 Recommendations 8 and 9.
18 These topics are mentioned in the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation 2009, but would need attention in a national setting too.

Share your views!

European Insolvency Law Harmonisation: The idea that has dared to speak its name

PAUL OMAR
Professor of International and Comparative Insolvency Law at the Nottingham Law School and Member of the EU Experts' Group in Restructuring and Insolvency

In words published in this journal just over three years ago, this author was of the view that: "It is difficult to see member states agreeing to proposals from the European institutions for substantive rapprochement of their internal [insolvency] laws unless there were overwhelming economic benefits for them to do so."[1]

Though not a prediction *per se*, these cautious words have nonetheless turned out to be quite far from the direction in which views on harmonisation have now apparently travelled.

The first salvo was in fact fired long before the above thoughts were published. The INSOL Europe Report of 2010, written with view to the eventual review of the European Insolvency Regulation ("EIR") and presented to the European Parliament Committee on Legal Affairs, advocated consideration of substantive harmonisation in a number of areas, including the opening criteria for proceedings, stays of creditor action, procedural management rules, ranking and priority rules, the filing and verification of claims, responsibility for the rescue plan, scope and extent of the debtor's estate, avoidance actions, contract termination or continuation, director's liability, post-commencement financing availability and insolvency practice qualifications.[2]

While many of these areas were procedurally focused, as befitted a review of the way in which the EIR could better function, the report seemed to suggest that the time had come to consider ways in which insolvency law across Europe could go beyond mere convergence and reach the stage at which harmonisation becomes feasible.

Echoes of the 2010 Report in fact found their way into the European Parliament's reply in 2011,[3] which acknowledged the difficulty of creating a "*body of substantive insolvency law at EU level*", but postulated the desirability of "*worthwhile*" harmonisation in a number of discrete areas, chiefly to avoid the adverse consequences of disparities in national laws that might favour forum-shopping.

"

THE TIME HAD COME TO CONSIDER WAYS IN WHICH INSOLVENCY LAW ACROSS EUROPE COULD GO BEYOND MERE CONVERGENCE

"

The areas included the opening criteria for proceedings, the filing of claims, avoidance actions, insolvency practice qualifications and common aspects for restructuring plans.[4]

Again, although quite modest, this report can be taken to represent a change of thinking on the part of the European institutions, which, apart from a brief dalliance with harmonisation in the first drafts of what was to become the European Bankruptcy Convention 1995 (and direct model for the EIR), had always shied away in practice from anything beyond promoting the idea of eventual convergence in good practice.

Eliminating legal uncertainty

The energies of the European Commission were directed from 2012 onwards to the reform of the EIR itself. However, even here, attention was given to whether it was desirable to proceed to what was described as an "*approximation of laws*" in discrete areas, some of which replicated items on earlier lists. The context though was not the ideal of harmonisation or the avoidance of disparity, but the need to eliminate legal uncertainty and an "*unfriendly business environment*", deemed to constitute obstacles to cross-border investment.[5]

In fact, rejecting some of the rationale of earlier proposals, the communication suggested that the type or focus of legal systems *per se* did not determine entrepreneurial success or possibility of rescue, rather the availability of specific tools that favour early warning of distress and promote the efficiency of procedures. In language reminiscent of a study in 2003,[6] the European Commission advocated concentration on improving "second chances" by introducing fast-track procedures for honest debtors, aligning and shortening discharge periods and, for small and medium enterprises ("SMEs") in particular, improving prevention, access to out-of-court settlements and debt-recovery generally.[7]

The focus on SMEs and entrepreneurship readily explains how the European Commission moved from incidental consideration of desirable steps to take in modernising domestic laws towards promoting its own vision of what European insolvency should look like. In 2014, it published a text that targeted reforms to deal with four particular concerns: the availability of a framework to facilitate preventive restructuring, assisting restructuring

negotiations through enabling the appointment of a mediator and for stays to be available, ensuring the success of restructuring plans through certain minimum content and clarifying creditor and court involvement in the adoption process as well as providing protection for new financing arrangements.

To these priorities the European Commission tacked on the issue of appropriate discharge periods for entrepreneurs, settling on three years as a new norm.[8] Although the recommendation was primarily addressed to the member states with action expected by March 2015, the European Commission reserved the option, subject to a further study,[9] to propose "additional measures to consolidate and strengthen the approach… in the recommendation", suggesting it might consider an enactment in some form to impose a common framework across the member states. In light of the fact that only a few member states responded,[10] it is perhaps of no surprise that the European Commission has now chosen to act.

Experts' group

In this connection, the European Commission has recently formed an Experts' Group on Restructuring and Insolvency. The role of the experts in the group, which began its work in January 2016, will be, over the course of a three-year period, to assist the Directorate-General Justice and Consumers in the formulation of minimum standards for a new and harmonised restructuring and insolvency law for the European Union.

The proposed law is intended in part to address the terms set out in the 2014 Recommendation. As such, the remit of the Experts' Group not only covers the development of common principles and rules in the area of preventive restructuring procedures that were the subject of the 2014 Recommendation, but also common principles and rules in relation to formal insolvency procedures, the promotion of second chances for honest debtors (natural persons), the qualification of insolvency practitioners, the duties and liabilities of directors in insolvency as well as measures seeking to reduce costs for SMEs in restructuring and insolvency procedures as well as facilitating their access to such procedures. In addition, the Experts' Group will be tasked with ensuring that any common principles and rules that are proposed are consonant with the Recast EIR.[11]

Re-energising harmonisation

It is interesting that the work on directors' duties echoes work carried out by UNCITRAL Working Group V, which resulted in the addition of a Part Four to its Legislative Guide in 2013 dealing with directors' obligations in the "twilight zone" and which UNCITRAL also hopes to extend to the position of directors of enterprise groups. It also reflects an earlier European preoccupation with the same issue appearing in a report aimed at re-energising the company law harmonisation programme.[12] In fact, this concern was again picked up in the Recast EIR which required a report to be submitted on the cross-border issues connected with directors' liability and

> "THE EUROPEAN COMMISSION HAS RECENTLY FORMED AN EXPERTS' GROUP ON RESTRUCTURING AND INSOLVENCY"

> IT IS CLEAR THAT THE DEBATE HAS MOVED ON AND THAT HARMONISATION IS NO LONGER THE IDEA THAT DARES NOT SPEAK ITS NAME IN POLITE SOCIETY

disqualification.[13] In respect of common rules for insolvency procedures, it is also noteworthy that the Recast EIR also mentions the need for a review of employment-related preferences.[14] It seems that at the very least these topics will form part of the new programme, although it may be difficult to predict the precise direction of all the initiatives that may be taken as part of this.

The journey so far

All this seems a far cry from the early days of the insolvency initiative, despite the long-standing interest, dating to the late 1960s, in a Community convention to regulate cross-border jurisdiction, recognition and enforcement in insolvency. For many years, insolvency has been seen merely as ancillary to some other area of interest, for example social policy (employment rights) or company law. "Core insolvency" never really extended beyond the private international and procedural aspects of jurisdiction and coordination.[15]

For the debate to have changed, in a significant way, to considering a methodology, whether "approximation", "convergence" or "harmonisation", and to what fields, procedural and/or substantive, this should extend, is a token of how far down the road the European Union has travelled. As a result of the journey so far, it is clear that the debate has moved on and that "harmonisation" is no longer the idea that dares not speak its name in polite society! ■

Footnotes:

1 In "European Insolvency Laws: Convergence or Harmonisation?" (2012 Spring) *Eurofenix* 20, at 21.
2 See INSOL Europe, *Harmonisation of Insolvency Law at EU Level* (April 2010).
3 See K-H. Lehne (Rapporteur), *Report with Recommendations to the Commission on Insolvency Proceedings in the context of EU Company Law* (Document A7-0355/2011) (17 October 2011).
4 Ibid., at 8-11.
5 See *Communication from the Commission etc. on a New European Approach to Business Failure and Insolvency* (Document COM(2012) 742 Final) (12 December 2012), at 5.
6 Best Project on Restructuring, Bankruptcy and a Fresh Start, *Final Report of the Experts' Group* (September 2003).
7 Above note 5, at 5-6 and 8.
8 *Recommendation on a New European Approach to Business Failure and Insolvency* (Document COM(2014) 1500 Final) (12 March 2014), at 6-10. See also the INSOL Europe Study (12 May 2014) assessing to what extent the member states were already compliant with the norms being promoted.
9 This study, carried out by the University of Leeds, produced an interim report in November 2015.
10 Call for Expressions of Interest in the Experts' Group (September 2015), at paragraph 2.
11 Ibid., at paragraph 3.
12 *Report of the High Level Group of Company Law Experts on a Modern Regulatory Framework for Company Law in Europe* (De Winter Report) (2002).
13 Article 90(3), Recast EIR. See also Article 90(4) which lays the ground for a study on abusive forum-shopping.
14 Ibid., Recital 22.
15 See, by this author, "The Emergence of a New European Order in Insolvency" [2004] 8 ICCLR 262.

EIR Recast: Some tiny interesting details…

Andrea Csőke draws your attention to some of the small but significant changes to European Insolvency Regulation 2015/848 (EIR Recast)

There are some interesting details in the old-new (recast) cross-border insolvency Regulation 2015/848. I do not want to deal with the big questions, like hybrid, pre-insolvency proceedings, or the insolvency proceedings of members of a group of companies, I only want to draw your attention to some "tiny" differences between the old and the recast Regulation.

JUDGE ANDREA CSŐKE
Hungary

Gaps in the Annexes

First of all, I see gaps in the new system of the Annexes. According to Art. 2 (4) all of the insolvency proceedings would be mixed into one Annex: "A". Without any other help nobody will know which one is for reorganisation and which one is for winding up. What is more important to know is in which proceedings the insolvency status of the debtor has to be examined by the court, and which concern a solvent company.

I know that Member States have to summarise the main information about their proceedings till 26 June 2016, they shall update them, and these will be published by the Commission (Art.86.), but I have to confess that in my practice not everybody will be able to perform these obligations in time.

This "little" question could be very important in a case, because the court of the secondary proceedings should know whether the proceedings opened in another Member State are based on insolvency or not. Art.34 contains the rule about the opening of the secondary proceedings:

> "*Where the main insolvency proceedings required that the debtor be insolvent, the debtor's insolvency shall not be re-examined in the Member State in which secondary insolvency proceedings may be opened.*"

Probably INSOL Europe, or its Judicial Wing, can help to sort out the proceedings under the Regulation into two – or three – groups: proceedings that concern only solvent companies, proceedings opened against insolvent ones and proceedings that concern both types.

Forum shopping

The second interesting detail – I am sure that it was a surprise to me only – is that the recast Regulation does not condemn all types of forum shopping (using the meaning in the old Regulation), only the bad ones. "Forum shopping" – with its pejorative content – means only bad forum shopping, the earlier "good" one, is NOT forum shopping. In fact, the recitals (5) and (29) contain the following rules:

> *(5) It is necessary for the proper functioning of the internal market to avoid incentives for parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position to the detriment of the general body of creditors (forum shopping).*
>
> *(29) This Regulation should contain a number of safeguards aimed at preventing fraudulent or abusive forum shopping.*

Local creditor

The third detail is the modification of the concept of "local creditor".

According to Art. 2. (11)

> " *'local creditor' means a creditor whose claims against a debtor arose from, or in connection with, the operation of an establishment situated in a Member State other than the Member State in which the debtor's centre of main interests is located*".

The definition does not include the idea that the COMI of this creditor should be situated in that Member State where the establishment is. Comparing to the "old" EIR, this text only gives the meaning of a local creditor, "*whose claim arises from the operation of that establishment*", but there is something missing from the text: that this kind of creditor is the one whose "*domicile, habitual residence or registered office is in the Member State within the territory of which the establishment is situated.*" [1346/2000/EC Art.3.(4) b)]

The real meaning can be understood only together with Art.2.(12) , because it explains the meaning of "foreign creditor":

> "*a creditor which has its habitual residence, domicile or registered office in a Member State other than the State of the opening of proceedings, including the tax authorities and social security authorities of Member States.*"

"THE RECAST REGULATION DOES NOT CONDEMN ALL TYPES OF FORUM SHOPPING, ONLY THE BAD ONES"

"

HOW CAN WE RECONCILE THESE DIFFERENT OPINIONS WITH THE RECAST REGULATION?

"

Share your views!

Of course, the two definitions together give us the meaning of the local creditor in the "old" EIR (because, logically, if someone is not a foreign creditor, he is a local one), but in the new EIR, Art.3. (4) b/i. allows for opening territorial insolvency proceedings only by a "*creditor whose claim arises from or is in connection with the operation of an establishment situated within the territory of the Member State where the opening of territorial proceedings is requested.*"

All we can say is that those creditors whose domicile or registered offices are in the Member State where the establishment of the debtor is, but whose claim did not arise from the activity of this establishment, cannot file for opening secondary proceedings.

Different opinions

Probably I should not say that the next remark is also a "detail", because I think it is a very important question.

Recital (7) contains the following:

> *(7) Bankruptcy proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings and actions related to such proceedings are excluded from the scope of Regulation (EU) No 1215/2012 of the European Parliament and of the Council. Those proceedings should be covered by this Regulation. The interpretation of this Regulation should as much as possible avoid regulatory loopholes between the two instruments.* ***However, the mere fact that a national procedure is not listed in Annex A to this Regulation should not imply that it is covered by Regulation (EU) No 1215/2012.***

The EUCJ said in the case of German Graphics - C-292/08 - the following:

> 17. "…*Furthermore, it is conceivable that, among those judgements, there are some judgements which will come within the scope of application neither of Regulation No 1346/2000 nor of Regulation No 44/2001.*"

But in the Nortel Network case - C-649/13 – it seems that the Court had a contrary opinion:

> 23. "*In that regard, the Court has already held that Regulations No 44/2001 and No 1346/2000 must be interpreted in such a way as to avoid any overlap between the rules of law that those instruments lay down and any legal vacuum. Accordingly, actions excluded, under Article 1(2)(b) of Regulation No 44/2001, from the scope of that regulation in so far as they come under 'bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings' fall within the scope of Regulation No 1346/2000. Correspondingly, actions which fall outside the scope of Article 3(1) of Regulation No 1346/2000 fall within the scope of Regulation No 44/2001 (judgment in Nickel & Goeldner Spedition, C 157/13, EU:C:2014:2145, paragraph 21 and the case-law cited).*

How can we reconcile these different opinions with the recast Regulation?

Can we say that Recital (7) and the judgment of the German

Graphics case refer to insolvency proceedings – because there are national insolvency proceedings which are not under the scope of the European Insolvency Regulation – and that the Nortel Network judgment refers only to the actions which are in close connection with insolvency procedures, but are not part of the insolvency proceedings, and to other actions which are related to civil and commercial matters?

In my opinion, with this interpretation we could handle the apparent contradiction.

Groups of companies

The last "detail" is probably only a misunderstanding. I have heard from my colleagues that the earlier practice of gathering the members of a group of companies under one jurisdiction is prohibited by Art.3 (1) of the recast EIR.

Interpreting the text, my opinion is that this rule deals only with the registered offices. Art.3. (1) subparagraph 2.says that in the case of a company the COMI shall be presumed in the country where the registered office is. "*That presumption shall only apply if the registered office has not been moved to another Member State within the three-month period prior to the request for the opening of insolvency proceedings.*" It means that when the registered office was moved from one country to another (Interedil case) the debtor shall wait for three months before the presumption quoted in connection to registered offices applies. But it is not prohibited rebutting the presumption by giving evidences about real COMI changing, regardless of the registered office.

Thus, in fact, according to Preamb. (53) of the new EIR the earlier practice in connection with groups of companies is not prohibited.

> "*The introduction of rules on the insolvency proceedings of groups of companies should not limit the possibility for a court to open insolvency proceedings for several companies belonging to the same group in a single jurisdiction if the court finds that the centre of main interests of those companies is located in a single Member State. In such cases, the court should also be able to appoint, if appropriate, the same insolvency practitioner in all proceedings concerned, provided that this is not incompatible with the rules applicable to them.*" ■

"

IS GATHERING THE MEMBERS OF A GROUP OF COMPANIES UNDER ONE JURISDICTION PROHIBITED BY ART.3 (1) OF THE RECAST EIR?

"

When International Investment Arbitration meets Insolvency

António Andrade de Matos and Jorge Bastos Leitão report on the landmark case of Dan Cake S.A. v. Hungary (ICSID Case no. ARB/12/9)

ANTÓNIO ANDRADE DE MATOS
Partner, Andrade de Matos & Associados - Sociedade de Advogados, RL, Lisbon (Portugal)

JORGE BASTOS LEITÃO
Partner, Andrade de Matos & Associados - Sociedade de Advogados, RL, Lisbon (Portugal)

Share your views!

Dan Cake S.A. is a Portuguese company whose scope of activity is the manufacturing of cakes, cookies, biscuits and toasts. It was incorporated in Portugal in 1979. In 1996 it acquired a capital participation in a Hungarian company that was later renamed Danesita, whose scope was also the manufacturing of cakes, cookies, biscuits and toasts for Eastern European countries.

Danesita pursued its activity until 2007, when it was declared insolvent by a final and binding decision from the High Court of Appeal of Budapest. The Court appointed a liquidator to deal with Danesita's insolvency and the decision was published in the Official Gazette.

Faced with this decision, Dan Cake S.A. pursued then the only available option under Hungarian law in order to avoid the sale of Danesita's assets and hence the liquidation of the company: requesting a composition agreement with Danesita's creditors[1] because in Hungary this is the only available option for this purpose.

A composition agreement first needs a hearing to take place where the creditors will vote the agreement prepared by the debtor company trying to restore its solvency. If the Court considers that the provisions of the Hungarian Bankruptcy Act (HBA) have been complied with, it sanctions the composition agreement.

In order to have a composition hearing convened the debtor shall request the Court to order it. The debtor's request shall be accompanied by: (i) a plan to restore solvency, (ii) a composition proposal and (iii) the list of creditors. The Judge shall then convene a hearing within 60 days following the receipt of the request.[2]

However, as further discussed below, upon receiving the request for a composition hearing[3] the Metropolitan Court of Budapest ("Court") rendered on April 22, 2008 a decision which refused the request. At the same time the Court strongly recommended that the liquidator should proceed with the sale of Danesita's assets. As a result, the liquidator launched a second tender and ultimately the assets were sold. The decision of the Metropolitan Court of Budapest was not appealable.

Thus, finally, Dan Cake S.A. started arbitration proceedings before the International Centre for the Settlement of Investment Disputes ("ICSID") in 2012, according to the Bilateral Investment Treaty between Portugal and Hungary.

Dan Cake S.A. claimed that its investment in Danesita was lost due to the arbitrary and discriminatory measures ordered by the Metropolitan Court of Budapest in the course of Danesita's liquidation. It also claimed that the decision of the Metropolitan Court of Budapest not to convene a composition hearing was a denial of justice. Lastly, Dan Cake S.A. took the view that the acts of the liquidator were attributable to Hungary.

On August 24, 2015, the ICSID Tribunal, composed of Professor Pierre Mayer (Chair), Professor Jan Paulsson and Toby Landau QC, delivered a decision on jurisdiction and liability whereby the Tribunal unanimously held that Hungary:

> *"- has breached its obligation to ensure that Dan Cake's investment be accorded fair and equitable treatment;*
> *- has breached its obligation not to impair by unfair measures the liquidation of Dan Cake's investment."*

The liquidation procedure

As seen above, pursuant to the HBA provisions, once a company faces liquidation proceedings the only available option to avoid the sale of the assets and hence the demise of the company as a legal entity is to reach a composition agreement. However, in order to reach a composition agreement a debtor needs the Court to convene a composition hearing[4].

Dan Cake S.A. did request that the Metropolitan Court of Budapest convene a composition hearing and the request was accompanied by all the relevant documents prescribed by law. As stated in its request, the prompt convening of a hearing was the only way to safeguard Dan Cake's investment in Danesita, but the Court declined to convene the hearing. On April 22, 2008 the Court served a decision ("Decision") on Dan Cake's Counsel whereby it demanded Danesita to make several supplementary filings, none of which was imposed by law and most of which were unnecessary for the purposes of convening a composition hearing, while some others were simply impossible to comply with.

Additionally, by the same

Decision, the Court strongly recommended that the liquidator was duty-bound to proceed with the sale of the assets and took care to serve it to the liquidator. As a result, the liquidator, soon thereafter, proceeded with the second sale tender which led to the sale of Danesita's assets.

In the Tribunal's view "*the accumulation of seven unjustified obstacles, coupled with the reminder of the liquidator's obligation to proceed with the sale of the assets*"[5] was "*a manifest sign that the Court simply did not want, for whatever reason, to do what was mandatory.*"

Therefore the Tribunal concluded that indeed "*the violation of the obligation to treat the investor in a fair and equitable manner took the form of a denial of justice*"[6]. Quoting some similar cases of denial of justice, such as Robert Azinian v. Mexico, Mondev International v. USA, Loewen v. USA and Elettronica Sicula v. Italy the Tribunal found that "*[T]he decision of the Metropolitan Court of Budapest does shock a sense of legal propriety.*"

Notably, notwithstanding that this was a first instance's decision, the fact that no appeal against such Decision was available decision led the Tribunal to treat the breakdown as "*systemic*"[7].

In the authors' view this landmark decision stands as one of the most relevant decisions adopted by an ICSID Tribunal in recent years. Not only did the Tribunal find that a State has denied justice to an international investor as it also determines that the violation of the fair and equitable treatment took place in the course of a liquidation proceeding, which makes this a singular case. This decision sheds some light in the understanding regarding denial of justice in international law as it also inevitably establishes a higher threshold for national judges and legislation when dealing with the liquidation of investments made by international investors. ■

Footnotes:

1 Section 44 of the Hungarian Bankruptcy Act ("HBA") at the time read as follows: "a composition agreement shall be deemed valid upon the consent of at least half of the creditors with proper entitlement to conclude a composition agreement in all groups, provided that their claims account for two-thirds of the total claims of those entitled to conclude the composition agreement".

2 Section 41(5) of the HBA.

3 Such request was filed before the Court on April 11, 2008.

4 Unlike bankruptcy proceedings, whereby the debtor prepares an agreement to restore solvency and the creditors vote it in a meeting and not before the judge. The only intervention of the Court is the approval by decree of the agreement made by the debtor and its creditors as long as such an agreement complies with the provision of the HBA (cf. section 18-21 in force at the time).

5 § 142.

6 § 146.

7 § 154.

"

THIS LANDMARK DECISION STANDS AS ONE OF THE MOST RELEVANT DECISIONS ADOPTED BY AN ICSID TRIBUNAL IN RECENT YEARS

"

Court Approval of Refinancing Agreements in Spain

José María Mesa Molina & Alberto Álvarez Marín analyse the approval system and offer a critical view of the insolvency law

ALBERTO ÁLVAREZ MARÍN
Mariscal & Abogados Asociados (Spain)

JOSÉ MARÍA MESA MOLINA
Mariscal & Abogados Asociados (Spain)

The 4th Additional Provision of Law 22/2003 of July 9, on Spanish Insolvency (the "Insolvency Law") regulates one of the main pre-insolvency instruments existing in Spanish law: court approval of refinancing agreements between a debtor company and its creditors.

As with other mechanisms of this nature, the legislature has tried – especially in the current economic crisis – to facilitate refinancing agreements between a debtor company and its creditors through court approval, with the primary goal of ensuring the economic viability of the debtor company and avoiding the need to carry-out an insolvency procedure that, in most cases, inexorably leads to the final winding-up of the company.

Perhaps the most important aspect of this "anti-insolvency" mechanism to highlight is the possibility of extending certain effects of the refinancing agreement (stay and reduction of debt, among others) to the so-called "dissident creditors", i.e. those creditors who have opposed or have not signed the refinancing agreement, contingent on certain majorities of financial liability thresholds being met, as discussed below.

Thus, the law attempts to prevent the opposition from creditors owed minor amounts that could pose a serious obstacle to the continuation of the debtor company. This is the direction taken by the latest reforms undertaken on court approval – such as Law 17/2014, of September 30, which adopted urgent measures on debt

refinancing and restructuring of debtor companies – that have tended to favour creditors who have signed a refinancing agreement at the expense of dissenting creditors.

This article analyses the fundamental aspects of court approval of refinancing agreements (requirements for court approval, court proceedings, effects, challenges, etc.) and offers a critical view of this mechanism.

Requirements to apply for court approval

The legal requirements to obtain court approval of a refinancing agreement are the following:

(i) The agreement should be signed by creditors representing at least 51% of the financial liabilities.

(ii) The agreement should lead at least to a significant expansion of the available credit or the modification or termination of the debtor's duties, provided that the debtor meets a viability plan which allows the continuation of professional or business activity in the short and medium term.

(iii) A certificate from the debtor's auditor certifying the

> ONE OF THE MAIN PURPOSES OF COURT APPROVAL IS THE POSSIBILITY OF EXTENDING CERTAIN EFFECTS OF THE REFINANCING AGREEMENT TO CREDITORS OPPOSED TO THE AGREEMENT

compliance with the financial liabilities' percentage required in order to adopt the agreement.

(iv) The agreement must be formalised in a public document.

Effects of court approval of a refinancing agreement

Court approval of a refinancing agreement has the following main effects:

(i) The extension of certain effects of the refinancing agreement to dissident creditors, depending on the percentages of approval of the agreement.

(ii) The paralysis of the enforcements brought against the debtor for the debts related to the refinancing agreement.

(iii) The inability to claw back the agreement if refinancing leads to subsequent insolvency proceedings.

Effects extending to dissenting creditors

As noted, one of the main purposes of court approval is the possibility of extending certain effects of the refinancing agreement to creditors opposed to the agreement. Under the Insolvency Law, the percentage of the financial liability affected by the agreement determines which effects of the agreement extend to dissident creditors.

When the agreement has the support of creditors representing 60% of the financial liability (65% for creditors whose claims are secured by collateral) the following effects of the agreement may be extended to the dissenting creditors:

(i) Forbearance of principal or interest payments for up to five years.

(ii) The conversion of debt into equity loans during the same period.

When the agreement has the support of creditors representing 75% of the financial liability (85% for creditors whose claims are secured by collateral) a greater variety of effects may be extended:

(i) Forbearance of principal or interest payments for a term of five years or more, but in no case more than ten.

(ii) Debt pardons.

(iii) The conversion of debt into shares of the debtor company.

(iv) The conversion of debt into equity loans, convertible bonds or subordinated loans, or other similar instruments.

(v) The transfer of property or rights to creditors as payment of all or part of the debt.

Procedure for obtaining court approval

The procedure articulated by the Insolvency Law to obtain court approval of a refinancing agreement is particularly characterised by its speed, which attempts to resolve a situation of actual or imminent insolvency that may force a company to end its economic activity by filing for insolvency. The main steps of this procedure are as follows:

(i) Application for court approval of the agreement addressed to the competent court where the debtor company or any signatory of the financing agreement has it's registered office, accompanied by certain documentation (e.g., refinancing agreement and certified auditor, among others).

(ii) Having examined the documentation, the judge will decide whether the application is admissible.

(iii) After full satisfaction of the legal requirements provided above, the judge shall automatically approve the refinancing agreement, without going into the merits, within fifteen days. The Court order shall be published in the Insolvency Public Register and the Spanish Official State Bulletin (BOE).

Challenging court approval

Although it is certainly restrictive, the Insolvency Law allows dissident creditors to challenge the court approval of a refinancing agreement. Dissident creditors may only allege (i) the disproportionate nature of the sacrifice required from the dissident creditors; and (ii) the failure to meet the legally required majority of financial liability.

In relation to the first ground, the Insolvency Law only refers to the disproportionate sacrifice very generically. Looking into Spanish doctrine and case law, determining the existence of a disproportionate sacrifice requires

(i) an assessment of the effects of the agreement for dissident creditors compared to the effects on signatories; and

(ii) an appreciation of whether the planned restructuring limits the rights of the dissenting creditors more than they could reasonably expect in the absence of a restructuring.

The second reason for challenging court approval concerns whether the refinancing agreement meets the legally required majority for approval (51% of creditors) and, where appropriate, the extent of the agreement's effects (from 60% up to 85%, depending on the case).

In challenging the court approval, dissenting creditors may be unsure about the period available to raise the challenge. The Insolvency Law refers merely to a period of fifteen days as of the publication of the Court order, but does not clarify whether it is fifteen business or calendar days.

In this regard, it should be clarified that the 15 day period is a procedural term which therefore should exclude non-working days (Article 185 of the Spanish Law of the Judiciary). This is due to the fact that the period to challenge begins to run as a result of a procedural action, which in this case is the publication of the order in the BOE and in the Insolvency Public Registry according to the Spanish Supreme Court's case law.

Despite not being an actual judicial notice, the "publication" is undoubtedly a procedural notification form which the Insolvency Law chooses precisely to expedite the process and avoid possible delays arising from the difficulties of communication to each of the dissenting creditors.

Lastly, the steps to successfully challenge are explained in the following points:

(i) The challenge should be initiated before the same court that approved the agreement.

(ii) If the judge in charge of the challenge deems it appropriate, the judge shall notify the challenge to the debtor and the other signatory creditors so that they may oppose the challenge within ten days.

(iii) The judgment ruling on the challenge of the court approval must be issued within thirty days.

Conclusion

As noted at the beginning of this article, the Spanish insolvency proceedings end in a high percentage of cases with the winding up of the debtor. Therefore, the pre-insolvency phase – specifically with court approval of refinancing agreement – stands as one of the determining factors in achieving business continuity in a critical financial situation, by setting up new instruments, amortisation repayment instalments, and financial conditions more in line with the market, in addition to providing refinancing agreements of a significant level of legal protection against third parties (e.g. dissident creditors).

That being said – and without losing sight of the advantages that this institution offers – the current legal configuration of this provision cannot be ignored as some of its other key aspects are detrimental to minority dissenting creditors.

According to the latest legislative reforms in Spain, given the urgency of judicial proceedings, the current approval process leads to a "quasi-automatic" refinancing agreement (at a first stage, the Court does not evaluate the existence or not of disproportionate sacrifice, reducing the process to the fulfilment of mere formalities) with a very short period and reduced reasons for its challenge.

The burden of pleading the invalidity of the refinancing agreement, however, falls exclusively on the dissenting creditors. This situation is aggravated by the fact that the creditors in question are not personally notified of the court's decision or of the short time frame they have to appeal the decision (fifteen days).

Most major critics are sceptical that any challenge to the court's approval would be filed before the same court that made the decision, and that appeal would be possible *vis-à-vis* an independent body. This leads to a certain degree of helplessness on the part of the dissident creditors (considering that it is a rather complex task for a judge to rule against his/her own decision and change the conclusion thereof).

Thus, the legitimate and necessary objective pursued by the legislative body to ensure the viability of the Spanish companies could have been also achieved in a fairest way and reasonably preserving the rights of dissenting creditors, who also play a key role in financing the debtor. ■

" MOST MAJOR CRITICS ARE SCEPTICAL THAT ANY CHALLENGE TO THE COURT'S APPROVAL WOULD BE FILED BEFORE THE SAME COURT THAT MADE THE DECISION "

Share your views!

Country Reports
Spring 2016

Updates from Italy, France, Latvia, Europe


GIORGIO CHERUBINI
Partner, EXPLegal, Rome, Milan (Italy)

Italy: New provisions for banks in financial difficulties

Italy has recently enforced new provisions concerning the management of banks' and intermediaries' crises following the European Union directives, concerning the saving of four Italian banks.[1]

Following the guidelines of Directive 2014/59/EU[2] which imposes the losses incurred in a bank rescue on shareholders and creditors in a process known as "bail-in", before any taxpayers' money can be tapped, two legislative decrees, namely 180/2015 and 181/2015, have been published in the Official Gazette 267 on November 16, 2015.

More recently, the Law n° 208/2015, effective from January 1, 2016, also known as Stability Law (*legge di stabilità*), indicating the guidelines established by public finance policy, has confirmed the contents of the above-mentioned legislative decrees.

In more detail, legislative decree 181/2015 introduces in the Consolidated Banking Law[3] provisions on recovery plans, intra-group financial support and early intervention measures. Furthermore, some articles regulating the extraordinary administration of banks and their forced liquidation have been modified. The legislative decree 180/2015 concerns regulations concerning the management of cross-border groups of companies, the powers and functions of the national Resolution Authority and the discipline of the national recovery fund.

One of the main innovations of the new provisions aimed at protecting taxpayers from the risk of having to bail out troubled lenders is the bail-in mechanism, which foresees that in a bank's crisis the State will not be involved, the following having to suffer the burden of the bank's losses:

- ✓ firstly the shareholders,
- ✓ followed by the subordinated bondholders and seniors,
- ✓ and lastly, the bank account holders with liquidity above €100,000 on their account.

Shareholders and creditors will be asked to remit a monetary contribution equal to 8% of the liabilities of the failing bank and the changes also concern brokerage companies.[4]

The new procedure for the management of banks in difficulty envisages that the new recovery process will be managed by an independent authority (the Resolution Authority) through the use of specific techniques ("resolution") and having powers offered by the European provisions. This Authority aims at avoiding the interruption of services offered by the bank (e.g.

deposits and payment services), reinstating the previous conditions of sustainability of the banks' healthy part and liquidating the remaining parts, while the forced liquidation is still considered an alternative measure to the resolution. In this way, if in financial difficulties, even when only prospective, the Bank of Italy shall evaluate if it is possible to activate the ordinary procedure of forced liquidation of the bank or if a resolution procedure is needed.

Therefore, the requisites for the enforcement of the forced administrative liquidation are amended and certain choice criteria will be established by the Resolution Authority on the suitable procedure to be applied.

Hence, the resolution will be enforced only after the Bank of Italy ascertains the existence of public interest and will be applied when the resolution it is necessary in order to pursue the objectives indicated by the provisions (e.g. continuity of essential functions of the bank, financial stability, protection of the clients), while the adoption of the forced administrative liquidation does not allow to achieve such objectives.

In order to provide the suitable resolution, the Resolution Authority can activate a series of different measures:

1. sale of a part of the activity to a private buyer;
2. temporary transfer of the activity and liabilities to a "bridge" bank constituted and managed by the Resolution Authority in order to pursue the main duties, in view of a subsequent sale;
3. transfer of the deteriorated activities to a "bad" bank, meant to manage the liquidation within reasonable terms.

The new provisions give priority to claims arising from deposits over other senior unsecured debt while under the previous legislation, depositors and bondholders had the same rank and losses were shared equally.

In the recent application of the new provisions, after absorbing part of the losses with equity and subordinated debt, finally the four mentioned banks will be split into a "bridge" bank and a "bad" bank. (*see diagram*).

Footnotes:

1 Banca Marche, Cassa di risparmio di Ferrara, Popolare Etruria e CariChieti, accounting together for about 1% of the total Italian deposits have been under special administration for quite some time.
2 BRRD (Bank of Recovery and Resolution Directive)
3 Testo Unico Bancario
4 Società Intermediazione Mobiliare

> "ONE OF THE NEW PROVISIONS IS THE BAIL-IN MECHANISM, WHICH FORESEES THAT IN A BANK'S CRISIS THE STATE WILL NOT BE INVOLVED"

Summary of the Bail-in

Who pays in case of bank restructuring?

BANK RISKING FAILURE

Bail-in

RESTRUCTURING

Imposition of losses on shareholders and creditors, up to the threshold of 8% of the bank's liabilities.

INVESTORS
8% threshold for intervention in the bank's liabilities

Entities affected by the losses in the following order:

- Stocks and equity instruments
- Subordinated bonds
- Bonds and other liabilities
- Deposits above €100,000 of individuals and SMEs

Exempted from the losses:

- Deposits under €100,000
- Covered bonds
- Debts deriving from employees' wages, Internal Revenue Agency, Social Security, suppliers

EUROPEAN FUND
5% threshold for intervention in the bank's liabilities

€70 billion

The European Fund for liquidation will have a capacity of seventy billion.

It will be gradually effective in the next ten years.

In the initial transitory period, it will work alongside national funds.

ALEXANDRE LE NINIVEN
Senior Associate, Squire Patton Boggs, Paris (France)

France: Nineteen specialised commercial courts to deal with the largest insolvencies

The French government has made the assessment that certain smaller commercial courts were regularly finding themselves confronted with cases of great complexity, without the human resources and means to manage and handle them, only because the company in difficulty had its head office in the jurisdiction of these courts. It has therefore been decided to reform the system in order to improve its efficiency.

The Macron law of 6 August 2015, named after the current Minister of the Economy, anticipated the establishment of specialised commercial courts (TCS) which will process the most complex insolvency proceedings.

Currently, any of the 134 French commercial courts can be applied to, the choice being mainly the location of the distressed company's headquarters. This new arrangement aims to improve efficiency and to increase the number of specialised judges (because in France, commercial judges are lay judges). The aim of the reform is to save jobs. The choice of the specialised commercial court is justified by the complexity and urgency of many matters and the need for a quick response time.

On 27 November 2015 the former Minister of Justice, Mrs Taubira, revealed a first list of 18 specialised commercial courts. This list (which has implications for workforce transfers and supplementary funds allocation) has resulted in intense debates between the Chancery (Ministry of Justice) and Bercy (Ministry of Economy), as they disagreed on the number of specialised commercial courts required (wanting to appoint between 8 and 35 from the 134 existing courts).

The relevant courts were initially Besançon, Bordeaux, Évry, Grenoble, Lille Métropole, Lyon, Marseille, Montpellier, Nanterre, Nantes, Nice, Orléans, Paris, Poitiers, Rennes, Rouen, Strasbourg and Toulouse.

One should be surprised that Bobigny, Créteil and Versailles were not on the list, even though they deal with important matters and ensure that the Paris area is not under-represented.

In this respect, many leading figures of the Bobigny Commercial Court, the second busiest court in terms of activity in the Paris area, have recently pointed out the qualities of their jurisdiction and requested the government to review its list, in the interest of those legally accountable. They have highlighted the risk of having to face a true "loss of skills" to the other nearby commercial courts (Nanterre or Evry), when judges transfer, having been attracted by the prospective ability of handling the most important cases. Bobigny is also at the heart of the "Grand Paris project" and a dynamic employment area which, according to them, justifies the choice of this court among the top 19.

The recent resignation of the Minister of Justice, Christina Taubira, and her replacement by Jean-Jacques Urvoas has slowed down the process by a couple of weeks.

The final list published on 26 February 2016, included jurisdictional changes with the courts of Besancon and Lille being replaced by those of Bobigny, Dijon and Tourcoing. It appears that the lobbying by the judges and lawyers of Bobigny has paid off.

> IT APPEARS THAT THE LOBBYING BY THE JUDGES AND LAWYERS OF BOBIGNY HAS PAID OFF

Latvia: Further developments concerning the status of the insolvency administrator

In January 2015, Eurofenix published an article, "Latvia: A fundamental reform of the status of the insolvency administrator", in which the readers were informed about the reform of the insolvency administrator's status: the administrators were going to be considered public officials. A year has gone by, and thus this article is dedicated to the recent developments in this regard.

Since half of the insolvency administrators in Latvia consists of sworn attorneys and the concept of a public official is closely linked with restrictions regarding the combining of several occupations, a number of them submitted a complaint to the Constitutional Court of the Republic of Latvia indicating that the new regulations restrict their freedom to continue practicing both professions.

On 21 December 2015 the Constitutional Court pronounced the reform anti-constitutional in respect of sworn attorneys. The Court recognised that, in principle, there are no obstacles for the legislator to change the status of the insolvency administrators to public officials. The reform is aimed at protecting the creditors' and debtors' legitimate interests and the new legal provisions allow for a greater control over the administrator's actions within insolvency proceedings. However, the Court, at the same time, emphasised that several restrictions concerning the position of public officials are not compatible with the principles of independence of an attorney and with the client-attorney confidentiality.

Firstly, according to the respective legal provisions, public officials are obliged to submit declarations which include information about their agreements with other persons, namely details of their clients and the amount of their fee. This information, although not publicly accessible, is available to a certain circle of public authorities and can be misused.

Secondly, it is not allowed to advertise a public official's services, but such a prohibition negatively affects the interests of the sworn attorneys who have to advertise about the legal assistance they can provide.

The Constitutional Court emphasised that there are other alternative, less restrictive means to achieve the legitimate aim of the reform, the new status of the administrators, especially by introducing new legal provisions specifically designed for insolvency administrators also practicing as sworn attorneys. Such provisions would not allow disclosure of information regarding the attorney-client relations and would not interdict the advertisement of their legal assistance capacity.

It should be also mentioned that on 22 February the Constitutional Court terminated judicial proceedings in a similar case brought by board members in a capital company and tax (financial) consultants. The Court noted that in contrast to sworn attorneys, the new legal provisions do not include restrictions for board members and tax (financial) consultants to practice as insolvency administrators.

Notwithstanding the conclusions in the first Constitutional Court's judgment, this February has brought new problems, soon to be fixed, hopefully. On 4 February 2016 the Parliament of the Republic of Latvia has adopted new regulations providing that insolvency administrators also practicing as sworn attorneys will have the obligation to submit a public official's declaration as of 1st September of 2016. This decision has already been criticised as contrary to the Constitutional Court's judgment and as complicating even more the introduction of the reform of the insolvency administrator's status. Such a decision from the legislator, again, is met with incomprehension and brings new questions without answers, at least for the moment.

The rest of the insolvency administrators, who are not sworn attorneys, are considered as public officials as of 1st January 2016. Such a reform in Latvia is unusual for the European states' approach in this regard and, in the view of the author, is incompatible with the fundamental principles of the insolvency administrator's rights and duties.

> THE CONSTITUTIONAL COURT PRONOUNCED THE REFORM ANTI-CONSTITUTIONAL IN RESPECT OF SWORN ATTORNEYS

JĀNIS EŠENVALDS
Insolvency administrator and sworn attorney, Partner at Law office "Rasa & Ešenvalds", Riga (Latvia)

SARAH MAY
Solicitor, Insolvency Department,
Moon Beever, London (UK)

GRAHAM MCPHIE
Partner, Insolvency Department,
Moon Beever, London (UK)

Europe: Orders for sale of properties in Europe: a helpful reminder, the case of Komu & Others v Komu & Another

The recent decision of the Court of Justice of the European Union in Komu & Others v Komu & Another serves as a reminder that it is essential to choose the correct jurisdiction in which to commence proceedings concerning the sale of a property in Europe, knowing that normally the jurisdiction is that of the country in which the property is situated.

Facts

The three claimants and two of the defendants lived in Finland. Together they were joint owners of two properties in Spain. The claimants had started proceedings in Finland for the properties to be sold, on grounds equivalent to the UK's Trusts of Land and Appointment of Trustees Act of 1996, which a UK trustee in bankruptcy would use to seek possession and sale of a property. The three claimants wished the properties to be sold and the proceeds distributed in accordance with already established beneficial interests. Under Finnish law if they disagreed as to whether the properties were to be sold they had to apply to Court, as is the position in England.

The Finnish District Court made an order for sale. On appeal, the Finnish Court of Appeal set the judgment aside on the grounds that the Finnish Courts had no jurisdiction to emit that order and that the Spanish Courts had sole jurisdiction. The Finnish Supreme Court referred the question of jurisdiction to the Court of Justice of the European Union.

The question for the EU Court of Justice

The normal rule is that such proceedings should be conducted in the European Member State where the defendant is domiciled (EC Regulation No 44/2001 Art 2(1)). One compulsory exception to this rule is when the proceedings have "*as their object rights in rem in immovable property*" (Art 22(1) Regulation 44/2001), in which case only the courts of the Member State where the property is situated have jurisdiction to determine an application.

The question for the Court of Justice in the Komu case was:

> "*Is Article 2(1) of Regulation No 44/2001 ... to be interpreted as meaning that an action by which some of the co-owners of immovable property apply for the property to be sold for the purpose of terminating the relationship of co-ownership and for an agent to be appointed to conduct the sale constitute proceedings which have as their object rights in rem in immovable property within the meaning of that provision?*"

The Court of Justice therefore had to determine whether an application for sale had as its object '*rights in rem*' (property). If it found that it did, the application for sale would have to be made where the property was situated, in Spain, rather than in Finland, where the claimants and defendants lived.

The Court of Justice held that an application for "*termination of co-ownership in undivided shares of immovable property by way of sale*" indeed has rights in rem as its object and therefore the Spanish courts had exclusive jurisdiction to determine the application.

Why does this matter?

Although this decision was not an insolvency case, the applicable law very much mirrored the terms of the European Insolvency Regulation, which by Articles 5 and 11 give similar jurisdiction to the country in which the property is situated. We are aware, from the decision in Schmidt v Hertel, that it is possible to litigate in the country in which the main proceedings were constituted to deal with assets or claims not located within that jurisdiction, but that the applicable law will be that in which the asset is situated.

For insolvency practitioners seeking to obtain possession and sale of a bankruptcy estate asset or an insolvent company's property, it is vital to know at an early stage where proceedings are best commenced and which law will apply. This will affect the likely costs and the decision whether the action intended is worthwhile taking.

The Court of Justice's decision is a reminder that in many cases the application for sale would be better made in the country where the property is located, rather than in the UK where the trustee, and often the defendant bankrupt, are. There is also no doubt that, in many instances, the local courts are also more content to enforce locally obtained orders. ■

> "ALTHOUGH THIS DECISION WAS NOT AN INSOLVENCY CASE, THE APPLICABLE LAW VERY MUCH MIRRORED THE TERMS OF THE EUROPEAN INSOLVENCY REGULATION"

FREE ADMISSION

ACADEMIC FORUM
INSOL Europe

Mid-Year Symposium

Credit Institutions' Recovery and Resolution: Lessons to be learned by commercial insolvencies

Humboldt University
Berlin, Germany
29 April 2016

ACADEMIC FORUM SPONSORS

SHAKESPEAREMARTINEAU

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

To Brexit, or not to Brexit, that has always been the question…

Emmanuelle Inacio provides a special report on the forthcoming referendum which will decide whether or not the UK stays within the EU

EMMANUELLE INACIO
INSOL Europe Technical Officer

"WHAT WOULD BE THE LEGAL CONSEQUENCES FOR THE BRITISH RESTRUCTURING AND INSOLVENCY PROCEEDINGS CONCERNING COMPANIES AND INDIVIDUALS?"

Share your views!

United Kingdom Prime Minister, David Cameron, has announced a referendum on whether the UK should remain a member of the European Union, to be held on Thursday 23 June 2016. Indeed, in January 2013, David Cameron promised that, should the Conservatives win a parliamentary majority at the 2015 general election, the UK Government would renegotiate the terms of the UK's EU membership, before holding a referendum.

The renegotiations were concluded at the European Council in Brussels on 18-19 February 2016 and concern four areas: economic governance, competitiveness, sovereignty, social benefits and free movement. The agreement will become effective on the date the UK informs the Council that it has decided to remain a member of the EU.

The UK and the EU have always had an uneasy relationship.

If we go back to 1956, Jean-François Deniau, a French statesman, who was a young member of the French commission in charge of drawing up the Treaty establishing the European Economic Community (EEC), narrated in his memoirs several charming anecdotes on the negotiations in Val-Duchesse in 1956, especially one. Jean-François Deniau told that Russell Bretherton, a British Under-Secretary from the Department of Trade was also attending the work sessions, England being invited. This delightful English gentleman never opened his mouth, except to smoke his pipe. Finally, one day, to everyone's surprise, he asked to speak. He wanted to deliver the following closing speech: "*Messieurs, I have followed your work with interest, and sympathetically. I have to tell you that the future Treaty which you are discussing a) has no chance of being agreed; b) if it were agreed, it would have no chance of being ratified; c) if it were ratified, it would have no chance of being applied. And please note that, if it were applied, it would be totally unacceptable to Britain. You speak of agriculture, which we don't like, of power over customs, which we take exception to, and of institutions, which horrifies us. Monsieur le president, messieurs, au revoir et bonne chance.*"

Joining the EEC

The UK finally joined the European Economic Community on 1 January 1973 after two applications for membership vetoed by French President Charles de Gaulle. A referendum was held on 5 June 1975 in the United Kingdom to gauge support for the country's continued membership of the European Economic Community. The UK voted to stay in.

Leaving the EU

But if the UK voted to leave the EU on 23 June 2016, what would be the procedure applicable for its withdrawal?

Article 50(1) of the Treaty on European Union (TEU) provides that "*any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements*". Article 50(2) would allow the UK, after having notified the European Council of its intention to withdraw, to negotiate and conclude an agreement setting out the arrangements for its withdrawal with the Union, taking into account the framework for its future relationship with the Union. Article 50(3) establishes an optional procedure. If the negotiation succeeds, the date of the withdrawal should be the date of the entry into force of the withdrawal. If an agreement is not reached, the withdrawal should be automatically effective two years after the notification, unless the European Council, in agreement with UK, unanimously decides to extend this period.

Whichever option is adopted, the UK will certainly try to negotiate an agreement setting up the new rules of its relationship with the EU, particularly the trade relations between the two parties. More than 40 years after joining the European Economic Community, UK's and other Member States' economies are indeed highly integrated and interdependent. As EU citizens, millions of British citizens live in other Member States and millions of EU citizens originating in other Member States live in the UK. A large number of industries and companies are established, both in the UK and on the Continent. The density of the flows of goods and services is significant.

Therefore, the new relationship between the UK and the EU could be a tailor-made agreement. There are other

options: the UK could try to become a member of the European Free Trade Association (EFTA) or a member of European Economic Area (EEA). The UK could also make the choice of following the Swiss model or try to negotiate a free trade agreement or a customs union agreement with the EU. The UK could finally make the choice of becoming a third country.

Legal Consequences

But if the UK voted to leave the EU on 23 June 2016, what would be the legal consequences for the British restructuring and insolvency proceedings concerning companies and individuals?

In this aspect, in case of a "Brexit", the European Regulation on cross-border insolvency proceedings would no longer apply to the UK. Therefore, insolvency proceedings opened in the UK would no longer benefit from automatic recognition in other Member States of the EU and insolvency proceedings opened in Member States would no longer benefit from automatic recognition in the UK. Furthermore, creditors or third parties' rights *in rem* acquired in respect of the foreign assets of UK companies would be affected. Similarly, in case of a "Brexit", the European Regulation Recast on cross-border insolvency proceedings which will be in force from 26 June 2017, will not apply to the UK albeit the new instrument aims at increasing chances to rescue European distressed companies and ensuring that procedures for cross-border insolvencies are effective and efficient.

The Cross-Border Insolvency Regulations 2006 (CBIR 2006), which implement the UNCITRAL Model Law on Insolvency, will then apply. This instrument is indeed used for recognition of insolvency proceedings with third countries, but the recognition is not automatic: the foreign appointed insolvency practitioners who want their proceedings to be recognised in the UK have to apply for recognition under the CBIR 2006.

Currently, the European Insolvency Regulation replaces the Convention between the United Kingdom and the Kingdom of Belgium providing for the Reciprocal Enforcement of Judgments in Civil and Commercial Matters, with Protocol, signed in Brussels on 2 May 1934. In the event of a "Brexit", the UK will have the possibility to negotiate similar bilateral or multilateral conventions with the EU Member States for mutual recognition of insolvency proceedings.

Schemes of arrangements do not fall within the scope of the European Insolvency Regulations as they are not insolvency procedures. The UK courts will allow a foreign company to propose a scheme to its creditors if there is a sufficient connection with England and whether the scheme will be recognised in the jurisdiction of incorporation of the company and in any countries where the scheme might need to take effect. UK courts considered that schemes of arrangements could be recognised by other Member States under the Brussels Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. But in the event of a "Brexit", the Brussels Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters will cease to apply. Therefore, recognition would be established under the private international law, or Rome I Regulation, on the law applicable to contractual obligations, if relevant. The Lugano Convention, which provides for mutual recognition of judgments between EU and EFTA countries, could also apply if it remains applicable to the UK.

Insolvency proceedings concerning insurance undertakings, credit institutions and certain investment undertakings are excluded from the scope of the European Insolvency Regulation. Insurance undertakings and credit institutions are subject to specific EU directives, whereas investment undertakings fall outside the European law. The EU directives have been implemented in the UK. Therefore, in the event of a Brexit, the UK government would have to decide whether to maintain the incorporated legislation.

If the result of the referendum is in favour of a "Brexit", this will bring uncertainty, complexity and increased costs for the restructuring and insolvency proceedings concerning companies and individuals in the UK and the EU.

41 years after the last referendum, hopefully the results will be identical. If the UK leaves the EU, we can indeed fear a domino effect…

Source: http://bobwessels.nl/2016/03/2016-03-doc2-brexit-european-insolvency-law/

Get in touch

For updates on the new technical content recently published on the INSOL Europe website, visit: www.insol-europe.org/technical-content/introduction
or contact Emma on: technical@insol-europe.org

Links

Email: technical@insol-europe.org

LinkedIn: www.linkedin.com

Twitter: @INSOLEurope

Resources
www.insol-europe.org/resources

Glossaries
www.insol-europe.org/technical-content/glossaries

Updated Insolvency Laws
www.insol-europe.org/technical-content/updated-insolvency-laws

State Reports
www.insol-europe.org/technical-content/state-reports

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

How to become an insolvency practitioner across Europe?
www.insol-europe.org/technical-content/how-to-become-an-ip-across-europe

National Case Law
www.insol-europe.org/technical-content/national-case-law

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

EIR Case Register
www.insolvencycases.eu

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

Working Groups
www.insol-europe.org/about-us/about-our-working-groups

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: Alberto Núñez-Lagos
alberto.nunez-lagos@uria.com

Deputy President: Steffen Koch
steffen.koch@hww.eu

Vice President: Radu Lotrean
radu.lotrean@citr.ro

Immediate Past President:
Robert Van Galen
robert.vangalen@nautadutilh.com

Treasurer: Jim Luby
lubyj@mcstayluby.ie

Director of Administration:
Caroline Taylor
carolinetaylor@insol-europe.org

Secretariat

Communications Manager:
Paul Newson
paulnewson@insol-europe.org

Membership & Conference Registrations Co-ordinator:
Wendy Cooper
wendycooper@insol-europe.org

EECC Secretary: Florica Sincu
floricasincu@insol-europe.org

Technical Officer:
Emmanuelle Inacio
technical@insol-europe.org

Sponsorship Co-ordinator:
Hannah Denney
hannahdenney@insol-europe.org

Working Group Chairs

Academic Forum
Christoph Paulus
chrpaulus@t-online.de
Secretary: Anthon Verweij
anthon.verweij@gmail.com

Anti-Fraud Forum: David Ingram
david.ingram@uk.gt.com

Congress Technical (Lisbon):
Evert Verwey
Evert.Verwey@CliffordChance.com
Francisco Patricio
francisco.patricio@abreuadvogados.com
Secretary:
Eduardo Peixoto Gomes
eduardo.p.gomes@abreuadvogados.com

Constitution: Catherine Ottaway
ottaway@hocheavocats.com

EECC: Evert Verwey
Evert.Verwey@CliffordChance.com
Radu Lotrean
radu.lotrean@citr.ro

EU Research:
Robert Van Galen
robert.vangalen@nautadutilh.com

INSOL International:
Catherine Ottaway
ottaway@hocheavocats.com

IOH Forum: Marc André
Mandrelaw@aol.com
Daniel Fritz, Daniel.Fritz@hww.eu
Stephen Harris, sharris@uk.ey.com

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

Lenders Group: Florian Joseph
florian.joseph@helaba.de
Alastair Beveridge
abeveridge@alixpartners.com

Sponsorship: David Rubin
davidr@drpartners.com
Frank Tschentscher
FTschentscher@schubra.de

Turnaround Wing: Chris Laughton
chrislaughton@mercerhole.co.uk
Steffen Koch
steffen.koch@hww.eu

YANIL: Jenny Gant
JenniferL.L.Gant@gmail.com

Young Members Group
Sabina Schellenberg
sschellenberg@froriep.ch
Slavomir Cauder
cauder@giese.cz

DATES FOR YOUR DIARY

Further Information:
www.insol-europe.org/events

2016

29 April	**INSOL Europe Academic Forum Mid Year Symposium** *Humboldt University, Berlin, Germany*
12 & 13 May	**INSOL Europe Eastern European Countries' Committee Conference** *Cluj-Napoca, Transylvania, Romania*
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*

2018

3 & 4 October	**INSOL Europe Academic Forum Conference** *Athens, Greece*
4–7 October	**INSOL Europe Annual Congress** *Athens, Greece*

INSOLVENCY OFFICE HOLDERS FORUM SPONSORS:

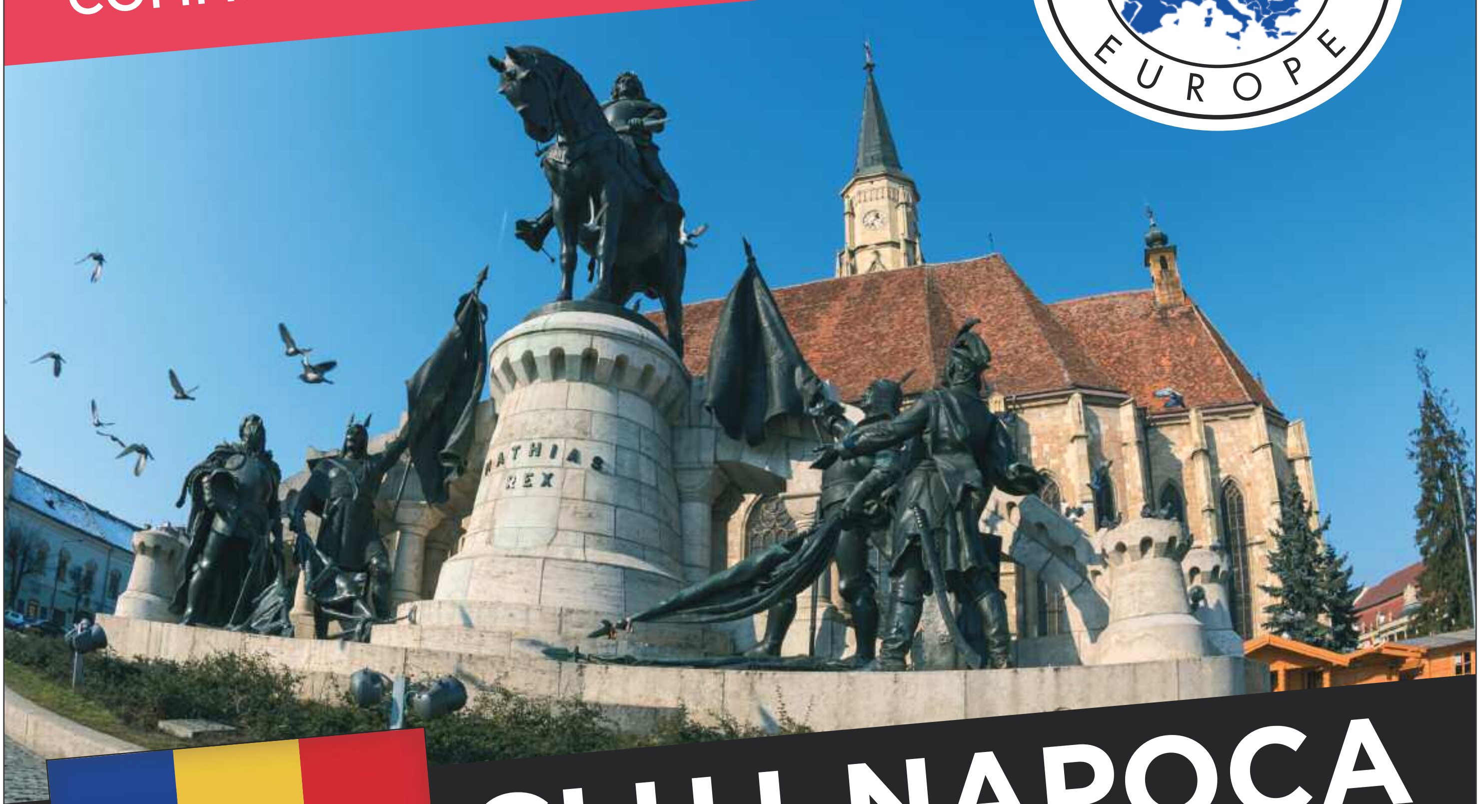
ACADEMIC FORUM SPONSORS:

For information on sponsorship packages, please contact Hannah Denney: hannahdenney@insol-europe.org

DATE FOR YOUR DIARY

EASTERN EUROPEAN COUNTRIES' COMMITTEE CONFERENCE 2016

INSOL EUROPE



CLUJ-NAPOCA

TRANSYLVANIA, ROMANIA

13 May 2016 • Grand Hotel Italia

New Trends in Insolvency:

Distressed Investing and the evolution of Personal Insolvency across Eastern Europe

Main Sponsor:

BDO RESTRUCTURING

Sponsor of Conference Material:

CITR

Supported by:

UNPIR

aija INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

For further information visit:

www.insol-europe.org/events

INSOL Europe General Sponsors