eurofenix

The journal of INSOL Europe
Summer 2016

Harmonisation and the Brexit effect

What now for UK and EU?

Company in Crisis

New legal concept created in Slovakia

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- Pledges in Luxembourg

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64 >
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Welcome from the Editors


ANNEROSE TASHIRO


GUY LOFALK

On Friday morning the world woke up with a result from the referendum in the UK that no-one really believed would be possible. The reactions were strong all over. Boris and his team were celebrating while a big portion of the British people started to Google, "what will happen if the UK leaves the EU?"

A little late you might think. Another British reaction was to start a petition to redo the referendum, when people have had a chance to reconsider. In a few days this managed to collect more than two million signatures. Scotland and Northern Ireland have started a liberation process from the UK or rather a dissolution process of the UK in order to be able to remain in the EU. It is hard to say what is media-driven and what are the real facts, but in a way it seems the British people voted more from an emotional point of view than a rational one, and when they realised the consequences they had second thoughts. But who knows what would be the result if the referendum was redone? According to some it would have the same result.

The process has started and now the separation is on its way. One of the major issues will be what access the UK will have to the common market after separation. On the one hand, if the difference of being out or being in is too small, others will follow the example and we will have a domino effect of a referendum all over Europe. So, the example needs to be clear. On the other hand, the UK is a part of Europe and the ties are of course deep and longstanding. On top of that, the separatists who will get into power when David Cameron has left will need to show that there is no big difference from a trading and common market perspective. They will try to delay the separation until they have something that will make them able to show that it was no big deal to leave the EU. As a kind of summary I think we don't really know the implications of the Brexit and no one does, and surely not the ones who voted for leaving. I am sure the consequences will fill a part of our lives for some years to come, not only in respect of the UK but in view of other nationalist parties that will maybe demand a referendum, like the National Front in France etc.

On the positive side, this has been a wakeup call for the bureaucracy in Brussels. The people do not acknowledge the ruling from Brussels and the way Brussels managed the crisis, especially the refugee crisis. Maybe this can bring the remaining EU countries together and make them focus on the common borders rather than on the detailed regulations of all kinds, which people of different countries find inappropriate for their national culture. Maybe it also will lead them to focus on the cost of the EU administration. As an example, let us mention that the whole EU parliament moves every month between Brussels and Strasbourg. A waste of money that no national parliament would get away with. The examples are numerous and it's a good time to start thinking about how to achieve a smart and cost efficient EU administration.

There are a lot of things of particular importance to consider these days. After Britain's vote, later this autumn we will have another election of global importance, the US presidential election. The choice of presidential candidates the American people seems to get is not as attractive as it should be, according to many groups in business and politics. The fact remains though, they both get a lot of votes but from different categories of people. Is this yet another example of the polarisation we see around the globe? What is triggering this development?

In our world we are still publishing Eurofenix with greater pride for each issue. This edition has a lot of interesting reading and I am particularly fond of the mix we are able to get between the different articles, from country reports to legal developments and analysis of cases, to reports from the different symposiums and conferences that are held around Europe. For us as practitioners it's also valuable to read that we have access to a database consisting of over 500 judgments.

The evolution of INSOL Europe and its different wings is rapid and more and more thorough. The INSOL Europe Turnaround Wing Guidelines have now been published which is yet another big step forward in our profession. There is also a report on INSOL Europe's role in UNCITRAL through Working Group V. Read and enjoy.

Guy Lofalk

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Summer 2016

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16
REPORT FROM
EEEC 2016

26
RESTRUCTURING
IN RUSSIA

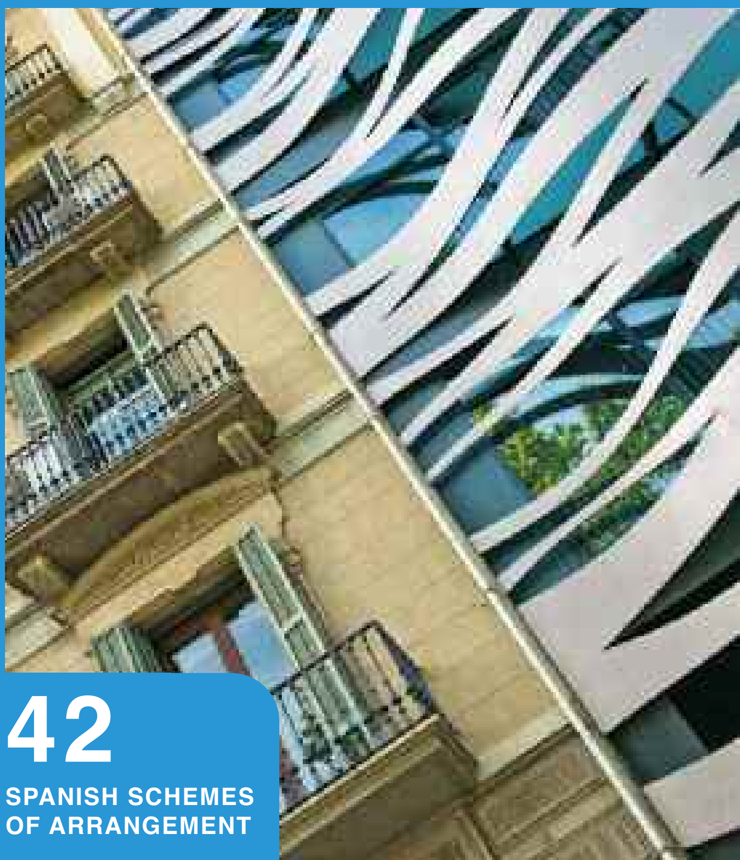
eurofenix

Edition 64 Summer 2016

CONTENTS

CONTENTS

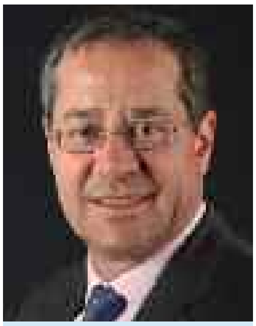
35
PLEDGES IN LUXEMBOURG



42
SPANISH SCHEMES OF ARRANGEMENT

Harmonisation and the Brexit effect

Alberto Núñez-Lagos discusses INSOL Europe's participation in the European insolvency laws harmonisation process and the effects of Brexit on harmonisation



ALBERTO NÚÑEZ-LAGOS
INSOL Europe President

"THE BREXIT DECISION IN THE UK REFERENDUM WILL MOST PROBABLY FACILITATE THE HARMONISATION PROCESS OF THE REST OF THE MEMBER STATES' INSOLVENCY FRAMEWORKS"

Share your views!

What is currently understood by the term "harmonisation"?

2016 has been chosen by the EU Commission as the year to study, analyse and eventually determine if and how the harmonisation of European insolvency laws could eventually be achieved.

All relevant European insolvency-related forums and organisations are openly discussing harmonisation. The Joint R3/ INSOL Europe Seminar (London, 22 April 2016), the INSOL Europe Eastern European Countries' Committee Conference (Cluj-Napoca, 12-13 May 2016), the R3 Annual Conference (Budapest, 18-20 May 2016), the 5th European Insolvency & Restructuring Congress (Brussels, 16-17 June 2016) and INSOL Europe's Annual Congress (Cascais, 22-25 September 2016) are the main forums in which harmonisation is and continues to be discussed, not counting the EU Commission forums such as the experts' and stakeholders' meetings, the Consultation launched by the EU Commission on an effective insolvency framework within the EU and the conference on convergence of insolvency frameworks within the European Union (Brussels, 12 July 2016).

These forums have not reached any conclusions and did not endorse any specific solution or criteria for harmonisation. Indeed, certain groups with very particular interests are expressing their views of their very specific industry. The INSOL Europe Annual Congress in Cascais will be a very important venue to continue discussing harmonisation. Your participation is very important as it will condition, influence and help to reach conclusions on harmonisation. I would identify three approaches to harmonisation of insolvency laws depending on the intensity of the proposed areas:

1. Pre-insolvency restructuring – capable of full harmonisation.
2. Clawback (avoidance) regulations – capable of at least soft harmonisation.
3. The Insolvency Office Holders regime – difficult to harmonise now.

I propose we discuss each of these areas in an open and non-dogmatic approach in Cascais.

Full harmonisation

Full harmonisation will probably be possible in relatively few areas of insolvency law due to two issues: (i) old traditional insolvency roots of each of the local jurisdictions, and (ii) interrelation with other regimes and areas of law such as corporate law, banking regulations (e.g. capital requirements when lending to insolvency companies) and labour law regulations.

Soft harmonisation

Soft harmonisation would basically mean harmonising through principles to be adopted locally by the Member State's legislation, to be done with a great flexibility and a variety of legal tools.

Difficult to harmonise

There are other areas of insolvency legislation which are so deeply rooted in the legal tradition of each Member State that it would be difficult to obtain the necessary consensus for such harmonisation, at least during the current 2016 consultation process. No doubt that such areas will be harmonised in the future after a longer period of education of the stakeholders involved in the process.

Brexit

In this context, the Brexit decision in the UK referendum will most probably facilitate the harmonisation process of the rest of the Member States' insolvency frameworks.

The UK has a very particular insolvency regime which is efficient and is very deeply rooted in the UK judiciary and among its practitioners. Consequently, if the insolvency framework of the Member State is no longer taken into consideration for harmonisation purposes, the complexity of the harmonisation process is reduced, and more so if such a system is very different than the rest of the systems in Continental Europe. An example is that of the differences on harmonisation of pre-insolvency processes also known as preventive restructuring frameworks.

The UK has always tried to avoid the harmonisation of UK Schemes of Arrangement within an insolvency framework, unlike the rest of the Member States, especially as regards the use of the COMI criteria to determine the competent jurisdiction. Needless to say that coordination between the Continental Europe insolvency systems and the UK insolvency system is desirable and possible in cross border matters. Cross border matters between two jurisdictions should probably be regulated by a bilateral treaty on applicable law, recognition and enforcement similar to the current (recast) European Insolvency Regulation.

It would not make sense for the UK, nor for the rest of the Member States, that the UK would actively participate in the current harmonisation process and not be bound by its result as a consequence of Brexit.

Harmonisation of preventive restructuring frameworks

I did make a proposal for harmonising preventive restructuring frameworks in the last issue of Eurofenix (*#62, Spring 2016*). It seems that the discussion is now focusing on the type of debtor which should benefit from such a preventive restructuring framework. The answer to this question will depend on how a preventive restructuring framework should be promoted in detriment of full insolvency proceedings.

I would suggest that to the extent that classes of creditors are protected (mainly by having each class cast a separate vote with no possibility to cram down the dissenting classes), any debtor should have the right to restructure under these preventive schemes, even if a balance sheet test or a cash flow test is used to determine the solvency or insolvency of the debtor, because the dissenting classes of creditors can block any such restructuring plan by considering it abusive or simply against their interest. In other words, the creditors' right to vote the restructuring plan will prevent opportunistic use of the preventive restructuring framework by debtors.

There is also the possibility I mentioned in my previous article, of allowing the debtor to choose to which classes of creditors to propose the restructuring (e.g. financial creditors, trade creditors), leaving the rest of the creditors unharmed by the restructuring. This would avoid opportunistic policies from debtors who will only restructure depending on the classes of creditors with which they are able to reach agreements by majority.

Harmonisation on avoidance law

Soft harmonisation is possible in areas where the principles of insolvency law are similar while the tools to restructure or apply such principles are not.

Almost all, if not all, Member States' insolvency regimes have avoidance law institutions, generally based on the roman *actio pauliana* in order to protect the *par condition creditorum*. The specific terms of such avoidance actions differ very much from one jurisdiction to another. Some avoidance institutions identify specific transactions, whilst others would leave the decision on which transactions to claw back to the judge or the insolvency office holder. Periods to exercise such actions differ, the party entitled to exercise the action also differs. Such differences do not need to be fully harmonised or could be harmonised to a certain extent.

My proposal would be to harmonise as much as possible such issues, which would give business partners in cross border operations unrelated to the debtor or its directors the possibility to be aware of the risks they take when entering into transactions with counterparties which are on the edge of insolvency. Thus, the objective when harmonising the avoidance laws, is to have the same certainty/risk assessment on claw back all over Europe.

Harmonisation of the insolvency office holders' regime

Harmonisation of the insolvency office holders' ("IOH") regime is extremely complex due to three reasons:

1. The IOH is key to the implementation of insolvency proceedings and thus, the specific regime is tailored to the specific substantive law of each Member State.
2. IOHs' real circumstances, including their relations to the judiciary, make them a very special type of civil servant/professional/practitioner, so their regime is very difficult to harmonise if the whole substantive and procedural system is not harmonised.
3. IOHs have many functions, requisites and relations which make them very different in regard to their background and education.

As to the first area of differences among substantive laws, the IOH's regimes vary if the Member State's insolvency proceedings' purpose is mainly rescue or mainly liquidation (e.g. a different type of IOH is needed for each kind of proceedings) or even if the insolvency proceedings imply both rescuing and liquidation.

Considering the second area of differences, in some jurisdictions the appointment of the IOH is done by the court, while in other jurisdictions the IOHs are appointed by the creditors, the debtors, or by a mixed group. Each jurisdiction can also have a very different selection system, such as lists of professionals, appointed with or without a rotation system or simply by accepting the petition (selection) presented by the stakeholder filing for insolvency or restructuring. Finally, remuneration and the institution deciding upon the IOH's remuneration can also differ very much in each Member State.

Concerning the third area of differences, I would mention (i) the qualification, training and entry into the profession; (ii) the existence of professional bodies exclusively for IOHs or not; and (iii) the continuous education system if any.

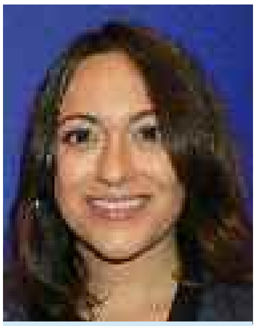
There are other areas where differences exist. We will have a passionate discussion on how to address these issues and other areas of harmonisation at INSOL Europe's Annual Congress in Cascais on 22-25 September. The co-chairs of the INSOL Europe IOH Forum, Daniel Fritz, Marc André and Stephen Harris, look forward to a lively discussion with all participants in an exclusive panel, among others. *I promise that it will be a very interesting Congress in this very interesting and decisive year for the European insolvency framework.* ■

"

WE WILL HAVE A PASSIONATE DISCUSSION ON HOW TO ADDRESS THESE ISSUES AND OTHER AREAS OF HARMONISATION AT INSOL EUROPE'S ANNUAL CONGRESS IN CASCAIS

"

To every end there will always be a new beginning...



EMMANUELLE INACIO
INSOL Europe Technical Officer

Emmanuelle Inacio takes a close look at Brexit and the triggering of Article 50

> BREXIT IS INDEED THE MOST IMPORTANT DECISION THAT HAS FACED THE UNITED KINGDOM IN A GENERATION AND IT HAS SERIOUS CONSEQUENCES FOR THE UK ECONOMY

The result of the United Kingdom's Brexit Referendum of 23 June 2016 has been declared and 51.9% of Britons have voted to leave the EU.

The morning after the referendum, David Cameron announced his resignation as Prime Minister of the UK and that he would step down in the autumn. He declared that a negotiation with the European Union will need to begin under a new Prime Minister who will take the decision about when to trigger Article 50 of the Treaty on European Union (TEU) which is the procedure applicable for any Member State's withdrawal.

Even if the EU Member States are pressing the UK to trigger the formal and legal process for its withdrawing, it could take many years or even never happen… Brexit is indeed the most important decision that has faced the United Kingdom in a generation and it has serious consequences for the UK economy that must be carefully considered.

As a reminder[1], 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) states that "*A Member State which decides to withdraw shall notify the European Council of its intention.*"

In other words, on the one hand, as long as the notification of the UK's withdrawal from the EU is not sent to the European Council, the UK remains a Member State of the EU. The notification could even never be sent at all…

On the other hand, the UK's withdrawal from the EU may be in accordance with its own constitutional requirements. Members of the UK Constitutional Law Association pointed out that the Prime Minister is unable to issue a declaration triggering the UK's withdrawal from the European Union without having been first authorised to do so by an Act of the UK Parliament[2]. Otherwise, the declaration would be legally ineffective as a matter of constitutional law and it would also fail to comply with the requirements of Article 50 TEU. Indeed, the UK's democracy is a parliamentary democracy, and it is Parliament, not the Government, that has the final say about the implications of the referendum, the timing of an Article 50 TEU, UK's membership of the Union, and the rights of British citizens that flow from that membership. Most members of Parliament are in favour of remaining in the EU: they could ignore the referendum's result or decide to dissolve the Parliament and call for a new general election.

Another constitutional issue is whether the consent of the Scottish Parliament – whose constituents voted in favour of remaining in the EU – is required for the UK to withdraw from the EU.

But even if the UK Parliament decided to authorise the UK Prime Minister to issue a declaration triggering UK's withdrawal from the European Union in order to comply with Article 50 TEU and UK constitutional law, Article 50(2) TEU states that "*In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.*"

Article 50(3) provides that "*The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the* *notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period*".

Article 50(4) adds that "*For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it. A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.*"

Finally, Article 50(5) states that "*if a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.*"

Once Article 50 is triggered, only the terms of the withdrawal arrangements are negotiated: the UK cannot revoke the notice to withdraw. The future relationship with the European Union will be taken into account in order to negotiate and conclude the withdrawal agreement.

Article 50(3) establishes an optional procedure as it allows for a negotiated agreement where the Member State in question and the EU agree on terms but it also recognises a unilateral right of withdrawal. 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 the concerned Member State, unanimously decides to extend this period.

If Article 50 is triggered, during withdrawal negotiations, the UK will not be in a bargaining position of strength and risks having to leave the EU with no agreement at all.

Even if the Member States of the EU are pressing the UK to trigger Article 50, they cannot oblige the UK to do so as Article 50 can only be invoked by the UK. There is nothing else for the European Union to consider until the UK notifies the European Council of its intention to withdraw.

The UK is still a member of the EU and will probably remain so or at least for several years. Therefore, the UK will *inter alia* participate in the challenging task of modernising and harmonising insolvency law in the EU.

On the way to European insolvency law harmonisation: inception impact assessment and public consultation

The European Commission has undertaken two recent initiatives in order to harmonise the European Insolvency Law by means of a common EU legislative framework[3].

On the one hand, The European Commission has published an inception impact assessment on its initiative to set common standards for restructuring and insolvency laws across the EU on 3 March 2016. The European Commission will present a legislative proposal by autumn 2016 which will cover the following topics:

1) Preventive restructuring procedures and a discharge of debt (second chance) for entrepreneurs as provided for by the Insolvency Recommendation; and
2) Key areas of insolvency beyond the scope of the Insolvency Recommendation as concerns corporate insolvency:
   - Common minimum rules for directors' duties and liabilities in anticipation of insolvency, as well as their disqualification due to breach of those duties;
   - Common minimum rules for the ranking of claims in insolvency and avoidance actions, with a view to bringing more legal certainty in the cross-border flow of capital;
   - A simplified approach to SMEs insolvency, for example by providing standard forms for filing claims and putting in place electronic means to reduce costs;
   - Common minimum rules for insolvency practitioners with the aim of allowing both easier exercise of this profession in different Member States and set standards ensuring proper conduct of these professionals;
   - Protection of investors' rights by ring-fencing securities from the insolvency regimes of intermediaries with whom investors deposited their securities.
3) Key areas of insolvency beyond the scope of the Insolvency Recommendation as concerns insolvency of natural persons:
   - Provisions on the availability of insolvency procedures, both debt restructuring and liquidation procedures;
   - Provisions on the discharge of debt of natural persons other than entrepreneurs after a reasonable period of time (no more than 3 years, as for entrepreneurs).

On the other hand, the public consultation on the insolvency initiative – consultation on an effective insolvency framework – was launched for 12 weeks from 23 March 2016 to 14 June 2016 to seek views with regard to common principles and standards which could ensure the efficiency of the national insolvency frameworks, in particular in a cross-border context. The responses to the public consultation will be used to identify the aspects to be possibly dealt with in the Commission's future insolvency initiative and will be taken into account in the Commission's impact assessment report in parallel with the results of an external study carried out for the Commission by the University of Leeds and other available information[4].

To be continued...

Footnotes:

1 In "To Brexit, or not to Brexit, that has always been the question…" (2016 Spring) Eurofenix.

2 https://ukconstitutionallaw.org/2016/06/27/nick-barber-tom-hickman-and-jeff-king-pulling-the-article-50-trigger-parliaments-indispensable-role/

3 http://ec.europa.eu/justice/civil/commercial/insolvency/index_en.htm

4 http://bobwessels.nl/2016/03/2016-03-doc13-consulation-on-harmonisation-insolvency-laws/

"THE UK WILL, INTER ALIA, PARTICIPATE IN THE CHALLENGING TASK OF MODERNISING AND HARMONISING INSOLVENCY LAW IN THE EU"

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 Financial Institutions 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!

INSOL Europe Council Elections 2016

Closing date for nominations: 21 July 2016

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

Countries with 30 or more members are entitled to a reserved seat on Council and in October this year, a vacancy will arise for the Romanian reserved seat following the appointment of Radu Lotrean as Vice President last year.

We are particularly pleased to announce that Austria has now reached the required number of members and is also entitled to a reserved seat on Council. In addition, the reserved seats for Ireland, The Netherlands, Sweden and Switzerland will become available when William Day (Ireland), Marcel Groenewegen (The Netherlands), Niklas Korling (Sweden) and Thomas Bauer (Switzerland) will have completed their three-year term in office.

Niklas Korling and William Day are unable to stand again for election as they have now held a maximum of two terms in office. However, Marcel Groenewegen and Thomas Bauer are able to stand for re-election against other nominations, having only completed one term in office.

Therefore, members from Romania, Austria, Ireland, The Netherlands, Sweden and Switzerland have been sent an email requesting nominations for candidates from their own country.

In the meantime, two non-reserved seat vacancies on Council (which may be occupied by members from any country) will also become available as Rocco Mulder (The Netherlands) and David Rubin (United Kingdom) will have completed their first term in office in October. Both are eligible to stand again for re-election against other nominations although due to other commitments, Rocco Mulder is unable to do so.

Information about how to nominate a candidate has been emailed to members. Contact Caroline Taylor, INSOL Europe's Director of Administration at carolinetaylor@insol-europe.org if you have not received your copy of the nomination form.

INSOL Europe Turnaround Wing Guidelines published

The team of TRI Leiden, led by Bernard Santen and Jan Adriaanse have published new guidelines for turnaround professionals.

These guidelines are a huge step forward for the Turnaround Wing of INSOL Europe, an achievement that every member of INSOL Europe can be proud of.

They are, of course, a compromise amongst all the different approaches and jurisdictions that define the diversity of INSOL Europe, but they once more show that INSOL Europe is willing and able to take leadership throughout the whole area of restructuring and insolvency within Europe.

The Guidelines have now been formally adopted by INSOL Europe. They should also be adopted by all our members, as they deliver a proper approach on how to act in turnaround/restructuring situations. And why not market this adoption by stating that you are committed to work under these Guidelines produced by INSOL Europe?

The Guidelines will be monitored on a regular basis by a committee chaired by Steffen Koch (Co-Chair, INSOL Europe Turnaround Wing and Deputy President, INSOL Europe) in order to reflect the dynamics of the restructuring and turnaround world.

So please feel free to send your comments to steffen.koch@hww.eu and get involved!

INSOL Europe's Lenders Group relaunches as Financial Institutions Group

The financing, social, economic and technological landscape in Europe in recent years has presented both opportunities and challenges to lenders and investors. The level of change is unprecedented, and navigating the environment requires a new combination of balanced skills including entrepreneurship, timely response, prudence and compliance.

The INSOL Europe Lenders Group was founded in 2008 and has changed its name to the INSOL Europe Financial Institutions Group to reflect the changing dynamics in the sector. The Group has diverse aims which are more relevant than ever in an increasingly interconnected world:

- Bringing financiers together
- Access to market leading professionals
- Communication with regulators
- Considering technical developments…
- …distilling commercial implications

Membership of our Financial Institutions Group is targeted at financiers and stakeholders operating in the financial sector across Europe and beyond.

We next meet at the INSOL Europe Annual Congress in Cascais, near Lisbon on 23 September 2016.

If you are interested in participating in the activity of the Financial Institutions Group or wish to find out more about it, please contact the co-chairs listed below or visit our website (www.insol-europe.org/financial-institutions-group-introduction-and-members) for further information and a copy of our new brochure.

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The role of banks in Romania

On 17 May 2016, Rovigo SPRL and SCA Deleanu Vasile (Attorneys at Law) organised a conference under the name of "**Enduring Romania: Restructuring v Liquidation; The Role of Banks**", with the participation of the president of NAFA (Romanian Fiscal Authority), the Ministry of Justice's State Secretary, the president of the National Counsel of Small and Medium Enterprises from Romania (CNIPMMR), bank presidents and insolvency practitioners. The event was co-labelled by INSOL Europe.

The discussions focused mainly on the practical application in Romania of the European Commission's Recommendation no. 1500/March 2014 on a new approach to business failure and insolvency.

The main point of the conference regarded the need to support the honest debtors and on that regard, the NAFA understood that coercion measures that lead to bankruptcy are not in any way efficient and practical. A new Approach is needed, an approach focused on understanding the mechanism and the particular aspects of the insolvency procedure.

On the other hand, the acute need of capital infusion became clear, in order to finance the insolvent debtors, with a direct connection to the provisions of the new Romanian Insolvency Code and to solutions already in use in other European countries.

The government representatives took note of these proposals and are interested in drafting some normative addendums in order to support/finance the debtors that found themselves in insolvency.

Dragos Ramniceanu, Senior Associate Lawyer, Deleanu Vasile Avocati

An international audience enjoys an afternoon of intense debate in Berlin

Academic Forum INSOL Europe

Christopher Gardt, Student Assistant at Humboldt-Universität zu Berlin, reports from the symposium hosted, co-organised and chaired by the Academic Forum's chair, Prof. Dr. Christoph G. Paulus, LLM.

Prof. Dr. Christoph Paulus opens the seminar in Berlin

On 29 April, INSOL Europe's Academic Forum held its Mid-Year Symposium on "Credit Institutions' Recovery and Resolution: Lessons to be learned by commercial insolvencies" at Humboldt University, Berlin.

The first of four speakers, Monica Marcucci (Banca d'Italia), talked about "Shareholders in times of distress: from veto powers to write down?". Afterwards, Thorsten Höche (Association of German Banks) gave a presentation on "BRRD: Implementation in Germany – Goodbye to Insolvency Law for Banks?". After a short recess, Dr. Thomas Bauer (FINMA) continued the symposium with his speech on "The DNA of the Financial Market Insolvency Regulation: Waiving the traditional Principles? – The Swiss Perspective". As the last speaker, Prof. Ignacio Tirado, PhD, LLM, (Universidad Autónoma de Madrid) delivered his presentation on "Banks Financing Sovereigns Rescuing Banks – a European 'Incest'".

All presentations resulted in intense and knowledgeable discussions with the international audience. An informal reception concluded the event.

A selection of photographs from the event can be viewed in our event galleries at www.insol-europe.org/gallery

With thanks to Shakespeare Martineau, sponsors of the Academic Forum.

Ensuring INSOL Europe's position as a community of professionals

Radu Lotrean reports from the recent UNCITRAL Working Group V's (Insolvency Law) session in New York

At INSOL Europe, we strive to make this Association not just a professional network but a community. A community that enriches the knowledge base of its members and that of their respective countries, a community that can speak out and step in to ensure our professional voices are heard.

One of these occasions was the 49th session of UNCITRAL's Working Group V (Insolvency Law), held on 2-6 May 2016 in New York, where INSOL Europe's President Alberto Nunez Lagos, Council Member Catherine Ottaway and Vice President Radu Lotrean, were invited to attend as observers. In accordance with the practice established by UNCITRAL, INSOL Europe was invited to represent its views and share its expertise on insolvency so as to facilitate the deliberations of the Working Group V.

Working Group V continued its consideration of measures to facilitate the cross-border insolvency of multinational company groups, as well as the obligations of directors of group companies in the period approaching insolvency. Our delegation was actively involved in the discussions and we particularly noted issues such as the definition of insolvency-related judgement, the scope of Model law and its interaction with existing Model Law.

At the same time, the issues regarding the directors of company groups were carefully balanced in order to ensure business recovery without influencing them to prematurely commence insolvency proceedings. Working Group V has also continued its deliberations on developing a model law or a set of model legislative provisions concerning the recognition and enforcement of insolvency derived judgements.

There were also discussions on the manner in which UNCITRAL can achieve harmonisation on these insolvency law issues. It was proposed that a Model Law or recommendation should be created as a soft-law tool or even a Convention, a hard-law tool. It would, however, be more difficult for a convention or a uniform law to achieve harmonisation because of the obstacles in obtaining multilateral agreements on a precise text among Member States due to the wide variations between existing national laws.

As for our delegation, although we see the advantages of the soft-law approach to work our way towards a recognised norm, we fully support the Convention way, believing it would be a more efficient way of achieving harmonisation.

Hindsight bias in insolvency law: foresight in retrospect

A mini-seminar hosted by Reinout Vriesendorp on Thursday 23 June 2016
Academiegebouw, Rapenburg 73, 2311 GJ Leiden, The Netherlands

With thanks to Shakespeare Martineau, sponsors of the Academic Forum.

ACADEMIC FORUM
INSOL Europe

Scholars and lawyers come across situations where insolvency office holders (court-appointed administrators/trustees) of insolvent/bankrupt companies chase the company's directors, and sometimes the shareholders too, because the directors/shareholders did not prevent the insolvency/bankruptcy. In addition, the insolvency office holders may initiate proceedings against them, claiming mismanagement, damages or even the entire deficit, in order to 'reconstruct' (or reconstitute) the bankruptcy estate.

Occasionally, an insolvency office holder has an interest in the outcome of these proceedings or settlement because the proceeds will be used to cover his costs and salary. The sole fact that the company went bankrupt becomes a factor (and presumption) of wrongful acts by the directors and the burden of proof of the contrary shifts to them. Subsequently, from time to time, a court seems to have difficulty in recognising and/or considering the risk of hindsight bias in its judgment regarding the behaviour of directors.

The hindsight bias issue concerning recent developments abroad was the subject of a mini-seminar in English with contributions from various foreign jurisdictions, including Belgium, Germany, Italy, The Netherlands, UK, France and Spain.

The mini-seminar was meant to foster a debate about possible cross-border experiences and solutions. Consequently, INSOL Europe supported the seminar which was labelled as an INSOL Europe Academic Forum event.

For further information and the full technical programme, visit our website: www.insol-europe.org/events/0/start_date/asc/colabelled).

Networking seminar and reception in Dublin (Ireland)

Willis Towers Watson

Members of INSOL Europe were recently invited to the offices of Willis Towers Watson in Dublin on Thursday 7 July 2016 for an informal networking seminar and reception.

The programme began at 5pm with registration and welcome, followed by presentations from representatives of INSOL Europe and Willis Towers Watson.

Steffen Koch, hww hermann wienberg Wilhelm, Germany (Deputy President of INSOL Europe) began by covering key aspects of INSOL Europe and Jim Luby, McStay Luby, Ireland (Treasurer of INSOL Europe) followed with an update on "The Irish Insolvency Landscape".

Mark Sanderson (UK), Managing Director of Willis Towers Watson introduced their company with some specific news for the Irish market. The evening closed at around 6pm with drinks and light refreshments.

Can you host a local seminar?

Similar seminars have previously been held by URÍA MENÉNDEZ in Lisbon (Portugal) and Gianni Origoni Grippo Cappelli & Partners in Rome (Italy).

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

Books Launched

"The Special Revitalisation Proceedings"

Author: Catarina Serra
Published in 2016 by Almedina
Price: €16.90 Pages: 128
ISBN: 9789724064161

"The Special Revitalisation Proceedings – Collection of Jurisprudence"

Author: Catarina Serra
Published in 2016 by Almedina
Price: €27.90 Pages: 384
ISBN: 9789724064802

"The Special Revitalisation Proceedings" (*O Processo Especial de Revitalização na Jurisprudência*) and "The Special Revitalisation Proceedings – Collection of Jurisprudence" (*O processo Especial de Revitalização – Colectânea de Jurisprudência*) are the product of careful research on the special revitalisation proceedings conducted by the author throughout the last three years.

The first book deals with the core issues debated in Portuguese courts concerning the special revitalisation proceedings. From the moment they were included in the Portuguese Insolvency Act (2012), these hybrid proceedings have given rise to multiple doubts and questions. The aim of this book is not only to clarify the doubts and answer the pending questions but also to provide legal scholars and legal practitioners a dogmatic framework that enables them to achieve a complete and more rigorous understanding of the proceedings.

As shown by its title, the second book is a collection of all the cases in which the Portuguese higher courts pronounced a decision from 2012 to 2015. It is intended to serve as a complementary tool considering the cases mentioned and the questions presented in the first book. But it may also work as an autonomous book, satisfying the need of most legal practitioners to have on hand a compilation of the relevant case law at hand.

Both books have been published by the Portuguese book house Almedina, which specialises in law.

The author, Catarina Serra, is a Professor of Company Law and Insolvency Law at the University of Minho (Portugal), and a member of the Academic Forum of INSOL Europe and of the Editorial Board of *Eurofenix*.

*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.*

European Insolvency Regulation Case Register

This unique case abstract service now provides summaries of over 500 judgments from the Court of Justice of the European Union and first instance and appeal courts of the EU Member States that consider a significant point relating to the EC Regulation on Insolvency Proceedings (No 1346/2000).

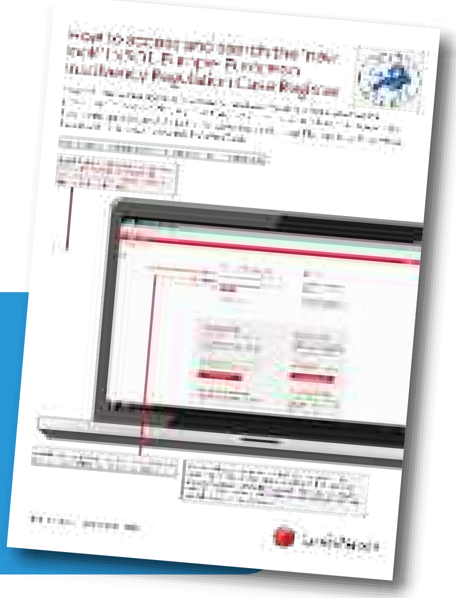
The Case Register committee is supported by a dedicated team of national contributors. All abstracts are published in English and are academically moderated by Professor Reinhard Bork and Dr Kristen van Zwieten.

Free access for INSOL Europe members

The INSOL Europe case register is now hosted by LexisNexis. It is free to access for INSOL Europe members who are provided with a user ID and password.

If you have any problems accessing the service, please call Raphael Victorino on the LexisNexis customer services helpline +44 (0) 845 3701234 (Opt 2 Ext 62025) or email raphael.victorino@lexisnexis.co.uk

To access the European Insolvency Regulation Case Register or to download a helpful guide to using the Register, visit our website here: www.insol-europe.org/technical-content/european-insolvency-regulation



New Trends in Insolvency

The 12th EECC Conference, Cluj-Napoca, Romania, 13 May 2016

Niculina Somlea reports from this year's EECC conference whilst Radu Lotrean and Veronika Sajadova add their own perspective

NICULINA SOMLEA
CITR Group,
Cluj-Napoca (Romania)

"THIS CONFERENCE, HIGHLIGHTING THE TRENDS IN INSOLVENCY, HELPS US STAY ONE STEP AHEAD OF CHANGE AND TO PROPERLY EMBRACE IT"

The insolvency field is going through fast changes. Business and the competitive landscape in general are going through a metamorphosis on the dictates of external forces that keep shifting the status quo and the very essence of the ways in which they operate.

What we anticipate to be happening in the distant future is most likely in nascent stages.

Our present keeps going forward at a faster pace than we can imagine. This is equally true for enterprises in difficulty and/or insolvent ones. Everywhere in Europe one can feel this fast-changing pace. This conference, highlighting the trends in insolvency, helps us stay one step ahead of change and to properly embrace it.

INSOL Europe's EECC Conferences, events that have become important moments of the year for the people and organisations who are shaping the present and the future of the European insolvency, have known more and more success over the years: Cluj Napoca has received over 175 delegates from 21 countries.

Bringing together leading experts and practitioners from all over Europe, the conference also proved to be an excellent opportunity for networking and sharing experiences. During the pre-conference dinner the delegates had a taste of Romanian traditional food and music.

The next morning, the conference kicked off with the opening speeches of Radu Lotrean (CITR Group, Romania, EECC Co-chair and INSOL Europe vice-president), Alberto Núñez-Lagos Burguera (President of INSOL Europe) and Emil Boc (former Prime minister and current Mayor of Cluj-Napoca).

The conference programme, coordinated by the Technical Committee co-chairs, Vasile Godîncă-Herlea (CITR Group,

Emil Boc, Mayor of Cluj-Napoca, welcomes delegates to Romania

Keynote speaker, Bogdan Olteanu was optimistic about the future


A record number of delegates attended the technical sessions and social events this year

Romania) and Nigel Davies (Wyn River, United Kingdom), thanks to whom we had this exciting content, featured the input from 28 speakers from 10 foreign countries and included many representatives from Romanian organisations, such as the National Bank of Romania and other leading Romanian banks, regional Romanian courts, the INPPI, as well as important investors.

Optimistic views

The keynote speaker for the event, Bogdan Olteanu, deputy governor of the National Bank of Romania, shared with us his optimistic views on the future of Europe.

The morning session started with the panel "Distressed Investment: Non Performing Loans", moderated in a very engaging way by Evert Verwey (Clifford Chance, The Netherlands). The speakers, Alberto Núñez-Lagos Burguera (Uría Menéndez, Spain), Crispin Daly (Proskauer Rose, United Kingdom), Rudolf Vizental (CIT Restructuring, Romania) and Mirona Dolocan (Banca Comercială Română, Romania) engaged topics such as the sellers' perspective vs. the buyers' one, the trade process, with a particular interest on due diligence, and all the issues that arise from such an operation – enforcement issues, bankruptcy issues, trans-national services, valuation, underlying securities and so on.

Session 2 called "Industry focus: Transporters and food manufacturers face to face with insolvency", moderated by Nigel Davies (Wyn River, United Kingdom), gave us an interesting view into the challenges encountered by the transporters and the food manufacturers, with the help of Alexandru Tănase from CITR Group, Romania, and Dorian Macovei from EMSA Capital, Austria, who also pointed out the changes these two sectors have had to make and the corners they cut in order to stay solvent.

Modernised rules

For our third session, "Update on the EIR and the Revisited EIR", Robert van Galen (NautaDutilh, The Netherlands), the panel moderator, together with Andreas Spahlinger (Gleiss Lutz, Germany), gave the audience an overview of the modernised rules on cross-border insolvency. In the near future, these rules will bring a broadened legal scope and various safeguards against bankruptcy tourism (forum shopping), interconnected insolvency registers, as well as new rules concerning secondary proceedings and a framework for group insolvency proceedings.

After a lovely networking lunch, the afternoon session started with the panel "The pitfalls of cross-border insolvency – a case study", moderated by Roman-Knut Seger (BDO Restructuring, Germany), together with Valter Pieger (Giese & Partner, Czech Republic), Giuseppe Scotti (Macchi di Cellere Gangemi, Italy), Alina Zechiu (BDO Restructuring, Romania), Václav Žalud (Dentons, Czech Republic), who dived into a detailed analysis of cross-border insolvency cases, pointing out the need for harmonisation of the legislation, especially on how to safeguard creditors' rights and valuable contracts.

The theme of the session five was "A comparative approach to personal insolvency", moderated by Simona Miloș (INPPI, Romania). The speakers, Veronika Sajadova (Latvia), Judge Daniela Deteșan (Tribunalul Caraș Severin, Romania), Petr Sprinz (Havel, Holásek & Partners, Czech Republic), Georg Kovacs (EOS KSI, Romania), gave a detailed view of the personal insolvency law across Europe and also provided some interesting statistical data.

The last panel, moderated by Pawel Kuglarz (Wolf Theiss, Poland), tackled the personal insolvency from the banks' perspective. The speakers, Mirela Iovu (CEC Bank, Romania), Marcell Nemeth (Wolf Theiss, Austria), Prof. Dr. Heinz Vallender (Cologne University, Germany), analysed the Polish, Romanian, German and Hungarian systems.

Vasile Godîncă-Herlea concluded the day with a wonderfully concise summary of the conference and invited the delegates for a drink reception where they could pursue further discussions.

I'd like to address special thanks to the sponsors of the conference, who made this event possible, and to the Co-Chairs of the EECC (Radu Lotrean and Evert Verwey) and the technical Co-Chairs of this 12th conference (Nigel Davies and Vasile Godîncă-Herlea) for their hard work. Congratulations also and to the INSOL Europe organising committee of this conference: Caroline Taylor, Malcolm Cork, Florica Sincu, Hannah Denney, Emmanuelle Inacio and Wendy Cooper.

"THE KEYNOTE SPEAKER, BOGDAN OLTEANU, SHARED WITH US HIS OPTIMISTIC VIEWS ON THE FUTURE OF EUROPE"

More photos from the event can be viewed on our website: www.insol-europe.org/gallery/eecc-cluj-napoca-2016

The panel took questions throughout the day

There were many attendees from Romania amongst the delegates

RADU LOTREAN
EECC Co-chair and
Vice-President of INSOL Europe

The Vice President's perspective

It was a privilege and an honour for Cluj-Napoca, Romania, to be the host of INSOL Europe's EECC Conference entitled "New Trends in Insolvency: Distressed Investing and the Evolution of Personal Insolvency across Eastern Europe".

We had an increased number of delegates than usual, due to the interest that Romanian and international practitioners have shown to the themes of the conference. I'm proud to announce that we had more than 175 delegates from 21 countries, important professionals and prominent figures in their own country.

We were indeed fortunate and are deeply thankful to all our eminent speakers and moderators from different parts of the world, specialists in insolvency, coming from banks, industry, academia and investment, who shared with us their time and knowledge.

As with all such events – and this conference has been an outstanding example – our minds have been assailed by a torrent of ideas and information.

The conference covered a wide range of topics: we got a taste of NPLs (the banks' change of attitude towards NPLs – from something to own to something to sell), the all-around benefits of the NPLs transactions and, of course, the issues that arise during this process: selling timing, due-diligence, enforcement and insolvency issues, local government issues, valuation, non-assignment clauses, underlying securities, strategy and so on.

We also got better acquainted with the key issues of the food industry (the growing population, food security, under-investment, land/weather and energy usage) and the key issues of the transport industry (very volatile price of the fuel, limited negotiation space for the small players, reduced level of development of the infrastructure, aggressive and competitive market).

We have had news about the Recast European regulation, which will come into force in 2017, and its provisions regarding the scope of application, the secondary insolvency proceedings and the group coordination proceedings, the practical impact of which remains to be seen.

More ideas and information came with the practical cases examined, that revealed how to safeguard creditors' rights and how to safeguard valuable contracts, all in all avoiding the pitfalls of cross-border insolvency.

Finally, we have certainly enjoyed a comparative view on personal insolvency in the European countries and discussed at length the impact personal insolvency has on banks, with an applied analysis and examples from the Polish, German, Romanian and Hungarian systems.

I am extremely glad to see our INSOL Europe community of professionals grow and improve business and best practices both locally and internationally.

Hoping that the ones who were present enjoyed the many surprises prepared, the traditional Romanian food and music, and, of course, exchanging with friends and networking, I'll be there for the next conference, in 2017, to welcome you again.

"I'M PROUD TO ANNOUNCE THAT WE HAD MORE THAN 175 DELEGATES FROM 21 COUNTRIES"

The Grand Hotel Italia was a fine ven

Delegates catching up with colleagues in between technical sessions

The pre-conference dinner was the first opportunity to make new contacts

View from a first-time panellist

Having had the honour of attending INSOL Europe's 12th EECC Conference in Cluj-Napoca (Romania) for the first time as a panellist, I would like to share my general impressions.

I had a unique opportunity to contribute to the work of Session 5 ("A Comparative Approach to Personal Insolvency")' and share the results of my PostDoc research project on 'Consumer Insolvency Proceedings in Europe'. The project was conducted in collaboration between the University of Latvia and the Geneva University (Switzerland).

One of the aims of my participation at the conference was to raise the awareness of the importance and diversity of legal regulation of personal insolvency proceedings across the Europe. Another aim was to preserve the network of insolvency experts that was born during the project, many being members of INSOL Europe.

Without any doubts it was a successful and fruitful conference. It provided an excellent forum for insolvency experts around the Europe to come together and share their unique experience and outstanding knowledge, as well as establish new connections. In its turn, the informal part of the conference gave everyone the possibility for cultural interaction in a friendly environment.

My expectations in regard of the organisation of the conference and the panel were not only fully met, but even overcome. For all of these, I would like to express my gratitude to the organising committee for hosting the conference and structuring an interesting program.

I am deeply thankful to Simona Miloş for moderating Session 5, as well as to other panellists for their invaluable input. Here I would also like to mention and thank Niculina Somlea for kind cooperation. Above all, I would like to pay my sincere thanks to Radu Lotrean and Vasile Godîncă-Herlea (CITR Group, Romania). I have been extremely touched by the friendliness and hospitality of the Romanian delegation.

I look forward to contributing to the next of INSOL Europe's EECC conferences. ■

"THE INFORMAL PART OF THE CONFERENCE GAVE EVERYONE THE POSSIBILITY FOR CULTURAL INTERACTION IN A FRIENDLY ENVIRONMENT"

ue for the 2016 conference

VERONIKA SAJADOVA
University of Geneva
Switzerland

Forging ahead with restructuring reforms

Joint Chairs Glen Flannery & Nico Tollenaar report on the recent R3 & INSOL Europe conference held in London on 22 April 2016

GLEN FLANNERY
Partner, Nabarro LLP,
London (UK)

NICO TOLLENAAR
Partner, RESOR NV,
Amsterdam (The Netherlands)

In April 2016, around 100 restructuring professionals from across the globe converged in London for the 13th annual joint R3 and INSOL Europe conference on international and cross-border restructuring.

The conference highlighted an abundance of developments, including another step towards harmonisation of European insolvency laws as part of the European Union's drive to achieve a capital markets union. For those who missed it, the conference chairs have summarised the main themes from the conference and commented as follows.

Abundance of important CJEU judgements

The Court of Justice of the European Union (CJEU) has been busy delivering judgments on aspects of the European Insolvency Regulation (EIR) beyond the COMI issues that were commonplace in its earlier days.

Recent cases include *Lutz v Bauerle* and *Nike v Sportland* on the EIR Article 13 exception – the so called "double actionability" rule which provides a defence to an avoidance action if an act detrimental to creditors as a whole can be shown to be subject to the law of another Member State and its law provides no means of avoiding the act.

Recast EIR coming soon

The majority of the "recast" EIR comes into force on 26 June 2017.

Consistent with the EU's desire to promote rescue over liquidation, the recast EIR will encompass a broader range of pre-insolvency and debtor-in-possession type proceedings, provided that they derive from insolvency law rather than company law.

It will also provide access to progressive new features such as "synthetic" secondary proceedings (first invented by UK practitioners in *Collins & Aikman*) and group co-ordination proceedings using an independent group co-ordinator.

EU Recommendations may become a Directive by the end of 2016

As part of its ambitious goal to achieve the building blocks of a capital markets union within the EU by 2019, the European Commission has commenced a fresh legislative consultation.

Although cryptically worded, this may result in conversion of its earlier Recommendations on business failure and insolvency into an EU-wide Directive.

The Recommendations, previously adopted on 12 March 2014, aimed to establish minimum standards across all Member States for preventive restructuring procedures and discharge periods to give honest bankrupt entrepreneurs a second chance. Responses to the consultation were to be submitted by 14 June 2016.

Brexit not necessarily the end of the EIR for the UK

Although the UK had "opt-out" rights, successive UK governments have "opted-into" the EIR and the recast version of it, presumably on the basis that it is in the national interest.

Accordingly, it seems likely that if the UK were to vote to leave the EU in its referendum on 23 June 2016[1], the UK would negotiate to remain within the EIR by treaty. The extent to which this would limit the UK's ability to influence future reforms is unclear.

Explosion in commodities cases, particularly in the oil and gas sector

Although the slide in oil prices and the slow-down in China were already underway at the time of last year's conference, we were still speculating about the extent to which these events would generate restructuring needs and opportunities.

The consensus was that this situation has now translated into a restructuring boom, particularly in commodity rich parts of the World, such as the US, Canada, Africa and Australia.

Recent filings include *Goodrich Petroleum*, a Houston based oil and gas producer (now under US Chapter 11), *Peabody Energy Corp*, the world's largest privately owned coal producer (also under Chapter 11) and *Arrium*, one of Australia's biggest steel producers (now in Australian administration).

The long arm of US bankruptcy laws

A case study panel session highlighted the broad jurisdiction of US Chapter 11 and how this can be used to resolve shortcomings in the EIR, even in cases which have little or no initial connection with the US.

For example, although an EU-wide insolvency moratorium may arise under the EIR from the opening of insolvency proceedings in a particular Member State, relying on the Article 5 exception and local conflict of law rules, a secured creditor may still be able to enforce its security in another Member State.

In an appropriate case, this issue may be overcome by, instead, opening US Chapter 11 proceedings in respect of the EU debtor. If the debtor does not have an existing connection with the US, one can be created simply by the debtor entering into a retainer with a US law firm.

Although not necessarily technically bound to recognise a US Chapter 11 stay when enforcing in a country outside of the US, a secured creditor which has activities in the US may nonetheless honour the stay for fear of being in contempt of the US court.

Rapid rise of litigation finance in cross-border insolvency cases, not just to fund claims but increasingly to fund the estate

As the industry matures, practitioners have access to more funders, more funding products and more precedent.

Jurisdictions such as the US, the UK and Germany are more advanced, but their models are now being followed in places such as the Netherlands.

In other places, barriers remain. For example, in a recent high profile Irish case (*Persona Digital Telephony Ltd. v. Minister for Public Enterprise*) a litigation funding agreement was disallowed on the basis of archaic "maintenance" and "champerty" laws developed to discourage third parties from meddling in disputes and encouraging vexatious litigation.

No let-up in forum shopping for English schemes

Despite extra scrutiny of proposed schemes by Mr Justice Snowden in cases such as *Indah Kiat* and defensive legislative reforms in other countries, foreign companies continue to look to the UK to restructure using its trusty scheme of arrangement.

At least 30 foreign companies have restructured using the English scheme over the last five years, almost one third of which have been Russian or Ukrainian.

UNCITRAL progresses provisions for dealing with cross-border enterprise groups

The United Nations Commission on International Trade Law (UNCITRAL) Legislative Guide on Insolvency Law contains principles that the Member States should ideally adopt in their national insolvency laws, taking into account the local context. Part 3, adopted on 1 July 2010, addresses insolvencies of groups of companies.

More recently, UNCITRAL Working Group V (Insolvency Law) has been working on legislative provisions for the insolvency of cross-border enterprise groups, which may be implemented in the form of an extension of the existing UNCITRAL Model Law on Cross-Border Insolvency or by some other means. A compilation of principles and draft articles has been produced.

Initiative on global cross-border insolvency convention

A sub-group of the insolvency section of the International Bar Association (IBA) is exploring the merits of developing an international insolvency convention, partly because of the lack of traction achieved by the UNCITRAL Model Law on Cross-Border Insolvency over almost two decades. The Model Law has only been adopted by less than 20 of the 60 UNCITRAL Member States.

Some within the IBA sub-group believe that the way forward should be an international insolvency convention modelled on the successful EIR.

A delegate survey revealed that almost two thirds thought a convention should be drafted for consideration. ■

This conference report was first published in the May edition of Global Turnaround, which is published monthly.

Footnote:

1 As indeed is the case, see *page 8*.

"It is interesting to observe how the EC's appetite for a capital markets union is influencing the pace of insolvency law reform across Europe. Before the year is out, we could have a minimum-standards directive building on earlier non-binding recommendations.

This would be another baby-step towards harmonisation – a topic which remains sensitive and warrants further consideration and debate, perhaps at a future R3 and INSOL Europe conference!

Looking beyond the EU, the case study session highlighted major problems that can arise in cross-border cases which are outside the scope of the EIR and the UNCITRAL Model Law.

Although practitioners have come up with some novel practical solutions to the challenges, there is little doubt that better outcomes would be achieved by further advancements in international frameworks for the recognition and enforcement of insolvency proceedings and judgments.

It was encouraging to hear that progress is being made, with various initiatives such as UNCITRAL's work on enterprise group insolvencies and fresh exploration of an international insolvency convention. We will have to wait and see whether the convention concept gathers momentum.

It was also interesting to hear about the sustained popularity of UK schemes for restructuring foreign companies, despite enhanced judicial scrutiny at home and competition from abroad in countries which have reformed their own laws to provide for more flexible restructuring – some modelled on the UK scheme."

Conference co-chair, Glen Flannery

"THE CONFERENCE HIGHLIGHTED AN ABUNDANCE OF DEVELOPMENTS, INCLUDING ANOTHER STEP TOWARDS HARMONISATION OF EUROPEAN INSOLVENCY LAWS"

Share your views!

Annual Congress 2016: Financing & Insolvency

Eduardo Peixoto Gomes outlines the topics for debate at the forthcoming Annual Congress in Cascais

EDUARDO PEIXOTO GOMES
Congress Technical Committee
(Lisbon)

In September 2016 Portugal will welcome this year's INSOL Europe Annual Congress. This conference will be held in Cascais, a picturesque city by the Lisbon shore. The venue for the conference will be the five-star Hotel Cascais Miragem, the perfect match to the distinction of this highly anticipated upcoming event.

Meeting the current demands of global markets, this expected congress will focus on Financing & Insolvency matters, the tunes all legal and economic peons are dancing to. Truth be told, during the most recent years very few topics have deserved as much attention as the rupture of the financial system and the collapse of companies and corporations throughout the world. Therefore, never has this topic concerned as many lawyers, judges, economists, bankers, companies and, last but not least, entire Governments. In our field of expertise financing is the oxygen for each and every business. Without financing, the patient has a problem.

Alongside, as legal and economic systems make their best efforts to find the fitting solutions for their existing problems, a formidable set of speakers will be present this September, coming forward with solutions for the unanswered questioned – all which this year's attendees can expect. The hand-picked program includes thought-provoking topics, presented by a formidable technical team, prepared to provide the attendees with a new perspective on the matters and a whole new insight into the financing problems. From real-life practitioners, including lawyers and judges, to academics and scholars, the speakers will approach the questions that lay deep within everyone's minds and that await a response that can help solve obstacles faced on a daily basis.

On Friday morning, you can expect the lenses to focus on financing technical matters. After the opening remarks by the Co-Chairs and a speech from the keynote speaker, José Manuel Durão Barroso, former Prime Minister of Portugal and 11th President of the European Commission, the session will embrace the discussion of global credit risk management as a helpful toolbox for cross-border insolvency practitioners. Financing will remain in the spotlight as the topics that follow will tackle the position of companies in distress and their directors': how can these companies make financial, legal and commercial decisions and how must their directors act, in order to limit their liability. Still before lunch, prepare yourself for a thorough scrutiny of equity, credit bidding and estate financing in Europe.

On equity matters, expect a multicultural experience, as speakers from every corners of Europe share their Dutch, French, German, English, Czech and Portuguese perspectives on the matter and help find answers for the questions: "will the equity

Share your views!

matters hurt any specific or constitutional rights or any specific laws?" and "who is finally the owner of the company?".

The lights will then shine bright upon credit bidding, as another experienced panel will focus on benefits and drawbacks of credit bidding and analyze it as a defensive tool for the secured creditor to avoid sales for low value and to control the process. The panel will also ask: who can credit bid in case of syndicated financing or bonds? That, and much more, might just be the ultimate answer for the innumerable problems practitioners find every day.

Later that same day, the afternoon session will shift focus towards Insolvency, starting with a European outlook and further harmonisation – based upon the Council Regulation (EC) no.1346/2000 of 29 May 2000 on insolvency proceedings. However, the pre-insolvency proceedings were not forgotten, as they will also be targeted.

The panel will then discuss the hot topics for an insolvency office holder in 2016 and question what happens when it all ends. In other words, not only will it ask questions; it will also answer the audience's doubts, as an exquisite group of experts in the field of insolvency will explain the termination of credit agreements as a result of insolvency.

On the last day of the Annual Congress, attendees will be greeted by the Co-Chairs as they make their opening remarks for the day, followed by a unique opportunity to hear keynote speaker Vitor Bento, a Portuguese economist. Different aspects of UNCITRAL, the commission that formulates and regulates international trade in cooperation with the World Trade Organisation, and its dealings with insolvency will be discussed, followed by a report from INSOL International.

Before the closing of the day and the end of this year's Annual Congress, substantial answers will be found, as we find ourselves learning from mistakes: opportunities for peripheral economies – as the attendees will become increasingly aware of how growing economies can avoid falling into the traps of the past. If there is one subject the program just could not do without is debt trading, namely buying loan portfolios and distressed debt trading. Closing the morning, we will ask the final question: IOH in the corner – what if it goes all wrong? The answers promise to be elucidative as yet again another panel of brilliance find ways to clarify all remaining doubts.

As usual, this year's INSOL Europe Annual Congress promises the quality that members have become used to and that makes every single event a remarkable experience. ■

For more information regarding the Annual Congress please visit: www.insol-europe.org/events

"IN OUR FIELD OF EXPERTISE FINANCING IS THE OXYGEN FOR EACH AND EVERY BUSINESS. WITHOUT FINANCING, THE PATIENT HAS A PROBLEM"

Exploring the limits of approximation, convergence or harmonisation

Anthon Verweij outlines the topics for debate in the forthcoming Annual Academic Forum Conference

ANTHON VERWEIJ
Secretary of INSOL Europe's Academic Forum

Substantive harmonisation of insolvency law within Europe has long been considered an impossible objective and deemed to be simply a bridge too far.

Just over three years ago Professor Paul Omar stated that: "*It is difficult to see Member States agreeing to proposals from the European institutions for substantive rapprochement of their internal insolvency laws...*"[1] The pursuit for harmonisation in the European Union has been a rather long and problematic journey. National legislators within Europe have fiercely resisted proposals of substantive approximation of their national insolvency rules. This reluctance by Member States can be explained by taking into account the different national attitudes towards the phenomenon of insolvency, as well as both the social and legal consequences for debtors.[2]

The debate for substantive harmonisation seems nonetheless to be rejuvenated and has been gaining more and more traction in recent years. Various institutions have acknowledged the need for substantive harmonisation in key areas of insolvency law. The INSOL Europe Report from 2010, although written with regard to the review of the European Insolvency Regulation, advocated consideration of substantive harmonisation in a number of areas of insolvency law, including criteria for opening the proceedings, the filing and verification of claims, stays of creditor claims, ranking and priority rules, avoidance actions, directors' liability and insolvency practice qualifications.[3] These proposals have to a certain extent been embraced by the European Parliament, which acknowledged the difficulty of creating a "*body of substantive insolvency law at EU level*", but recognised the desirability of "*worthwhile*" harmonisation in a number of the suggested key insolvency law areas.[4]

Since 2012 the European Commission considered whether it was desirable to proceed towards an approximation of areas of insolvency law. Recently the European Commission has formed an Expert's Group on Restructuring and Insolvency. The Group, which started its work in January 2016, is tasked with advising the Directorate-General Justice & Consumers in the formulation of minimum standards for a new and harmonised restructuring and insolvency law in the European Union.

On the agenda

In light of this development the theme of this year's annual conference of the Academic Forum of INSOL Europe, "Harmonisation of European Insolvency Law" can be considered to be highly appropriate. In the conference session on '*Creditor ranking in*

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insolvency: possible approaches and obstacles to harmonisation' Professor Gerry McCormack from Leeds University, Professor Ignacio Tirado from the Universidad Autónoma of Madrid and Paolo Castagna from UniCredit will share their thoughts on the feasibility and desirability of harmonising creditor ranking in insolvency through different perspectives. In addition, during the '*Shakespeare Martineau Session on Insolvency Office Holders Qualification, Regulation and Remuneration*' the substantive harmonisation of insolvency practice qualifications within Europe will be the topic of debate.

During another conference session regarding the '*Challenges for preventive restructuring frameworks*' issues surrounding the harmonisation of restructuring procedures throughout Europe will be discussed by Professor Catarina Serra from the University of Minho, Professor Bob Wessels from the Max Planck Institute Luxembourg, Professor Stephan Madaus from the Martin Luther University Halle-Wittenberg and Samantha Renssen from Maastricht University. The conference will traditionally end with the '*Shakespeare Martineau Lecture*' which will this year be given by Ignacio Sancho from the Spanish Supreme Court.

During the conference, various aspects of substantive harmonisation will be discussed and placed within a comparative perspective in order to challenge, stimulate and ask profound questions about the feasibility and desirability of approximation, convergence or harmonisation of insolvency law within Europe.

The range of jurisdictions represented by speakers will lend this event a truly international and comparative flavour. This is particularly appropriate given the location of the gathering, in a city where Vasco da Gama, the Portuguese explorer, started his quest to reach India by sea, linking Europe and Asia for the first time by an ocean route. The annual conference of the Academic Forum of INSOL Europe in Lisbon will hopefully be the launching site of the exploration of the Harmonisation of European Insolvency Law.

We look forward to seeing you there! ■

Footnotes:

1 P.J. Omar [2012] "European Insolvency Laws: Convergence or Harmonisation?", Eurofenix Spring 2012, p. 21

2 I.F. Fetcher [2005] "Insolvency in Private International Law National and International Approaches", Oxford Private International Law Series, Oxford: Oxford University Press, p. 4

3 INSOL Europe [2010] Harmonisation of Insolvency at EU Level

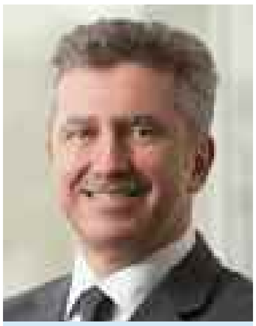
4 K.H. Lehne [2011] "Report with Recommendations to the Commission on Insolvency Proceedings in the context of EU Company Law" (Document A7-0355/2011)

For more information regarding the conference programme please visit the Academic Forum event page at: www.insol-europe.org/academic-forum-events

> "THE ANNUAL CONFERENCE IN LISBON WILL HOPEFULLY BE THE LAUNCHING SITE OF THE EXPLORATION OF THE HARMONISATION OF EUROPEAN INSOLVENCY LAW"

Is restructuring possible in Russia?

Sergey A. Treshchev looks at the Russian insolvency legislation and asks if it is possible for a Russian debtor to reorganise



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The main insolvency law in Russia is the Federal Law No. 127-FZ of October 26, 2002 "On Insolvency" (the "Law") which for the last 14 years has suffered about 50 sets of amendments.

The Law deals with pre-insolvency re-organisation and formal insolvency procedures including re-organisation. Starting from the 1998 crisis, the commercial courts have developed a great expertise in dealing with insolvency.

Who decides whether and when to enter insolvency proceedings?

Under Article 7 of the Law the debtor, a creditor, and authorised bodies (for example, tax authorities) have the right to file an application for declaring a debtor insolvent, as well as the debtor's current or former employees having claims for paying severance benefits or wages.

A creditor, the debtor's current or former employees, and the authorised body may apply to court in respect of money liabilities from the date on which a court decision with respect to debt repayment or a court judgment for enforced execution of arbitral awards on collection of amounts of money from the debtor becomes final.

A bank creditor may apply to court from the date on which the debtor starts to show the signs of insolvency. In accordance with Article 3 of the Law, a debtor shall be deemed to show signs of insolvency when incapable of paying its debts, or paying severance benefits or wages of the employees and/or make mandatory payments if the person does not discharge the obligations and duties within three months after their due date.

At least 15 calendar days before the bank's application to court, it must publish a notice of intention to file an application for deeming a debtor insolvent by means of including the debtor in the Unified Federal Register of Information on the Activities of Legal Entities.

The debtor is entitled to file a debtor's application with a court if an insolvency is anticipated and when circumstances exist that provide clear evidence of the debtor's incapacity to pay debts, claims for paying severance benefits and/or to pay wages and/or making mandatory payments when due.

The senior manager of the debtor is obliged to file a petition with a court to start insolvency proceedings if, in particular:

1) satisfaction of claims of one or more creditors makes it impossible for the debtor to pay debts or make mandatory payments and/or other payments in full to other creditors;
2) a levy of execution against the debtor's property is going to significantly aggravate or make impossible the pursuit of the debtor's economic activity; or
3) the debtor shows the signs of inability to pay and/or signs of insufficiency of property.

The debtor's application shall be filed with the court within the shortest time period possible but at the latest within one month after the date of emergence of relevant circumstances.

If in the course of its voluntary out-of-court liquidation a debtor starts to show signs of insolvency, then the liquidation commission of such a debtor is obliged to file the application with a court within ten days from the time when any of the signs are detected.

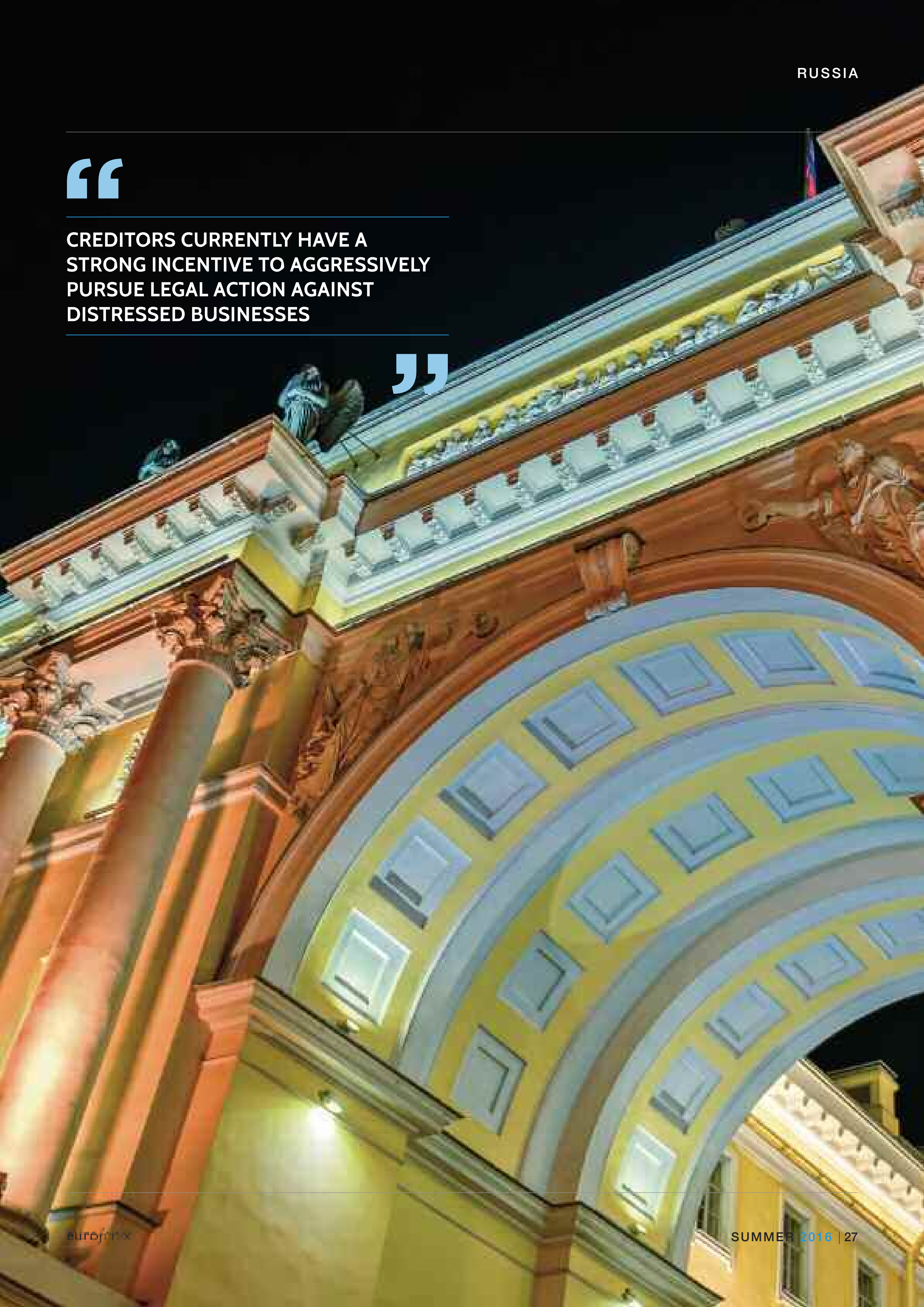
> "THE PRINCIPLE OF "THE EARLY BIRD GETS THE WORM" STILL APPLIES"

Who controls the process?

The insolvency process is controlled by a trustee appointed by the court by recommendation of the debtor or creditors. The principle of "the early bird gets the worm" still applies.

A couple of key issues warrant highlighting at this point:

1) among the elements of a debtor's insolvency petition is the identification of a candidate to serve as interim trustee in supervision, the initial stage of Russian insolvency procedure. In practice, the interim trustee appointed by the court is usually re-appointed for other stages of the proceedings (e.g. external trustee);
2) the interim trustee is the gatekeeper of the debtor's claims register;
3) only creditor claims that are evidenced by a court judgment (recognised as binding in the Russian Federation), or that have been approved by the court within the insolvency procedure, can be registered in the debtor's claims register;
4) the supervision stage of the case cannot under the Law exceed a period of six months;
5) at the creditors' meeting only



CREDITORS CURRENTLY HAVE A STRONG INCENTIVE TO AGGRESSIVELY PURSUE LEGAL ACTION AGAINST DISTRESSED BUSINESSES

creditors whose claims are registered in the debtor's claims register have a right to vote; and

6) the perception, right or wrong, is that the party who appoints the interim trustee exercises *de facto* control over a debtor's insolvency proceedings, at least over the supervision stage, because of his or her influence upon which claims are registered in the debtor's claims register entitling the creditor to vote.

As a result of these and other facts, creditors currently have a strong incentive to aggressively pursue legal action against distressed businesses, to secure their vote at creditors' meetings and the right to propose their own candidate to serve as an interim trustee.

> "THE LAW DOES NOT ENCOURAGE VOLUNTARY RESTRUCTURING OF DEBT IN A WAY DESIGNED TO PRESERVE THE CONTINUED OPERATION OF BUSINESS AND JOBS"

Is the debtor able to reorganise?

Theoretically, the answer is yes, however considering the above, it is clear that the Law currently does not encourage voluntary restructuring of debt in a way designed to preserve the continued operation of business and jobs. The interests of debtors and creditors are not appropriately balanced at present to achieve the best results.

Out-of-court Reorganisation

Under the Law, if signs of insolvency appear, the senior manager shall send information on such signs to the owner/shareholders having the right to convene an extraordinary general meeting, within 10 days after the date when that manager learned about the occurrence thereof.

As a result the owners/shareholders shall take timely measures for preventing the debtor's insolvency and restoring its solvency. In particular, they may provide financial assistance to the debtor in an amount sufficient to repay debts, claims for paying severance benefits and/or wages to employees, and make mandatory payments.

Reorganisation as stage of insolvency

After the supervision stage is finished the creditors may opt for and the court may order to either (a) financial rehabilitation or (b) external administration.

Financial rehabilitation

The financial rehabilitation procedure was introduced in 2002 to encourage restructuring but this has never occurred. The financial rehabilitation may last up to 24 months which does not seem sufficient term for a proper financial recovery of a debtor. Although the financial rehabilitation allows for the continued service of current management, it is rarely, if ever, employed.

The problem is that a condition for concluding financial rehabilitation is the provision of security by a third party to secure the satisfaction of creditors' claims in full accordance with the agreed plan of financial rehabilitation and debt repayment schedule.

External administration

The goal of external administration is to restore the debtor to solvency pursuant to a plan developed by the court appointed external trustee and approved by a creditors' meeting. External administration must be concluded within 18 months, which period can be extended for an additional six months. The external trustee is responsible for gathering and managing the debtor's property, assessing the debtor's finances, developing a plan of external administration for approval and implementing any plan approved by the debtor's registered creditors. Unlike in financial rehabilitation, the external trustee is primarily responsible for the operation of the debtor's business as most management powers are terminated. The external trustee has broad discretion, but needs the approval of the debtor's registered creditors that hold a majority of registered claims to perform material transactions, to borrow or lend money, etc.

Secured lenders

The Law is more favourable to the secured lenders than unsecured creditors in Russia. Secured creditors' claims are accorded third priority ranking along with unsecured claims, but the proceeds generated from the sale of a secured creditor's collateral is distributed as follows:

1) 70 percent (80 percent if obligation arises under a bank loan) is applied to satisfy the secured creditor's claim (principal and interest) and the balance is placed in a segregated bank account as a reserve to pay higher priority claims (if needed);
2) 20 percent (15 percent if obligation arises under a bank loan) is applied to pay first and second priority claims, if unencumbered assets are insufficient to satisfy those claims; and
3) the balance is applied towards current payments, if unencumbered assets are insufficient to satisfy those claims.

If unencumbered assets are sufficient to satisfy those higher ranked claims for which a portion of the sale proceeds were reserved and the secured claim was not satisfied in full, the residual amount is applied to such secured claims; otherwise it is made available to all other third priority claims. The secured lenders may commence insolvency proceedings and are entitled to vote at creditors' meetings conducted during supervision without limitation and during financial rehabilitation and external administration provided such creditors forego the right to foreclose on its collateral during such proceedings.

If the secured creditor stands on its rights to realise its collateral, it may attend, but may not vote at, the creditors' meeting. However its ability to foreclose is not guaranteed. A secured creditor may petition the court to permit it to foreclose on its collateral during financial rehabilitation and external administration procedures. The court may permit execution against collateral if the debtor cannot prove that the loss of such assets will render its efforts to restore its solvency impossible.

Priority claims

Wage claims are paid in the second order of priority in Russia. First priority claims are claims for damages for personal injury and moral harm. Second priority claims are claims for wages, salary, other employee benefits and royalties payable to authors of copy written materials. To make such payments the trustees use proceeds from the sale of secured creditors' collaterals and other assets of the debtors.

Also, payments of wages and salaries to the debtor's employees are made in the form of "current payments" which are monetary or obligatory payment obligations that arise after the acceptance of the debtor's insolvency petition.

Conclusion

So theoretically, a Russian debtor is able to reorganise. However considering the above, it is clear that the Law currently does not encourage voluntary restructuring of debt in a way designed to preserve the continued operation of business and jobs. The interests of debtors and creditors are not appropriately balanced at present to achieve the best results. Creditors currently have a strong incentive to aggressively pursue legal action against distressed businesses, to secure their vote at creditors' meetings and the right to propose their own candidate to serve as an interim trustee.

“ THE INTERESTS OF DEBTORS AND CREDITORS ARE NOT APPROPRIATELY BALANCED AT PRESENT TO ACHIEVE THE BEST RESULTS ”

Disruption of film company avoided with restructuring plan

Prof. Dr. Torsten Martini explains how a German film licence trader was given a new start

PROF. TORSTEN MARTINI
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One of the leading companies in the film licence trade in Eastern Europe, Berlin based A-Company, left insolvency proceedings after one year in March 2016 with a film library of more than 440 films.

A-Company's portfolio includes Oscar-winning titles such as The King's Speech, Hurt Locker and The Reader, alongside commercial highlights as Cloud Atlas, Shutter Island and the Saw franchise. With a balance sheet total of €42 million in 2014 the company had one of its focal points of distribution in Russia.

In the course of the proceedings accompanied by diverse international aspects and complex licensing issues the company was maintained by means of an insolvency plan presented by the debtor. In addition to the restructuring of the company, the plan unties the company from its international group of companies. The shares of the prior shareholder were reduced and new shares were issued to an investor company.

International operations

The internationally operating trader in film licences under the roof of A-Company Filmed Entertainment AG as a holding company had eight sister companies, seven of them being abroad and insolvent, too.

The author was appointed as insolvency administrator over the assets of A-Company Film Licensing International GmbH (A-Company), its former shareholder, A-Company Filmed Entertainment AG, as well as the affiliate A-Company Filmproduktionsgesellschaft mbH.

Due to illiquidity, A-Company, founded in 2001, filed for insolvency proceedings at the local court of Berlin-Charlottenburg on February 18, 2015 and the author was appointed as provisional administrator following the debtor's proposal. Proceedings were instituted on May 1. The insolvency plan, submitted on November 2, 2015, had been prepared by attorneys-at-law Dr. Oliver Damerius and Dr. Christoph Weber of the Berlin law office of BBL in close coordination with the author's office.

Political crisis

A-Company's liabilities amounted to €30 million at the time of the filing, compared to €80,000 of actual cash liquidity. With the political crisis in the Ukraine and the Russian occupation of the Crimea, the company got into difficulties as the TV market in Russia and the Ukraine broke down. The collapse of the

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Russian currency and the high inflation also led to a serious loss in sales.

According to A-Company's managing director, Alexander van Dülmen, "*TV stations stopped buying our programme. From one day to another we lost our main market, Russia, which made up 65% of our sales*". Russian costumers were no longer able to pay the license fees for the US-American movies payable in US-Dollars due to the enormous currency devaluation, revenues were cut by 40%. Following US-sanctions, a potential US investor withdrew from re-financing negotiations.

Licence agreements

The most important challenge of the insolvency proceedings resulted from the demanding situation of the licence agreements as A-Company is licensee and licensor at the same time and its business is focussed on the international market.

In consideration of the German Insolvency Statute, the continuance of licence agreements is already extremely problematic on a national level. In the present insolvency proceedings what made matters worse was that the major part of licensors was domiciled in the U.S.A. and the agreements were subject to U.S. legislation, while the majority of licensees, as contracting parties, came from Eastern Europe and Russia.

The formalities of licensing law and the international context considerably affected, *inter alia*, two aspects of the proceedings: the mediating task, with regard to colliding claims, and the task of upholding the existing license stock.

For one thing, licensors from the US asserted claims against the debtor, who had already purportedly assigned its claims deriving from sublicense agreements to, *inter alia*, Russian banks. The estate was not entitled to the proceeds (other than the contribution to costs) however, and it was also uncertain and subject to international colliding regimes, whether the banks or the Hollywood studios were entitled to them. By way of stop-order the proceeds had been collected during the provisional proceedings already, but issues of multiple assignments, foreign law, recognition outside of Germany and contribution to costs came next.

And for another thing, the essential economic value of the enterprise was contained in the film licences. From the beginning, the parties involved had to discard the option of restructuring via asset deal: the manifold license packages would have required individual agreements for every single license, which would have been hardly possible to achieve.

A transfer would have been possible with the consent of all licensors only. Yet, obtaining the consent in each and every case would have brought about major coordinating difficulties and the success would not have been certain. The licensors are predominantly film producers in Hollywood. The licensees are mainly cinema operators and TV broadcasting stations in Russia, Poland, Czech Republic and Hungary and other Eastern Europe states.

Film stock

In order to assess if the utilisation of the licence stock for the remaining licence periods was a feasible alternative solution to the insolvency plan, the author's team invited a German licence agent to review the film stock and to provide an offer to utilise the stock while the proceedings would have continued under the author's administration until the end of the individual licence period.

Therefore, either way, the preservation of the entity and maintaining of the licences issued to this entity was the most promising way forward. Agreements with the main stakeholders were pre-negotiated and various disputing claims were settled unanimously. The intense dialogue between creditors, the author's office, the management and the BBL team, successfully preserved the international licensors' trust and prevented the termination of licenses in most cases. Business continued without limitations all along.

Insolvency plan

In the end, the debtor and its advisors convinced the creditors of the efficiency of the insolvency plan by precisely explaining why it was the most sensible way forward economically, not only in comparison to the alternative utilisation offer, but also with regard to the liability and contestation claims.

The insolvency plan was accepted by the creditors and confirmed by the court on 3 December2015. Finally, the insolvency court closed the insolvency proceedings on 25 January 2016. In addition to the restructuring of A-Company Film Licensing International GmbH, the insolvency plan unties the company from the A-Company group, by reducing the shares of the prior owner, A-Company Filmed Entertainment AG, and by issuing new shares in favour of the investor company, Colchis GmbH. Without this measure under company law, the restructuring would have been impeded considerably.

Colchis intends to continue exploiting the existing film stock. The short-time closing of the insolvency proceedings was a mandatory precondition for the further utilisation of the existing film library. Managing Director of A-Company remains Alexander van Dülmen, who maintains close business relations in Eastern Europe with his team. In spite of the insolvency proceedings, key employees could be kept in the company. For Russia, the management expects the recovery of the market. According to Alexander van Dülmen, the company shall save future overhead costs by outsourcing the distribution to A-Company Hungary and the management intends to buy new films with the support of a sister company. ■

> **"FROM THE BEGINNING, THE PARTIES INVOLVED HAD TO DISCARD THE OPTION OF RESTRUCTURING VIA ASSET DEAL"**

Reform of the French "Civil code"

Catherine Ottaway and Georges-Louis Harang write on the Insolvency law and Contract law in the light of the Reform of the French "Civil code" entering into force on 1 October 2016

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After years of discussions, the chapter related to the "Contract", included in the Civil code (the "Code") since 1804, has been entirely and substantially reformed by the Ordinance[1] dated 10 February 2016 (the "Reform").

The purpose is to improve the French contract law in order to:

(i) introduce most of the case law developed these past decades so that the code reflects the substantive law (called the "codification");
(ii) modernise the contract law so as to reinforce its economic efficiency and its attractiveness; and
(iii) introduce new concepts in the contract law as far unknown under French civil and commercial law.

As a result, all the articles governing the "contract" in the Code are modified, not only their numbering (to organise it into a more coherent body of law), but also their content.

New articles have been drafted and the new legislation will enter into force on 1 October 2016. Nevertheless, the contracts signed before 1 October 2016 will still be submitted to the previous Contract law, which means that during the next years two different legislations will apply.

Among the (r)evolutions, without being exhaustive, the Reform

(i) admits the unforeseeability doctrine,
(ii) introduces in the Code the concept of significant imbalance between the rights and obligations of the parties (in a standard contract and not anymore only in the Consumer code), or
(iii) does away with previous concepts (like the doctrine of "cause", a key feature of the traditional French contract law).

Practitioners will therefore face a new challenge in their day to day practice.

This Reform might impact the other legal fields given that the civil law permeates all the kinds of law. We might expect some interference with the insolvency law too, especially regarding one of the main innovation of the Ordinance, which is the introduction of the "*théorie de l'imprévision*", the "*unforeseeability doctrine*", in the Code.

The recognition of the unforeseeability doctrine in Civil law

The *Cour de cassation* (French High Court) refused to adapt, revise or terminate a contract so far because of an imbalance resulting from a sudden change – not foreseen by the parties – in the economic conditions that existed at the time of the conclusion of the contract, on the ground that the unforeseeability doctrine conflicts with the principle enshrined in the current Article 1134 of the Code according to which agreements lawfully entered into have the force of law for those who have made them.

The Reform puts the French civil system into a new age of the binding force of contracts as the parties will be allowed to renegotiate the contract when unpredictable circumstances occur and to insert in their contract a hardship clause[2] in order to organise the conditions of this renegotiation. Therefore, the parties will be able to challenge the binding force of their contract, except for the existence of a contrary clause.

The new Article 1195 of the Code provides that:

"*If a change of circumstances, unforeseeable at the time of the conclusion of the agreement, renders its performance excessively onerous for one party, who did not accept to bear such risk, that party can request renegotiation of the agreement from the other party. The requesting party continues to perform his obligations during the renegotiation period. In the case of refusal or failure of the renegotiation, the parties may agree to rescind the agreement, upon the date and conditions they determine, or together request the judge to proceed with its revision. Failing agreement within a reasonable period of time, the judge may, at the request of one of the parties, revise the agreement or terminate it at the date and under the terms and conditions he fixes himself.*"

The change is fundamental, as the previous principle was the non-interference of a judge in the contract. As of 1 October 2016 a judge will be able to interfere in the contract signed after this date.

In fact, as of 1 October 2016, a contract might be revised or terminated due to unforeseen circumstances that make it too onerous for one party to meet its obligations. Parties which cannot agree on this can now ask a judge to adapt or terminate a contract. Parties might also forbid, in their

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contract, hardship clauses to prevent such eventuality from happening and thus, to maintain the binding force of their contract in any circumstances.

May this innovation interact with some insolvency proceedings and, if so, change the rules governing such proceedings?

The potential impacts of the unforeseeability doctrine on the safeguard proceedings

Among the different proceedings related to bankruptcy and concerning their implementation conditions, we may wonder about whether the Reform and the unforeseeability doctrine might have an impact within the context of safeguard proceedings (article L 620-1 of the Commercial code).

The safeguard proceedings may be opened by the Commercial court:

"[…] at the request of the debtor mentioned in Article L. 620-2, who can prove that although he/she is not faced with a cessation of payments, ***he/she has difficulties that he/she is unable to overcome****. The purpose of this procedure is to facilitate the reorganisation of the business in order to allow the continuation of the economic activity, the maintenance of employment and the settlement of liabilities. […]"* (emphasis by us)

Therefore, the unpredictable circumstance or onerous circumstance (economical difficulty) to which one party could not face is the only condition provided for in both new article 1195 and article L 620-1.

Where the main difficulties of a company come from a contract, the potential defaulting company will now have to choose an option:

- Try to renegotiate the contract, under the Judge's supervision, if necessary, without the prejudice of the termination of the contract; or
- Request the opening of safeguard proceedings and the opportunity to benefit from imperative rules, such as the stop of any claim and the continuation of the contracts in force.

Which one should prevail?

Authors[3] are trying to develop arguments in favour and against one kind of proceedings rather than the other, arguing the following:

- In case of a hardship clause, parties have contractually provided the possibility to renegotiate the contract and, due to this, only the way of the revision of the contract should be allowed in case of economic difficulties, not the safeguard proceedings (should the company not be in default of payment);
- the choice between Article 1195 or Article L 620-1, in case of economic difficulties, should belong to the co-contractant facing difficulties. This choice is necessary as the period to undertake actions under Article 1195 or Article L 620-1 is different. Safeguard proceedings will be opened rapidly if the conditions are fulfilled, whereas the revision of the contract under Article 1195 will take time, as the parties will have to discuss and to find a

> "THE REFORM PUTS THE FRENCH CIVIL SYSTEM INTO A NEW AGE OF THE BINDING FORCE OF CONTRACTS AS THE PARTIES WILL BE ALLOWED TO RENEGOTIATE THE CONTRACT WHEN UNPREDICTABLE CIRCUMSTANCES OCCUR"

> **IS THERE A RISK OF A DIVERSION OF THE SAFEGUARD PROCEEDINGS?**

deal, or to seize a Judge, and that could take months before reaching a decision. The consequences might be important as, without a fast opening of safeguard proceedings, a company could be deemed in a state of default of payment and, thus, excluded from any of the measures implied by the reorganisation of the business.

Furthermore, is there a risk of a diversion of the safeguard proceedings? Will the party in economical difficulty try to pressure its co-contractant to renegotiate the contract by threatening the other party with the opening of safeguard proceedings?

More than a way to be protected by safeguard proceedings and its imperative rules in order to reorganise its business, the co-existence of the safeguard proceedings and the unforeseeability doctrine, grounded on the same conditions, might be an argument of negotiation, by using the first one to the benefit of the second.

However, where the renegotiation provided by the Reform will be semi-confidential (between the parties and possibly, implying a judge), the safeguard proceedings are known publicly and this can lead to other difficulties.

This potential disadvantage could be limited by using, in a first time, the "*mandat ad-hoc*" proceedings, which are in fact a confidential mediation between the parties, with the assistance of an insolvency office holder appointed by the Commercial Court.

Conclusion

Will the Reform be likely to challenge the bankruptcy-prevention proceedings and the way all the practitioners dealt with this specific law until today?

Given that the new articles of the Code are definitively drafted, the interactions between the "new" contract law and the insolvency law can now be seriously considered, especially regarding the unforseeability doctrine, although case law will define and limit these interactions in the near future. ■

Footnotes:

1 Act adopted without any in-depth scrutiny by the Parliament.

2 Only admitted before in international contracts.

3 For example, see the article by Philippe Delebecque, in Bulletin Joly *Entreprises en Difficulté*, 1 May 2016, n° 3, page 209.

Luxembourg pledges put to the test of insolvency proceedings: Ten years of case law

Mathilde Lattard assesses ten years of case law as Luxembourg pledges are put to the test of insolvency proceedings and provisional and protective measures

The keystone of the law of 5 August 2005 on financial collateral arrangements, as amended[1] (the "Law") is the lack of influence of any insolvency proceedings, seizures or any such measures on financial collateral arrangements (article 20(4) of the Law).

The Law covers a broad range of reorganisation measures and winding-up proceedings, which together with multiple attachment, foreclosures or other measures foreseen by the Law (article 19, point b) shall be called "insolvency proceedings" for the purpose of this article, unless the context requires otherwise.

The *ratio legis* of article 20(4) of the Law is clear: create a legal certainty for any financial collateral arrangements falling within its scope. Luxembourg's financial collateral arrangements and pledges in particular, have thus found their place in most of the international financial transactions involving Luxembourg companies.

This has not prevented the first disputes to arise in the wake of the financial crisis of 2008.

An analysis of Luxembourg case law over the past ten years confirms the primacy of pledges over insolvency proceedings (1), provided there is no fraud (2).

Primacy of pledges over insolvency proceedings

Insolvency of the pledgee

A Luxembourg bank, which was admitted to the procedure of suspension of payments, had brought its case before the Luxembourg district court (the "Court") regarding the bank's ability to enforce a pledge granted to it[2].

The Court acknowledged that the terms and conditions for the enforcement of the pledge were met. It then recalled that the provisions governing reorganisation measures (such as the suspension of payments) are not applicable to financial collateral arrangements and thus not an obstacle to their enforcement. The Court therefore concluded that the bank could enforce the pledge in accordance with the pledge agreement.

This position was confirmed when the management of another bank, also admitted to the procedure of suspension of payments, asked if they could enforce pledges governed by the Law[3]. The Court refused to confirm the possibility for the bank to enforce the said pledges as the Court considered that the provisions of article 20(4) are clear, i.e. the bank is entitled to enforce a pledge without asking if a procedure of suspension of payments may refrain it from proceeding with such an enforcement.

Insolvency of the pledgor

A company had pledged its shares held in one of its direct subsidiaries in favour of a bank[4]. When the group to which the borrowing company belonged experienced financial difficulties, the bank enforced the pledges by selling the pledged shares. Two months later, the borrowing company was declared bankrupt in Luxembourg. The bankruptcy receiver filed a claim with the

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"THE PROVISIONS GOVERNING REORGANISATION MEASURES ARE NOT APPLICABLE TO FINANCIAL COLLATERAL ARRANGEMENTS AND THUS NOT AN OBSTACLE TO THEIR ENFORCEMENT"

Court to have the agreement for the sale of the pledged shares declared null and void.

The receiver's arguments were rejected by the Court which again recalled that the provisions of bankruptcy law were expressly excluded by the Law, thus preventing the receiver from relying on those provisions to challenge the agreement for the sales of the pledged shares.

The non-effect of insolvency proceedings on financial collateral arrangements shall be read in conjunction with the mechanism for the security interests (*in rem*) as provided for in the Insolvency Regulation[5]. Article 8.1 of the Insolvency Regulation[6] provides that by derogation from the universal scope of the law applicable in the place of the opening of the main insolvency proceedings, the opening of such proceedings shall not affect the rights *in rem* of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets, belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings. Article 8.1 shall be read in conjunction with article 8.4. which provides that actions for voidness, voidability or unenforceability shall remain subject to the *lex concursus* unless the act from which arises the rights *in rem* is subject to the law of a Member State other than that of the State of the opening of proceedings and the law of that Member State does not allow any means of challenging that act in the relevant case (article 16 of the Insolvency Regulation). As recalled by the Court, the purpose of the Law is to keep the financial collateral arrangements "bankruptcy proof" in order to take advantage of the above exception.

The Court then stated that there remain two safeguards: civil liability in the case of fraudulent actions and damages if the sale did not take place under commercially reasonable measures in accordance with the Law.

Insolvency of a foreign pledgor

In 2014 the Court declared itself to be competent to rule on the conditions of enforcement of a pledge while the pledgor was subject to insolvency proceedings in Spain[7].

Pledges put to the test of seizure

In this specific case a request of return of pledged shares seized following an international action was deposited with the Court.

The Court recalled that Article 20(4) of the Law clearly confers to the Law the feature of a public policy rule and that the seizure shall not prevent the enforcement of the pledge.

Pledges put to the test of receivership

The pledgee of a share pledge had enforced the pledge in accordance with the pledge agreement by selling the disputed shares by mutual agreement in the first case[8], and by acquiring the pledged shares in the second case[9].

In both cases the pledgor tried to avoid the enforcement by requesting for the disputed shares to be put in escrow. In the first case the first judges granted the application, whereas the Court of Appeal repealed the decision on the grounds that the pledged shares having been taken over by the creditor in accordance with the pledge agreement, there was no dispute regarding their ownership and the first judges were not entitled to allow an escrow on them. This position was confirmed by the Court in the second case.

Pledges put to the test of summary proceedings

In the first instance the Court ordered the suspension of the effects of an enforcement

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following a two-step reasoning. Firstly, the Court stated that if pursuant to Article 20(4) of the Law a certain number of provisions, notably insolvency proceedings, are not applicable to financial collateral arrangements, this Article does not provide that the rules derived from common contract law and the consumer protection rules are not applicable to financial collateral arrangements. Secondly, the Court ruled that the conditions of emergency were met: the enforcement of the pledge and the appropriation by the bank of the pledged assets could have cause damage to the pledgor. The Court then ordered the suspension of the enforcement.

The Court of Appeal[10] overruled this decision: a bank may put its liability at risk if it commits errors in the enforcement of the pledge, but the enforcement of the pledge itself cannot be suspended in emergency proceedings[11].

Fraud

By a judgment of 10 July 2013[12] the Court ordered a restitution of the pledged shares appropriated by a bank on the sole ground that a fraud had been committed by the bank[13]. In this specific case, a bank enforced a pledge less than one hour after the signature of a pledge agreement. The Court ordered the restitution of the pledged shares considering the enforcement of the pledge to be fraudulent.

Fraud would therefore be the sole limit when a court would accept to cancel the effects of enforcement of a pledge. Absent any fraud, the only remedy would be damages for non-compliance with the contractual terms and conditions of enforcement of a pledge.

Ten years of case law clearly show the primacy of Luxembourg pledges whose sole limit would only be the fraud of the pledgee. ■

> “ FRAUD WOULD BE THE SOLE LIMIT WHEN A COURT WOULD ACCEPT TO CANCEL THE EFFECTS OF ENFORCEMENT OF A PLEDGE ”

Footnotes:

1 The Law implemented the Financial Collateral Directive 2002/47/EC of 6 June 2002 on financial collateral arrangements. Since 2005 the Law has been amended once by the law of 20 May 2011

2 Luxembourg District Court, 29 October 2008, n°1314/08

3 Luxembourg District Court, 31 October 2008, n°1349/08

4 Luxembourg District Court, 16 November 2012,n°1802/2012

5 Regulation (EC) n°2015/848 of 25 May 2015 on insolvency proceedings (recast) reforming the former European Regulation on insolvency proceedings (EC) 1346/2000 of 29 May 2000. Regulation (EC) 1346/2000 will continue to apply to insolvency proceedings that are within its scope and that have been opened prior to 26 June 2017. The provisions of Regulation (EC) n° 2015/848 are applicable to insolvency proceedings opened after 26 June 2017.

6 At the time of the aforementioned Court decision of 16 November 2012 it was article 5.1 of the Insolvency Regulation in its version of 29 May 2000. Article 5.1 of the new regulation was not amended.

7 Luxembourg District Court,29 January 2014

8 Luxembourg District Court, 23 December 2009

9 Luxembourg Court of appeal, 3 June 2009, Kaupthing Bank Luxembourg S.A.

10 Luxembourg Court of appeal, 3 November 2010

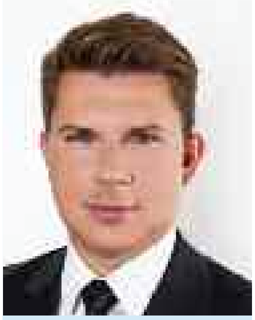
11 Position confirmed in Luxembourg District court, 8 December 2010 and Luxembourg District court (summary proceedings) on 15 July 2015.

12 Luxembourg District court, 10 July 2013, n°1089/13

13 Decision of the Luxembourg District court of 10 July 2013 was heavily commented. See ALJB, Bulletin droit et banque n°54, décembre 2014 et Suretés & Garanties Financières. Le droit et la morale, Daniel Boone, Jurisnews droit des sociétés vol. 6 n°9-10/2013.

Company in Crisis: A new legal concept in Slovakia

Dávid Oršula and Filip Takáč ask if this new legal concept will help create a better business environment



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Mid-life crisis, couple-relation crisis…. As if this wouldn't be enough. In Slovakia, companies can be in crisis too, now. An entirely new legal concept – a "company in crisis" has been introduced into Slovak law. According to the law, any limited liability company, joint-stock company or limited partnership, whose limited partner is not a natural person, can find itself in "a crisis".

A company is in a crisis if it is (i) bankrupt or (ii) threatened by bankruptcy.

Bankruptcy

Obviously, a debtor company (a legal person) is bankrupt if it is a) insolvent or b) over-indebted:

a) An insolvent legal person is a company that is unable to pay at least two monetary debts to more than one creditor 30 days after their due date.

b) An over-indebted legal person is a company which is obliged by law to keep accounts (book-keeping), has more than one creditor and the value of its debts exceeds the value of its assets.[1] When assessing over-indebtedness the *value of debts towards affiliated parties is not considered*.

Bankruptcy threat

A company is threatened by bankruptcy if the ratio between its net equity and its debts is lower than 4:100. This ratio applies in 2016. In the following years the ratio will gradually increase. In 2017 it will be 6:100 and from 2018, 8:100.

The ratio between the company's net equity and its debts is based on the company's book-keeping.

The statutory body is obliged to monitor the value of the company equity and its debts and to evaluate whether the company is in crisis on an ongoing day-to-day basis. *This obligation is continuous*. For practical reasons, we recommend monitoring these values at least once a month.

Consequences of a crisis

If a company is in crisis, there are consequences for the statutory bodies as well as for the company itself. If the statutory body (managing director, board of directors) determines or, considering all facts, can determine that the company is in crisis, directors are obliged, in compliance with the requirements of necessary professional or due care, to do everything that a reasonable person would do in a similar situation to overcome the crisis.

The wording of this provision is very general and vague. The exact meaning of the legal term "requirements of necessary professional or due care" is unclear. Moreover, there is neither relevant legal practice nor case law.

The Commercial Code does not provide statutory bodies with any guidelines advising on how to act during a crisis. Therefore, their respective steps will depend mainly on specific circumstances. However, in our opinion, adequate steps of a statutory body in connection with a crisis include, for example, suggesting measures to overcome the crisis and convening a general meeting where these suggestions will be discussed.

As a consequence of a crisis, a new legal instrument, '*ban on disbursement of a company's own capital replacing performance*', has been introduced.

The law defines a company's own capital replacing performance as:

(i) a credit or a similar performance which economically corresponds to it;

(ii) any performance provided to a company before the crisis, whereas the maturity of this performance was postponed or prolonged during the crisis, such as prolongation of maturity of an invoice; or

(iii) any performance provided by the so-called controlling person.[2]

The above-mentioned ban also applies to accessory claims and contractual fines. The company also cannot return a company's own capital replacing performance if doing so would trigger crisis as a consequence.

The law also specifies what is not a company's own capital replacing performance:

(i) Performance or security provided during a crisis pursuant to the restructuring plan for the purpose of its overcoming.

(ii) Provision of financial means for a duration which does not exceed 60 days (this does not apply in case of repeated performances).

(iii) Postponement of maturity of obligations from delivery of goods or provision of services

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for not longer than 6 months (this does not apply to repeated postponements).
(iv) Free of charge provision of assets or rights.

The provision of a guarantee, lien or other security by the controlling person is similarly regulated in the Commercial Code. If the controlling person secures the company's obligations during a crisis through a guarantee, lien or other security, a creditor can satisfy its claim from this security without having to enforce its claims against the company first. In such an instance, the controlling person who, as guarantor, satisfies a liability on the company's behalf, is not entitled to compensation if:
(i) the company is in crisis, or
(ii) the company would face a crisis as a result.

Liability

Company directors are personally liable against the company and its creditors for disbursement of performances in contradiction to the statutory ban as explained above. In such a case the directors will become guarantors of the wrongfully disbursed payments by the operation of the law.

Ways to overcome a crisis

If a company wants to overcome a crisis under the Commercial Code, it has to stock up its net equity in such a way that its ratio to the company's debts is higher than 4% (2016), 6% (2017) and 8% (from 2018 and later). Basically, the equity can be increased in two ways, namely:
(i) through increase of the company's registered capital, or
(ii) through a debt-to-equity swap.

Other ways of increasing equity include:
(i) mandatory increase of the reserve fund based on the memorandum of association, and
(ii) waving of intercompany loans (tax consequences must be taken into account).

Practical impact and conclusion

Practical impact

1) Banks consider the crisis as an event of default under standard loan agreements.
2) Companies operating business models with low net equity equipment, such as leasing companies, are forced to stock up their registered capital, unless they assume the trouble with companies providing their financing.

Conclusion

It must be clear that any shareholder's or similar financing during a crisis must be properly considered by the statutory bodies, because this can have a significant impact on the company as well as on the liability of the statutory bodies.

Nevertheless, prevention is of utmost importance in this regard. If a company wants to prevent being in a crisis in the first place, the statutory body must duly and periodically monitor the financial indicators of the company (liabilities) which might indicate the problems.

In summary, the new legal concept of "Company in Crisis" and related issues can be regarded as a step forward in creating a better business environment in Slovakia. Let's wait and see. ■

Footnotes:
1 If a person is over-indebted, it is obliged to file for bankruptcy within 30 days from learning of this fact or from the moment it could have learned of this fact with due care.
2 A controlling person is a member of the statutory board, managerial employee, proxy, branch director, board member, the person who holds a direct or indirect share which forms at least 5 % of the registered capital of the company or voting rights in the company or a party that has the possibility to exercise such influence over the company which is comparable to the influence corresponding to this share, a silent shareholder or a party close to the enumerated parties.

> "IF A COMPANY WANTS TO PREVENT CRISIS IN THE FIRST PLACE, THE STATUTORY BODY MUST DULY AND PERIODICALLY MONITOR THE FINANCIAL INDICATORS OF THE COMPANY"

International sales contracts: Square peg, round hole?

David Conaway examines the problems arising from companies and lawyers using domestic contracts for foreign transactions

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The purpose of a sales contract is to define the parties' obligations and to optimise outcome if a dispute arises. As such, a contract is a tool to manage risk and prevent loss.

The good news is the vast majority of contracts are performed as planned, and no issues arise. The bad news is when issues arise, they can be costly, eroding or eliminating the anticipated profits, or causing loss from the transactions.

In particular, sales contracts for the sale of goods in the U.S. are based on Article 2 of the Uniform Commercial Code, which has been adopted by every U.S. state. Likewise, contracts in other countries are often based on the local law of that country. When disputes have arisen domestically, court rulings have been largely uniform and predictable. Foreign litigation can be less predictable and before courts that are less impartial.

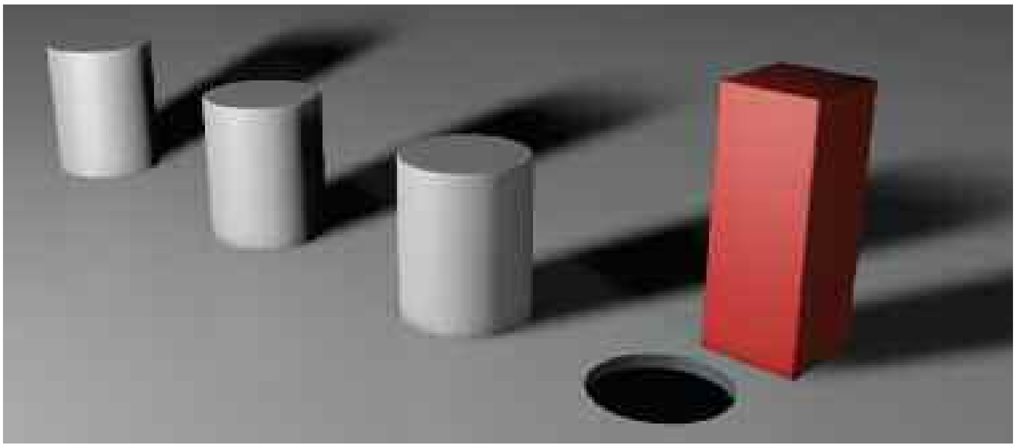
We have noted a prevalent use of contracts, originally designed for domestic sales, in transactions involving foreign customers or supply chain. Usually these contracts have few or no modifications to address the laws, court systems or country risks of the foreign country.

Bespoke contracts for each foreign country is likely not practical. Any company doing business globally should have an "international" sales or supply contract template, and variations for key market countries, or material customer relationships.

What law applies?

Most U.S. contracts provide that the laws of a particular U.S. state apply, which would incorporate Article 2 of the Uniform Commercial Code (UCC). However, the United Nations Convention on Contracts for the International Sale of Goods (CISG) is a treaty that, as a species of federal law, would trump application of U.S. state law. The CISG applies to any sales contract between parties from signatory countries. To date, 84 countries (covering over 80% of world trade) are signatories to the CISG treaty including the U.S., Canada, China, Germany, Japan, and Mexico. To exclude application of the CISG and to provide for the UCC to control, the contract must expressly exclude application of the CISG, and provide that the UCC governs.

The relative bargaining position of the parties may compel using an "international" law, rather than a U.S. law. Whether or not the UCC or the CISG is preferable focuses on a comparison of the seemingly similar, but materially different, laws. A comparison of the UCC and the CISG is beyond the scope of this article, but one example relates to a common occurrence in commercial transactions: the battle of the forms. Often parties utilise purchase orders, order acknowledgements, invoices, terms and conditions of sale, and sales contract, some or all of which may be electronic. Naturally, the seller's and the buyer's forms have materially conflicting provisions reflecting the parties' differing interests. When this occurs, the UCC would nevertheless create a contract, incorporating all the terms that are in common, and any non-material additional terms. However, any material additional terms, such as a warranty disclaimer, an arbitration clause, or an attorneys' fees provision, are excluded.



By contrast, the CISG utilises more of a "mirror-image" rule. Unless the parties' forms are virtually identical, there is no contract. The seller's order acknowledgement, for example, containing additional terms or conditions, would be considered a counter-offer, typically accepted by performance of the parties. In this sense, the seller gets the "last shot", and the CISG protects the seller's forms to a greater extent.

In the context of a customer Chapter 11 filing, a seller of goods may have an enhanced recovery opportunity for goods shipped to and received by the customer within 20 days prior to the filing. The UCC provides that goods are received upon physical possession, while the CISG does not define when receipt occurs. A recent Bankruptcy Court (World Imports, E.D.Pa. 2014), in the context of Chinese suppliers of goods, ruled that the CISG applied and that the U.S. buyer received the goods when "delivered", which is when goods are loaded for delivery in an FOB plant contract. The CISG "receipt" would almost always occur earlier and outside the 20 day period, denying the seller the Section 503(b)(9) remedy.

Where will disputes be resolved?

Parties naturally seek the "home court advantage" of courts in their particular jurisdiction. Again, this may not be possible depending on relative negotiating advantage of the parties.

More importantly, parties should consider how a judgment would be enforced, which largely depends on where the counter-party's assets are located. Unfortunately, there are few adopted international treaties regarding the enforcement of judgments. The U.S. is not a signatory to any ratified international treaty for the recognition or enforcement of foreign court judgments. Thus, obtaining a judgment and enforcing it abroad may be a waste of time, if the counter-party has no assets in the country where the judgment is rendered.

Arbitration of foreign disputes

By contrast, the U.S. is a signatory to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). 156 countries are signatories, including U.S., Canada, China, Germany, Japan, and Mexico. Clearly, arbitration has developed to be the preferred dispute resolution mechanism for international business disputes.

U.S. companies naturally gravitate to U.S.-based arbitration institutions, such as The American Arbitration Association, to conduct arbitrations in the U.S. However, if an arbitration award must be enforced by a foreign court (where assets are located), it is necessary to consider whether the foreign court favours or disfavors the arbitration rulings of certain arbitration institutions. For example, Chinese courts generally will only enforce arbitral awards of CIETAC (China International Economic and Trade Arbitration Commission). Mexican courts generally favour the arbitral awards of the ICC (International Chamber of Commerce), CAM (Arbitration Center of Mexico) and ICDR (International Center for Dispute Resolution), CAMCA (Commercial Arbitration and Mediation Center of the Americas).

Contract parties may not be willing to submit to the jurisdiction of the other party's forum. An international arbitration institution provides a neutral forum for dispute resolution.

Who pays the costs of dispute resolution?

In the U.S., the majority "American" rule is that each party to a dispute bears its own legal costs, unless that risk is shifted by contract.

By contrast, most countries have adopted the "English" rule that requires the loser to pay the winner's reasonable attorneys' fees.

Because legal costs of dispute resolution are material, and shifting the risk among the parties can impact incentives to initiate a dispute in the first instance, and to efficiently resolve a dispute, it is important that such provisions in international sales contracts are clear and comprehensive. The enforceability of such provisions varies among countries, but increasingly courts are recognising the parties' rights to shift risks in their business dealings.

Miscellaneous important contract provisions

a) Intellectual Property Rights should be protected by appropriate registration. Patent, trademark and copyright protection varies on a country-by-country or regional basis. Because of the time required to obtain these rights, the need to file should be anticipated, and initiated as soon as the need is recognised.

b) Certain goods may require special import/export or other regulatory compliance or government approvals.

c) As financial distress of contract counter-parties increases, parties should consider hedging the credit risk with security, title retention, credit insurance, or vigorous internal credit risk assessment, which includes country risk analysis.

d) Force majeure (act of God, strikes, political unrest) clauses are increasingly important to hedge risks created by turbulent financial markets and global conflicts and crises.

e) Currency fluctuations and risks are important considerations in contract profitability. Parties should certainly include contract provisions that allocate this risk. Moreover, parties are well-advised to evaluate financial products that hedge such risks.

f) The parties must also take care about the flow of electronic information that may be shared pursuant to the Agreement, particularly if it involves the transfer between countries of any sensitive personal information of customers, employees, or other users. Some countries may prohibit the transfer of certain information, and others, most notably the EU countries, require agreements addressing data privacy and breach, with additional EU data protection regulations effective in 2017. ■

> "ANY COMPANY DOING BUSINESS GLOBALLY SHOULD HAVE AN "INTERNATIONAL" SALES OR SUPPLY CONTRACT TEMPLATE, AND VARIATIONS FOR KEY MARKET COUNTRIES"

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Judicial consideration of the Schemes of Arrangement

Carlos Nieto considers the initial outcomes of the first Schemes of Arrangement in Spain

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The significant changes brought to Spanish insolvency law and introduced in the latest legislative session have been firmly directed at promoting schemes of arrangement as a measure to prevent corporate insolvency.

The previous edition of this journal has already analysed the most salient features of Spain's new regime for refinancing after the adoption of the Royal Decree-Law 4/2014 and Law 17/2014.

High levels of debt

After more than a decade of application of the current Law 22/2003 on Insolvency, the Spanish insolvency proceedings conducted in commercial courts have proved excessively long and costly. This factor, however, has not determined their failure to serve as a corporate life jacket. Instead, there is a much stronger case for attributing the failure to the compounded resistance of debtors in Spain to legal insolvency proceedings.

Thus, according to official statistics, when companies finally decide to seek a declaration of insolvency, their condition is usually very serious or practically irreversible: in 2014, 77.98% of the bankruptcies had a level of debt that made it impossible to pay off all their debts in less than 25 years, worse figures than those for 2013 (77.12%), 2012 (73.2%), 2011 (72%) and 2010 (66.6%). The deterioration in corporate finances caused by this postponement has meant that every year the percentage of companies that become insolvent with positive operating results has got smaller and smaller (in 2014 only 29.91% compared to 30.85% in 2013, 36.56% in 2012, 39% in 2011 and 43% in 2010).

Viable alternative

It became essential to offer an effective viable extrajudicial alternative to the meeting of creditors that would enable decisive and above all timely action to deal with companies' financial difficulties.

In the light of the initial outcomes from the application of the reforms, that objective has certainly been achieved: between 2014 and 2016 schemes of arrangement have been judicially approved for major firms like Metrovacesa (Commercial Court No. 3 in Madrid, decision dated 24.6.2014), Fomento de Construcciones y Contratas (Commercial Court No. 10, Barcelona, decision dated 12.1.2015), Sacyr Vallehermoso (Commercial Court No. 7, Madrid , decision dated 12.2.2015), Realia (Commercial Court No. 1, Madrid, decision dated 1.3.2016), and very recently, Abengoa (Commercial Court No. 2, Seville, decision dated 6.4.2016).

Other major refinancings are currently in progress and being followed by the financial press minute by minute, almost like the broadcast of a sporting event (the most recent case being the construction company Isolux).

Consequently, without being overly optimistic, it can be predicted that mega insolvency proceedings in Spain, at least as regards major firms, are now a thing of the past. Major banks undoubtedly prefer to assume major losses outside insolvency proceedings with a speedy, controlled solution rather than running the risk of a long receivership and an uncertain outcome. The foreseeable increase in judicially approved schemes of arrangement and their increasing complexity are the reason why four Commercial Courts in Madrid now specialise exclusively in this type of proceedings (soon to be increased to six courts).

It is worth, however, considering whether or not it is a good idea that the tool which prevents and avoids filing for composition proceedings (to which Law 22/2003 dedicates a total of 226 articles) should continue to be regulated by a single, 13-point Additional Provision to the Law.

Legal uncertainty

The extreme brevity and conciseness of the legal framework meant that the commercial courts in the cities where most of the operations are concentrated had to publish sheets of criteria (like, for example, those published by the Madrid commercial courts on 7 and 21 November 2014).

These criteria show a well-intentioned attempt to remedy the legal uncertainty caused by the lacunae, but they may cause some perplexity to foreign operators from the perspective of the hierarchy of laws, especially when they can be changed or clarified without advance notice (thus for example, the Explanatory Note from the Commercial Judges in Madrid dated 20.1.2015 on the position of holders of financial guarantees in the approval of

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> IN THE LIGHT OF THE INITIAL OUTCOMES FROM THE APPLICATION OF THE REFORMS, THAT OBJECTIVE HAS CERTAINLY BEEN ACHIEVED

schemes of arrangement).

Many procedural problems arise over approval proceedings for schemes of arrangement approval proceedings, especially when the affected creditors object (initiating a single objection procedure or the formation of several with subsequent accumulation, summonsing all the creditors who have joined the agreement or only the debtor and publication of the objection, with the possibility of other interested creditors appearing) and in the case of non-fulfilment of measures agreed by one or more affected creditors.

Reforms

From the substantive perspective, however, (undoubtedly the one of most interest for operators involved in refinancing operations) there are three issues which need clarifying in the applicable legislation and a couple of points which should probably be the object of reforms.

The necessary clarifications in the legal text concern firstly the type of measures considered in a scheme of arrangement which can be imposed on dissenting and absent creditors. The text of the Fourth Additional Provision contains a short list of these measures (reductions of debt, debt moratoria, debt to equity conversions or shareholder loans, dation in payment), but it does not specify whether the list is closed or whether other possibilities are also acceptable (maintaining bill discounting facilities, establishing new guarantees, waiving existing ones, etc.), and contradictory judicial decisions have been handed down in this regard.

Secondly, it is also doubtful after reading the legal text whether the measures should be the same for all types of creditors, or whether differences should be made between different categories of debts and whether the measures should be imposed asymmetrically.

Thirdly, it is uncertain whether refinancing operations should include all the debtor's liabilities or whether there can be partial refinancing. This is a key issue because the requirement for certain majorities in order to impose agreements on dissenting parties may promote fraudulent actions if the debtor is allowed to set the boundary of the refinanced liabilities (a sort of gerrymandering).

Conclusion

To conclude, the necessary legal reforms should include the possibility of granting extraordinary extensions to the short deadlines imposed for negotiating agreements (currently, stopping foreclosure and applications for involuntary bankruptcy only last four months: an excessively short period for complex refinancing with highly fragmented liabilities and the presence of foreign banks).

Such extensions could require guarantees from a significant percentage of financial creditors as proof of their seriousness and to prevent undue delay.

And finally, changes in competences should be introduced so that the commercial courts could hear any disputes that may arise over the interpretation of refinancing agreements and their enforcement. These disputes are currently dealt with by non-specialised civil organs, which may hinder harmonised application of the legal framework. ■

Country Reports Summer 2016

Updates from Italy and Czech Republic

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Italy: New Provisions For Banks In Difficulties

On 3 May 2016,the Decree Law no. 59/2016 containing "Urgent measures on enforcement and bankruptcy proceedings, in favour of investors in banks in liquidation" was published in the Official Gazette.

The Decree Law no. 59/2016 is intended to reduce the duration of the insolvency proceedings and to speed up the payment of creditors. These amendments concern both the bankruptcy and the court preventive agreement, as well as the various steps of the procedures and the various parties involved.

One of the most important and significant innovations of the Decree concerns the establishment of the creditors' committee, since the new paragraph of Article 40 of the Bankruptcy Law states, first of all, that the creditors' committee is appointed from the date of acceptance of its members, also by electronic means, without the need of convocation before the receiver and even before the appointment of its President. The intent of the amendment is probably to avoid the danger that the creditors' committee is inactive for a long period due to the inactivity of the receiver in its convocation.

Article 3 of the Decree Law no. 59/2016 requires the establishment, at the Ministry of Justice, of an electronic register of the insolvency proceedings and crisis management tools.

All information and documents related to the bankruptcy proceedings, court preventive agreement, administrative compulsory liquidation referred to in Royal Decree 16 March 1942 no. 267 shall be published in this register, consisting of two sections: a public and free-access section and a restricted area.

Another new provision concerns the phase of verification of the bankruptcy claims and the formation of the bankruptcy liabilities. In fact, this step of the procedure, especially in large bankruptcy proceedings, requires several hearings which inevitably delay the allocation of the assets. The Decree Law 59/2016, amending Article 95 of the Bankruptcy Law, states that the hearing can also be held online, provided that the principle of an adversarial process and the effective participation of creditors is guaranteed.

As mentioned above, the Decree Law has introduced novelties, also regarding the court preventive agreement. In order to speed up and simplify the insolvency proceedings, a provision allowing online hearings has been introduced with the purpose of preventing that several hearings may delay the approval and therefore the execution of the agreement.

In order to facilitate the recovery or the sale of the receivables of the bankrupt estate, a strengthening of the investigative powers of the receiver has been established. Article 5 of Decree Law no. 59/2016, offers in fact the receiver the possibility to access databases containing financial information about the subject against whom the procedure has a credit, even in the absence of an enforceable title, but after the authorisation from the Bankruptcy Judge.

As an extension of the receiver's duties, article 6 of Decree Law no. 59/2016 introduces, at article 4-ter of the Bankruptcy Law, a specific cause for revocation of the receiver who does not proceed to the distribution of assets every four months when liquid sums are available.

The aim of the latter provision is to reduce the time frame of payment of the other creditors by severely punishing, with revocation, the receiver who fails to comply to the Law.

Czech Republic: Frivolous insolvency motions recognised as criminal offence

According to a ruling by the Czech Supreme Court, filing a motion for the initiation of insolvency proceedings on the basis of knowingly false information (i.e., what is known as a "frivolous insolvency motion") may qualify as a criminal offence – that of defamation.

If the knowingly false insolvency motion moreover serves to coerce a third party (who is otherwise not bankrupt) into taking certain actions (such as making payments towards the party who filed the motion), the elements of the criminal offence of extortion may also be met. In this sense, filing a frivolous motion for insolvency may not only have civil-law consequences but also criminal-law consequences for the applicant.

A case heard by the Czech Supreme Court under ref. No. 8 Tdo 1352/2014 concerned a motion for the initiation of insolvency proceedings which was aimed not so much at resolving the debtor's inability to pay, but at attaining unlawful enrichment for the petitioner.

The Supreme Court established that the petitioner had filed the insolvency motion in spite of having been fully aware that the claim raised against the "debtor" lacked any legitimate title, and that the "debtor" was not in fact bankrupt. At the same time, the petitioner knew well that the insolvency motion would have adverse consequences (i.e., in particular, damage to the reputation of the "debtor", or the exclusion of the "debtor" from the possibility to participate in tenders for public contracts as a bidder), and in fact sought to use these adverse consequences as leverage in order to coerce the "debtor" to satisfy illegitimate claims for payment and to withdraw a court action which the "debtor" had filed earlier.

The petitioner was eventually found guilty of the misdemeanor of defamation, in that it had disseminated false information which was apt to cause substantial harm to the reputation which the other party enjoyed among the general population, and of the misdemeanor of extortion, in that the actions of the petitioner were not aimed at resolving a bankruptcy situation but at forcing another person (who is not bankrupt) to engage in, refrain from, or suffer, certain actions.

With a view to the above, it stands to reason to assume that the risk of being the subject of criminal prosecution over a frivolous insolvency motion is substantial enough to act as a deterrent. Practice has shown that the current fine of up to CZK 50,000 envisioned by Sec. 128a of the Insolvency Act has had little value as a deterrent, and the same goes for the recourse to claiming damages in a potential civil-law procedure. By contrast, the risk for specific individuals of becoming exposed to criminal-law penalties may very well play a protective role in this respect.

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> THE RISK FOR SPECIFIC INDIVIDUALS OF BECOMING EXPOSED TO CRIMINAL-LAW PENALTIES MAY VERY WELL PLAY A PROTECTIVE ROLE

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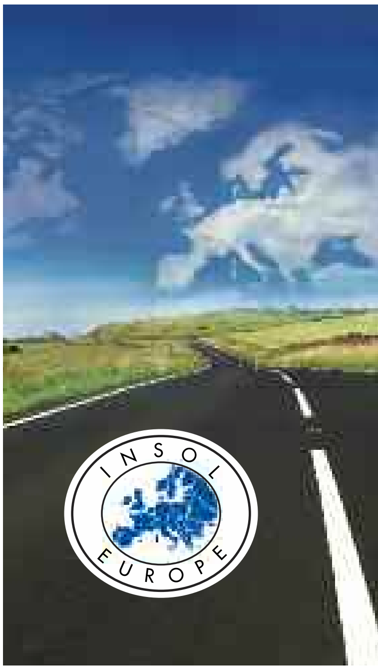

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