INSOL EUROPE

#97 · Autumn 2024

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The journal of INSOL Europe

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Insolvency's forgotten tool

Carbon market

Insolvency and regulations

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- **Ukraine: Debt restructuring & Energy infrastructure**
- **Country Reports, Statistics & more!**

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#97 Autumn 2024

Welcome from the Editors


EDVĪNS DRABA


JOSÉ CARLES

US President Woodrow Wilson said that "*friendship is the only cement that will ever hold the world together*". In the world we are living in —that sometimes falls apart—, having the cement of the friendships forged within INSOL Europe indeed holds our worlds together.

We will grow those bonds in person in Sorrento at our Annual Congress in the beginning of October, where we will keep thickening that cement layer that holds our world together. A *limoncello* toast to those friendships, as our President Giorgio Corno says (***pp. 8-9***), with our minds on Sorrento!

Our Autumn number addresses, as usual, news on **harmonisation** within the European Union. The recent report on the future of European competitiveness states, with regard to restructuring and insolvency, that there are still significant differences across European countries on available mechanisms, rules for proceedings and treatment of claims, among others (***pp. 14-15***). The recommendations include achieving the highest level of harmonisation within the EU, which makes us expect further progress on the pending proposal for Harmonisation Directive, which will then need to be transposed to our national legislations on insolvency.

In this edition, we also celebrate the Silver Jubilee of the European Insolvency Regulation and the tenth anniversary of the European Insolvency Regulation Recast. As Paul Omar concludes, both pieces of legislation have provided for a stable framework for jurisdiction, recognition and enforcement of insolvency regimes within the EU (***pp. 22-23***).

This issue also refers to further developments in the implementation of the **Restructuring Directive** even beyond the current EU members. Moldova (with candidate status to the European Union) modified its legislation to include preventive procedures for businesses or entrepreneurs in a way that largely corresponds to the terms of the Restructuring Directive (***pp. 19-20***). News from Ukraine (also candidate status), its need of a radical solution in the short term (***pp. 32-33***) and a report on the country's first cases of energy infrastructure bankruptcies (***pp. 34-35***) are also addressed. Regarding EU members, articles include an update on the recent amendments of the Italian insolvency legislation (***p. 40***) or challenges for Estonian and Swedish Courts derived from the cross-border Aktsiaselts METUS-EST case (***pp. 38-39***). This edition also addresses "firsts" of certain restructuring plans in the EU, such as the complex bond restructuring through a Dutch WHOA of *Bio City*, including the amendment of applicable law with the support of the bondholders to avoid the limitations of the rule in *Gibbs* (***pp. 28-29***). This case may be a precedent for other similar solutions in other EU countries, so it is worth a read!

The current insolvency solutions do not only take into account the traditional stakeholders, but give more and more relevance to ESG criteria. In this respect, the advances on the legislation to combat climate change is introducing new concepts under insolvency scenarios such as the debtors' rights derived from verified carbon credits. An interesting analysis of their current implications in Turkey is also included in the IT&DA column of this issue (***pp. 16-18***). It also addresses the different roles of State entities under restructuring and insolvency procedures and how creating specialized public agencies aimed at recovering state debt would be more efficient for public interests (***pp. 26-27***).

From the other side of the Atlantic Ocean, our US column analyses the rights of critical vendors and what essential steps trade creditors should follow in the US to maximize their recovery expectations (***pp. 36-37***).

We hope all these news and articles from our members across Europe and beyond will be the perfect prelude for some days of an amazing academic program, time with old and new friends that cements and holds our worlds together and the beginning of many future cross-border collaborations that allow for more European businesses to survive.
See you all under the Sorrento sun with a magnificent view to the Mediterranean Sea in a few days!

José

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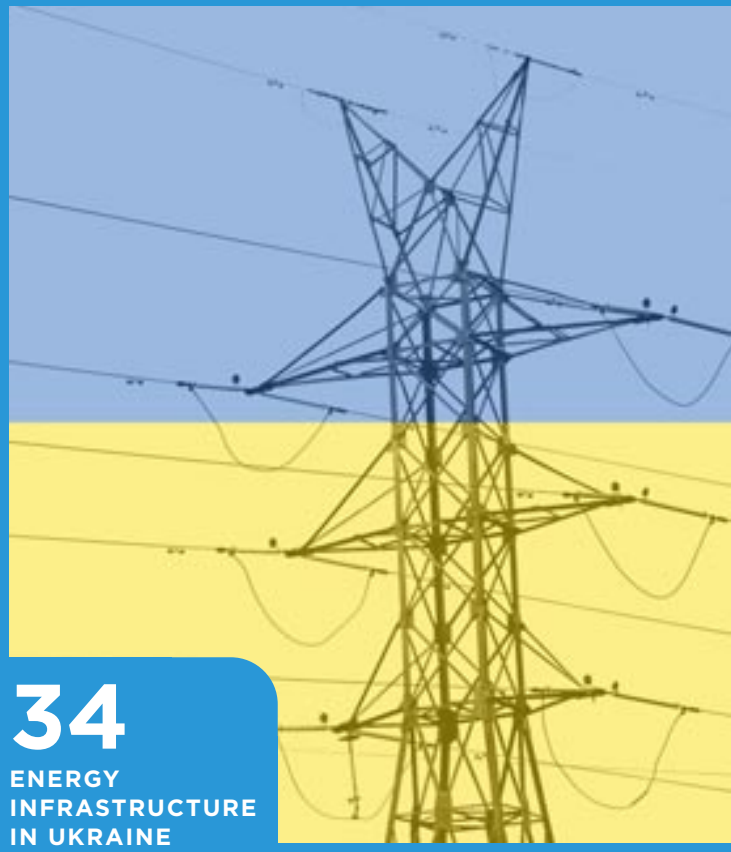

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With our minds on Sorrento...

GIORGIO CORNO
INSOL Europe President

Giorgio Corno looks forward to Sorrento and looks back on his year as President

> *I have had the pleasure and opportunity to speak in person in the Netherlands, France, England, Scotland, Poland, and, no surprise of course, in Italy*

I assume that most of you will be reading this edition of Eurofenix while eagerly awaiting our meeting in the beautiful Sorrento. We expect to have a fantastic Annual Congress, with more than 450 delegates.

By way of introduction to this new edition of Eurofenix, the final one before my fast-approaching handover of the INSOL Europe presidency, I would like to thank **José Carles, Edvins Draba, Emmanuelle Inacio, Paul Omar and Paul Newson** for their hard work on this issue. Along with many of our members, as well as some of our staff, they have curated an edition full of content, articles and statistics from varying jurisdictions. I hope you enjoy it.

Reflecting on the past year...

This column gives me the opportunity to reflect on my presidency, and to share with our readers an insight into what we have achieved over the past year.

Financial situation

I have the pleasure of leaving the association in a sound financial state. This is the result of careful financial planning, put in place by our wonderful treasurer **Eamonn Richardson**, and has allowed us to face unexpected events, as had already occurred in the past, during the Covid pandemic. This, however, is also a result of the support of our members, from delegate attendance in our conferences, to the contributions of our sponsors, and the endless work of our sponsorship group, led this year for the first time by **Frank Tschentscher,** who was greatly assisted by **Hannah Denney**.

Giorgio speaking at the EECC Conference in Krakow, Poland

This financial success allows us not only to fund our association, alongside its current and future projects, but also to confirm our continuing support for the International Red Cross, which will receive a share of the income from our Annual Congress.

Membership

Beyond funding, this year has also seen an increase in membership, following a trend set in previous years. I am proud to say that the number of our younger members has increased significantly, allowing stability within our association, new efforts towards the future of our association, as well as confirming that INSOL Europe still attracts participants of this industry both within and outside of Europe.

Cooperation agreements

In line with our 2020-2025 strategic plan, and the work of the Membership Development Committee wisely led by **Alice van der Schee**, we have been able to sign further cooperation agreements with associations from all over Europe. We now have 12 agreements in place (*see table*) and are working towards their implementation. This explains why the Italian Consiglio Nazionale dell'Ordine dei Dottori Commercialisti ed Esperti Contabili supports our conference in Sorrento; why the French association ARE organized a joint conference with INSOL Europe last November; and why, looking to the future, we are planning events with the Portuguese association APDIR and INSOL International. *Watch this space for further announcements!*

Conferences

During my presidency, INSOL Europe organized the EECC conference in Krakow as well as joint conferences with R3 and ABI in London and in Scotland. I had the honor of representing INSOL Europe at many of them, and to speak about cross-border, international and national issues on restructuring and insolvency in the

Netherlands, France, England, Scotland, Poland, and, unsurprisingly of course, in Italy (Alba and Novara, Cagliari, Scandicci, Milan, Rome), as well as getting the chance to attend virtual meetings in Romania and Ukraine.

Looking to the future

While my presidency ends, I cannot forget how our association has helped me over the past 20 years in building a fantastic network with friends and professionals. This is why I accepted to serve as a Council member for the past six years, as an Executive member for the past three, and as a President in the past year. My commitment towards INSOL Europe will remain, and I look forward to finalizing the Strategic Taskforce 2025–2030 with Alice and other members of the group, as well as contributing to the increase of Italian membership.

Acknowledgments

Before I close this column, I would like to express my gratitude to the many people who supported me in my role throughout this past year. I would like to thank **Paul Newson**, for helping me understand my role and perform my duties in a timely way, as well as his team (**Hannah, Emma, Harriet and Natasha**) who worked endlessly with me, and the Executive and the Council, for helping me reach the above-mentioned, fantastic results, which allow me to leave my post satisfied with all the work done and excited for the years to come.

On a more personal note, I would like to thank all my colleagues at Studio Corno for allowing me to devote so much time and effort to INSOL Europe, while serving our national and foreign clients. Finally, and most importantly, I would like to thank my wife, Stefania, for supporting me during this year and accepting to celebrate her birthday during an INSOL Europe conference once again! ■

> *My commitment towards INSOL Europe will remain, and I look forward to finalizing the Strategic Taskforce 2025–2030*

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

UNIDROIT Consultation on Bank Liquidation

The International Institute for the Unification of Private Law (UNIDROIT) has launched a consultation on its Draft Legislative Guide on Bank Liquidation. The Draft Legislative Guide has been developed by the Working Group on Bank Insolvency, a group of international experts from different legal systems, as part of the Bank Insolvency Project conducted by UNIDROIT in cooperation with the BIS Financial Stability Institute.

The aim of the Draft Legislative Guide is to assist legislators and policymakers in designing effective bank liquidation regimes tailored to the special nature of banks and their role in society. The Guide focuses on "non-systemic banks", thereby complementing existing international standards. Specifically, it provides guidance on frameworks for the orderly liquidation of (i) banks that are not placed under a resolution procedure compatible with the FSB Key Attributes, and (ii) parts of a bank following, or in the context of, a resolution action.

INSOL Europe has been invited by the Secretary-General of UNIDROIT, **Prof. Ignacio Tirado** (who will be speaking at both our Academic Conference and our Annual Congress in Sorrento), to give any feedback on the Draft Legislative Guide on Bank Liquidation, given its members' expertise in this area. Possible comments may be submitted to the UNIDROIT Secretariat.

The consultation runs until 11 October 2024. All information regarding the consultation, including the text of the Draft Legislative Guide itself, is available on the dedicated consultation webpage at: *www.unidroit.org/work-in-progress/bank-insolvency/draft-legislative-guide-on-bank-liquidation-public-consultation*

SBLA/UNCITRAL/EBRD Cross Border Insolvency Law Conference

On Friday, 7 June 2024, judges, academics, legal practitioners, insolvency practitioners and other interested parties gathered at the Serbian Chamber of Commerce for a regional cross-border insolvency law conference.

The conference was hosted by the Serbian Bankruptcy Law Association (**SBLA**) and organised in partnership with the United Nations Commission on International Trade Law (**UNCITRAL**) and the European Bank for Reconstruction and Development (**EBRD**). The event marked the first ever joint EBRD-UNCITRAL conference in the field of insolvency. Presenters shared perspectives and experiences on cross border insolvency from countries including Croatia, Greece, Montenegro, Poland, Romania, Serbia, Slovenia and the United Kingdom.

The conference was a success and well attended, both in person and online. It revealed the significant common threads that unite many countries in the Balkans region and beyond: language, legal traditions and culture, as well as the value of cross-border interactions to build future cooperation between courts and insolvency practitioners.

Read the full report at: *www.insol-europe.org/download/documents/2943/1*

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Richard Turton Award 2024 Winner

The Richard Turton Award Panel is pleased to announce that the 2024 winner is Emily Onyango from Kenya.

Emily is an Insolvency Professional, Advocate of the High Court of Kenya, Governance Auditor, Certified Secretary and Certified Professional Mediator. She is currently a Consultant at Adili Group, an affiliate of Africa Legal Network, where she advises clients on business restructuring, distress, and recovery.

Emily will be writing a paper on "*Financing Corporate Rescue in Kenya: The Case for a Corporate Rescue Fund*", which will be published in summary in one or more of the supporting Associations' journals and in full on their websites.

As part of the award, Ms Onyango is invited to attend the INSOL Europe conference in Sorrento, Italy in October.

The panel adjudicating this year's applications was made up of:

- Barry Cahir, INSOL Europe
- Neil Cooper, INSOL International
- Nicky Fisher, R3
- Yin Lee, IPA

We would like to congratulate Emily on her excellent application, and also thank all the candidates who applied for the award this year and wish them a successful career in their chosen field.

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

The full details of the Turton Award and papers of the previous winners can be found at: www.insol-europe.org/richard-turton-award

All INSOL Europe members are invited to express their interest to participate as speakers at our next flagship event, the Annual Congress in Vienna, Austria, from 9-12 October 2025.

All expressions of interest should be sent to Emmanuelle Inacio, at **emmanuelleinacio@insol-europe.org**, and should indicate:

(a) the speaker's nationality, affiliation and qualifications,

(b) the topic on which the speaker would be interested in speaking, and

(c) a short statement as to what unique or compelling perspective the speaker would like to bring to the congress.

The Technical Committee seeks in particular proposals from speakers who have not been speakers at the last two Annual Congresses.

Expressions of interest should be sent as early as possible.

All expressions of interest will be considered by the Technical Committee, although due to the large number the Committee expects to receive, the Committee likely will not be able to accommodate all, or even most, requests.

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A closer look at...
Draghi's report on the European competitiveness

Emmanuelle Inacio reports on the long-awaited report on the future of European competitiveness

EMMANUELLE INACIO
INSOL Europe
Chief Technical Officer

The former European Central Bank President and Italian Prime Minister, Mario Draghi, delivered on 9 September 2024 to the European Commission President, Ursula von der Leyen, his long-awaited report on the future of European competitiveness that she commissioned on 13 September 2023.

The findings of Draghi's report will contribute to the European Commission's work on a new plan for Europe's sustainable prosperity and competitiveness and in particular, to the development of the new Clean Industrial Deal for competitive industries and quality jobs, which will be presented in the first 100 days of the new Commission mandate.

Draghi's report is structured in two parts: Part A[1] presents the competitiveness strategy for Europe, while Part B[2] contains in-depth analysis and sectoral and horizontal policy recommendations.

The report highlights the EU's weak productivity growth and the widening gap between the EU and US GDP levels. Draghi's report outlines three major changes facing Europe today and proposes a new industrial strategy to address these challenges.

1. Accelerating innovation and finding new drivers of growth. Only four European companies are among the world's top 50 tech companies, and the EU's global position in tech is deteriorating. The EU's share of global tech revenues fell from 22% in 2013 to 18% in 2023, while the US's share increased from 30% to 38%. In this context, Draghi's report underlines the need for Europe to close the innovation gap and redress the EU's slowing productivity.
2. Reducing high energy prices while continuing to decarbonise and move towards a circular economy. The report highlights how EU companies still face electricity prices that are two to three times higher than in the US and natural gas prices that are four to five times higher. To reduce energy prices and seize the industrial opportunities of decarbonisation, Draghi's report calls for a joint plan for decarbonisation and competitiveness.
3. Navigating an unstable geopolitical environment characterised by dependencies and security challenges. To tackle these challenges, Draghi's report calls on Europe to enhance its security and reduce its dependence in order to remain resilient in an increasingly volatile global context.

> *The report highlights the EU's weak productivity growth and the widening gap between the EU and US GDP levels*

Draghi's report sets out the four building blocks of the proposed industrial strategy. First, the report stresses the need for a full implementation of the Single Market. Second, the report calls for the alignment of industrial, competition and trade policies to ensure that they work together as part of a coherent strategy, with a focus on supporting sectors rather than individual companies. Third, massive investment will be essential to the success of the industrial strategy, which will require the mobilization of private finance. To achieve this, Draghi's report also advocates for the integration of Europe's capital markets, enabling high household savings to be channelled into productive investments within the EU.

The recommendations include achieving the highest level of harmonisation across the EU Single Market, ensuring coherence across different pieces of legislation. Indeed, the report highlights that despite the recent progress made inter alia on insolvency, regimes across Member States remain substantially unaligned. The report also points out that harmonising insolvency frameworks will be critical to remove fragmentation created by differing creditor hierarchies. Indeed, the report underlines that significant differences exist across countries in thresholds for insolvency, rules for proceedings, priorities of claims, and restructuring mechanisms.

Lastly, the report proposes reforming EU governance, improving coordination and reducing the high regulatory and administrative burdens that hamper the competitiveness of EU businesses. Draghi's report underlines how regulation is seen by more than 60% of EU companies as an obstacle to investment, with 55% of SMEs flagging regulatory obstacles and the administrative burden as their greatest challenge.

According to the report, investors cannot be envisaged to invest cross-border if there is no cross-border certainty about what happens if a company goes bankrupt. Therefore, further steps have to be taken towards a common, harmonised insolvency framework.

The report focuses on the General Data Protection Regulation (**GDPR**), Due Diligence Directive (**DDD**), and the Packaging and Packaging Waste Regulation (**PPWR**) to illustrate the difficulties businesses face complying with EU law, the gold-plating of legislation by Member States, and the proportionally higher regulatory burden faced by SMEs compared to larger companies.

Proposals to address these challenges include streamlining the EU acquis under a new Vice-President for Simplification. The report also calls on the EU institutions to refocus and apply a 'self-restraint' principle in policymaking by filtering future initiatives and streamlining the existing acquis of EU law. It also calls for a more active use of the subsidiarity principle by national parliaments to counter the Commission's legislative activity which has been growing excessively over the years.

To accelerate the work of the EU, if action at the EU level is hindered or blocked by existing institutional procedures, the report recommends resorting to the possibility of enhanced cooperation foreseen by Articles 20 TEU and 329 TFEU where "*the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole, and provided that at least nine Member States participate in it.*" As a last resort and in the clear absence of the required conditions to fall back on enhanced cooperation, intergovernmental cooperation should be considered.

To be continued… ■

Footnotes:

1 The Future of European Competitiveness, Part A, September 2024: https://commission.europa.eu/document/download/97e481fd-2dc3-412d-be4c-f152a8232961_en?filename=The%20future%20of%20European%20competitiveness%20_%20A%20competitiveness%20strategy%20for%20Europe.pdf

2 The Future of European Competitiveness, Part B, September 2024: https://commission.europa.eu/document/download/ec1409c1-d4b4-4882-8bdd-3519f86bbb92_en?filename=The%20future%20of%20European%20competitiveness_%20In-depth%20analysis%20and%20recommendations_0.pdf

> ***Recommendations include achieving the highest level of harmonisation across the EU Single Market, ensuring coherence across different pieces of legislation***

This section brings you the most relevant news in the field of insolvency tech and digital assets. To propose an idea or article for a future edition, please send your proposal to: *insolvencytech@insol-europe.org* or one of the Co-Chairs:
Dávid Oršula *david.orsula@bnt.eu*
Laurent Le Pajolec *lpa@exco.pl*

Insolvency in voluntary carbon markets

Çağdaş Umut Vardar and Emre Özdemir give an overview of the carbon markets, focusing on Turkey

ÇAĞDAŞ UMUT VARDAR
Partner, Vardar Şanlı, Turkey

EMRE ÖZDEMIR
Associate, Vardar Şanlı, Turkey

Various means can be deployed to combat climate change. One of these is the use of carbon credits for carbon offsetting,[1] traded on so-called "carbon markets".[2]

Although it is uncertain whether carbon markets will scale up or down in the long run, it is worth reflecting upon the legal issues concerning carbon credits, as they are already being transacted and will likely maintain or gain some degree of importance in the near future for businesses. In this article, the authors briefly touch upon carbon credits traded in voluntary carbon markets in Turkey, particularly in relation to insolvency, and discuss the extent of the instrument-alization of insolvency laws to combat climate change.

Overview of the carbon markets

At the domestic level, it is accepted that there are two categories of carbon markets: "compliance carbon markets" and "voluntary carbon markets".[3] Compliance carbon markets involve administration by public authorities.[4] They may be structured in a way known as "*cap-and-trade*".[5] Voluntary carbon markets, on the other hand, generally lack the involvement of public authorities.[6] In these markets, project proponents, entities or persons have overall control over and responsibility for researching and conceiving a climate mitigation project, which may take the form of a greenhouse gas ("GHG") emissions reduction or removal project. These projects may then be registered, following *ex-ante* validation, with an entity, otherwise known as an independent carbon crediting program ("ICCP"). Examples of ICCPs are the Verified Carbon Standard (Verra) and the Gold Standard. After validation and registration, the practical reductions or removals achieved over a period are verified by a third-party verifier accredited by the ICCP. Subsequent to verification, the ICCP issues a verified carbon credit ("VCC") to the project proponent. VCCs are issued into the registry accounts of the project proponent and may then be traded.[7]

Although carbon markets have a history dating back to the Kyoto Protocol, adopted in 1997, there is uncertainty as to the legal nature of carbon credits.[8] In this respect, a working group at UNIDROIT is in the process of developing an instrument.[9] Recently, UNIDROIT and UNCITRAL have published a study on the legal nature of verified carbon credits issued by independent carbon standard setters.[10]

Carbon market regulation in Turkey

Currently, there is no legislation in Turkey regulating carbon markets, nor has there been, to the best of our knowledge, a court judgment endeavouring to ascertain the legal nature of carbon credits. However, Turkey has informed UNCITRAL that "*legislative actions to implement a mandatory cap-and-trade system*" are underway.[11] In parallel, the 2025-2027 Medium-Term Programme states that the legal infrastructure of a national emissions trading system ("ETS") will be completed, with development aligned to ensure compatibility with the EU's carbon border adjustment mechanism.[12] Besides, the Directorate of Climate Change within the Turkish Ministry of Environment, Urbanisation and Climate Change has announced that the first phase of ETS implementation is set to begin with on 15 October 2025 the

publication of the National Allowance Plan for 2027 by the Carbon Market Board in the Official Gazette.[13] Nonetheless, the Turkey Sustainability Reporting Standards 2 Climate-related Disclosures[14] provides for a definition of carbon credit as "*an emissions unit that is issued by a carbon crediting program and represents an emission reduction or removal of greenhouse gases. Carbon credits are uniquely serialized, issued, tracked and cancelled by means of an electronic registry.*"[15] Furthermore, to the best of our knowledge, there is only one Turkish company that operates an online platform for carbon credit trading.

The lack of legislation in Turkey creates a gap in the legal framework for companies that want to engage in carbon credit trading. One consequence of this gap is the ambiguity regarding the legal grounds creditors can invoke against insolvent debtors holding carbon credits.

The legal nature of VCCs under Turkish law

The applicable insolvency laws will hinge upon the legal nature of carbon credits, which should, therefore, be considered. In our opinion, consideration should be made with respect to laws regulating proprietary rights (*ayni haklar*), contractual rights and digital assets.

Under Turkish law, proprietary rights have two main categories, i.e., the right to property (*mülkiyet hakki*) and the right to limited proprietary rights. Limited proprietary rights, such as mortgage (*ipotek*), are subject to a *numerus clausus* under Turkish law. Hence, it is not possible to subsume VCCs under this category. The right to property can be in movable and immovable objects. An immovable object is mostly land, which a VCC cannot be considered to be. A movable object, on the other hand, needs to have tangible characteristics. For this reason, a VCC would not be considered a movable object, meaning that VCCs may not be eligible for the establishment of any proprietary right.

As explained above, there are multiple parties involved in the lifecycle of a VCC. Therefore, VCCs may be viewed as corresponding to a bundle of contractual rights. However, the contractual privity that gives the holder of the VCC the right to see the VCC recorded in a registry, the right to see the VCC transferred, and the right to withdraw the VCC, is between the holder of the VCC and the registry. Thereby, VCCs may be envisaged as the result of the continuous performance of contractual obligations by the registry.[16] This sort of explanation for a VCC is plausible in accordance with Turkish law. However, in scenarios where the holder of the VCC is not the project proponent, but a third party, such as a custodian, it may become even harder for creditors to recover their receivables.

Pursuant to the Capital Market Law of Turkey No. 6362,[17] crypto assets are intangible assets that can be created and stored electronically using distributed ledger technology or similar technology, distributed over digital networks, and can express value or rights. Yet, we do not believe VCCs would be subsumed under this definition: "*As matters currently stand, registries do not currently operate like blockchains and do not provide the degree of control to holders that blockchains provide.*"[18]

Insolvency laws applicable to VCCs

Creditors can attach (*haciz*) and sell tangible and intangible assets having economic value, so they may try to attach VCCs pursuant to provisions of the Enforcement and Bankruptcy Law of Turkey No. 2004 ("EBL").[19] If the VCC is considered a bundle of contractual rights, debtors may invoke Article 89 of the EBL. However, Article 89 of the EBL sets out rules for the attachment of claims for contractual receivables. Contrary to its wording, a contract between the holder of a VCC and a registry will, most likely, not include a clause setting the grounds for a claim for a contractual receivable. Therefore, it seems implausible for a debtor to recover its receivable by invoking

Article 89. Furthermore, the EBL provides no other provision to which debtors may resort, provided that the legal nature of a VCC is considered a bundle of contractual rights. Thus, the attachment of a VCC may occur only if the EBL is amended in such a way that allows bundles of contractual rights, such as VCCs, to be attached.

Another solution to the attachment of VCCs could be their consideration as movable objects. This again would require a legislative change. If we consider them as movable objects, Article 88 of the EBL would become applicable. As set out under that provision, once an asset is attached, the creditor may allow a third person to take the asset into their custody (*muhafaza etmek*) for a temporary term, provided that the third person agrees. Considering that a registry would be online, the plausible way to attach the VCC would be to ask the registry to take the VCC into its custody. If the registry refuses, which it may, then creditors would have no chance to attach the VCC, because it is also not possible for enforcement offices to attach assets on online platforms. It should be noted that the attachment process could have been made much easier had the

> ***Although carbon markets have a history dating back to the Kyoto Protocol, adopted in 1997, there is uncertainty as to the legal nature of carbon credits***

> *The trading of carbon credits in voluntary carbon markets presents unique challenges within the framework of Turkish insolvency law*

VCCs been registered with an official registry to keep track of the title and made attachable via the electronic attachment procedure provided for under Article 78 of the EBL. That being said, in instances where the holder of the VCC does not have title over the VCC, but is merely a custodian, it may again become harder for creditors to recover their receivables.

Moreover, even if a VCC is attached in some way, it is doubtful that the creditor may be able to find a willing buyer for the VCC. This stems from the very nature of the market where VCCs are traded. The willing buyer would need to be engaged in the carbon market to have an incentive to buy the VCC. As a result, this means that willing buyers will be limited to those companies on the carbon market, making the recovery process difficult. Alternatively, creditors may invoke Article 111/a of the EBL, provided that the VCC is considered a movable object, and request the debtor to be granted the power to sell the attached VCC. This could prove to be a better option to rely upon within the current legal framework.

De lege feranda: Should the law regulate the use of sale proceeds?

A pertinent issue for examination is whether the law should regulate how sale proceeds from attached VCCs can be utilised. Subsequent to the sale of the attached asset, creditors are generally free to use the proceeds as they see fit. Currently, no mandatory legal provisions preventing creditors, who have recovered debts through the sale of VCCs, from using the proceeds in ways that could be detrimental to the environment. For instance, an oil company might apply such proceeds to expand its operations, thereby exacerbating environmental harm.

The legislator could take his issue into account and formulate legal provisions governing the use of such sale proceeds. While such intervention may be viewed as infringing upon property rights, one can argue that, given the environmental purpose of VCCs, the law should protect the broader objective of environmental sustainability. This may involve restricting how proceeds are applied, particularly through insolvency laws. Any such legal measures would need to strike a proportional balance between conflicting interests, including the fundamental rights and freedoms and the public interest in environmental protection. Further, when considering this intervention, the legislator would need to carefully determine the scope and limits of using insolvency laws as an instrument for combating climate change.[20]

Conclusion

The trading of carbon credits in voluntary carbon markets presents unique challenges within the framework of Turkish insolvency law. The lack of clear legislation and established legal precedents creates significant ambiguity regarding the classification and treatment of VCCs during insolvency proceedings. As Turkish legislation evolves to incorporate comprehensive regulations on carbon markets, it will be essential to clarify the legal nature of VCCs, whether as proprietary rights, contractual rights, or potentially as digital assets. Until such clarity is achieved, creditors and debtors alike must navigate a complex and uncertain landscape, making it crucial for legislative bodies to address these issues promptly to provide a robust legal framework that supports the growth and stability of carbon markets in Turkey. ■

Footnotes:

1 There are also others that criticize use of carbon credit. A recent example to this view could be found in ClientEarth and other civil society organizations joint statement ("**Joint Statement**") titled "*Why carbon offsetting undermines climate targets*". Pursuant to the Joint Statement, the idea of carbon offsetting is built around the notion that emitter can get to keep emitting. Thereby, carbon offsetting should not be considered as having substantial impact on the fight against climate change. As such, prominent regulatory frameworks exclude the use of carbon credits in achieving interim emission reduction targets. "*In particular, the European Sustainability Reporting Standards (ESRS) state that carbon offsets cannot be merged with actual emissions reductions in corporate climate target reporting*." See the Joint Statement, available at https://changingmarkets.org

2 UNCITRAL Expert Group and UNIDROIT Working Group, 'UNCITRAL/UNIDROIT study on the legal nature of verified carbon credits issued by independent carbon standard setters' A/CN.9/1191 (14 March 2024), Annex I ("UNCITRAL/UNIDROIT Study").

3 Ibid., paragraph 25.

4 Ibid., paragraph 26.

5 Ibid., paragraph 28.

6 Ibid., paragraph 52.

7 UNIDROIT Working Group on the Legal Nature of Voluntary Carbon Credits 'Issues Paper' Study LXXXVI – W.G.2 – Doc. 2 (April 2024), paragraphs 45–54; UNCITRAL/UNIDROIT Study (above note 2), paragraphs 51-62.

8 UNCITRAL/UNIDROIT Study (above note 2), paragraph 24.

9 See UNIDROIT's website about the project, available at https://www.unidroit.org/

10 See UNCITRAL's website including the link to the UNCITRAL/UNIDROIT Study, available at https://uncitral.un.org

11 UNCITRAL/UNIDROIT Study (above note 2), paragraph 30.

12 Official Gazette, 5 September 2024, No. 32653 (bis).

13 Directorate of Climate Change of Republic of Türkiye Ministry of Environment, 'Emisyon Ticaret Sistemi ve SKDM İlişkisi' (22 February 2024), available at < https://ticaret.gov.tr>

14 Official Gazette, 23 December 2023, No. 32414 (bis).

15 See the IFRS S2 Climate-related Disclosures, available at: ifrs.org/issued-standards; Commission Delegated Regulation (EU) 2023/2772 of 31 July 2023 Supplementing Directive 2013/34/EU of the European Parliament and of the Council as regards sustainability reporting standards for another carbon credit definition, available at: eur-lex.europa.eu/eli/reg_del/2023/2772, according to which, a carbon credit is "*a transferable or tradable instrument that represents one metric tonne of CO2eq emission reduction or removal and is issued and verified according to recognised quality standards.*"

16 UNCITRAL/UNIDROIT Study (above note 2), paragraphs 98-100.

17 Official Gazette, 30 December 2012, No. 28513 (as amended from time to time).

18 UNCITRAL/UNIDROIT Study (above note 2), paragraph 105.

19 Official Gazette, 19 June 1932, No. 2128 (as amended from time to time).

20 For reading on private law and environmental sustainability see. Barbara Pozzo, 'Private Law and Environmental Sustainability' in Marta Santos Silva et al. (eds), Routledge Handbook of Private Law and Sustainability (Routledge 2024).

Preventive restructuring beyond the EU Directive? The Moldovan experience

Irina Selevestru writes on the impact of the Moldovan adoption of the EU Directive

The Republic of Moldova is going through a rather difficult period of time from an economic point of view. As might be expected, businesses have not yet fully recovered from the post-pandemic crisis and are facing other crises caused by military action in Ukraine and rising energy prices.

Under these circumstances, so that entrepreneurs are not paralyzed by the risks to which they are exposed, the authorities should provide them with the necessary support in order to effectively manage unwanted situations that may arise, including solutions to overcome financial difficulties.

In Moldova, both the bankruptcy procedure and the restructuring procedure are carried on by an insolvency practitioner authorized by the Ministry of Justice, thus allowing the same professional to manage both insolvency and restructuring procedures.

The law in Moldova first began with the legal framework provided by the **Bankruptcy Law** (1996- 2001), then the **Insolvency Law** (2001-2012) and now Insolvency Law no. 149 of 29 June 2012. In this latest law, the concept of "insolvency" is defined as over-indebtedness and includes the following procedures:

- Bankruptcy;
- Restructuring in insolvency; and
- Accelerated restructuring (as a preventive procedure).

The new Insolvency Law applies to all entrepreneurs, including small businesses. In 2020, the accelerated restructuring procedure was modified and now largely corresponds to the terms of Directive (EU) 2019/1023, which is apt as, in 2022, Moldova obtained the status of an EU candidate country.

Options for debtors

Options for debtors in financial difficulty can include:

- Opening out-of-court negotiation with creditors (the negotiation being carried out only with creditors affected); and
- Asking the court for a moratorium on individual forced executions for a period of two months.

The debtor is required to present proof of financial difficulty, in which case, during the negotiation period, the court will suspend enforcement over the debtor's assets.

Accelerated restructuring

If the debtor and creditors can negotiate a plan, the debtor can ask the court to initiate an accelerated restructuring procedure. The court can dismiss the request for formal reasons (e.g., the failure to attach accounting documents or relevant extracts from public registers concerning assets). However, it must be noted that a person who has already been, within the last five years, subject to a restructuring procedure, or is insolvent, cannot request the opening of this type of procedure.

After the accelerated restructuring procedure is opened, creditors can submit requests for validation of claims. For these purposes, creditors are divided in four classes:

- Secured;
- Tax or social security authorities;
- Unsecured; and
- Lower-ranked unsecured (such as claims from connected parties).

Nonetheless, only creditors who have requested claims validation within the stipulated deadline are included, as the law does not mention late claims. Claims that appear after the opening of the accelerated restructuring will be claims paid on a priority basis.

When a debtor enters an accelerated restructuring procedure, a plan is voted on by a majority of classes and by the majority of claims within a class. It is possible to vote on the plan even without a majority of claims in the same class, although unaffected creditors do not get a vote. Following creditor approval, the restructuring plan is subject to confirmation by the court.

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> ***In 2020, the accelerated restructuring procedure was modified and now largely corresponds to the terms of Directive (EU) 2019/1023***

> *The changes introduced by Insolvency Law no. 149 regarding accelerated restructuring largely correspond to the provisions of Directive (EU) 2019/1023*

Managing the insolvency

During the restructuring period, debtors retain control over their assets and their current business activity. The appointment of an insolvency practitioner ("IP") in the field of restructuring can take place, but not necessarily, at the stage of negotiations (i.e., during the two months). The IP can be proposed by the debtor or appointed later by an assembly of creditors from a list of IPs provided by the Ministry of Justice. After the opening of the accelerated restructuring procedure, it is mandatory to name an IP, but the involvement of the IP is limited to supervising the execution of the restructuring plan.

Oversight of IPs

There are sufficient remedies provided to sanction dishonest or negligent IPs. These include:

- disciplinary liability (by a Commission formed by the Ministry of Justice);
- administrative liability (assured by the court); or
- criminal or summary (*contraventional*) liability.

IPs are also subject to continuously professional development provided by the Union of Authorised Insolvency Practitioners.

Conclusion

As stated, the changes introduced by Insolvency Law no. 149 regarding accelerated restructuring largely correspond to the provisions of Directive (EU) 2019/1023. However, to ensure the wider application of these changes, it will be necessary to:

- Develop texts and special guides for early warning processes, made available to the courts and associations of entrepreneurs for information and application purposes;
- Organise trainings for entrepreneurs about early warning systems;
- Include minor amendments to the legislation on the granting of facilities for small and medium-sized enterprises;
- Ensure data on the application of the law is monitored; and
- Elaborate a consumer insolvency law.

Note: the table opposite illustrates the differences and similarities between Insolvency Law no. 149 and Directive 2019/1023 as well as and possible proposals for further development of Moldovan law. ■

Table 1: (Non-)Alignment with Directive 2019/1023

Present	Absent	Possible Proposals
The insolvency law of the Republic of Moldova applies to all entrepreneurs, including small businesses, without differentiating between procedures.	A consumer insolvency law. Facilities for SMEs compared to large corporations.	Development of consumer insolvency law. Development of facilities for SMEs, especially regarding debt-forgiveness, and easier access to the early warning procedure.
Debtors in financial difficulty can resort to: 1. Out-of-court negotiation with creditors; and 2. Suspension of individual forced executions for a period of 2 months during negotiations.	Sufficient information for debtors regarding early warning tools (e.g., website-based), as recommended by the Directive. Nonetheless, the *Moldinsolv* Training Centre exists, which uses its own resources to publish information and relevant articles for debtors. The possibility of an informal restructuring based on contractual agreements, similar to the ad hoc mandate in Romania. As such, the possibility of recourse to extrajudicial agreements is limited.	Developing methods to inform the debtor (texts, guides and helpful instructions), developing an official web page, organizing courses for entrepreneurs to help them understand financial difficulty. The inclusion of an ad hoc mandate, or the possibility of out-of-court negotiation with subsequent confirmation of the agreement by a court.
During negotiation of the plan with creditors, the court makes an order suspending the forced execution of the debtor's assets. This order is issued at the request of the debtor, who must present documents proving that financial difficulty.	Clear tests that would prove that the debtor is in financial difficulty at the time of submitting the application. Currently, these tests are left to the discretion of the debtors and the court.	A viability test should be introduced as a condition for access by debtors to the accelerated restructuring procedure.
The negotiation is carried out only with affected creditors.	There is insufficient of who is an affected creditor, with assessment being left to the discretion of the court. At the moment, the term from the Directive is the one seen in practice.	Either the inclusion in the law of the term of affected creditor, or the elaboration of a guide for creditors, which would also define the term.
If the debtor and creditors negotiate a plan, the creditor can ask the court to initiate the accelerated restructuring procedure. The court may dismiss the request for formal reasons (e.g., proof that creditors who are not affected by the plan are paid in the ordinary course of the debtor's activity, or extracts from public registers about the debtor's assets, although information from accounting records may have been presented).	A procedure to grant a term by the court, for example to remedy the deficiencies. The law states that the court either grants the request of the debtor who negotiated a plan, or dismisses it for formal reasons.	To simplify the method of requesting the initiation of an accelerated restructuring procedure. Debtors who have already negotiated a plan in the previous two months apply for the procedure. Therefore, the role of the court is to start the legal approval process in respect of the plan, without involving too many formalities. The Directive proposes minimal involvement of the judicial authorities.
A person who in the last 5 years has been subject to a restructuring procedure, or is insolvent, cannot request the opening of the procedure.	A limited number of procedures that allow companies to restructure their activity only at a relatively late stage in the context of insolvency proceedings.	n/a
After the start of the accelerated restructuring procedure, creditors submit claim validation requests. Creditors are included in the table by class: guaranteed, state budget, unsecured, lower-ranked unsecured. We have 4 classes. Regarding the claims that have not yet become due, they will be considered due from the moment the procedure is initiated. The table includes the claims submitted within the deadline, as well as the debts included in the accounting records.	A clear solution for late claims.	A clearer regulation for late claims.
During the restructuring period, debtors retain control over their assets and their current business activity. The involvement of the insolvency practitioner is limited to supervising the execution of the restructuring plan.	A regulation that the court could remove a bad faith debtor from business. In that case, the management of the enterprise should be conducted by the insolvency practitioner.	Include clear explanations under which conditions bad faith debtors may be removed from asset management.
The appointment of a practitioner in the field of restructuring can take place, but not necessarily, at the stage of negotiations (i.e., within the 2 months). For the supervision of the execution of the plan, the appointment of the IP may also take place but is not mandatory.	n/a	The appointment of a practitioner in the field of restructuring is always necessary, especially in the absence of information on restructuring and the lack of a guide for entrepreneurs. According to the Directive, in order to support the parties in negotiating and drafting a restructuring plan, Member States should make it mandatory to appoint a restructuring practitioner.
The suspension of foreclosures for the entire period of early restructuring. Restructuring can take up to 3 years from the moment the plan is confirmed (plus 3-4 months until confirmation). The term can be extended by another 2 years. The suspension also refers to the suspension of the debtor's or creditor's obligation to request the opening of an insolvency procedure that could lead to the debtor's liquidation. Plan voting is based on classes, of which there are 4: secured, state authorities, unsecured and lower-ranked unsecured. The plan is voted by a majority of classes, and with a majority of claims within a class. It is possible to vote on the plan without a majority of claims in the same class under certain conditions that correspond to the recommendations of the Directive. Creditors not affected by the restructuring plan have no voting rights.	A suspension of individual forced execution only against certain creditors or categories of creditors.	n/a
The restructuring plan is confirmed by the court. The courts are specialized in insolvency matters.	Sufficient courses for insolvency judges, which could be conducted jointly with those for IPs to ensure uniform practice.	Ensuring the mixed training of judges and IPs and the development of texts, practical guides, commentaries, etc.
A provision is made for the possibility of enterprises undergoing restructuring to receive post-filing loans, which become claims of the estate. This provision has never been applied.	n/a	n/a
A provision regarding the possibility, within a period of no more than 5 days after publication of the decision confirming the restructuring plan to be appealed, but without suspension of the execution of the plan. There is also the situation in which the court suspends the execution of the decision confirming the restructuring plan.	n/a	n/a
Provisions regarding the choice of the insolvency practitioner, who can be proposed by the debtor or appointed by the assembly of creditors from a list of practitioners provided by the Ministry of Justice. Practitioners are subject to continuous processional development by the Union of Authorized Insolvency Practitioners. Sufficient remedies are provided to sanction dishonest or negligent practitioners including disciplinary liability (by a Commission formed by the Ministry of Justice), administrative liability (provided by the court) as well as criminal or summary (*contraventional*) liability.	Training provided by the National Institute of Justice alongside judges, prosecutors, bailiffs. This would ensure the uniform application of judicial practices.	n/a
The possibility of using electronic means only when filing requests in the courts. The E-file register is currently not functional. Recently, a register of insolvency cases was established, where all insolvency cases and the most important documents are entered.	A record of the results of restructuring, insolvency and debt relief proceedings, in order to monitor how insolvency law is applied.	n/a

The European Insolvency Regulation: Milestones and celebrations

Paul Omar gives a brief history of the introduction and impact of the Original EIR and the EIR Recast

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In 2025, two significant anniversaries will occur: the Silver Jubilee of the European Insolvency Regulation ("Original EIR")[1] and the tenth anniversary of the advent of its replacement, the European Insolvency Regulation (Recast) ("EIR Recast"),[2] both adopted in the month of May. Both texts came into force within the European Union ("EU") roughly two years after their promulgation, giving time to appreciate how they might be used in practice.

Over the quarter of a century that the two texts have been in force, significant changes have also occurred to the shape of insolvency proceedings, the way cross-border instances are coordinated and the frameworks that now permit bridging between domestic systems to allow for global solutions to be reached in the case of indigent debtors (usually, but not exclusively, corporate). To these changes, the texts have tried to respond.

> *It is difficult at this remove to imagine just how revolutionary the Original EIR was, not that it was "original" in any sense*

The advent of the Original EIR

It is difficult at this remove to imagine just how revolutionary the Original EIR was, not that it was "original" in any sense, having been preceded by the Council of Europe's Istanbul Convention 1990, the EU's own European Bankruptcy Convention 1995 and UNCITRAL's Model Law on Cross-Border Insolvency 1997, all of which owed their genesis to the work first initiated by the EU (then European Community) in the 1960s.[3] While these texts assumed different forms (two being treaties and one a Model Law), necessitating some differences in their structure, and each knew a different fate, only the Model Law surviving to the present day, the Original EIR that saw light in 2000 could boast an excellent pedigree. Moreover, it was not wholly different from its predecessors in what it sought to do: create proper jurisdictional bases, dictate the applicable law (and any exceptions), simplify the process of recognition and enforcement and connect insolvency proceedings by imposing rules on communication and cooperation.

But, compared to what had gone before, the Original EIR was revolutionary because, for the first time, a framework was made available that was clear, predictable and (mostly) modern. The use of the directly applicable regulation format helped considerably in creating common rules across member states.[4] Gone was the need to ascertain the arcana of rules of private international law, especially the many bars to recognition and enforcement constituted by public policy exceptions, to engage with thorny rules and procedures towards gaining the assistance of a host court in respect of foreign judgments and orders as well as, and this particularly true of the incremental approach of the common law, to rely on judicial discretion to develop new rules for novel situations and occasions. Two major exceptions, however, remained: for entities and procedures outside the scope of the Original EIR[5] and in the relationship of member states to other (non-EU) countries, recourse to traditional rules would continue to be needed.[6]

This does not mean, however, that the Original EIR was wholly suited to its time. Since the 1960s, when the basic railbed of the text was first laid down, ways of carrying out business globally had changed. Waning was the traditional head office and branch (or representative agency) model, being superseded, for perfectly logical liability limitation reasons, the parent-subsidiary model (often grouped in a pyramid structure for ease of control/ownership).[7] The paradigm of the text, however, cleaved closer to the older model, making administration of groups of connected entities problematic.

As the European Court of Justice reminded us in *Eurofood*,[8] company law doctrines required consideration of each ostensibly separate legal entity separately, albeit the presumption of insolvency at a registered office was rebuttable and insolvency could occur wherever the centre of main interests ("COMI") was found. Moreover, the way the constellation of proceedings was structured and its insistence on a hierarchy between procedures (as well as a limitation on the availability of rescue in secondary proceedings) made restructuring/rescue difficult to achieve,[9] even for entities that adopted the traditional head office and branch structure, never mind for companies adopting the group model. These were only some of the problems that the Original EIR came with; there were others: definitional issues, the precise ambit and scope of jurisdiction,

articulation between the *lex fori concursus* and carve-outs etc.

That said, the Original EIR began to experience success. The case-law interpreting its provisions is testimony to its unresolved issues (*certes*), but also its prevalence in use. There also emerged the desire to palliate some of the difficulties in the text with solutions emanating from practice-based innovations. Group structures were organised through "manipulating" COMI, bringing subsidiaries under the roof of their ultimate parent for a global outcome to be facilitated, *Re Collins & Aikman*[10] and *Re MG Rover*[11] being just two examples of this process.[12]

The limitation to liquidation in secondary proceedings was palliated by creating "virtual secondaries" through avoiding the opening of such proceedings,[13] but creating a structure on paper within amalgamated proceedings that mimicked the effects. This was a step that necessarily required the cooperation of stakeholders, which was boosted by insolvency office-holders being able to give undertakings that local law and, in particular, local priorities, would be respected.[14] Such developments (not the only ones) went far towards palliating some of the more obvious issues of a text rooted in the 1960s and are reminiscent of the oft-observed difference between the law on the books and the law as practised.

Moving on to the EIR Recast

Article 46 of the Original EIR mandated review of its operation by 2012, which was eventually done. The result was the EIR Recast. There are good things that may be said about it, not least that it builds upon the trajectory set up by the Original EIR, thus smoothing the path towards integration into practice. But it also goes further in not only addressing groups of companies in a dedicated Chapter V, but also putting virtual secondaries and undertakings on a statutory basis in its Article 36.

To underpin these imports from practice, the EIR Recast also provides (in Article 38) that stakeholder requests for such proceedings to be opened are to be notified to the insolvency office-holder in main proceedings to facilitate a right to object and pre-empt their opening. It also abandons, for secondary proceedings that are opened, the restriction to liquidation previously mandated by Article 3(3) of the Original EIR, thus facilitating the possibility of a global outcome. With coordination in mind, the text also beefs up the cooperation and communication provisions, extending them to courts (both "horizontally" with other courts and "vertically" with practitioners, on whom this duty had already been imposed by Article 31 of the Original EIR).

Nonetheless, the EIR Recast is not without its criticisms, in particular the inclusion of a group coordination procedure, also in Chapter V, that appears to be redundant. It is seemingly unused in practice, perhaps by reason of the likely costs involved and its imposition of an extra (inefficient) layer in the group insolvency dynamic. The otherwise laudable reflection of modern technology, particularly the interconnection of registers enabling searches across the EU, mandated by Article 25 of the EIR Recast and supported by processes contained in its Articles 87 and 89, has experienced considerable delays that are, at time of writing, not completely resolved.

Also praiseworthy (albeit inelegantly drafted) is the attempt in the provisions governing scope (Articles 1 and 2) to craft definitions that would include the more modern types of insolvency proceedings, going beyond the classic binary divide of office-holder-led rescue and liquidation to embrace debtor-in-possession and pre-insolvency proceedings. Nonetheless, these definitions risk being overtaken by events, particularly by the crafting of new procedures in the Preventive Restructuring Directive ("PRD")[15] and the intention to provide pre-pack frameworks via the latest suggestions in the proposed EU Harmonisation Directive.[16] Which of these procedures will come to fall within the EIR Recast, given the desire to avoid any gap in the dovetailing between it and the Brussels I Regulation,[17] will need determining in due course.

Conclusion

In the final analysis, as the anniversaries approach, it cannot be denied that both texts have led to the emergence of a more or less stable framework for jurisdiction, recognition and enforcement of insolvency instances within the EU. Granted, there have been teething troubles at their introduction and copious case-law resulting from the need to explain the intricacies of their workings, but by and large the texts have worked. Although lacunae have needed to be filled, it has been possible to bring onboard practice solutions as part of the EIR Recast adoption process.

The time for the next review of the framework, mandated by its Article 90 and scheduled for 2027, rapidly approaches. Very soon, thought will need to be given to what other changes currently seen in practice could be usefully taken on board. Definitions may need to alter, especially in light of the procedures adopted in the PRD transposition process and that may come to be adopted through the latest proposals.[18] As yet, though, there has been little call for a fundamental revision of the approach embodied in the texts, which seem to work and to offer enough certainty and predictability as frameworks for the coordination of cross-border insolvencies and restructurings. Even if such calls were to come, these would not be difficult or impossible tasks to realise, especially given the assistance of experts and commentators drawn from practice, academia and the judiciary to which the European Commission has access. ■

Footnotes:

1 Regulation (EC) No. 1346/2000 of 29 May 2000.

2 Regulation (EU) No. 2015/848 of 20 May 2015.

3 See, by this author, "European Insolvency Law Reform: Taking it to the Next Level?" (2024) *Eurofenix* (Spring) 32.

4 But also created other problems due to the lengthy process for amending the Annexes to reflect changes in the domestic laws and procedures of member states.

5 For an example of non-EIR-based recognition, see *Schmitt v Deichmann and others* [2011] EWHC 294 (Ch).

6 For a list of treaties and conventions between member states superseded by the texts, where applicable, see Article 44, Original EIR; Article 85, EIR Recast.

7 For a catalogue of types of models available, see Irit Mevorach, *Insolvency within Multinational Enterprise Groups* (OUP, 2006).

8 *Eurofood IFSC Limited* (Case C-341/04) ECLI:EU:C:2006:281.

9 Of course, such concepts as restructuring/rescue were little developed in the period of the text's origins, albeit they were more widespread at the time of its adoption.

10 *Re Collins & Aikman Europe SA* [2006] EWHC 1343 (Ch).

11 *Re MG Rover España and others* [2006] EWHC 4326 (Ch).

12 In one memorable case, the tables were turned to "locate" the parent at the subsidary's premises, although allowing secondary proceedings to be opened in respect of the parent: *Burgo Group SPA v Illochroma SA* (Case C-327/13) ECLI:EU:C:2014:2158.

13 Unless absolutely necessary, e.g., to utilise a local procedure that was more beneficial for (some) stakeholders, such as redundancy procedures for employees.

14 Such undertakings were sanctioned by the court in *Re Collins & Aikman* (above note 10).

15 Directive (EU) No. 2019/1023 of 20 June 2019.

16 See: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52022PC0702

17 Regulation (EU) No. 1215/2012 of 12 December 2012.

18 Above note 16.

> ***Very soon, thought will need to be given to what other changes currently seen in practice could be usefully taken on board***

The State's role in restructuring and insolvency procedures

Dragoș Ghiță overviews the different roles that state entities have in restructuring or insolvency procedures – be it that of a creditor or a shareholder for the insolvent company

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> *Large companies usually act in highly regulated domains, which, naturally may lead to certain pecuniary incidents arising from the normal activity of the company*

State entities have a number of different roles in restructuring or insolvency procedures – be it that of a creditor or a shareholder for the insolvent company. This is really important, especially in economies where state owned enterprises/large companies enter restructuring/ insolvency procedures, as these are the economies that are very sensitive to the market turbulence that is usually implied.

As is known, different roles will impose specific behaviour by the state entity in its main goal: be it that of loss minimization or gains maximization and, in some cases, managing the social cost of such a procedure.

In the European insolvency framework, there are two legislative tendencies related to state actors' debt treatment in insolvency/restructuring procedures: one in which state creditors are given a privileged position in the hierarchy of debt (a reflection of protectionist views on behalf of public entities), or the one in which state actors are treated the same as other actors in that procedure.

Starting from this, we can see that the first view can and could generate a less proactive approach in dealing with outstanding debt, as the higher position in the hierarchy of claims basically creates a safety net for public entities that ensures no sanctions can be applied if no usually pro-active behaviours are adopted before the procedure commences. In post-centralized economies that have been through a privatization process, we see that most of the restructuring/insolvency procedures of large companies (total assets valued at over EUR 10m) are indebted mostly towards statal actors as a natural consequence of measures aimed at increasing the companies' attractiveness towards potential investors (debt forgiveness policies, public debt waivers, etc.).

Different types of roles

It would be simplistic to state that all creditors are the same because they aim to maximize their debt recovery rate and minimize potential losses, and this statement is even more nuanced when it comes to the different "hats" that a public entity wears in different procedures.

Regulatory agencies

Large companies usually act in highly regulated domains, which, naturally may lead to certain pecuniary incidents arising from the normal activity of the company. In this case, the regulatory agency's initial purpose (ensuring specific legislation is respected) will be shifted into new territory – recovering debt in a highly specialized and collective procedure, in which limited experience is held.

In the case of a European insolvent company active in the chemical processing industry, the most important creditor was the national environment agency that fined the company subject to the procedure. However, the environmental agency had to postpone its recovery in order for the processing plant and business to be sold and continue its activity. Moreover, given the fact that the agency's statute limited its options in enforcing the administrative decisions rendered before it, it could not have taken action meant to conserve or preserve the assets and, unfortunately, the procedure was extended, and the recovery grade of the debt diminished.

Fiscal creditors

This is the most frequent "hat" that state actors put on, and rightly so, derived from the fiscal collecting obligations that fall onto ulterior insolvent companies.

From experience in practice, fiscal authorities in insolvency/ restructuring procedures tend to aim mostly to maximize their debt recovery and minimize procedural costs. In the past, in some procedures, this translated to cost lowering decisions (selecting assessors, auditors, insolvency practitioners), multiple layered decisions, prolonging restructuring measures and effectively lowering the debt actually recovered.

For example, in one bankruptcy case, the fiscal creditor hesitated to vote in the creditors' meeting in order to select the electrical company that was to provide electricity to the industrial plant, and, as a result, the security services firm could not operate at full capacity, the consequence being the occurrence of thefts and devaluation of the main asset.

On the other hand, we see that, starting in the Covid-19 era, several European states adopted debt restructuring measures aimed at preventing insolvencies or bankruptcies that may have commenced as a result of outstanding fiscal debt. These measures usually involved an opportunity analysis of

restructuring debt, rather than recovering it by classical procedures.

This is, of course, a result of historical low rates of recovering debt through insolvency procedures or forced execution, as these procedures are and can be delayed by other participants (at times -abusively by exploiting procedural incidents).

In one recent case, a large factory that was put up for privatization at the dawn of the 2000s, as a result of measures aimed at making it more attractive for investors, benefited from an actual waiver of execution from the fiscal authorities, ensuring that any investor would not be put in difficulty by the fiscal authorities.

After an analysis of the assets and securities structure, in a classic recovery procedure, the state would have recovered at most about 7% of its total debt over a period of at least 4 years (principal and interest up until the time of the analysis, not taking into account litigation costs associated with the procedure). Accessing the restructuring measure insured that an advance payment from the principal was made, with half of the principal being phased over 5 years, effectively bringing the recovery rate up to 30% of the total debt, which is an obviously better result from a private creditor's point of view.

It is our opinion that this type of savvy commercial behaviour is to be preferred over classical rigid decision making in the case of public debt recovery and we salute these types of restructuring mechanisms that give actual second chances to companies in order to avoid classic insolvency procedures that might not be the best fit for the particular case.

Shareholders

Another interesting role that state entities can have is that of shareholders of the insolvent company itself – usually in this case there is a political factor involved – in the form of a national ministry or agency. A defining characteristic in this case is the political and social factors that are taken into account when implementing or voting for certain measures in a state–owned company.

Before implementing a plan meant to restructure its public debt and revitalize its business, the public shareholders of a large manufacturing plant put forth several iterations of measures aimed at downsizing the asset-base of the company and the sale of non-core assets in order to gain short term liquidity needed to overcome its financial difficulties. The process of implementing such a measure extended across several months, after which subsequent leadership inside the shareholders' structure changed direction and went against the initial plan. All this resulted in a blockage of the restructuring process of the company, which had its debt continuously raised as a result of this lack of implementation.

Best Practices – in lieu of Conclusions

Considering our past practice and some of the examples set out in this article, we can firmly say that some of the strategies that state actors have successfully adopted in raising their recovery rates have been along the following lines:

Streamlining decision making

Several public entities have implemented sleeker departmental structures that leave decision making to be faster and closer to the "action", effectively removing formalistic approaches to procedural acts and diminishing response times.

Opportunity costs

In both restructuring and insolvency procedures, EU Law has already defined the "private investor/private creditor" concept as one that is to be taken into account when accepting an alternative form of payment of the debt which is to be recovered, but even more state actors have been seen to use concepts such as net present value of money over time, which leaves a lot of the arbitrary aspects of arguing in favour of debt restructuring, giving it a "mathematical" sense of precision.

Pooling the recovery effort

We have seen that creating specialized public agencies aimed at recovering state debt in restructuring or insolvency procedures is far more efficient for public interests, as is pools all the effort, expertise and resources in one centralized and effective organization, rather than it being spread out across all the institutions in the country. ■

> ***Creating specialized public agencies aimed at recovering state debt in restructuring or insolvency procedures is far more efficient for public interests***

WHOA: Landmark decision in the District Court of Amsterdam

Emma Buchanan and Siert Klinkhamer explore the legal techniques used in the first-of-its-kind restructuring of Bio City

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> ***The Dutch procedure can support the swift implementation of restructuring with a range of helpful features***

The District Court of Amsterdam has, for the first time, sanctioned a Dutch Restructuring Plan (WHOA) of bonds that were originally governed by English law. The restructuring also included a number of "firsts" in relation to the techniques used to implement a complex bond restructuring through a Dutch WHOA proceeding.

Introduction

Following implementation of Directive (EU) 2019/1023 on preventive restructuring frameworks in the Netherlands, a Dutch procedure (akin to the English Scheme of Arrangement) under the *Wet homologatie onderhands akkoord* ("**WHOA**") became available in the Netherlands on 1 January 2021.

The Dutch procedure can support the swift implementation of restructuring with a range of helpful features, including: a possible cram-down of creditors or shareholders within the same class with a two-thirds consenting majority, cross-class cram-down, a court-ordered stay period, debtor-in possession ("**DIP**") and DIP financing, the ability to amend or terminate erroneous contracts and a clear set of grounds for refusal. The Dutch procedure can offer a high degree of certainty as the sanction judgment under the WHOA cannot be appealed. It is also an efficient process as only one court hearing is required, which is held two weeks after the documents are submitted.

This article explores the legal techniques that were utilised to implement a first-of-its-kind

restructuring by Bio City Development Company B.V., further expanding the body of case-law precedent in respect of complex cross-border restructurings utilising the Dutch WHOA process.

Background

Bio City Development Company B.V. ("**BCDC**") is the holding company for a planned real estate development in Istanbul. BCDC had issued USD 207.4 million (the original principal amount) of English law governed bonds, which, with accumulated interest, had grown to c. USD 900 million (the "**bonds**"). The value of the bonds exceeded the value of BCDC's assets, as the development of the real estate did not take place in accordance with initial expectations.

BCDC therefore entered into a commercial arrangement with the bondholders and shareholders whereby BCDC would be sold by its parent entity (the "**parent**") to one of the bondholders (the "**purchaser**") for cash. The cash proceeds of the sale would be combined with the resources on BCDC's balance sheet and used to redeem the bonds at a discount from par value.

The practical effect of the redemption was that the bondholders transferred the bonds to the parent, releasing their beneficial interest in the bonds in return for a cash payment. The parent would subsequently contribute the bonds to BCDC by way of a share premium contribution in kind, so that the bonds would be nullified by way of amalgamation. The terms and conditions of the bonds needed to be amended to insert a call option

to allow the bonds to be redeemed at discount from par by the parent. This amendment required the consent of 100% of the bondholders.

The bonds were held through the main European clearing systems, Euroclear and Clearstream. Therefore, BCDC did not have full visibility on who the ultimate beneficial holders of the bonds were. Following a process of outreach and discussions, BCDC was able to identify and obtain support from approximately 98% of the bondholders by value. However, the consent of 100% of the bondholders was required to amend the bonds to insert a call option. To mitigate any litigation risk, the purchaser also required the support, either of 100% of the bondholders or the certainty of a court order, to proceed with the transaction. Without the required consents, BCDC had to consider a court process(es) to implement the transaction, with the WHOA forming an attractive alternate restructuring process.

Accessing a Dutch restructuring process

A long-established rule of English law (the rule in *Gibbs*) holds that an English law debt can only be compromised using an English law process, unless the creditor submits to a foreign process. BCDC's bonds were governed by English law and so the effect of the rule in *Gibbs* would have been to render a procedure under the WHOA ineffective to amend the bonds as a matter of their governing law.

The solution was to change the governing law of the bonds from English law to Dutch law. This amendment could be effected contractually with the consent of the holders of 75% of the bonds (in accordance with their terms). Sufficient support was obtained to change the governing law from 98% of the bondholders, i.e., all those identifiable to BCDC.

BCDC had effected a deliberate change to the governing law of its debt for the purposes of accessing a restructuring process. This is the first time a company has changed the governing law of its debt to Dutch law to support a WHOA process. The District Court of Amsterdam did not find anything improper in this action, demonstrating the Dutch Court's flexibility and capacity to implement cross-border restructurings.

However, this solution may not always be available in instances where it is of fundamental importance to the parties that a contract is governed by English law (or any other law), which may therefore result in a 100% consent threshold being required to contractually amend the governing law. In such cases, the debtor company may have no choice but to use the restructuring process(es) available to it in the governing law of the contract.

Inaugural appointment of an independent expert

The Dutch Court carefully considered the implementation steps and handed down an interim judgment appointing an independent expert to provide a report confirming that certain steps (which were designed to ensure that the transaction as whole would remain tax neutral) were not contrary to the purpose and purport of tax laws and regulations.

The independent expert recognised that the restructuring plan being proposed by BCDC was a variant of a debt-to-equity agreement, which has been regularly used and, moreover, has been recognised in guidelines published by the Dutch Tax Authorities to the effect that the authorities are willing to cooperate with a debt-to-equity restructuring plan. The independent expert confirmed BCDC's reasoning and recognised that the restructuring plan was motivated by the desire to structure the transaction as whole in a tax neutral manner and thus to be able to successfully restructure the debts through the Dutch WHOA proceeding.

This was the first time that an independent subject matter expert has been appointed by the Dutch Court as part of a WHOA proceeding. In this instance, the Dutch Court followed the expert's opinion, agreeing with the expert's point of view. Also, the appointment of an independent expert did not significantly delay the timetable, as a sanction judgment was still rendered within 7 weeks of the start of the voting period, demonstrating the efficiency of the WHOA process.

Implementation by way of new legal techniques

The restructuring was implemented by granting BCDC certain powers of attorney, enabling it to enter into a number of agreements and take decisions on behalf of the bondholders. The legal effect of these agreements would be that the bondholders would relinquish their present and future rights against BCDC and its subsidiaries in return for a payment of cash.

Powers of attorney are a common legal technique used in English Schemes of Arrangement and Restructuring Plans to confer powers on the debtor company to issue the necessary instructions on the creditors' behalf at the appropriate time, with the assurance that the steps have been court-approved. However, this legal technique has not explicitly been considered or approved before by a Dutch Court. In this case, the Dutch Court found that the power of attorney was a suitable instrument to implement the transaction, recognising that it is customary in international restructuring practice for a restructuring plan to provide, by means of a power of attorney, for obligations to be imposed on creditors or shareholders in the context of the implementation of the restructuring plan. ■

BCDC's bonds were governed by English law and so the effect of the rule in Gibbs would have been to render a procedure under the WHOA ineffective

Covert surveillance: Insolvency's forgotten tool

Roger Bescoby explains the possibilities for covert surveillance whilst keeping on the right side of the law

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> *There is a prevailing myth that any and all covert surveillance is illegal when not undertaken by public authorities*

The implementation of the UK Government's Covid support scheme may be remembered in history as one of the greatest examples of legislative oversight in recent years.

Whilst laudable in its aims to keeps businesses afloat during the trials of lockdown, the scheme became a tool for self-enrichment by the unscrupulous. As the Government prioritised ensuring businesses received the financial support needed to remain solvent quickly and easily, some directors took advantage of the urgency of the situation and the lack of thorough checks to benefit at the expense of the public purse. As pressure grows to remedy the situation and recoup funds, we may see surveillance emerge as the key to tracking and catching these criminals.

Thankfully, the Insolvency Service and the Government have taken action to empower insolvency professionals to join the hunt. With the passing of the Rating (Coronavirus) and Directors Disqualification (Dissolved Companies) Act 2021, the Government granted the Insolvency Service the power to investigate directors of dissolved companies. This provides an opportunity to open a new front in the war against fraud by empowering insolvency professionals to discover and investigate incidences of fraud themselves – allowing more scammers to be brought to justice despite resource constraints in policing. Since then, the Insolvency Service has disqualified more than 800 company directors between 2023-2024 (an increase of more than 80% on the previous year) and has even created a team solely dedicated to investigating Bounce Back Loan misconduct.[1]

At the same time, fraud has also significantly increased since the pandemic, doubling in value in 2023 compared to the previous year according to analysis by financial services firm, BDO.[2] Meanwhile, the ability of the authorities to investigate and pursue cases against fraudsters has fallen with prosecutions falling to a record low in 2023 – with only 1 in 1,000 cases making it to court.[3]

With insolvency-specialists encountering large increases in the volume of cases involving fraud, they are assuming an increasingly crucial role in tackling these crimes. Professionals working in insolvency now have the power to investigate and pursue fraud under insolvency legislation, giving them a uniquely important role in identifying and pursuing fraud. However, the powers given under legislation are still relatively new and many insolvency practitioners today are still not familiar with all the tools that are at their disposal in instances where they suspect foul play.

A powerful legislative toolkit

Insolvency practitioners have wide-ranging powers to investigate company directors so that they can fulfil their duty to properly scrutinise their conduct. Examples of the powers they have include interviewing directors under compulsion, searching and seizing property associated with fraud, having assets frozen, and even arranging for directors considered a flight risk to surrender their passport.

Another tool available to insolvency professionals, but often overlooked, is covert surveillance. This is likely because the rules around covertly surveillance are not generally well understood. There is a prevailing myth that any and all covert surveillance is illegal when not undertaken by public authorities. However, so long as all relevant laws are complied with, covert surveillance is a legitimate and powerful tool for insolvency professionals looking to gather evidence in an investigation into fraud.

Covert yet compliant

Common legislative considerations to ensure an investigation is legally compliant include the General Data Protection Regulation 2016 (GDPR)[4] and the Human Rights Act 1998. Any investigation will need to ensure that there is a legitimate interest for collecting and processing any personal data whenever consent has not been obtained – which is unlikely to be the case in a covert investigation. Collecting data for litigation or to detect fraud would be considered a legitimate interest so any properly carried out investigation will generally pass this test.

Other considerations include ensuring that any collected data is adequately protected from being stolen, whether they need to notify the data subject that their data has been collected, whether proper governance frameworks are in place in handling personal data, that the investigator has a data protection officer and whether the

investigator has the appropriate processes in place to respond to any subject access requests. Meanwhile, it is not permissible to trespass on private property, to access someone's phone or computer without their consent or to record phone calls without notifying all of the participants on the call.

International investigations

When conducting covert surveillance as part of an investigation with an international element, as is commonly the case, then it is essential to ensure that investigators are compliant with all requirements in all relevant jurisdictions.

The laws regarding investigations can vary wildly from country to country. While the UK and many other jurisdictions do not have any specific requirements for investigators to operate so long as the relevant laws are followed, this is not the case universally, and it is important to be cognisant of this. For example, in China, all private investigation is illegal after it was banned in 1993. This is also the case in many countries in the Middle East, such as in Saudi Arabia. When there are suspicions of fraud taking place that necessitates investigation within these territories, it is strictly necessary to work with the public authorities alone.

Meanwhile, many other jurisdictions require investigators to hold a licence to practice such as in Spain, the United States or Ireland. In such territories it would likely be necessary to work with professional investigators locally in the region, if the investigation cannot be carried out remotely. Further, all investigations will need to comply with the relevant local laws in the jurisdiction in which it is being conducted. As an example, at present, each individual state in the United States has its own rules on privacy and compliance for investigators. There are presently 15 states that have passed comprehensive data privacy laws; California, Virginia, Connecticut,

Colorado, Utah, Iowa, Indiana, Tennessee, Oregon, Montana, Texas, Delaware, Florida, New Jersey, and New Hampshire.[5]

It is likely that more states will implement their own laws, in line with international trends to increase the regulation of data. However, this may soon change as the US may soon implement a unified legislative framework with the passing of the American Privacy Rights Act (APRA). This would create a national standard for privacy protections in the US and would supersede any of the state laws.

The key point to understand is that it will always be necessary for investigators to make sure that they have an up-to-date understanding of any relevant legislative and regulatory requirements for any investigation being carried out. If there is uncertainty about what these are, it may be preferable to work with a locally based team to ensure compliance.

After all, if an investigation is undertaken that is not compliant, the investigator may find themselves facing legal repercussions and any their findings unusable. Nevertheless, so long as these rules are followed, insolvency practitioners should not shy away from making use of their powers to investigate. They now a form a critically important dimension in the ongoing campaign to prevent and prosecute fraud. As such, it is key that insolvency professionals familiarise themselves with all the powers that they hold and their concomitant responsibilities in exercising them so that they can do their part to help reduce the amount of fraud taking place. ■

Footnotes:

1 See: www.gov.uk/government/news/more-than-800-company-directors-banned-for-abusing-covid-support-scheme

2 www.bdo.co.uk/en-gb/news/2024/reported-fraud-doubles-in-2023-bdo-report-finds#:~:text=The%20latest%20Crime%20Survey%20for,to%20a%20three%2Dyear%20high.

3 See: www.telegraph.co.uk/news/2023/02/01/fraud-surges-prosecutions-slump-record-low/

4 Implemented in the UK by the Data Protection Act 2018.

5 See: https://pro.bloomberglaw.com/insights/privacy/state-privacy-legislation-tracker/#:~:text=Currently%2C%20there%20are%2015%20states,data%20privacy%20laws%20in%20place

> *It will always be necessary for investigators to make sure that they have an up-to-date understanding of any relevant legislative and regulatory requirements for any investigation*

Debt restructuring in Ukraine: The impact of war

Catherine Bridge Zoller writes about the impact of the war in Ukraine on the ability of small businesses to generate profits and repay debts

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Russia's full-scale invasion of Ukraine in February 2022 has caused irreparable damage to many Ukrainian companies, including small and medium-sized enterprises (SMEs). Assets that generated profits for Ukrainian businesses and were used to pay off debts to creditors were destroyed or damaged.

As a result, many businesses have been unable to repay bank loans. This has increased the risk of foreclosure and claims against guarantors, including business owners. It has also put the spotlight on Ukraine's insolvency and restructuring laws and whether these are sufficiently robust to support long-term restructuring.

The legal framework and NPL trends

The increase in the number of borrowers who cannot repay a loan to a bank in Ukraine is evidenced by the rising share of non-performing loans (NPLs). According to National Bank of Ukraine figures, on 1 July 2024, the volume of NPLs was equal to 34.6% of all banking-sector loans. The actual number of distressed loans is likely to be higher.

NPLs had previously been on a declining trend, falling from 55% in 2018 to 27% in 2022. This success in reducing NPL levels was partly due to efforts by Ukrainian legislators, which included the enactment of a new Code of Ukraine on Bankruptcy Proceedings No. 2597-VIII (the Insolvency Law) on 18 October 2018, which came into effect a year later. The new Insolvency Law was complemented by a voluntary framework for financial restructuring of legal entities, the Law of Ukraine on Financial Restructuring No. 1414-VIII (the Financial Restructuring Law). Enacted on 14 June 2016 and effective from April 2017 for a limited period, the law was part of efforts by the Ukrainian authorities to tackle high NPLs, with assistance from the World Bank and the European Bank for Reconstruction and Development (EBRD).

Restructuring statistics and tools

According to statistics compiled by Secretariat, a body that administers the Financial Restructuring Law from the offices of the National Association of Ukrainian Banks, as at July 2024, 63 restructuring cases had been completed under the Financial Restructuring Law framework. In total, these restructured more than UAH 81 billion (almost US$ 2 billion) of debt owed by Ukrainian businesses.

However, there has been a sharp decline in new cases since February 2022: only one case has been initiated in the last two years, compared with a previous average of eight new cases a year. Meanwhile, there has been an increase in the number of formal insolvencies. The Supreme Court of Ukraine confirmed that in 2023, the number of insolvency applications had increased 44.4 per cent to 14,400 applications from 9,700 in 2022.

While Ukraine has a relatively new Bankruptcy Code, it still lacks certain restructuring tools – something that has become more widely adopted within the European Union (EU) since the EU Directive on Restructuring and Insolvency 2019 framework. In a recent assessment by the EBRD – the Business Reorganisation Assessment 2022 – Ukraine ranked 27th out of the 39 jurisdictions assessed for the effectiveness of their restructuring frameworks.

Moreover, Ukrainian insolvency legislation does not contain any express protection of new financing. While the Bankruptcy Code acknowledges that any Article 5 pre-insolvency rehabilitation plan may include "measures to obtain loans or credit", it also gives secured creditors a veto right on any change in priority, undermining support for any new financing.

Another issue is the lack of protection of so-called "essential contracts" necessary to support the continuation of day-to-day operations. There are no meaningful limitations on ipso facto clauses to prevent the termination of contracts solely on the grounds of insolvency or the commencement of an insolvency procedure. While the Article 5 pre-insolvency rehabilitation procedure states that the approval and implementation of the rehabilitation plan will not be considered a breach of the contract between the debtor and any non-participating creditor, it falls short of an outright prohibition on ipso facto provisions and does not apply to any in-court rehabilitation proceedings.

Also, under the Insolvency Law, there is no concept of cross-

class cram-down, where the decision of a creditor majority in one or more classes can be imposed on other classes of creditor voting against the reorganisation plan. Each class of unsecured and secured creditors must approve either the pre-insolvency or in-court rehabilitation plan. Awkwardly, the majorities for secured and unsecured creditor classes differ in the legislation. An approval for a secured creditor class requires a two-thirds majority by value compared with a simple majority of more than half by value for unsecured creditors.

Functioning courts and the impact of war

Insolvency cases have continued to be heard by Ukrainian courts despite the war. In 2022, the work of courts located on or near the territory where military action was taking place was undermined. However, this issue was swiftly resolved by transferring ongoing cases to other Ukrainian courts that were able to review them.

In practice, a wide range of debt restructuring mechanisms have been used since 2022 in wartime Ukraine outside of the formal insolvency framework. Following Russia's full-scale incursion, the National Bank of Ukraine recommended that banks and other financial institutions assist borrowers in restructuring. It also eased the requirements for banks to record loans so that they were not automatically recognised as non-performing, provided that the borrower's ability to repay was affected by the war.

In general, banks agreed to restructure the debt of their borrowers if the war had significantly affected the customer's business in such a way that its loan repayments were at risk of default. Many banks also introduced their own initiatives to support corporate or retail clients. These included measures such as the waiver of mandatory fees, loan repayment holidays and a freeze on penalty interest. However, banks required appropriate supporting documents from borrowers evidencing the deterioration of their financial situation.

The Ukrainian parliament also made temporary emergency amendments to the Civil Code of Ukraine to protect borrowers following the introduction of martial law after the Russian invasion on 24 February 2022. These amendments will expire 30 days after the end of martial law. Among the temporary measures introduced were the application of penalty amounts under credit agreements, including inflation-related payments, and the suspension of the statutory default interest rate of 3% per annum. Creditors thus wrote off any contractual penalties and other payments for borrower delays in meeting their obligations.

Currency and loan issues

In 2022, the National Bank of Ukraine prohibited any restructuring involving a change in loan currency from foreign currency to Ukrainian hryvnia (UAH). As a result, borrowers with exposure in foreign currency must deal with heightened exchange-rate risks and hedging requirements for businesses caused by the war. However, this situation is mitigated to a certain extent by much lower interest rates for loans in foreign currency than in the Ukrainian national currency.

Despite a decrease in the key interest rate from 25% at the beginning of 2023 to 13% in June 2024, loans in UAH remain expensive for borrowers. Many companies can only obtain UAH-denominated loans from banks under state support programmes such as the "5-7-9%", through which local companies can borrow up to UAH 150 million (around EUR 3.3 million) for refinancing or investment purposes or up to UAH 5 million (around EUR 109,000) for working capital financing, at preferential interest rates of 9% per annum, adjustable to 7% or 5% per annum, subject to meeting certain conditions. The difference between the market interest rate and the preferential interest rate is funded by the Ukrainian government.

Typical restructuring measures used in the market since February 2022 have included reductions in interest rates and the extension of debt repayment terms. Most banks have agreed to provide refinancing and loan repayment holidays, usually for a period of up to six months. However, debt reductions or cancellations remain rare.

Restructuring challenges and assistance

A significant challenge for Ukrainian restructuring has been the damage, destruction and uncertainty caused by the war. Businesses have needed to document any damage and destruction to their main assets, while estimating future cash flows in highly unstable market conditions. In some cases, businesses have lost all their assets in territories in eastern Ukraine occupied by the Russian army. Consequently, many businesses have arranged a cash sweep with their lenders, whereby they turn over all or a certain percentage of their income to service their debt, after the deduction of any operating costs.

Since 2020, the EBRD, with the support of Arzinger Law Firm, has been providing information to Ukrainian SMEs on legal and regulatory changes affecting their businesses: the Ukraine SME Business Guide.[1] This website has sought to complement the existing services offered by e-governance app Diia Business with general legal guidance, including useful information on restructuring and insolvency. From 2022, it has offered Ukrainian businesses regular newsletters on emergency measures introduced by the government in response to Russia's invasion.

Future reforms

In future, Ukraine's insolvency framework is expected to benefit from further reforms that strengthen restructuring as the country aligns with EU legislation, including the 2019 EU Directive. However, in the short term, a more radical solution may be needed to address the volume of restructuring required for Ukrainian businesses.

The Financial Restructuring Law offers a useful framework for voluntary restructuring. However, its appeal has been primarily for state-owned banks and officials previously concerned with incurring potential liability for restructuring based on contract. Changes would be needed to ensure that it could have more mainstream appeal and possibly some stewardship by the National Bank of Ukraine. The Law on Financial Restructuring is also temporary. Introduced in 2016, it has been extended several times, including most recently in August 2022, and is currently scheduled to expire on 1 January 2028.

Further consideration needs to be given to Ukraine's insolvency and restructuring framework in preparation for peace. The EBRD and other international partners stand ready to help Ukraine with reconstruction efforts, including financing and technical assistance, when the time comes. ■

NB: An overview of Ukrainian insolvency legislation can be found on the EBRD's website: EBRD Assessment (ebrd-restructuring.com).[2]

Footnotes:

1 See: https://businessguide.ebrd.com.ua/

2 See: https://ebrd-restructuring.com/economy-profile/ukraine

Energy infrastructure bankruptcies in Ukraine

Vadym Kizlenko and Yaroslav Mudryi report on the first cases of bankruptcies of energy companies during the present war with Russia

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Amid the ongoing full-scale war, major players have reported multiple bankruptcy cases against electricity suppliers

Russia's ongoing attacks on Ukraine's energy infrastructure have forced the state to take decisive actions to mitigate, prevent, and minimize the negative impacts of these attacks. As a result, Ukraine is actively working to enhance its legislative framework to protect energy enterprises and ensure their stable, uninterrupted operation.

Preventing bankruptcy among energy infrastructure enterprises is a crucial component of this effort. At present, this involves imposing prohibitions or moratoriums on bankruptcies of specific economic entities within the energy sector, or groups of enterprises that meet certain criteria.

Legislative levers

In the realm of bankruptcy law, the Verkhovna Rada of Ukraine has enacted Law No. 3577-IX, titled On Amending Certain Legislative Acts of Ukraine to Restore the Solvency of Certain State Enterprises in the Energy Sector which are in a Critical Condition. It aims to prevent key energy companies from going bankrupt.

With effect from 8 March 2024, the new law changed the final and transitional provisions of the Ukrainian Code of Bankruptcy Procedures in the following ways:

1) Insolvency proceedings against the State Enterprise Eastern Mining and Processing Combine are prohibited until **1 January 2025**.
2) Debtors who operate electricity distribution systems within the field of licensed activities may not be in the process of bankruptcy until **1 January 2026**. This is especially true in those areas where hostilities occurred as of 31 December 2023 and in territories temporarily occupied by the Russian Federation.

The first precedent

In relation to Law 3577-IX, a precedent has been established in case No. 913/567/19 concerning the bankruptcy of Luhansk Energy Union LLC, an energy distribution company located in the temporarily occupied town of Starobilsk.

In 2019, bankruptcy proceedings were initiated by the debtor after it he was unable to repay creditors. The total amount of monetary claims declared by all creditors, including SE Energorynok, Ukrenergo, Ukrinterenergo, Ukrtransgaz, Ukrgasvydobuvannya, Oshchadbank, and Bank Credit Dnipro, reached nearly EUR 258 million as at 30 June 2019.

Despite the fact that Luhansk Energy Union LLC's bankruptcy procedure has been ongoing since 2019, creditors' demands have not yet been considered by the court. With over 1,500 court decisions, resolutions, and orders already in place, this case was approaching a crucial point - the court's consideration and recognition of creditors' claims.

Nevertheless, after the enactment of Law No. 3577-IX, the situation changed drastically. In April 2024, the Eastern Interregional Department of the Ministry of Justice of Ukraine filed a Motion with the Commercial Court of the Luhansk Region to close the proceedings. As such, the Luhansk Energy Union's bankruptcy proceedings are expected to be closed by the court in September 2024.

It will be the first bankruptcy closure for an energy infrastructure enterprise since the

passage of Law No. 3577-IX.

As a result, creditors of Luhansk Energy Union will be compelled to pursue debt recovery through the "general procedure" by filing new (separate) claims or enforcing existing decisions in their favour through the enforcement service bodies. At least until January 2026, recovery of debt from Luhansk Energy Union will be impossible under bankruptcy procedures.

Bankruptcies will persist

In terms of the bankruptcy of energy industry companies, there has not been a "general" moratorium enacted by the legislator. This allows economic actors to initiate bankruptcy procedures against energy companies involved in energy distribution/sale, provided they operate outside the occupied territories or areas of active hostilities as at 31 December 2023.

Amid the ongoing full-scale war, major players – distribution system operators and electricity wholesalers – have reported multiple bankruptcy cases against electricity suppliers. Notable cases include *Powerstock LLC (Case No. 908/2289/23)* and *Ernering LLC (Case No. 910/13723/22)*. In each instance, bankruptcy proceedings were triggered by the inability of local suppliers to settle their debts.

"Pros" and "Cons" of the moratorium

In our opinion, Law No. 3577-IX is flawed as it introduces uncertainty regarding the debtor's obligation to file for bankruptcy, as stipulated by Article 34(6) of the Code of Ukraine on Bankruptcy Procedures. According to this provision, a debtor is required to file a motion with the Commercial Court within one month to initiate bankruptcy proceedings if fulfilling the demands of one or more creditors would make it impossible to fully meet the debtor's obligations to other creditors (threat of insolvency), as well as in other cases specified by the Code.

This means that an energy company, once it exhibits signs of bankruptcy, is obligated to submit its own application for bankruptcy proceedings. Nevertheless, Law No. 3577-IX imposes a moratorium on such filings, creating a contradiction that clearly requires legislative revision.

Moreover, initiating bankruptcy proceedings on its own could benefit the energy company's solvency. Judicial oversight of creditor claims, control of the company's economic activities by an arbitration manager, and the opportunity to implement rehabilitation procedures could collectively improve the company's financial situation. This, in turn, would positively impact not only the enterprise, but also the energy security of the region and the state as a whole. ■

> *Ukraine is actively working to enhance its legislative framework to protect energy enterprises and ensure their stable, uninterrupted operation*

Tale of two courts... Trade creditors take note

David Conaway writes on the critical vendor rodeo in Texas and the McKesson Rite Aid supply contract dispute in New Jersey

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> *In Chapter 11 cases one of the vendor's best shots at getting paid its pre-petition debt is being designated as a "critical vendor"*

Cross-border insolvency proceedings between the US and other countries are increasing. US companies such as McDermott International are filing proceedings outside the US, and non-US companies (SAS) are seeking Chapter 11 protection. Foreign-based creditor interests need to follow the latest trends in US insolvency cases.

In Chapter 11 cases, particularly, one of the vendor's best shots at getting paid its pre-petition debt is being designated as a "critical vendor".

Zachry Holdings

In connection with the Zachry Holdings Chapter 11 case filed in the Southern District of Texas on 21 May 2024, the Bankruptcy Court made disturbing comments regarding treatment of critical vendors. Specifically, the Bankruptcy Court, without prompting, asked the Debtors' counsel to revise the critical vendor order, to not limit the Debtors' remedies, if a critical vendor at any time stopped supplying goods to the Debtors. In addition to disgorgement of the critical vendor payment, the court specifically indicated the vendor should be in contempt of court and responsible for all consequential damages caused to the Debtors.

Debtors' counsel did not request this, and the critical vendor order proposed by the Debtors provided that, if a trade claimant does not maintain or reinstate trade terms at least as favourable as those existing in the twelve months prior to the Chapter 11 during the chapter 11 cases, the Debtors could demand a return of the payments, or their application to post-petition shipments (instead of payment of pre-petition accounts receivable).

The revised critical vendor order, responding to the Bankruptcy Court's "too limited" comments, provided that, in addition to the disgorgement of payments, the Debtors shall have all remedies available at law or in equity with respect to such trade claimant and the payment made to such trade claimant, including contempt of court and liability for all of the Debtors' incidental and consequential damages.

The order arguably eliminates protections afforded to unsecured creditors under contract law including the Uniform Commercial Code regarding the sale of goods, and under the Bankruptcy Code. If a vendor supplies goods or services to a debtor on a purchase order and invoice basis, without a formal sales contract, it has no obligation to continue to supply or provide credit terms (though debtors sometimes assert that an open purchase order constitutes an agreement). If a vendor receives payment in full of its pre-petition debt, fair enough, the appropriate *quid pro quo* is continuing to do business with the debtor, as it was conducting business before the Chapter 11 filing.

Material differences in business dealings

A material difference in business dealings prior to Chapter 11 and in Chapter 11 is that the customer has declared itself insolvent, and, in many Chapter 11 cases, debtors become "administratively insolvent" (insufficient liquidity to pay their ongoing debts as they become due), or the debtor's assets are liquidated through a section 363 sale. Buyers of debtors' assets in section 363 sales never assume unpaid obligations that arose during the Chapter 11 and before closing. Sales to Chapter 11 debtors inherently have more risk. Also, before a Chapter 11 filing, a vendor has legal rights to stop supplying or providing credit terms, if it has reasonable grounds for insecurity regarding the customer's ability to pay, or if it learns that the customer is insolvent.

If a supplier is selling to a customer/debtor under a written sales or supply contract, Bankruptcy Code section 365(e)(1) prohibits the vendor from terminating or modifying the contract:

> *"solely based on a contract term regarding the insolvency or financial condition of the debtor or the commencement of a [Chapter] 11".*

However, Bankruptcy Code section 365(e)(2)(A)(i) further provides an exception to section 365(e)(1) if "applicable law" excuses a party from rendering performance. Both common law regarding contracts and the Uniform Commercial Code regarding the sale of goods are such "applicable law". UCC 2-609 (which codifies contract common law) allows a seller of goods to suspend performance when it has reasonable grounds for insecurity of the customer's ability to pay. UCC 2-702 allows a vendor to revert to cash in

advance credit terms regardless of a contract term requiring credit terms, if a customer is insolvent.

Rite Aid

In the Rite Aid Chapter 11, the debtors attempted to compel McKesson, Rite Aid's largest pharmaceutical supplier, to continue to perform under a supply agreement by shipping goods unabated and extending pre-petition credit terms. McKesson refused to increase its USD 720 million pre-petition exposure during the Chapter 11 case, and the debtors responded with a Motion for a Temporary Restraining Order and Preliminary Injunction to compel McKesson to supply goods and extend pre-petition credit terms regardless of the increased risk to McKesson. The debtors did not acknowledge Bankruptcy Code section 365(e)(2), which supported McKesson's right to suspend performance and not increase its risk by requiring cash in advance payments.

Appropriately McKesson responded with the assertion that under section 365(e)(2) and other applicable law, it was entitled to terminate the supply agreement, suspend shipments of goods and require cash before delivery payment terms. Specifically, McKesson relied upon UCC sections 2-609 and 2-702 as other applicable law which allowed it to terminate or modify the contract with Rite Aid. McKesson argued:

> *"Any attempt by the Debtors to argue that the Bankruptcy Code's prohibition on enforcement of "ipso facto" clauses precludes McKesson from the protections of the California Commercial Code must fail. Section 365(e)(1) only prohibits termination or modification of an executory contract that is based solely on a contractual provision conditioned on insolvency, financial condition, or a bankruptcy filing."*

Within 30 days of Rite Aid's strong-arm litigation, the parties settled. Notably, key terms were:

1. 7-day payment terms on McKesson's invoices;
2. McKesson could suspend shipments and change payment terms if Rite Aid failed to pay; and
3. McKesson was granted super-priority administrative priority payment status for all post-petition shipments.

In other words, McKesson won.

Vendors' rights and trade agreements

The Zachry Holdings court's critical vendor comments and the resulting revised critical vendor order undercuts the rights of vendors, such as asserted by McKesson in Rite Aid's Chapter 11.

It is routine for critical vendor agreements to be set forth in a written "trade agreement". Over the years, on behalf of vendors, we have successfully negotiated into critical vendor trade agreements conditions of ongoing shipments and credit terms that allow the vendor to stop shipping or providing credit terms if during the Chapter 11 the debtors fail to pay invoices, have a lack of working capital or liquidity to operate and pay invoices in the ordinary course of business, or become administratively insolvent. The Zachry Holdings critical vendor order will make this more challenging, as it will be cited in future cases.

We do not believe that Delaware, the Southern District of New York or the District of New Jersey would adopt the rationale stated by the Zachry Holdings court.

Takeaways for trade suppliers

Clearly, for Chapter 11 cases in Texas, there is a heightened risk that the Bankruptcy Court may ignore the rights of suppliers under applicable non-bankruptcy law such as provisions of the Uniform Commercial Code Article 2 regarding the sale of goods. If forced to continue shipping and extending credit terms into a potentially administratively insolvent Chapter 11, a trade supplier's loss may be increased.

In New Jersey Bankruptcy Court, in fighting Rite Aid's motion for a temporary restraining order, McKesson bet that the court would recognize a trade supplier's rights under Article 2 of the Uniform Commercial Code, specifically, the rights to suspend shipping goods and/or revert to cash before delivery payment terms. The parties reached a quick settlement that protected McKesson from undue risk.

While neither the Texas nor the New Jersey Bankruptcy Courts issued opinions on these issues, the outcomes of the Zachry Holdings critical vendor order, and the Rite Aid and McKesson settlement approved by the court, are nevertheless instructive to trade suppliers on protecting their rights in high stakes Chapter 11 cases.

It is essential that suppliers (1) object to critical vendor motions that do not recognize the legal rights of creditors, and (2) in negotiating critical vendor trade agreements, include terms that allow the vendor to suspend performance and revert to cash in advance payment terms if the debtor fails to pay, there is a material adverse change in liquidity, the Chapter 11 case becomes administratively insolvent, or there is a sale of assets that does not assume the vendor's contract or otherwise provide for payment of the vendor's invoice. ■

> ***The Zachry Holdings court's critical vendor comments and the resulting revised critical vendor order undercuts the rights of vendors***

Cross-border transaction avoidance: The Aktsiaselts METUS-EST case and the challenge to Estonian and Swedish courts

Anto Kasak reports on the cross-border insolvency case, a challenge for both Swedish and Estonian courts

ANTO KASAK
Partner, Kasak and Lepikson Law Firm; Lecturer, Tartu University, Estonia

> ***Both insolvency proceedings involve foreign elements, making them cross-border insolvencies under the EIR Recast***

The Estonian Court declared the bankruptcy of Aktsiaselts METUS-EST (register code 10195826) on 5 July 2023. The Swedish court declared the bankruptcy of MetuSweden AB (register code 556843-1281) on 2 August 2023. MetuSweden AB is 100% Aktsiaselts METUS-EST daughter company.

The Swedish bankruptcy trustee of MetuSweden AB was of the opinion that payments made to the Estonian mother company Aktsiaselts METUS-EST before the declaration of the bankruptcy in the total sum of SEK 18,044,311 are subject to transaction avoidance rules according to Swedish bankruptcy law.

The Estonian bankruptcy trustee of Aktsiaselts METUS-EST was of the opinion that, even if these payments are subject to the Swedish transaction avoidance rules, the same payments are not avoidable under Estonian transaction avoidance rules.

Nevertheless, as the Recast European Insolvency Regulation 2015 (EIR Recast) applies, the outcome of the case may be fascinating, albeit an interesting fact that the Estonian and Swedish transaction avoidance rules are very similar, not to say identical, as the law used as the model for Estonian transaction avoidance rules was Swedish law.

Ascertainment of proceedings

In this case, both insolvency proceedings involve foreign elements, making them cross-border insolvencies under the EIR Recast. According to Article 7(1) of the EIR Recast, the *lex fori* applies to both parallel insolvency proceedings. This means that the insolvency proceedings over the Estonian company Aktsiaselts METUS-EST are governed by Estonian law, while the insolvency proceedings in respect of the Swedish company MetuSweden AB are governed by Swedish law. Therefore, we have two main insolvency proceedings, first, the main insolvency proceedings in respect of Aktsiaselts METUS-EST opened under Estonian law and, second, the main insolvency proceedings over MetuSweden AB opened under Swedish law.

Jurisdiction

Article 6 (1) of the EIR Recast provides that: "*the courts of the Member State within the territory of which insolvency proceedings have been opened in accordance with Article 3 shall have jurisdiction for any action which derives directly from the insolvency proceedings and is closely linked with them, such as avoidance actions*." Taking into consideration that Article 6(1) is not optional, all transaction avoidance claims filed by the Swedish company MetuSweden AB are to be filed in the Swedish court under that provision of the EIR Recast.

Applicable law

Article 7(2)(m) stipulates that: "*[the] lex fori shall apply to the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to the general body of creditors*." So, according to the Article 7(2)(m), the transaction avoidance claims filed by the Swedish company MetuSweden AB with the Swedish court under Article 6(1) are to be governed by Swedish law.

However, Article 16 of the EIR Recast also provides that: "*Article 7 (2) m shall not apply where the person who benefited from an act detrimental to all the creditors provides proof that the act is subject to the law of a Member State other than of the State of the opening of proceeding and the law of the Member State*

does not allow any means of challenging that act in the relevant case."

Since payments that were made to the Estonian Company went via an Estonian bank, the *lex causae* might be in this case Estonian law. If the lex causae is Estonian law, payments made by the Swedish daughter company MetuSweden AB to the Estonian mother company Aktsiaselts METUS-EST are not avoidable under Article 16 of the EIR Recast, especially if these payments are not avoidable under Estonian transaction avoidance rules.

Conclusion

In the opinion of the Estonian bankruptcy trustee of Aktsiaselts METUS-EST and in that of the author (as far as familiar with all the facts of this case), the payments made by MetuSweden AB to Aktsiaselts METUS-EST are not subject to Estonian transaction avoidance rules, because these payments were not made to the detriment of the general body of creditors under Estonian law and Supreme Court practice. Since the transaction avoidance rules in Estonia and Sweden are similar, not to say identical, the Estonian Supreme Court practice is very clear about the assumption of transaction avoidance that is to the detriment of the general body of creditors.

Despite this opinion, this is a most interesting case for the Swedish court to solve, because, even if Estonian and Swedish laws are similar, the Supreme Court practice might be different. If the *lex causae* is Estonian law, the Swedish court has to take into account, not only Estonian law, but also Estonian Supreme Court practice.

On the other hand, if the Swedish court grants satisfaction to the claim of MetuSweden AB against Aktsiaselts METUS-EST, it is still a claim in the Estonian main insolvency proceedings involving Aktsiaselts METUS-EST. Article 7(2)(g) of the EIR Recast stipulates that claims against the debtor's insolvency estate and the treatment of claims arising after the opening of insolvency proceedings shall be governed by the *lex fori*.

The interpretation of this article means that the treatment of claims in the Aktsiaselts METUS-EST insolvency proceeding are governed by Estonian law. Therefore, all claims lodged against METUS-EST, including the potential claim from MetuSweden AB, will be governed by Estonian law. According to the Estonian Bankruptcy Act, if MetuSweden AB wins the transaction avoidance case, they will still be ordinary creditors without any preference whatsoever.

Overall, this case will be no doubt provide a challenge for both Swedish and Estonian courts. ■

> ***This is a most interesting case for the Swedish court to solve, because, even if Estonian and Swedish laws are similar, the Supreme Court practice might be different***

Here we bring you short updates from our members including statistics updates and insolvency measures in response to the COVID-19 crisis in their jurisdictions. To contribute to a future edition, please contact: *paulnewson@insol-europe.org*

Recent changes to Italian restructuring legislation

GIORGIO CHERUBINI
Founding Partner, EXP Legal, Italy

The Italian Council of Ministers, in its session of 4 September 2024, after having been examined by the Justice Commissions of both the Chamber of Deputies and of the Senate and with the comments of State Council, has approved a Legislative Decree (*Decreto Correttivo ter*) relating to supplementary and amending provisions of the Business Crisis and Insolvency Code, first introduced in Italy through the Legislative Decree of 12 January 2019 no. 14. The last step before becoming effective is the publication in the Official Gazette which will take place shortly.

The amendment text is made up of 57 articles and modifies many of the provisions introduced to replace the bankruptcy legislation referred to in Royal Decree 267/1942. This means that, in the short space of a few years, we have already been faced with a third corrective decree, this latest text included within the framework of commitments undertaken by the National Recovery and Resilience Plan.

Some material errors have been corrected and regulatory references updated. Among the main innovations that stand out are changes regarding the mechanism of early reporting of company crisis with mitigation or even exclusion of liability for auditors who promptly act by reporting to the relevant administrative body.

There is also news regarding the role of professionals who are required to attend continuous professional training courses.

Main goals of the text:

- **Correcting defects in regulatory coordination that emerged following previous corrective decrees.**
- **Editing errors in the previous decree.**
- **Updating regulatory references.**
- **Providing clarifications on interpretative doubts emerging during the application of the Business Crisis and Insolvency Code.**

> *Among the main innovations that stand out are changes regarding the mechanism of early reporting of company crisis*

Negotiated Settlement

The main focus of the corrective text is called negotiated settlement, which can be defined as a path that the entrepreneur voluntarily decides to undertake, aimed at reaching an agreement with creditors and other interested parties, so as to allow the company to overcome a situation of temporary imbalance and to ensure the business is in continuity.

The negotiated settlement has the aim of leading to a real settlement of the interests of the parties involved in the business crisis and is achieved through bargaining inspired by the principles that characterize agreements in private law, such as good faith, fairness and solidarity between the parties, as well as the balance and contractual reasonableness with which the company's recovery is achieved, with greater satisfaction in the long term.

Thus, Italian law is moving from an assisted, compulsory settlement to a negotiated settlement, which the entrepreneur independently decides to access, even in the event of alerts. In fact, the procedure, is conceived as operating on a voluntary basis and located outside the courtrooms. Only the entrepreneur can spontaneously make use of the process when the recovery of the company is "reasonably achievable", without having the fear of finding himself in the presence of the Public Prosecutor in he event of failure. ■

National Insolvency Statistics Update: Belgium bankruptcies

BART DE MOOR
Strelia Insolvency & Restructuring, Brussels, Belgium, INSOL Europe Country Coordinator

In 2023, the number of bankruptcies recorded in Belgium was 10,243. This represents an increase of 11% compared to 2022 and the third highest result in the last ten years. *By Bart de Moor with the assistance of Marine Callebaut, Sofie Onderbeke and Denajda Bajraktari of Strelia Insolvency & Restructuring team (Brussels, Belgium).*

During the first six months of 2024, Belgium recorded 5,815 bankruptcies. Compared with previous years, the number of bankruptcies until June 2024 represents an increase of 9.4% compared with 2023 and an increase of 17.5% compared to 2019. These 5,815 bankruptcies led to the loss of 17,633 jobs.

In 2024, the number of bankruptcies recorded in Belgium is a record in two sectors of activity: (i) construction industry with 1.342 bankruptcies that represent 18.3% more than in 2023 which was the previous record; (ii) transport and storage where 371 bankruptcies were recorded, 5.7% more than the previous record in 2023.

In 2023 there is a return to a 'normal' number of bankruptcies, similar to the annual statistics prior to the Covid-19 period and energy crisis. The measures taken by the government to deal with the aforementioned crises have resulted in a significant reduction in the number of bankruptcies: in 2020, 7,203 bankruptcies were recorded, representing a reduction of 32.0% compared to 2019, when 10,598 bankruptcies were recorded. An all-time low of 6,533 bankruptcies was recorded in 2021.

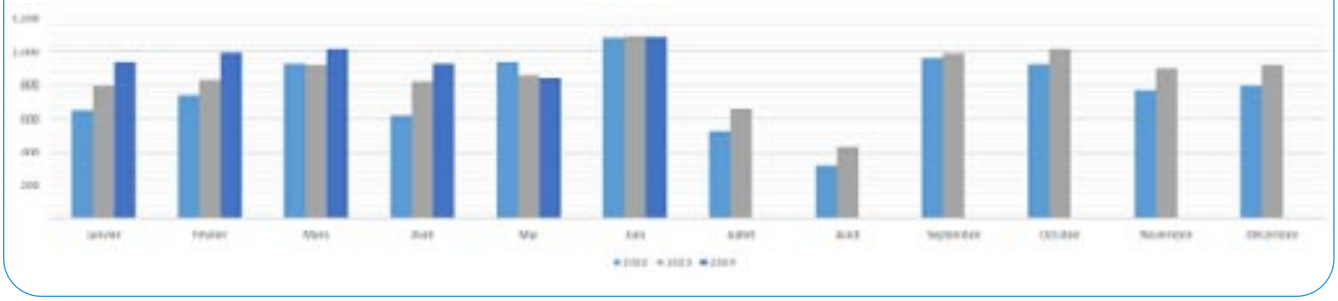
As for the reorganisation proceedings, 838 petitions were filed in 2017 to enterprise courts to request the opening of reorganisation proceedings.

The recent legislative changes in Belgian insolvency law due to the transposition of the European directive 2019/1023 will undoubtedly have an impact on the number of insolvency proceedings in the next years, as they expand the various reorganisation proceedings by adding the possibility to apply for private reorganisation proceedings and to silently prepare a bankruptcy (the so-called 'prepack').

Sources: StatBel, Graydon, Onem, annual statistics from courts and tribunals ■

> ***In 2024, the number of bankruptcies reached a record in construction, transport and storage***

Trend in the monthly number of bankruptcies in Belgium since January 2022



Restructuring and insolvency outlook in 2024

Myriam Mailly writes about the latest information made available to the INSOL Europe members on the INSOL Europe website

MYRIAM MAILLY
INSOL Europe Technical Officer

State of play on the implementation of the EU Directive on Restructuring and Insolvency (2019/1023) in all EU member states

The latest article will be published to focus on legislative amendments being introduced in **Poland**, the latest country to consider implementing the EU Directive on Restructuring and Insolvency. Progress of the text is still available thanks to our dedicated tracker at: *www.insol-europe.org/tracker-eu-directive-on-restructuring-and-insolvency*

At the time of writing, the Polish bill is still at government level and the government plan is to introduce the Directive adaptation in Q4 2024. Once adopted, the insolvency reform will be summarised by our INSOL Europe country coordinator for Poland (Paweł Kuglarz from Tatara & Partners Restructuring & Insolvency Law Firm).

In the meantime, for an overview of the expected changes in Poland, please see the articles from the latest editions of Eurofenix that have been published in the State Reports section of our website written by Tatara & Partners Restructuring & Insolvency Law Firm: "*A second chance…. for the Second Chance Directive in Poland*" (Paweł Kuglarz and Mateusz Kaliński, Eurofenix, 2024 Spring edition) & "*The EU Proposal for Insolvency Law Harmonisation: The Polish perspective*" (Mateusz Kaliński Eurofenix, 2023 Spring edition), available at: *www.insol-europe.org/technical-content/state-reports-poland*

Consequently, 27 reports (26 EU Member States + the UK) are currently available: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic (updated), Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands (updated), Portugal, Romania, Slovakia, Slovenia (updated), Spain, Sweden, and the UK.

> ***The Polish bill is still at government level and the government plan is to introduce the Directive adaptation in Q4 2024***

Individual articles as well as the consolidated table are available at: *www.insol-europe.org/technical-content/insol-europelexispsl-research-on-implementation-of-the-eu-directive-20191023*

Please note that the results of this research are only available to members of INSOL Europe (you must log in to access to the individual articles as well as to the consolidated table).

Updated insolvency laws

Following the implementation of the European Directive on Restructuring and Insolvency in **EU Member States**, a new set of information has been made available for **Belgium**.

I am grateful to Bart De Moor (Strelia, Brussels – INSOL Europe Country Coordinator for Belgium) and the whole Strelia team for their kind assistance.

At the time of writing, updated links to insolvency legislations are therefore available for: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Guernsey, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Norway, Portugal, Romania, Slovakia, Spain, and Sweden.

More updates will follow soon for **Ireland**, **Italy** and **Slovenia**.

Updates for **non-EU Member States** (Switzerland, Turkey and the UK) are also available at: *www.insol-europe.org/technical-content/updated-insolvency-laws*

New data available on national insolvency statistics

Latest **Eurostat** quarterly statistics on declarations of bankruptcies (released on 16 August 2024) are now available as well as the *2024 Global Bankruptcy Report* (Dun & Bradstreet Worldwide Network, 1 July 2024) and the *2023 Global Insolvency Report* (Allianz Trade, 28 February 2024).

Please note that short commentaries published in 2024 in the INSOL Europe E-newsletters or Eurofenix are also available for **Denmark**, **Switzerland** and **Belgium**.

Further updates from **Romania** and **Slovenia** will be published soon. So please do not hesitate to have a regular look at the dedicated technical section of our website at: *www.insol-europe.org/technical-content/national-insolvency-statistics*

European Insolvency Regulation case register

As a member of INSOL Europe, you have free access to the European Insolvency Regulation Case Register, which is a unique internet-based system for collecting and disseminating information on court decisions that consider a significant point relating to the Recast Regulation on Insolvency 848/2015 (or its predecessor, Regulation (EC) 1346/2000 on Insolvency Proceedings).

It relies on a network of National Correspondents working closely with the Case Register's Management Board. All abstracts are published in English and are academically moderated by Professor Reinhard Bork (national cases) and Stefan Ramel (CJEU cases).

At the time of writing, the case abstract service provides abstracts published in English for **873 judgments**, from the Court of Justice of the European Union and first instance and appeal courts of the EU Member States, including **80 abstracts applying the Recast Regulation on Insolvency 2015/848**: 1 from Austria, 2 from the CJEU, 11 from England & Wales, 7 from Estonia, 3 from France, 14 from Germany, 2 from Gibraltar, 5 from Italy, 20 from Lithuania, 2 from Netherlands, 12 from Portugal and 1 from Scotland.

For details of how to use and search the case register, see the 'How to Guide' available at: *www.insol-europe.org/technical-content/european-insolvency-regulation* ■

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

Other Useful Links

Coffee Breaks Series 2021
>www.insol-europe.org/publications/web-series

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

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

EIR Case Register
> http://tinyurl.com/y7tf2zc4

European Insolvency Regulation
> www.insol-europe.org/technical-content/useful-links-to-be-aware-of-before-applying-the-recast-insolvency-regulation-2015848

> www.insol-europe.org/technical-content/outcomes-of-national-insolvency-proceedings-within-the-scope-of-the-eir-recast

LinkedIn
> www.linkedin.com/company/insol-europe/

> www.insol-europe.org/technical-content/state-of-play-of-national-insolvency-data-by-outcomes-currently-available

> www.insol-europe.org/national-texts-dealing-with-the-eir-2015

EU Directive on Restructuring and Insolvency (2019)
> www.insol-europe.org/technical-content/eu-draft-directive

> www.insol-europe.org/technical-content/eu-directive-on-restructuring-and-insolvency

Brexit Publications
> www.insol-europe.org/technical-content/brexit-publications

USBC Chapter 15 Database
> www.insol-europe.org/technical-content/introduction

Academic Forum Publications
> www.insol-europe.org/academic-forum-documents

> www.insol-europe.org/academic-forum-news

Here we regularly review or preview books which we think are relevant and interesting to our readers.

If you would like to suggest a book for a future edition, please contact our book editor **Paul Omar** (khaemwaset@yahoo.co.uk)

The European Insolvency Regulation and Implementing Legislations – A Commentary

Gilles Cuniberti and Antonio Leandro (eds) (1st edition) (2024, Elgar, Cheltenham), xlix + 718pp, £265, ISBN 9781802205206

"The European Insolvency Regulation and Implementing Legislations – A Commentary," edited by Gilles Cuniberti and Antonio Leandro, offers an authoritative and comprehensive analysis of the European Insolvency Regulation (EIR) Recast 2015/848. Published by Edward Elgar Publishing in 2024 as part of the Elgar Commentaries in Private International Law series, the book is authored by a diverse group of established academics, professionals and a judge. This diversity ensures a rich exploration of the EIR and its practical implications.

The introduction provides essential historical context. It effectively explains the need for a Community-wide approach to cross-border insolvencies, addressing issues like choice of law and forum. Cuniberti and Leandro emphasize the necessity for group provisions and more efficient secondary proceeding mechanisms introduced in the recast. The introduction also briefly touches on the implications of the UK's EU withdrawal and the complementary nature of the Brussels I-*bis* Regulation.

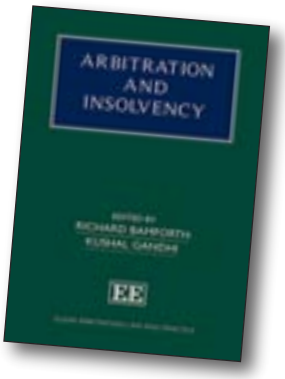
The commentary is organized into seven chapters that mirror the EIR Recast structure, each starting with brief introductions before detailed analyses. Chapter I, dealing with general provisions, is particularly thorough, presenting each article verbatim and dissecting them. For instance, the analysis of Article 1 compares the 2000 and 2015 versions, contextualized with relevant recitals and practical examples from national laws, such as French law. This approach clarifies the regulation's scope, referencing Annex A of the EIR Recast, and includes robust footnotes citing academic papers and EU case law. Article 3, covering the centre of main interest (COMI), delves deeply into the evidence required to establish COMI in a specific jurisdiction, addressing complexities related to group companies and forum shopping practices. Article 7 discusses applicable law, preferring *lex fori concursus* and issues arising at different insolvency stages. The section on third-party rights in rem (Article 8) concludes with critical assessments and suggestions for a new recognition regime for rights in rem and privileges related to assets in other countries.

Chapter II addresses the recognition of insolvency proceedings, explaining the simplified regime for recognizing foreign judgments, including those not issued by judicial bodies. Comprehensive coverage of Articles 20, 24, 25-30, 32, and the public policy exception (Article 33) underscores the need for consistent and restrictive interpretation, supported by extensive case law and literature. Chapter V, on group insolvencies, explores new procedural consolidation mechanisms for group companies.

Compared to other commentaries, this book's accessible language makes it suitable for a wide audience. Detailed footnotes offer a wealth of references for further research, making it a valuable resource for both academics and professionals, within and outside the EU.

Eugenio Vaccari, Senior Lecturer in Law, Royal Holloway, University of London

Arbitration and Insolvency



Richard Bamforth and Kushal Gandhi (eds) (1st edition) (2024, Elgar, Cheltenham), xxxi + 236pp, £145, ISBN 9781800887381

"Arbitration and Insolvency", edited by Richard Bamforth and Kushal Gandhi and published by Edward Elgar Publishing in 2024, is an essential addition to the literature on international arbitration and insolvency law. Part of the Elgar Arbitration Law and Practice series, the book brings together insights from both academics and professionals, focusing primarily on English law, while also referencing other jurisdictions. English law is known for supporting arbitration agreements, even in insolvency cases. The landmark case *Salford Estates v Altomart* [2015] Ch 589 highlighted the courts' reluctance to allow insolvency proceedings to bypass arbitration agreements, maintaining a high threshold for exceptions.

The book addresses the increasingly relevant issue of how arbitration and insolvency can coexist, especially as global business disputes rise. Arbitration offers a faster, more flexible resolution than court litigation, but insolvency proceedings can complicate or disrupt arbitration. This work aims to clarify these complexities and suggest ways to harmonize the two frameworks, benefiting all stakeholders. Key topics include whether insolvency is procedural or substantive for arbitration, the impact of insolvency on arbitration agreements, theories on arbitrability during insolvency, challenges when a party files for insolvency, and the enforceability of arbitral awards.

The introduction explores the fundamental debate on reconciling insolvency and arbitration. Arbitration, while private and chosen by the parties, is rigorous and impartial. The primary issue is the lack of coordination between parallel arbitration and insolvency proceedings, leading to inconsistent outcomes globally. Chapter 2 examines the substantial, procedural, and merits-related impacts of insolvency on arbitration, citing cases like *Vivendi v Elektrim* [2007] EWHC 571 (Comm) to illustrate the lack of coordination between national courts. It suggests practical adaptations in arbitral practice due to insolvency and recommends the International Bar Association Toolkit for guidance.

Chapter 3 discusses creditor equality in insolvency and its impact on arbitration rights, referencing the "conflict of near polar extremes" between the two. It outlines the continued effectiveness of pre-insolvency agreements and the conditions under which court permission is required to proceed with arbitration. Chapter 4 addresses arbitrability, critiquing the expansive interpretation of arbitration clauses in English law and highlighting privacy and confidentiality issues.

Overall, the book argues that arbitration and insolvency can share the goal of avoiding lengthy legal disputes and preserving value in distressed companies. It is highly recommended for insolvency and arbitration professionals, providing valuable insights and practical guidance for navigating the complex intersection of these fields.

Eugenio Vaccari, Senior Lecturer in Law, Royal Holloway, University of London

Reinventing Insolvency Law in Emerging Economies

Aurelio Gurrea-Martinez (1st edition) (2024, CUP, Cambridge), 340pp, £95, ISBN 9781009431712

Aurelio Gurrea-Martínez's "Reinventing Insolvency Law in Emerging Economies" is a pivotal work that examines the crucial role of insolvency law in economic growth. Blending theoretical analysis with empirical research, it explores the multifaceted dimensions of insolvency law and its real-world applications. The book critiques the trend of adopting insolvency frameworks from advanced economies into emerging ones, arguing that emerging economies must consider their unique characteristics for effective policy outcomes. This comprehensive and thought-provoking exploration sets a high standard for scholarship in the field.

Part I establishes the foundations, detailing how insolvency law influences the economic decisions of debtors and creditors, emphasising minimising value destruction and promoting the efficient allocation of resources. Part II then delves into the features and challenges of insolvency law in emerging economies, examining the market and institutional environment and making tailored policy recommendations. The book surveys insolvency and restructuring laws across various regions, discussing workouts and hybrid procedures, types of insolvency proceedings, governance of insolvency procedures, rescue financing, creditor rights, director duties, transaction avoidance, insolvency frameworks for micro- and small firms, claim ranking, debt discharge for individual entrepreneurs, and cross-border insolvency.

Part III proposes a new insolvency framework for emerging economies. It advocates for promoting workouts and hybrid procedures, particularly in jurisdictions with less developed legal and institutional environments. The book also highlights the importance of tailored approaches for directors' duties, simplified insolvency frameworks for micro- and small enterprises, and creditor/debtor-led insolvency proceedings to mitigate inefficiencies. Additionally, it explores allowing companies to choose their insolvency forum in cross-border situations. Part IV closes by calling for global insolvency reforms, stressing the need for legislation tailored to a country's specific economic environment.

The book critically examines the reasons behind the failure of insolvency systems and provides policy recommendations for improvement, with a particular focus on emerging economies. It commendably advocates for each jurisdiction to consider its unique characteristics rather than simply adopting the laws of other countries. Combining theoretical insight with practical relevance, this book is an essential read and a valuable resource for policymakers, researchers, and practitioners.

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2024

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3-6 October	INSOL Europe Annual Congress: *Sorrento, Italy*
27-29 October	ABI & INSOL Europe International Insolvency and Restructuring Symposium: *London, UK*

2025

8-9 October	INSOL Europe Academic Forum Conference: *Vienna, Austria*
9-12 October	INSOL Europe Annual Congress: *Vienna, Austria*

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