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Editors' Column

Joe Bannister
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I write this editorial, sitting in my study, shortly after the funeral of Baroness Thatcher. In the eyes of some, Baroness Thatcher was the UK's greatest peacetime Prime Minister. To others, Baroness Thatcher became a symbol of division and hatred. The one issue on which many people agree is that Margaret Thatcher was brought down at least in part by the strident exposition of the inadequacies of the European Union as she saw them. Yet to view Baroness Thatcher as a Eurosceptic is to misunderstand a politician who once remarked that the "intellectual and material richness of Europe [lay] in its variety".

With The Hague Quadrennial upon us, that comment makes it an appropriate time to revisit the current state of pan-European insolvency law and practice. It is also appropriate to consider proposed reforms to one of its cornerstones, the European Insolvency Regulation.

This quarter's INSOL World therefore offers readers a series of rich pickings from both the European and the international scene. Gabriel Moss, Reinhardt Dammann and Daniel Fritz start the debate with lucid summaries of the proposed reforms to the European Insolvency Regulation and their likely perception in each of United Kingdom, France and Germany. They highlight – and broadly welcome – the improved reporting regime and the restatement of the importance in the establishment of COMI of a tangible presence or actions by a debtor.

Steffen Koch contrasts the practice in German rescues between the insolvency law of 1999 and the new ESUG provisions. These have facilitated the use of debt for equity swaps in the German market. They have also made it easier for creditors to select insolvency administrators of their own. These two reforms address two of the greatest perceived deficiencies in German restructuring practice.

We move via Jasper Berkenbosch's thorough review of The Netherlands' treatment of so-called "letterbox" companies to Charo de los Mozos summary of the establishment in late November 2012 of the Spanish bad bank, Sareb. The description of the inter-relationship in Sareb's ownership structure between a majority of private shareholders, national banks, insurers and public capital makes an interesting contrast to recent government interventions in national banks.

This all comes at a time when the EU is considering the introduction of a recovery and resolution directive for credit institutions. The EU's objective, consistent with that of other governmental authorities, is to ensure that no financial institution is ever again perceived to be "too big to fail", (at least in an orderly manner).

Portugal and Greece are not left out either. Catarina Serra reviews amendments to Portuguese insolvency law intended to facilitate the implementation of out of court rescues. The article includes a review of insolvency professionals' roles in developing creative restructuring proposals. Yiannis Sakks summarises the new legislative provisions with which Greece has enacted the UNCITRAL Model Law. He expresses some optimism at the Greek courts' ability to apply the new provisions in an effective fashion.

We then move via a comparison between Danish restructuring procedures and US Chapter 11 reorganisations to a consideration of the rules for majority voting in scheme creditor meetings in the BVI and other common law jurisdictions. That is followed by Francisco Satiro's summary of the Brazilian Superior Court ruling that advance payments under foreign exchange contracts should fall outside the Brazilian reorganisation procedure. The exclusion of these claims is justified in part by reference to their importance in the financing of Brazilian export transactions. Accounts by Andrew DeNatale of the low jurisdictional threshold for Chapter 11 cases and Nathan Lebioda's summary of the Puda Coal ruling' simplication for directors duties complete this quarter's review.

Although the topics and jurisdictions differ, their common theme is the importance of co-operation if transnational restructuring or insolvency proceedings are to succeed. As preparations for The Hague quadriennial intensify, the words of Margaret Thatcher again come to mind. Her command that "Only if we [spoke] together [could] we expect the world to heed the voice of Europe" apply with equal force to the cross-border restructuring professional and to the implementation of the proposed reforms to the European Insolvency Regulation.

I look forward to seeing you all.

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President's Column

By Gordon Stewart
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Hong Kong

Well I thought, if US President Barack Obama can execute a "Pivot to East Asia", then so can the President of INSOL International. And thus it was at the end of January that the INSOL Executive headed to Hong Kong for a few days.

One of our duties was to attend the first meeting of the G36 outside London or New York. During an excellent evening, kindly hosted by Davis Polk & Wardwell, we were privileged to hear the thoughts and insights of Jake Williams of Standard Chartered Bank, a most experienced restructuring banker. While we are all no doubt fairly secure in our own intellectual abilities, it must still be nice to have a bio – as does Mr. Williams – which reveals that you were once actually a rocket scientist…

We took the opportunity when in Hong Kong to meet with the Hong Kong Institute of Certified Public Accountants to discuss mutual interests and cooperation and Mark Robinson, our INSOL Treasurer, and I presented to a meeting of the HKICPA on *Current challenges for insolvency practitioners across the world (including a comparative look at liquidators' remuneration)*. Admittedly that is perhaps not the snappiest title for a talk but, if by nothing else, the audience seemed suitably gripped by our relaying news of the reported claim of German insolvency administrators in the Lehman case for fees of potentially €800,000,000. The audience's astonishment was only slightly tempered by the qualification that, ultimately, the German court will rule on the quantum.

The INSOL Lender's Group has always had strong support from Hong Kong and so we also took the opportunity to meet with some leading bankers active in the restructuring space to see what scope there was for further cooperation, training and sharing of best practice.

The written word

The last three months have also been a time for writing. We have just finished editing the fourth edition of *Directors in The Twilight Zone* which will be published at the time of The Hague Quadrennial Congress and mailed to members. In addition, having delivered a keynote address to a conference in Dubai last summer, I was asked to convert this into a chapter for a book of the conference to be published by the Dubai Economic Council. Now E.M. Forster is widely reported to have asked the question: "How do I know what I think until I hear what I have to say?". But it is always interesting nailing down precise authority to back up the views one has happily expressed orally in a speech!

Out of a clear blue sky…

Now we recently had an asteroid cross the world's skies on its not-quite collision course with Earth. As I understand the science and the statistics, it seems pretty likely that at some point the Earth is going to find itself directly in the path of some humungous asteroid which is not going to be ideal. Unless we can devise some form of science fiction solution involving nudging the asteroid on to a different course, we are going to be toast. And it seems that we don't really know precisely when one of these chunks of rock – variously described as 'several football pitches long' or, its big brother, 'the size of Wales' – is just going to appear out of the asteroid belt and head towards us and we may not have time to develop or complete the technology and get the vehicle up in space to do whatever nudging is necessary. And perhaps neither Tom Cruise nor Matt Damon will be immediately available to pilot the rocket… Of course we are all relatively sanguine about this because the statistics also suggest that a fatal hit only becomes a likelihood when one measures timescales in aeons. Mind you, try telling that to the dinosaurs…[1]

And also out of a pretty clear blue sky came the problems of Cyprus. Europe's economic woes are far from over.

Getting sucked in

The pressure on the retail market in the UK is such that shops are even beginning to develop some understanding of customer service. Not of course service in the sense it is delivered in North America or the Far East, but at least some sign that the customer is more to be cherished than loathed. My local card shop is part of a chain that has just been through an insolvency and it has had a major refurb, both of its interior and in the attitude of its staff. An only slightly sceptical shop assistant said to me the other day "And thank you for shopping at [X] Cards" when handing me my purchase and change. As she also said it to the person in front of me, I took this not to be a spontaneous reaction to my personal charisma.

Forsaking the joys of the Allen & Overy coffee machine, I have found myself after lunch going to the nearest sandwich and coffee shop to get my afternoon fix. That it is also the cheapest of the local coffee shops is a happy coincidence. However after I had been going there for a few days, I found myself being recognised by one of the – admittedly very efficient – assistants behind the counter so much so that one Friday she waved away my offer to pay for the coffee and I was given an informal loyalty bonus of a free black Americano. Oh no I thought, I am being sucked in. I only wanted an occasional afternoon coffee, not a relationship…

But an even better example of being sucked in I guess was my agreement to be the prize in an auction our department's business development (BD) group recently held in support of our firm's chosen charity for the year, *Afrikids*. Well it was not technically *me* who was being auctioned, more that I agreed to do a room swap for a day with the highest bidder. I have to confess, dear reader, that I was sufficiently worried about the possibility of not eliciting a bid (despite my cutting edge CD collection plus what I insist on calling the 'hi-fi' in my room) that I even put in a silent bid myself through the auctioneer. However, I needn't have worried, as my electronic whiteboard and latest Mumford & Sons CD seemed to do the trick and the room swap went for a decent price. But then of course having talked the talk I had to walk the walk, the chosen day duly arrived and I found myself sharing a room sitting on a low-slung chair with prominent back support that I was singularly unable to reconfigure. The number of junior associates from my department who found it necessary to come and discuss a point of law or admin with me that day seemed statistically unlikely and from the smirk on their

[1] If this all sounds too doom-laden, don't get me started on how part of Yellowstone Park is a super-volcano, said by some to be hundreds of years overdue for an eruption.

faces I suspect these were not essential visits. But to be fair, after the robust negotiation over the thermostat with my new room-mate at the start of the day - to ensure that the temperature was nearer ice box than sauna - the day passed smoothly and I was well looked after by my new surrounding colleagues. Although apparently the Australian in the adjoining room had been prevailed upon to exercise a certain self-control on the strong language front. And I was finally sucked in further by being invited to drinks by the whole BD team at the end of the day which seemed to involve me buying everyone lashings of chilled white wine and chips[2] and a good time was had by all.

Reflections

By the time you read this my Presidency will just be concluding, a hugely interesting and enjoyable 27 months. What are my takeaways from the Presidency, what are the issues of the day? A few thoughts follow.

- There is huge enthusiasm across the world for change and improvement in insolvency and restructuring laws and systems. This is particularly noticeable in the Middle East and Africa. There is a hard edge to this. Governments are waking up to the fact that the laws we operate within and the work that insolvency professionals do are important. Good laws together with competent, experienced advisers lead to value preservation, better deployment of the state's capital and avoidance of unnecessary unemployment.

- We should continue our excellent work in opening new markets by publicising best practice and inviting developing economies and markets to take their pick of best in class from across the world as they embark on reform. But no system should rest on its laurels. Full credit to the United States for embarking on a major review of their bankruptcy code in a continuing effort to improve. INSOL is proud to sit on one of the ABI committees looking at international aspects. Similarly the EU has just completed its review of the European Insolvency Regulation and made some useful proposals for reform.

- Business continues to become ever more cross-border and the networking opportunities afforded by INSOL International are huge. Our Fellowship course has really taken hold over the last few years but one particularly interesting aspect – besides the involvement of the next generation in our work perhaps earlier than would otherwise be the case – is the extent to which the Fellows from each particular year network and refer cases to each other.

- And finally there is the 'problem of the Courts'. Some countries and jurisdictions have over the years invested their nations' intellectual capital heavily in their judicial system and their laws and they are attractive to 'consumers' (stakeholders across the world) as a result. But what does a jurisdiction do when starting to build a credible court system from scratch? This is one of the big problems out there in many, many parts of the world. You can have the best laws, the best culture and the best practitioners but if there are no courts to enforce the law reliably, promptly and with integrity then you are almost back at square one. People *are* starting to find workarounds. In Montenegro, the World Bank has helped that country build on its existing expertise in ADR as a way forward. Dubai in its financial centre – the DIFC – has effectively outsourced the courts by bringing in retired judges from other common law jurisdictions to sit in specialist courts. Could other jurisdictions create specialist tribunals manned by either experienced or retired professionals from that jurisdiction, or from elsewhere, as a way to get things moving in the right direction? Watch this space.

It has been a huge honour to be your President for the last two years and more. I am very proud of our profession and what we do: keep up the good work!

[2] That would be French (or Freedom) fries for readers from the US.

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INSOL 2013

Ninth World INSOL International Quadrennial Congress
19th-22nd May 2013, The Hague, The Netherlands

This edition of INSOL World is being distributed at the INSOL 2013. Attendance at the Congress will be 600+ delegates from around the world. We will be delighted to see everyone in The Hague for our Ninth International Quadrennial Congress. Not only we will have many eminent practitioners and experts in their field of knowledge to engage the delegates in debate, but we are also delighted to introduce the case study film *A tale of two businesses one good.... one bad....* kindly sponsored by:

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We will also be introducing the INSOL Congress App for the first time, which we hope the delegates will find a useful tool for accessing the Congress materials and networking.

The Congress would not be what it is without the hard work of the Main Organising Committee and Technical Committee who are listed below and our thanks go to them for volunteering to help. We hope they have enjoyed the experience.

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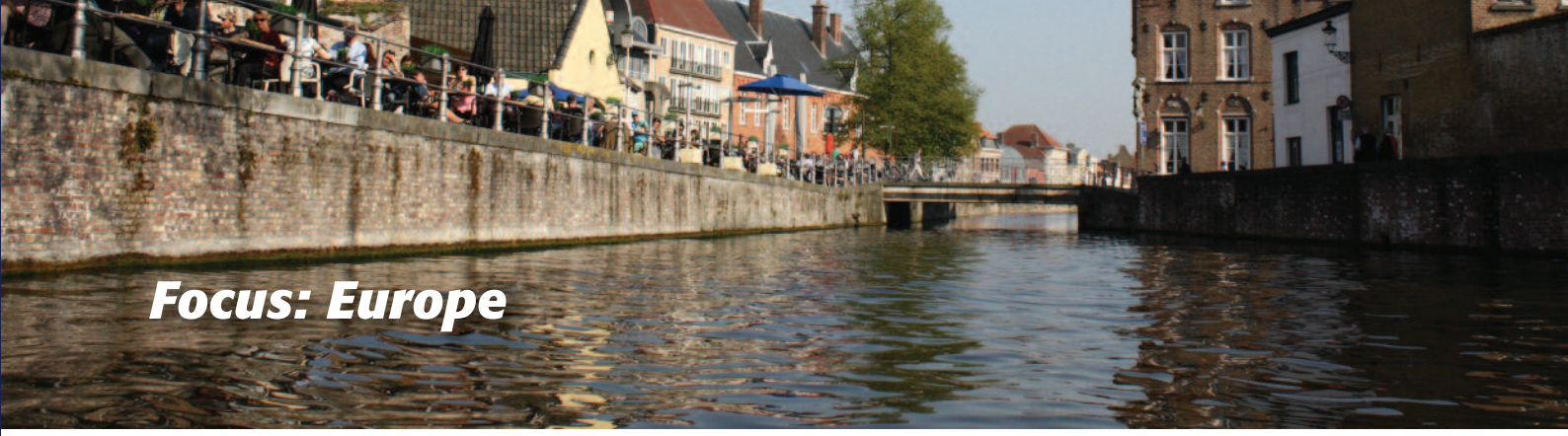

Focus: Europe

The 2012 "ESUG"- Reform of German Insolvency Law

By Dr. Steffen Koch
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On 1st of March 2012 a major reform of the German insolvency law became effective. Shortly after passing this law, the so called ESUG (act to further facilitate the restructuring of companies) reform was hailed by German politicians as a real milestone in the history of German insolvency law.

One year of "ESUG in practice" makes a first evaluation of the new law possible and allows an initial review of the changes, and especially of the use of the new tools by the companies in trouble.

I. ESUG – new opportunities of "restructuring by insolvency"

Even with the introduction of the new insolvency law (InsO) in 1999 the German legislature accomplished the proceeding of the insolvency plan like the US Chapter 11-proceeding and the possibility of self-administration like the US debtor-in-possession rule.

Until then the standard procedure used through German insolvency law was the application of the debtor's assets for the for the pro rata payment of all the company's creditors. This was regularly undertaken either by an asset sale to a New Co - if the business was saved - or via an auction procedure transferring every single asset to different buyers if the business was liquidated. In both cases the insolvent legal entity was dissolved at the end of the insolvency proceedings.

Alternatively an insolvency plan should give creditors means to restructure the company itself. That should afford insolvent companies a new start with the same legal entity emerging following the completion of the insolvency plan. The original intention of the legislature was: to enable the use of the insolvency plan and self-administration either individually or together in any given case.

Restructuring practice over the last 12 years has shown that both tools were in fact not always deployed to maximum advantage. Only in 1% of all insolvency cases was either the possibility of self-administration or the possibility of an insolvency plan employed in the restructuring of an insolvent company. In other words, although the legislative reforms of 1999 created new means of restructuring an insolvent company via either or both an insolvency plan or a self-administration there was little evidence of these procedures being applied in conjunction with each other.

With the ESUG-reform in 2012, the German legislature intended to improve the utility of the insolvency plan and of self-administrations as tools to achieve a restructuring through an insolvency. The changes to the various parts of the German insolvency law are intended to facilitate the conclusion of restructurings through insolvency proceedings and thus to encourage companies to file for insolvency earlier than might otherwise have been the case.

In particular, the influence of creditors on the selection of the (preliminary) administrator should be strengthened as a result of the new law, the use of insolvency plans should become more attractive and the accessibility of the tool of self-administration should be improved.

The main changes effected by the reform of the ESUG can be summarized as follows:

1. Preliminary creditors committee

A key priority for the German legislature was to strengthen the influence of creditors within any insolvency proceedings. Hence a preliminary creditors committee was created to take office immediately on - or even before - any insolvency filing was made.

According to the new § 22a Abs. 1 InsO a preliminary creditors committee should be set up as soon as any two of the following three criteria are met:

- The annual average number of employees (annual – average) is at least 50;
- The balance sheet total is at least €4,840,000.00;
- The company's turnover in the last 12 months is at least €9,680,000.00.

If any two of these three criteria are not met, it is still possible, under § 22a Abs. 2 InsO to set up a preliminary creditors committee, if the debtor requests it.

Once appointed by the court, the creditors committee, consisting of representatives of the different types of creditors (unsecured, secured, employees) may propose a (preliminary) administrator. This proposal will be binding for the court if the vote has been taken unanimously (§ 56a InsO). Well organized creditors can now choose their

(preliminary) administrator in advance if they are able and (willing!) to include all major groups of creditors including employees in their decision-making process!

2. Changes in the insolvency plan

The German legislature has also made a number of changes within the procedural rules of the insolvency plan. The most significant changes relate to debt-to equity-swaps and change-of-control-articles.

Even before the ESUG-reform creditors were able to undertake debt-to equity-swaps so as to participate directly in the successful rehabilitation success of an insolvent company by converting their debt into shares. Doing so required shareholder approval. Since the passing of the new § 225a InsO shareholder approval is no longer necessary.

In the case of a debt-equity-swap, change-of-control clauses – set out in the company's memorandum will be void under to § 225 Abs. 4 InsO.

Consequently, one of the major effects of the ESUG-reform is the possibility of completing a sustainable lasting restructuring through the use of debt-to equity-swaps without shareholder interference.

3. Self-administration

The ESUG regime also made fundamental alterations to a self-administration process.

First, the influence of creditors on the process was strengthened. Under the new law the preliminary creditors committee – if formed - has to be consulted by the insolvency court once a petition for insolvency proceedings has been filed and before any decision is taken by the insolvency court (§270 Abs. 3 InsO).

Since the enactment of ESUG the debtor has also gained more influence on the self-administration process. Under § 270a Abs. 1 InsO the insolvency court – upon filing - should appoint a preliminary trustee as against a preliminary administrator for the period between the filing and the opening of insolvency proceedings. The reason for this is to allow the debtor to keep control over the companies business and assets with only the involvement of a (preliminary) trustee who will merely check the actions of the company without taking decisions himself.

Hence self-administration is expected to become the normal route companies in crisis if they file for insolvency proceedings. This will only happen if the company receives professional advice in advance even if it is only a small or medium sized company. Presently many small and medium sized companies do not receive professional advice. The market is likely to close that gap in the next years as the market for pre-insolvency advice is estimated to grow rapidly.

The debtor also has an opportunity to withdraw a filing, if it does not lack liquidity when the filing takes place illiquid and the insolvency court determines that the debtor has failed to meet the preconditions for a self administration. The debtor remains in control of the proceedings at this time.

4. Insolvency protection proceedings

The major alteration and most popular change made by the ESUG is the introduction of the so-called *"Schutzschirmverfahren"* (insolvency protection proceedings).

If a debtor, due only to prospective - as against actual - illiquidity – files for insolvency proceedings and combines this with a request for self-administration, insolvency protection proceedings will also be possible. In such circumstances, the debtor will need a special certificate issued by an experienced tax consultant, a certified accountant or by a lawyer or a similarly qualified person). This certificate must confirm the absence of default and indicate that the proceedings have a reasonable prospect of success.

Insolvency protection proceedings give the debtor the chance within three months independently to create an insolvency plan. The preliminary trustee will be exclusively chosen by the debtor. The insolvency court may deviate only from the debtors proposal, if the proposed appointee is obviously not qualified to take office. After three months or upon receipt of the insolvency plan, the insolvency court will initiate conventional insolvency proceedings in which the insolvency plan must be adopted or approved in a creditors' meeting held at the insolvency court.

The purpose of this reform of German insolvency law is again to keep the company and its directors in the drivers seat once a filing for insolvency proceedings becomes necessary. The legislature is again seeking to motivate more companies to file for insolvency proceedings earlier instead of waiting until it is very often too late…

II. First experiences with the new law

Almost one year after its enactment, first experiences with the ESUG show a mixed picture. On the one hand there are weaknesses in the insolvency field, especially in self-administration and insolvency protection proceedings. Conversely, numerous restructurings of bigger companies have been undertaken very quickly and successfully by using the new law and the new tools it gives to the professionals.

A statistical evaluation is difficult, because the new law does not allow the publication of the number of self-administration applications or insolvency protection applications. The result is that only successful proceedings (of self-administration and/or of insolvency protection) receive publicity. In other words, there is no statistical data on the period before opening the insolvency proceedings.

Some private institutions have undertaken surveys. For example, *"Deutsches Institut für angewandtes Insolvenz-recht"* DIAI has undertaken research that enables some preliminary analysis to be undertaken of the pre insolvency period.

These statistics show more active use of new law. By way of comparison: In a 12 month period under the old law, only 11 self filing applications were filed. In the same time period for the new law more than 170 on self-administration or insolvency protection applications were made.

The practice also has shown that the success of the initiation of self-administration or of insolvency protection proceedings actually results from the collaboration between all key participants (debtor, preliminary board of creditors, preliminary trustee, insolvency court). The new law does not give proper guidance as to how this

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participation should take place. Hence there is no standard procedure. It appears to the writer essential for the success of the new proceedings that that experienced professionals lead the parties involved (debtor/creditors) and communicate effectively with the courts so as to involve them in the process and allow the judges to be part of any solution.

A review of insolvency courts, which have already some experience of the new law and with proceedings for self-administration and insolvency protection proceedings (§§ 270a, 270b InsO), shows a growing degree of collaboration between them. Nevertheless, it is still surprising that only 50% of applicants for insolvency protection proceedings and only 70% of applicants for self-administration contacted the insolvency courts beforehand.

Another survey undertaken by the insolvency court of Berlin-Charlottenburg from August 2012 shows that about 90% of applications (made under the new law) for self-administration or for insolvency protection proceedings are not correctly made. The poor quality of debtor applications is a serious issue. There is a survey by "Roland Berger Strategy Consultants", which shows that the main reason for the rejection of applications is the unprofessional work of unqualified advisors. In particular, the certificate issued by an experienced tax consultant or by a certified accountant or by a lawyer in order to confirm the absence of default and that there is a reasonable prospect of a successful restructuring often fails to meet the prescribed requirements.

Nevertheless particularly the more complex and substantial proceedings for self-administration or insolvency protection illustrate that the new law can provide a real opportunity for the rapid and efficient restructuring of an indebted company. For example: the "Dura Tufting Holding" and the "Nextira One GmbH" were each successfully restructured within approximately 10 months under the new self-administration and insolvency procedures.

III. Conclusion

The first year of ESUG's operation demonstrates that the legislature has created a strong new law with new tools and far better prospects of achieving a successful restructuring than was possible under the old law.

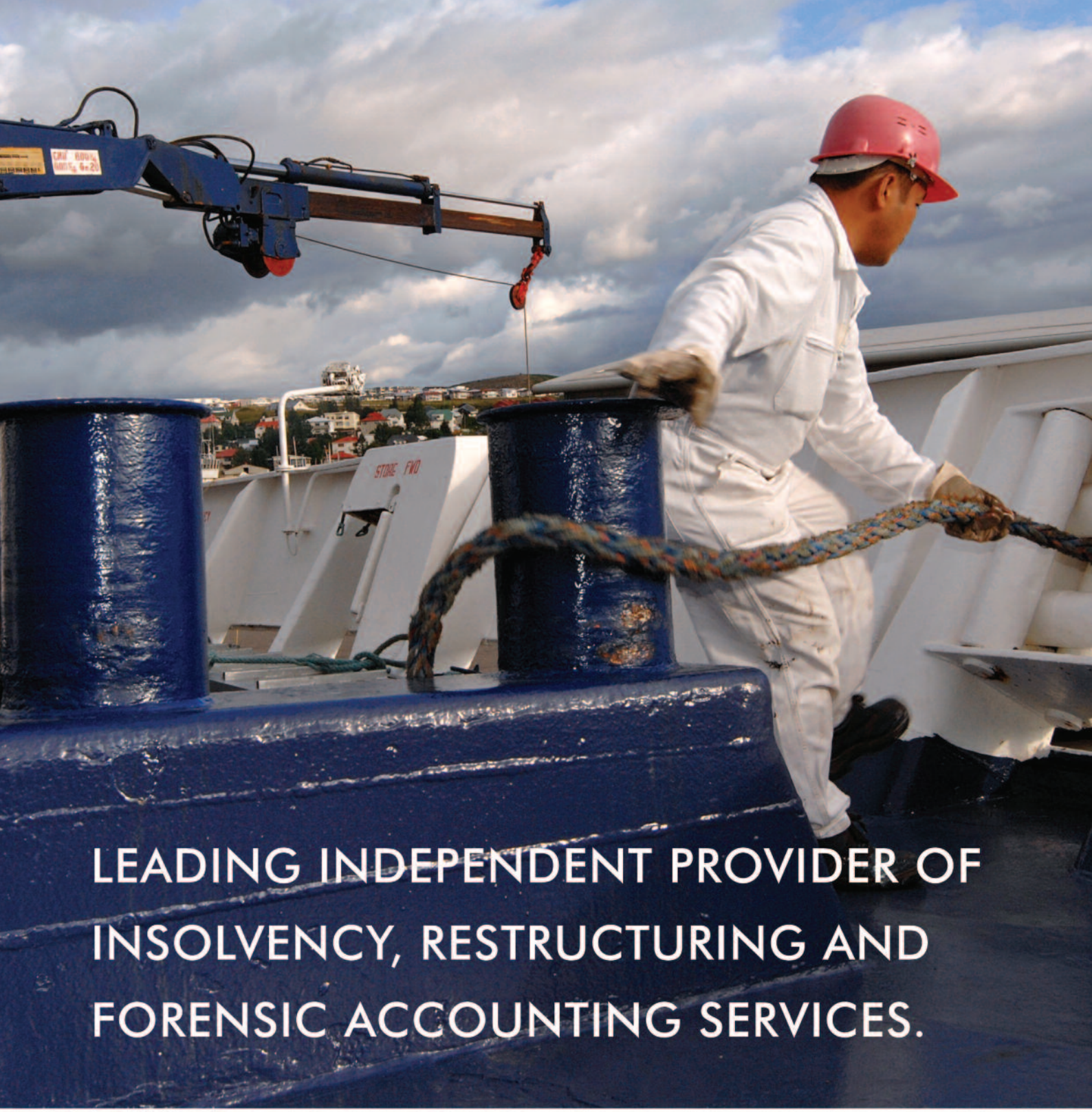
The (currently) still occurring problems seem not to be problems of the design of the law. But the first 12 months with ESUG manifest a lack of quality of advice to small and medium sized companies. But it is likely that the market will react on that, as there is a lot of fees to be earned in this sector.

But first experiences especially with larger proceedings show, if the debtor hires a professional advisor with expert knowledge in insolvency-related restructuring and with real expertise in German insolvency law, the new law – self-administration and insolvency protection proceedings – is an effective toolbox to restructure the company rapidly by insolvency.

Therefore it is absolutely necessary to hire a professional advisor at an early stage in order to evaluate all options. A great benefit can also be realized, if the advisor is capable to communicate with the creditors (advisors, committee) and knows the insolvency court, because that simplifies the necessary communication and transparent course of action. Consequently the first contact for a debtor should be an experienced insolvency administrator or an experienced advisor both with a checkable track record.

Conclusion

German ESUG is an exciting new tool in the hands of insolvency professionals (insolvency administrators and experienced advisors) to restructure by insolvency that will gain more and more importance especially for medium- and large sized companies in trouble.



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Reforming the EC Regulation on Insolvency Proceedings 1346/2000 – UK Perspective

By Gabriel Moss QC
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London, UK

Introduction

The EC Regulation on Insolvency Proceedings 1346/2000 lays down rules of jurisdiction, choice of law, recognition and enforcement for EU member States except Denmark. The European Commission presented a report and proposals for change on 12 December 2012. Among other sources of advice used by the EC, there was a private group of experts including the author.

The Commission considered that the Regulation had generally worked well but had five main areas which required change.

1. Scope

The text of the Regulation was based on a failed Convention and was long out of date by 2000. It reflected an insolvency world focussed on liquidation and did not cover rescue and restructuring proceedings or debtor in possession' (DIP) proceedings.

In practice, these limitations were sometimes ignored and both rescue and DIP proceedings can be found listed in the authoritative list of proceedings covered by the Regulation in Annex A. The Commission's proposal is to catch up with the *de facto* position and expand the scope of the Regulation to include pre-insolvency procedures and DIP procedures.

The new scope would cover "solvent" or pre-insolvency schemes of arrangement used in the UK to help restructure the finances of foreign companies whose financial documents are governed by English law. However, the UK is unlikely to ask for schemes to be added to Annex A.

2. Forum Shopping

Critics have become very excited about the relatively small number of "forum-shopping" cases, where a debtor has tried to use the Regulation to move jurisdiction to a forum of choice, often the UK, but in some cases France. This is done by moving the criterion for jurisdiction to open main proceedings, the "Centre of Main Interests" (COMI). In practice, the corporate moves of COMI have been seen to be for the benefit of creditors and the moves of COMI undertaken by individuals have been fakes or at least not within the "ascertainability" criteria laid down by the European Court of Justice. As Advocate - General Colomer in the *Seagon* case[1] points out, Recital (4) of the Regulation only condemns abusive forum shopping.

The Commission proposes some useful changes which ought to restrict the scope for bad forum shopping.

One proposal is to require a court, when considering the opening of a proceeding, to examine of its own motion the grounds on which jurisdiction to open the proceeding is based. For cases of proceedings opened without a court decision, the Commission proposes that the insolvency practitioner, if any is appointed, should have an obligation to examine the question of jurisdiction.

Importantly, the Commission suggests that any creditor or interested party from another Member State should be able to challenge the decision opening the proceedings[2]. This is already the position in England under the case law. However in various Continental jurisdictions it is either impossible or difficult for creditors to challenge the opening of proceedings and the proposed change would be a useful one. However, it should extend to internal as well as foreign creditors, as is the case in England.

There is already in place case law in non-insolvency areas of EU law, which suggest that there is a general EU doctrine of abuse and this may be available in future cases to counteract bad but successful forum shopping moves. Its application to insolvency proceedings was left open in the *O'Donnell* case.[3]

3. Secondary Proceedings

The Commission drew attention to the fact that the opening of secondary proceedings can disrupt the efficient working of main proceedings, for example where there is an attempted rescue or beneficial sale.

In England, we have developed a practical remedy whereby the insolvency practitioner running a UK main proceeding promises local creditors in other member States where there is an "establishment" that if they do not request the opening of secondary proceedings, then, if no secondary proceedings are opened, local priorities would be respected in relation to local assets which would have been subject to the secondary proceeding.[4] This was done in the *Collins* and *Aikman*[5] and *Nortel*[6] cases. However, this practical solution is apparently not possible in all Member States.The Commission proposals suggest adding to the Regulation a power to give such an undertaking.

The Commission also proposes the abolition of the requirement that secondary proceedings have to be winding up proceedings. The proposed change would enable there to be parallel main and secondary proceedings, each of the rescue or reconstruction or beneficial sale as a going concern type. This would follow the practice we already have in England of having, for example, parallel U.S. Chapter 11 and English administration proceedings combined with an English CVA or scheme of arrangement.

4. Registration

The Commission recognises the problem caused by a lack of universal national registers of insolvency proceedings and the lack of a central EU register.

The Commission proposal would provide for mandatory national registers and eventually a central EU register, linking all the national registers.

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1 *Seagon v Deko Marty Belgium Marty Belgium NV* [2009] B.C.C. 347 (Case C-339/07)

2 Proposed new Article 3b.

3 *Brian O'Donnell v Bank of Ireland* [2012] EWHC 3749.

4 Sometimes referred to as a "synthetic secondary".

5 Re *Collins & Aikman Europe SA* [2006] B.C.C. 861.

6 Re *Nortel Networks SA* [2009] B.C.C. 343.In *Nortel,* this technique was reinforced by the English judge sending out a letter of request to courts where a potential secondary proceeding was possible, asking them to cause the main proceedings liquidators to be given notice of any request to open a secondary proceeding, so that they could oppose the opening of secondaries, if such opposition was in the interests of the creditors.

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5. Groups

Suggestions have been put forward in the past, by INSOL Europe as well as others, for the introduction of group proceedings. Such suggestions have proved controversial, and have not been taken up by the Commission.

The Commission's approach in its proposals is to extend the co-operation and communication between courts and insolvency practitioners in relation to different group companies in a way parallel to the co-operation and communication which should be taking place between main and secondary proceedings. This proposal would maintain the strict entity approach currently applicable to proceedings under the Regulation.

Centre of Main Interests

The Commission also proposes enshrining in legislation the approach to COMI laid down in the European Court of Justice cases of *Eurofood*[7] and *Interedil*[8]. I These cases hold that to rebut the presumption based on the place of registered office, one needs to show facts which are objective and ascertainable and show that the 'head office functions'[9] were carried out in another Member State.

7 *Eurofood IFSC Ltd* [2006] B.C.C. 397 (Case C-341/04)

8 *Interedilsrl v FallimentoSrl* and *Intesa*(Case 396/09)

9 This is a phrase used in national cases and in literature. The same idea is sometimes described as "command and control". The ECJ refers to "…attaching greater importance to the place of the company's central administration…" and to "…the company's actual centre of management and supervision.."

French Perspective on the Modernization of the European Regulation n° 1346/2000 on Insolvency Proceedings

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On 12 December 2012, the European Commission published its proposal for a regulation amending the Council Regulation (EC) n°1346/2000. An essential first step has thus been made and will hopefully lead to the adoption of the final bill by the European Parliament and Council.

What was the approach of the Commission? What are the major innovations?

Since it came into force in 2002, the interpretation of the regulation has led to a significant amount of case law from the European Court of Justice and individual Member States courts.

The Commission decided not to overhaul the content of the regulation. Instead, the proposed amendments allow pragmatic solutions to be reached as through case law and where appropriate through innovation by practitioners.

1. The concept of COMI: transposition of case law

The concept of "Centre of Main Interests" ("COMI") as defined in article 3 has led to a significant amount of case law.

The proposal transposes the rather strict ECJ interpretation of the concept of COMI. The solutions reached in the *Eurofood* and *Interedil* cases are restated in a new recital 13a and recital 13 itself is embedded in the new article 3. Thus, the new definition sanctions the *"concordant indicia"* approach, as initiated by the French commercial court of Nanterre in the *EMTEC* case.

The proposal also approves the *Eurotunnel* case, heard by the *Cour de Cassation* by granting foreign creditors the right to challenge the decision opening main proceedings (article 3b).

The proposal also transposes the principle of *"vis attractive concursus"* as established in the ECJ *Deko Marty* case. Actions that derive directly from the insolvency proceedings and which are closely linked to those proceedings fall within the scope of the regulation n°1346/2000 (article 3a). If such proceedings are related to an action in civil or commercial matters, the proposal will allow the liquidator the choice of bringing both actions either in the court opening the insolvency proceedings or in the courts of the Member State within the territory in which the defendant is domiciled. The proposal thus departs from the *Deko Marty* case law that prescribed exclusivity of jurisdiction in such cases.

2. The acknowledgement of the new culture of rescue in Europe

Article 1.1 defines the scope of the regulation narrowly, excluding debtor-in-possession type proceedings.

The ECJ *Eurofood* case has however widened this to include pre-insolvency proceedings. Debtor-in-possession proceedings such as the French *"sauvegarde"* were also included in Annex A.

The new article 1.1 sanctions this evolution by clearly including interim, collective and debtor-in-possession proceedings in the scope of the regulation.

Thus, the proposal approves the case law of the French commercial court of Nanterre in the *Alkor* case that had recognised the opening of a German interim proceeding as a main proceeding under the regulation, giving the provisional liquidator the power to request

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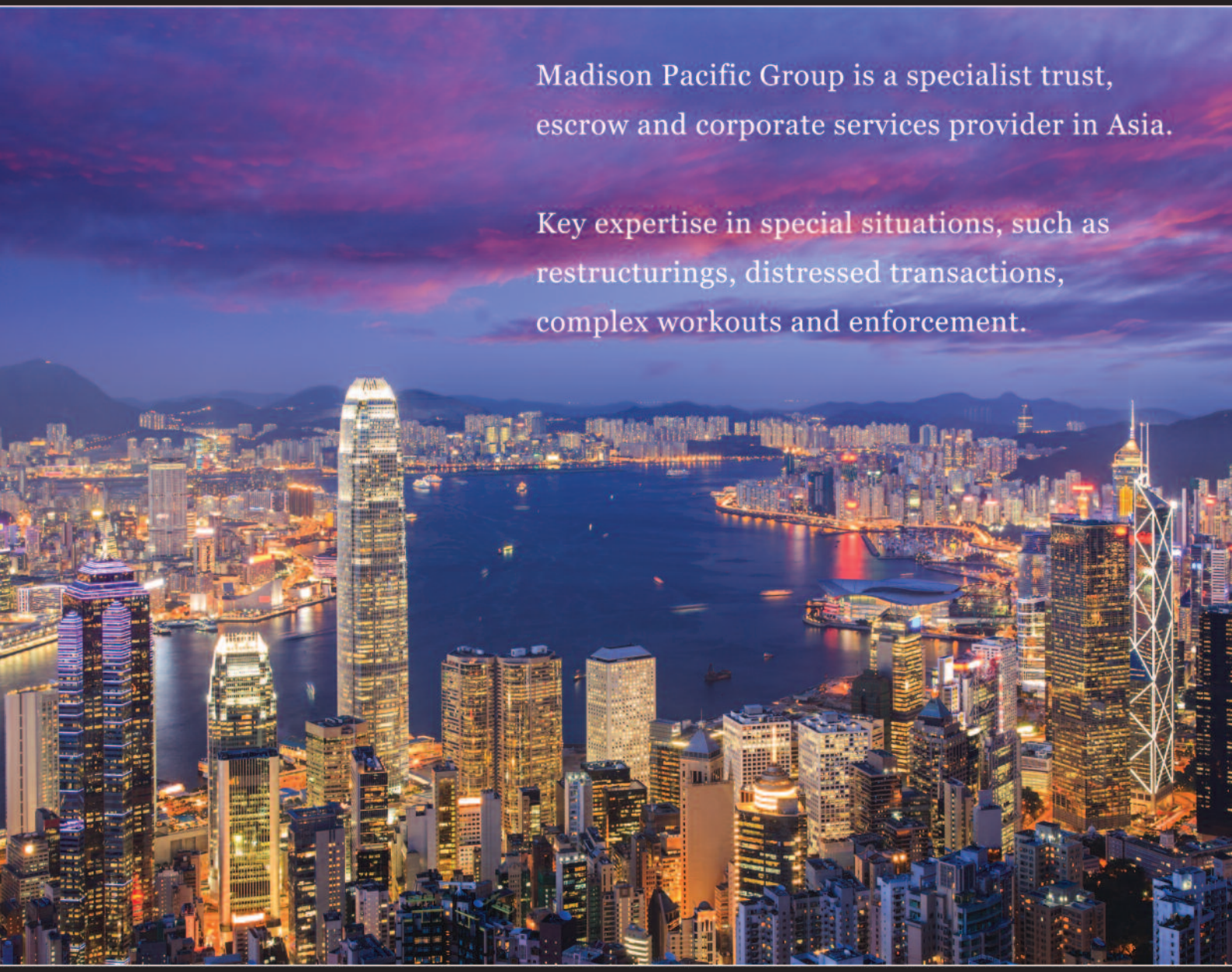

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the opening of secondary proceedings.

However, non-collective and confidential proceedings such as the French *"mandat ad hoc"* and *"conciliation"* procedures remain outside the scope of the regulation.

Finally, the proposal confirms the pre-eminence of Annex A, setting out the proceedings to which the Regulation applies thus confirming the recent ECJ *Christianapol* case. However, the proposed amendments now impose on the Commission a duty to verify whether the national insolvency proceedings meet the conditions set out in article 1 before they are included in Annex A, as requested by Member States (article 45.2).

3. The new rules for dealing with groups of companies

The regulation was silent on its treatment of groups of companies. Practitioners and courts had addressed this shortcoming by concentrating, under the jurisdiction of one court only, all the proceedings opened to the benefit of several companies belonging to a group thanks to an extensive interpretation of the concept of COMI.

The proposal confirms that approach, although only for highly integrated groups of companies (recital 20b) in order to favour either the implementation of a reorganisation plan (as in the *Eurotunnel* case), or the coordinated sale of assets (as in the *Collins & Aikman II* and *Nortel* cases). The proposal also allows the same liquidator to be nominated for these proceedings (recital 20b).

The proposal goes one step further by providing new rules for communication and cooperation if insolvency proceedings are opened by several courts in different Member States. In particular, the liquidator has the power to propose, but not impose, a global restructuring plan (article 42a). Local courts always have the final say. The proposal also recognises the importance of protocols as developed by practitioners since the French-English *Sendo* case.

The proposed amendments are also innovative in the way they implement obligations of communication and cooperation between courts. This is what is especially useful, both in the case of groups of companies and when linking main and secondary proceedings.

4. A new balance between main and secondary proceedings

Originally, secondary proceedings were limited to liquidation proceedings. As demonstrated in the *Christianapol* case, this was problematic when the main proceeding was of a rescue type. In this case, the ECJ responded negatively to the preliminary question asked by the Polish court about the possibility of refusing to open a Polish secondary proceeding (of liquidation) on the ground that this secondary proceeding was incompatible with the French, main, *"sauvegarde"* proceedings.

The proposal now provides that secondary proceedings need no longer necessarily be liquidation proceedings. They can be of any nature in order to be consistent with the main proceedings.

However, this liberalisation of secondary proceedings could lead to an increase in the number of such proceedings, thus rendering restructurings more complicated. In order to mitigate this risk, the proposal reinforces the powers of the officeholder in the in main proceedings. The officeholder will be able to request the postponement of or the refusal to open secondary proceedings when they are not necessary to protect the interests of local creditors. In the *Collins & Aikman II* and *M.G. Rover* cases, Member States' courts refused to open secondary proceedings because local creditors had been granted, in the main proceedings, the same rights as they would have had in secondary proceedings, had such proceedings been opened. New articles 18.1 and 29a transpose this case law. in doing so, they create a sort of "synthetic" secondary proceeding.

The Commission has also taken into consideration the lessons learned from the *Nortel* case where the English administrators, appointed in the main proceedings, had transferred assets from France to the UK before the opening of secondary proceedings in France. The proposed reforms maintain the liquidator's power to realise freely or to re-locate any asset of the debtor. However, the proposal introduces safeguards to prevent the abuse of these powers.

5. Improvements to the procedures for lodging claims

The proposed changes offer foreign creditors the ability to lodge claims both in writing and by any other means of communication including electronic forms of communication. Foreign creditors will also be able to lodge their claims in any official language of the Union within a period of no less than 45 days following the publication of the opening of proceedings in the insolvency register of the State where proceedings are opened.

6. Increased publicity for insolvency judgments

The proposal reinforces the transparency and publicity of judgments by requiring Member States to establish and maintain local insolvency registers. These registers will be inked together by the Commission.

7. Increased legal certainty through the introduction of new definitions in article 2(f)

The regulation does not fully address the localisation of certain assets.

In particular, share pledges are a key feature of leveraged buy-out structures. When the target company and the pledgee are located in different Member States, the location of the shares will be a crucial factor in the application of article 5.

The Commission has therefore proposed that the registered shares of a company are situated in the Member State within which the issuing company has its registered office. The proposal also states that financial instruments, title to which is evidenced by entries in a register or account maintained by or on behalf of an intermediary, are situated in the Member State in which the register or account is maintained.

Finally, the localisation of bank accounts was disputed especially with regards to the branches of foreign banks. The proposed amendment, if adopted, will state that the cash held in an account with a credit institution is situated in the Member State in which the credit institution is located by reference to the account's IBAN.

Taken together, these proposed changes to the European Insolvency Regulation should all improve the effectiveness of cross-border insolvency proceedings, at the very least from a French perspective.

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The New European Insolvency Regulation - The European Commission's Reply to the Changes in European Insolvency Law

Report on the EIR revision proposals by the European Commission, from the German point of view

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Insolvency practitioners had been eagerly awaiting the European Commission's European Insolvency Regulation ("EIR") revision proposals which were presented to the public on 12 December 2012. The EIR, as a directly applicable Regulation, determines within the European Union (with the exception of Denmark) the consequences in other Member States of insolvency proceedings initiated in one Member State, the liquidator's powers in other EU states, and the governing law for the relevant insolvency proceedings.

The revision proposals - which now merely need to be coordinated with the European Parliament and with the Council, and therefore with the governments of the EU Member States, will at the earliest be passed in a few months' time, subject to potential modifications due to these consultations. However, even now it is foreseeable that the proposed revisions to EIR may have significant practical consequences for cross-border restructurings and insolvencies.

The draft EIR had been preceded by years of discussion, in particular regarding the phenomenon of forum shopping. The EIR, passed in 1999, was intended to prevent just this. However, many are of the opinion that the EIR instead caused this phenomenon. Whatever the position one may take, one result of the relocation of the Centre of Main Interests ("COMI") into states with legal regimes which, in the opinion of the protagonists, are most favourable (in particular, proceedings against foreign companies were initiated in England and also in Germany), was the creation of competition between the various European jurisdictions.

Many governments have reacted to this and have modernised their insolvency laws. Germany, for instance, has significantly facilitated the scope of debtor in possession proceedings in that jurisdiction. It has introduced the so-called "protective shield" procedure. At the same time, the parties involved now have more influence in the choice of insolvency administrator than used to be the case.

In putting together its revised the proposal, the European Commission carried out a survey of insolvency practitioners, it commissioned studies by the Universities of Vienna and Heidelberg, and had appointed approximately 20 specialists as personal experts.[1] The submissions of INSOL Europe[2] were also taken into consideration during the consultation process.

In particular, the new restructuring proceedings in the EU Member States, especially the so-called hybrid proceedings which are possible even prior to an actual insolvency or are to a large extent beyond the control of the courts, constituted a challenge for the European Commission. The Commission has now tried to incorporate as many proceedings as possible into the EIR. It now includes procedures which, pursuant to the new Art. 1 of the EIR are "based on a law relating to insolvency, or adjustment of debt and in which for the purpose of rescue, adjustment of debt, reorganisation or liquidation (a) the debtor is totally or partially divested of his assets and a liquidator is appointed, or (b) the assets and affairs of the debtor are subject to the control or supervision of a court."

Even though, pursuant to the new Recital 31, the European Commission should determine whether the procedures proposed by the Member States as proceedings under the new EIR actually fulfil the criteria of the EIR, the Commission has only set a very low threshold for these criteria. Considering that the new EIR also defines a debtor in self-administration as including a liquidator, and that under the new Art. 3b (2) procedures are intended to be acknowledged which are initiated without a court resolution, the availability of means to protect creditors appears to be very low.

For instance, the debtor could ultimately define his COMI himself (see new Art. 3b (2) 2). It is thus not surprising that the German Ministry of Justice in March of this year, on the occasion of the 10th German insolvency law conference of the DAV (German Bar Association), voiced public criticism with regard to the unduly wide scope of application of the amended EIR. As much as the new approach is to be welcomed to acknowledge the modern restructuring proceedings under the EIR, the Commission should reconsider the approach of the European Parliament which recently started an initiative to harmonise European insolvency law at a national level. It would be good if the means could be found in the pending discussions of the amendment of the EIR to protect the interests of creditors while at the same time modernising the EIR. This could be achieved by providing for the incorporation of judicial safeguards in the revised provisions. However, apart from this criticism of the regulations regarding the scope of application, this report must not fail to mention the predominantly positive new aspects. The courts' practice

1 Among them was the author of this article. The author accordingly only states his own personal opinion, and does not speak on behalf of the European Commission.
2 Revision of the European Insolvency Regulation – Proposals by INSOL Europe, Drafting Committee van Galen, André, Fritz, Gladel, van Koppen, Marks QC, Wouters, 2012.

regarding the definition of COMI, in spite of the important landmark decisions by the European Court of Justice (in particular in *Eurofood*), still left room for uncertainties on the level of the Member States with regard to the usage of this term. The revised text of EIR now also contains a definition of COMI which in particular also stresses the importance of the "ascertainability by third parties" of any COMI.

Significant amendments are proposed to the provisions relating to secondary insolvency proceedings which are opened in another EU Member State in respect of the debtor's assets in that jurisdiction. Here, the Commission correctly took into consideration input from practitioners. Additionally, secondary insolvency proceedings now no longer necessarily have to be liquidation proceedings. It has also been recognised that secondary insolvency proceedings, which at the moment often need to be prevented in the interests of the creditors in their entirety, must at least not lead to the taking of un co ordinated measures in the secondary jurisdiction. Such undesirable measures could include instance court controlled auctions, splitting up essential production units, thus destroying the going concern value. Here, the liquidator in the main proceedings is now granted the right, in the form of a so-called undertaking under the new Art. 18, to put the creditors who would otherwise initiate secondary proceedings in a position within the main proceedings which corresponds to the position they would hold as creditors in the secondary proceedings.

These so-called "synthetic" secondary proceedings could solve this problem under other insolvency regimes, similar to the current practice in England, thus avoiding secondary proceedings which would otherwise be prejudicial to the restructuring. Furthermore, it is in the interests of legal certainty to provide in favour of the main proceedings officeholder that he has the right to collect foreign assets in the main insolvency proceedings. Even if secondary insolvency proceedings are still opened, the liquidator in the main proceedings may stop such proceedings under the new Art. 29a if he proves that such proceedings would not be advantageous for the creditors of these secondary insolvency proceedings, and if he gives the undertaking regarding the treatment of creditors in the secondary proceedings mentioned above.

The proposed revisions conclude with entirely new regulations on the insolvency of groups. This is particularly interesting as such regulations scarcely exist in Europe in a codified form. The German legislature has also now almost simultaneously submitted a discussion draft on the German law governing the insolvency of groups. Both proposals are very similar. Both contain regulations on communication and cooperation between the proceedings against affiliate debtors which are consistent with the present EIR provisions relating to the coordination of main and secondary insolvency proceedings.

Both drafts refrain from introducing regulations to consolidate different insolvency estates, which has met with almost unanimous approval in Germany. In contrast to the German draft, the revisions proposed for the EIR do not contain any regulations regarding a group COMI. This leaves open the option of consolidating proceedings on a

European level if the COMI of several debtors is actually centralised within one jurisdiction. If however, an artificial group COMI would have been created for groups on European level, inefficient, costly proceedings may be the result, where the insolvency law of one state ends up conflicting with numerous legal relationships (for instance with employees and suppliers) which were entered into and are regulated under a completely different legal regime. Hence, the Commission has correctly refrained from introducing revisions on these lines.

The European proposal is in any event more progressive than the German draft in the area of cooperation in the event of group insolvencies. Here, the German draft provides for a court-controlled coordination process which gives rise to concerns that it might be cumbersome. The Commission merely grants the liquidators in the insolvency of a corporate group real genuine co-determination rights in the other proceedings; for instance, one liquidator may propose a restructuring plan in the other proceedings, or apply for a stay of proceedings for the other proceedings if he can prove that this is more favourable for the creditors of those other proceedings. Furthermore, the liquidators can agree between them to grant special powers to one of their number to achieve the effective co ordination of the proceedings.

To conclude, the Commission's draft contains numerous progressive elements paving the way for an increased number of successful restructuring proceedings, in particular with regard to international group insolvencies. The fact that the European and the German legislature have each submitted proposals to revise the treatment of group insolvencies makes the further development of a revised EIR an exciting prospect for restructuring professionals.

Transnational Insolvency Proceedings in Greece: Law 3858/2010 Adopting the UNCITRAL Model Law

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Greece has traditionally been a forum willing to recognize, and give legal effect to, foreign insolvency proceedings, having a clear tendency toward the principle of universality that underpinned the attitude of domestic courts and the operation of cross-border insolvencies in Greece. In the absence of specific statutory provisions, rules of private international law were used to govern jurisdictional issues and matters of recognition. This lacuna in the Greek legislation was redressed in 2010 with Law 3858[1], enacting the UNCITRAL Model Law on Cross-border Insolvencies. Together with the EU-adopted provisions in the form of Regulation 1346/2000 (the "EIR") addressing *intra*-European insolvencies, the Greek legal order now encompasses all cases of supranational default.

The legislators steered clear of the U.S. Bankruptcy Code approach and elected not to adopt Law 3858 as a chapter of the Greek insolvency code (IC). Instead, it was introduced as a separate law, effective as from July 1, 2010. Perhaps this was a conscious decision to avoid the unnecessary procedural complexities that a direct association with the IC would otherwise have entailed. At the same time, this may mark an effort to distinguish the provisions of Law 3858 on the basis of their international origin, distinguishing these from any specific of national provisions.

For example, when Greek courts are presented with an application for recognition of foreign proceedings, the rules regarding the furnishing of evidence have less-rigid requirements compared to ordinary proceedings under Greek law. This affords the court the leeway necessary to accept the documentation it deems appropriate to confirm the existence of the foreign proceedings and the appointment of a liquidator in the absence of the evidence specifically listed in article 15(2) of Law 3858. It also entitles the court to accept documents in their original language.

This is a substantial development for a highly codified judicial system accustomed to strict procedural rules. Although there has not been much case law so far, the courts' approach in the early stages of perhaps the very first case currently before them (unreported) suggests that the judiciary is ready to assume the responsibilities dictated by the multi-jurisdictional nature of proceedings.

That is consistent with the interpretational proviso of the Model Law, which makes explicit reference to the need to promote uniformity in its application and the observance of good faith. This principle is also repeated in Law 3858. In fact, Greek legislation has followed the Model Law almost to the letter, deviating only in very limited cases for reasons of coherency with the IC. Law 3858 also amalgamates new terminology with the existing provisions i while seeking to respect the legal heritage of Greek insolvency law principles.

For instance, foreign proceedings under article 2[2] of Law 3858 are considered proceedings having two main pillars, first the debtor's insolvency and second the partial or total divestment of the estate. This is very similar to the wording of article 1(1) of the EIR. Nevertheless, the Model Law offers a definition with a somewhat broader scope, making reference to proceedings pursuant to a law relating to insolvency in which the assets and affairs of the debtor are subject to control or supervision by a foreign court[3]. However, the discrepancies in the text of article 2(a) between the Model Law and Law 3858 are justified,

1 Law 3858/2010, SG A' 102/2010.
2 Greek legislation has maintained the same number of articles as the Model Law, thus facilitating the use of the law by foreign practitioners and courts, and thereby promoting its efficient operation.
3 Article 2 (a), Model Law.

otherwise the definition of foreign proceedings for *extra*-European insolvencies under Law 3858 would differ from the equivalent text governing *intra*-European cross-border cases in Greece under the EIR. In any case, the deviation of the Greek law from article 2(a) of the Model Law is not expected to have much practical significance in the operation of the Model Law in Greece.[4]

Consistent with this spirit of efficient operation of the Model Law, the Greek legislature did not make the applicability of domestic cross-border insolvency provisions dependant on a reciprocity requirement, as other states have elected to do. On the contrary, in article 27 of the Model Law, where the text invites states to add to existing forms of cooperation, the Greek legislation has expanded on those set out. The Greek provisions refer to the communications between the liquidators appointed in cases of concurrent proceedings, particularly with regard to the status of the procedure for the announcement and verification of claims or any reorganization attempts and the particulars of the debtor's assets.

Furthermore, Law 3858 also fills a vacuum in domestic law as regards the exchange of information when the Greek judiciary is not the recipient of the request. Article 25(2) affords national courts the right to contact foreign courts and foreign liquidators directly to collect information in relation to proceedings pending in Greece. Although Anglo-Saxon jurisdictions are more familiar with these forms of cooperation, it is doubtful whether Greek courts would have assumed standing to make similar requests given that this authorization was lacking prior to article 25[5].

The Greek judiciary is not obliged to make requests for assistance. It had the discretion to do so. It is possible the Greek courts will need some time to make full use of these provisions. The same also applies for article 27(d), which makes reference to the approval or implementation by courts of agreements concerning the coordination of proceedings, resembling the protocols of cooperation between the U.K. and U.S. judiciary in cross-border insolvency cases.

Law 3858 has made efforts to provide a legislative framework that builds on the existing pro-recognition mentality of the Greek judiciary and which, with the assistance of all actors involved in cross-border insolvency cases, could in effect promote the efficient operation of cross-border insolvency proceedings within its scope, while still keeping in line with Greek insolvency law principles. Much of this burden falls on the judiciary. Judges will need to interpret the provisions of the new law in conformity with its international heritage, particularly when faced with requests that are at the core of disputes in the context of cross-border insolvencies, such as setting aside antecedent transactions. The approach taken by the Greek courts in the past, together with the reported decisions to date, provide reassurance that the Greek courts and legislature will make effective use of the UNCITRAL Model Law provisions.

4 E. Perakis, *Insolvency Law*, Nomiki Bibliothiki, 2010, page 429, see fn. 42.
5 L. Kotsiris, *Insolvency Law, Eighth Edition*, Sakkoulas Publications, page 90.

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Challenges for Danish Debtors Seeking to Use U.S. Restructuring Procedures

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Restructuring a company which is incorporated and headquartered in Denmark, listed both there and the U.S., has both English and Danish law secured debt owed to European and Chinese banks, has English law maritime liabilities, and whose assets consist of ships which trade the world over presents unique challenges.

In 2012 Skadden and Gorrissen Federspiel had cause to consider precisely how to confront these challenges during their representation of Danish shipping giant TORM A/S. In late 2011 the long slump in ship values and charter rates which had already lasted for 4 years left TORM in a situation where it needed to restructure both its secured debt and time charter liabilities. The shipping crisis had already caused the failure of numerous ship owners and operators, with some, notably Omega Navigation, General Maritime Corporation and Marco Polo SeatradeB.V., turning to Chapter 11 to look at alleviating their difficulties.

The position of TORM, and in particular its numerous international connections, provided an opportunity for consideration of the relatively new Danish reconstruction procedure and its potential interaction with the U.S. Chapter 11 bankruptcy procedure.

Background to shipping industry Chapter 11 cases

Historically, shipping and bankruptcy or insolvency procedures have not always mixed well. The *sui generis* rules applicable to enforcement of maritime debts, and the powerful rights those rules grant to maritime creditors have the potential to undermine the objective of most insolvency regimes, if not to be entirely incompatible with them. The cases noted above have, however, shown a resurgence of interest in the use of Chapter 11 procedures, particularly amongst European shipping companies.

The resurgence of Chapter 11 as an effective tool for restructuring non-U.S. shipping companies owes much to its exercise of *in personam* jurisdiction over creditors. Ordinarily, in order to implement an effective international restructuring it is necessary to ensure enforceability both in the jurisdiction of the debtor's incorporation (in order to prevent a local liquidation being commenced), and in the jurisdiction(s) in which the debtor'sassets are located (so as to prevent local enforcement procedures), as well as, potentially, the jurisdiction of the law governing the relevant debt. As a shipping company's assets may move between many different jurisdictions at short notice, some, at least, of which are likely not to recognise a foreign restructuring procedure and permit vessel arrest, pursuit of such a traditional strategy may be problematic.

Chapter 11, on the other hand, eschews this approach to jurisdiction. It places greater focus on whether the Bankruptcy Court has *in personam* jurisdiction over creditors. While a local maritime court may refuse to recognise the effect of the automatic stay applicable in Chapter 11 proceedings and would, if an application were made, permit enforcement against the debtor's vessels, the threat is nevertheless alleviated so long as the relevant creditors have sufficient connection to the U.S.. The automatic stay, and ultimately any plan of reorganization, will be effective so long as creditors face the threat of sanction by the U.S. Bankruptcy Court.

For these reasons, as well as the relatively low jurisdictional threshold, Chapter 11 is an attractive option for non-US incorporated shipping companies.

In the case of a Danish company, however, Chapter 11 alone may be insufficient. Danish law traditionally does not recognise the effectiveness of foreign bankruptcy regimes, particularly foreign regimes applied to Danish companies. Where a company has creditors that do not have sufficient connection to the U.S. and who may thus not feel themselves bound by the automatic stay, there may be a real risk that a Danish court would open a reconstruction or liquidation procedure on the application of a creditor despite the existence of a foreign proceeding. In Denmark, where a proceeding is opened on the application of a creditor, creditors have significant input into the appointment of the administrator, and as such may be able to exercise greater control over the process.

Permitting the commencement of dual proceedings by a creditor therefore risks undermining the company's attempt to implement a restructuring through a Chapter 11 procedure. Additionally, while a Chapter 11 case could potentially be commenced prior to the debtor becoming insolvent so as to minimize the risks, a Danish company considering Chapter 11 would also have to evaluate any risks of personal liability directors and officers could face if they fail to commence a local proceeding.

One option for a Danish debtor would be a Danish main proceeding with US recognition under Chapter 15. However, Chapter 15 usually provides protection only for US assets, not the world-wide protection available in Chapter 11 referred to above. Danish debtors that need international protection could consider, however, the possibility of commencing simultaneously both a Chapter 11 and a Danish reconstruction procedure.

The Danish reconstruction procedure

Parallel insolvency proceedings in respect of the same entity are now relatively common in certain jurisdictions.

Provisional liquidation in an off-shore jurisdiction to provide protection during a Chapter 11 case, or parallel schemes of arrangement, are well known techniques. Parallel Chapter 11 and Danish reconstruction procedures appear much more challenging however. The specific rules applicable to both procedures would severely restrict the options available for a debtor, and careful planning would be required to ensure that a debtor could comply simultaneously with both procedures.

The Danish reconstruction procedure is relatively new, having been implemented by an amendment to the Danish Bankruptcy Act entering into force 1 April 2011. Like Chapter 11, the current management remains involved in the conduct of the business during the proceedings. However unlike the U.S. debtor-in-possession ("DIP") approach, an administrator is appointed to develop and implement a plan for the restructuring of the company. The company can continue to trade in the ordinary course, but the administrator's approval is required for all significant or unusual transactions or the disposal of the company's assets.

Dual or parallel processes

Truly parallel Danish/U.S. proceedings necessitate the conduct of the Chapter 11 case, and the preparation of a plan of reorganization implemented in the U.S., in such a way as to comply with the requirements of a Danish procedure. Four of the major differences between the reconstruction procedure and Chapter 11 lie in the timing requirements, the options available for the restructuring solution, the voting mechanism and the availability of financing.

The Danish administrator must call a meeting of creditors within four weeks of the start of the case and present a preliminary plan for the restructuring of the company. If the plan is rejected by the creditors the administration is converted immediately into a liquidation. The final restructuring plan, which with limited flexibility must be either i) a reorganization of the company's unsecured debt or ii) a sale of its business or assets, or a combination of i) and ii), must then be presented to a meeting of creditors within six months of the commencement of the initial creditors meeting. This deadline can be extended by up to four months. The flexibility of Chapter 11 means that both the solutions available and the timeline for the reconstruction procedure could be matched, however this would impose significant restrictions on the conduct of the Chapter 11 case.

The voting mechanism in a Danish reconstruction is significantly different to that applicable in a Chapter 11 case. Only unsecured creditors who will be affected by a reorganization (reduction or moratorium) of the debts or who can expect to receive a dividend after a sale of the business may vote, and there is consequently only one "class" of general unsecured creditors. Security holders may vote only in respect of that portion of their debt which is unsecured (their "deficiency claim"). A corollary of the fact that only unsecured creditors may vote, is that a plan of reorganization cannot compulsorily restructure either secured debt or the shareholding in the debtor. In practice, however, unsecured creditors would be unlikely to accept a reorganization in which the current shareholders retained significant value and in which no concessions were made by the secured creditors. In this way, the Danish procedure can have the effect of giving more power to unsecured creditors because they cannot be crammed-down as they can be in Chapter 11 proceedings. Parallel reconstruction plans would have to be capable of satisfying both voting requirements. This would in effect mean that no cram-down would be available, but the higher U.S. Chapter 11 voting threshold would have to be met in respect of unsecured creditors.

Another added restriction is financing the reconstruction process. Whereas in Chapter 11 debtor in possession ("DIP") financing can be secured by priming liens, in Denmark financing for a reconstruction can only be secured in relation to any unencumbered assets, potentially limiting the debtor's options for obtaining DIP finance.

Conclusion

Chapter 11 remains a viable, and most likely attractive, option for Danish debtors, including particularly those with foreign assets whose creditors are large institutions with U.S. connections. Close consideration must be given, however, to the interaction between the Bankruptcy Code and the Danish Reconstruction procedure.

So, how do you restructure a company like TORM A/S? Out-of-court… of course.

TORM's restructuring was successfully completed on an out-of-court basis in November 2012.

In the Eye of the Crisis – A Portuguese Perspective

By Catarina Serra
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How is Portugal dealing with the financial crisis?

2012 was a year marked by the contraction of economic activity in Portugal and by the strengthening of austerity. These followed the measures taken in return for international financial assistance and the implementation of the Memorandum of Understanding on Specific Economic Policy Conditionality (Troika Memorandum), signed by the Portuguese Government in 2011.

The crisis has certainly changed the face of the market. It led to significant changes in the availability of credit, with a considerable increase of interest rates. This, of course, resulted in the decrease of entrepreneurship, and triggered more and more cases of default.

According to a study released earlier this year, the number of insolvent companies in Portugal increased by 41% in 2012, to 6.688, compared to 2011. As the study points out, 76% of these insolvent companies were micro-companies and the construction sector was the most affected. The position for families is even gloomier. The number of insolvent individuals quadrupled between early 2011 and the end of 2012. In 2012 about 12.545 individuals were declared insolvent by the courts. One of causes of these insolvencies is unemployment, which is now up to 17,5%.

It would have been impossible for the Portuguese legislature to ignore the growing distress of both companies and individuals and, if only to comply with the requirement on the part of the Troika, amendments were made to the Insolvency Act in 2012. It provided for the rescue of companies and individuals in pre-insolvency situations and created a new procedure. No real attempt was made, however, at dealing with the low rate of successful rescue cases in actual insolvency situations or to improve the tools available for that purpose. Considering the low success rate of the only rescue procedure under Portuguese law (the insolvency plan) has been doomed form the start, it is right to question whether there was *ever* a rescue culture in Portugal.

It is necessary to consider the effect of these *de facto* and legal changes on the insolvency establishment (insolvency courts, insolvency lawyers and insolvency practitioners), in addition to its consequences for the victims of insolvency. How is the work of courts and practitioners being affected by all these changes? And conversely, what are they doing to improve (or to avoid further worsening) the situation? Will they be able to make any difference?

Restoring (or introducing?) rescue culture

Any amendments to insolvency law in the context set out above were bound to include tools designed to foster corporate rescue. And so it happened with the 2011 amendments. The legislature introduced a brand new proceeding in the new Insolvency Act – the special revitalisation proceeding. This will apply only to pre-insolvency situations (economic distress and imminent insolvency). A couple of months later, another proceeding was created – the out-of-court proceeding for the rescue of companies – bearing a strong resemblance to a little used proceeding that had existed since 1998.

The special revitalisation proceeding envisages a period of negotiations between the corporation and its creditors and is intended to achieve agreement on a restructuring plan. The agreement may be approved by the court, provided it is accepted by a qualified majority. There must be some minority protection (no creditor should be left in a worse position by the plan than would otherwise apply. Additionally, no creditor should receive a return in excess of the value of its claim). If these conditions are met, the plan will be binding to all creditors.

The greatest advantage of this new proceeding is the ability it creates to carry out a restructuring without the corporation submitting to the court, therefore preventing the loss of value that could otherwise result. At the same time, the new procedure should reduce materially the number of costly and time-consuming insolvency proceedings that would otherwise open in the Portuguese courts.

The new procedure in fact appears to be very popular: from the day it first became available (in May 2012) until now, at least 420 individuals and companies of all kinds (wholesalers, construction companies, manufacturers, car workshops, spas, sports and technology parks, football clubs) have submitted applications to the Portuguese courts.

Looking at the special revitalisation procedure from the insolvency practitioner's point of view, it gives him a central role: he must conduct the negotiation process, which lies at the heart of the whole process. That said, one is likely to ask: can the insolvency practitioner indeed act as a negotiator? His usual role in an insolvency proceeding is that of a guardian of the debtors' assets or a manager of the debtor's company. Will he be able to engage in this new role from the outset? And what about the interests he is supposed to perform? Being appointed by the court at the request of the debtor, will it be possible for the practitioner to act with absolute independence? The answers are bound to be negative. First an insolvency practitioner is not necessarily endowed with the skills of a negotiator, neither does the system provide for him to receive any specific training. On the other hand, debtors tend to ask the court to appoint an insolvency practitioner of their choice who is willing to act for their exclusive benefit.

Taking this into account, an insolvency practitioner is definitely not the best person to conduct negotiations and broker an agreement between the two opposing parties (debtor and creditors). An insolvency practitioner lacks the competence and the impartiality required of a mediator.

In any event, insolvency lawyers are likely to keep their jobs. Despite the apparent informality of the first stage of the special revitalisation procedure, the number and complexity of documents required to open it are considerable. It is

necessary, in most cases, for there to be a lawyer guiding and assisting the debtor.

The second type of corporate recovery procedure appears to have better prospects of success. It seeks to reach agreement between the company and all or some of its creditors representing at least 50% of the company's total liabilities. It is basically an out of court proceeding, with the Portuguese agency that supports small and medium enterprises acting as a mediator.

Though it may give the impression that the court is dispensable, in some cases the company may find it helpful to apply for the court's approval of the agreement. Provided the agreement is approved by creditors who represent more than two thirds of the company's total liabilities, the court's approval will make the plan binding on all creditors, thereby maximising the prospects of recovery.

Addressing the over-indebtedness of individuals

There is much debate on how individuals should be protected, particularly as to whether if over-indebtedness should remain within the framework of insolvency law, and continue to be addressed in the Insolvency Act. The alternative proposal is for over indebtedness to follow a regime of its own. The idea of a Portuguese Consumer Code has been suggested but it has never come to pass.

The fact is that, in most cases, over-indebted consumers or households have no choice but to withstand the hardships of an insolvency procedure. it is true this may afford them a way out of their misery – through the discharge, they may be able to get rid of most of their liabilities, with the exception of tax liabilities. But discharge does not come easily; it is supposed to be the result of a very rigorous process, taking at least six to seven years, time during which the debtor must perform certain duties.

Furthermore, Portuguese courts are not discharge-friendly. Out of fear that the debtor might abuse the benefit (and on account of evidence of such abuse), the courts will refuse to grant discharge in a significant number of cases.

Out-of-court mediation has proved to be more beneficial. Its accessibility, informality and low cost makes mediation especially suitable for dealing with these situations. The out-of-court approach rests essentially upon the renegotiation of debts carried out by public institutions or private entities at the request of the debtor. This renegotiation seeks to establish a global payment plan suited to the true situation of the debtor while also protecting the interests of creditors.

The content of the plan can vary. It may include, among other measures, extension of loan maturities, discharge of interest and/or capital, decreased spreads, and the collateralization of assets.

The Portuguese association for the protection of consumers has the most extensive experience, especially since 2000, when it created consumer assistance offices within the country. The demand for these offices is growing, and has intensified since 2007. During 2011 and 2012, this association was called upon to intervene in more than 4000 cases.

The role of insolvency professionals

It is also important to evaluate the performance of insolvency professionals in general. When insolvency strikes more and more Portuguese households and companies every day, will there be sufficient insolvency practitioners of the right calibre to effect successful rescues, at least in some of the cases?

The ruling, last year, of the Court of Portalegre gives guidance as to the current role of the courts. In this particular case, the court refused to enforce the remaining, unpaid parts of a housing loan, following the enforcement of the mortgage. The court decided, in short, that the delivery of the mortgaged property to the bank should discharge the debt. The majority of Portuguese judges described the decision as groundbreaking, demonstrating that the courts were able to adapt to the changes. It is expected to have an impact on future cases and to serve as a warning to banks.

Portuguese lawyers are also supposed to be creative. They did not use to be called upon in many insolvency cases, therefore paid little attention to insolvency issues. The crisis has awakened lawyers to the importance of mastering the Insolvency Act and associated legislation. In addition, needing to become familiar with the legal framework, they had to be able to think creatively enough to be able to answer the deficiencies in the legislation.

It is evident that in view of the increased number of insolvency cases in Portugal, the present number of insolvency practitioners (around 320) is clearly insufficient to address the increased number of cases. According to the president of the association representing insolvency practitioners, the number of people able and willing to meet the technical and regulatory requirements of becoming an insolvency practitioner should be assisted in doing so by the proposed, new, insolvency practitioners' statute.

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Letterbox Entities Under Attack!

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Introduction

The recent developments in Cyprus have stirred up a discussion in The Netherlands concerning the many letterbox (i.e. holding) entities we host. Some politicians say these entities do not pay enough taxes and new rules should me made to discourage incorporation in The Netherlands of these "letterbox" companies.

As professionals we know there are many valid reasons for incorporating holding companies in a group structure. Obviously businesses are placed in separate companies to avoid recourse, the holding company linking the other companies together in one group. The holding company's activities are often limited to holding shares in the capital of foreign subsidiaries. The Dutch tax system is beneficial for holding companies because no taxes are levied on profits of foreign subsidiaries. The assumption is that taxes will be paid in the relevant foreign country. An additional benefit is that the Dutch tax authorities are prepared to issue rulings on tax structures so that there is certainty in advance about the amount of taxes to be paid.

Speaking as Dutch insolvency lawyers and practitioners, the use of Dutch holding companies provides for interesting cross-border insolvency work. The European Insolvency Regulation ("Regulation") sits on the corner of our desks.

Both the tax and the bankruptcy consequences of the use of letterbox entities are the subject of discussion. As insolvency administrators of Dutch holding companies, we encounter much resistance from foreign colleagues, creditors and foreign courts against main insolvency proceedings regarding Dutch holding companies. The professionals involved often consider that it is inappropriate for a Dutch insolvency administrator to wind up foreign activities vested in either or both of the holding company and its subsidiaries. Sensitivities about sovereignty still seem to play a role here, even though the Regulation was introduced more than 10 years ago.

In the last few years, our appointment insolvency administrators have been challenged in multiple court proceedings in Germany, Italy, France and The Netherlands. People who know us – and as you can see from the photo – can tell we are not particularly aggressive people; on the contrary, we dare say that we continuously seek ways to cooperate. The CoCo guidelines and examples of cooperation protocols also sit on the corner of our desks.

We know that resistance to a restructuring is not personal and that it reflects professional necessity as against being evidence of acting in bad faith. It is nevertheless a matter of conflicts of interest between the creditors of the respective group companies. Stakeholders, i.e. creditors, directors, shareholders and/or foreign insolvency practitioners manoeuvre to maximize their financial and legal position. They exploit the lack of clarity in the Regulation towards centre of main interests ("COMI") in the context of group structures. Our experience reveals, broadly speaking, a three-step approach in the making of any challenge to the main insolvency/administrator:

1. challenge COMI in country where proceedings are opened,
2. challenge the main proceeding administrator on grounds of public policy,
3 devising a creative alternative to challenge or at least frustrate the proceedings.

Below we give an example of a recent case in which 1. the Dutch courts ruled COMI of Dutch holdings/letterbox entities to be in The Netherlands despite head office functions in France. 2. the French court ruled that the public policy exception did not apply. 3. the French court, however, approved the French subsidiary's administrator's seizure of the Dutch holdings' assets.

1. COMI of a letterbox entity

The group structure comprised two Dutch holding entities, Jemnice B.V. and En Sof Property Fund I B.V. ("Dutch Holdings") which hold the shares in a French subsidiary, Continental Property Investment S.A. ("French subsidiary") owning real estate companies in France and Spain. The French subsidiary was already subject to French insolvency proceedings (*redressement judiciaire*). First, Dutch Holdings applied for insolvency in France, but the Paris Commercial Court denied the request because a French COMI had not been established. Subsequently, the main creditor filed bankruptcy petitions against the Dutch Holdings with the Amsterdam District Court.

Both the director of Dutch Holdings and the French administrator of the French subsidiary argued before the Amsterdam District Court that the COMI of Dutch Holdings was in France, because – in short – the actual head office functions of the Dutch Holdings were carried out in Paris and that consequently the COMI-presumption of Amsterdam as the 'place of the registered office' (article 3(1) Regulation) should be rebutted. Nevertheless the Amsterdam District Court in the first instance opened Dutch bankruptcy proceedings. The parties lodged an appeal. As trustees we confirmed before the Amsterdam Court of Appeal that head office functions were indeed carried out in Paris, and that if that were the test then main

proceedings should indeed be opened in France instead of in The Netherlands, although there were other factors supporting the establishment of COMI in The Netherlands.

With an emphasis on the requirements of transparency and predictability of the applicable law regarding the opening of insolvency proceedings, the Amsterdam Court of Appeal ruled that COMI was in The Netherlands.[1] The Court argued that key factor was the view of potential creditors of the debtor's COMI, to be judged on the basis of objective aspects. What was important was the fact that the activities of Dutch Holdings, being a letterbox entity, were limited in nature. The activities only involved: holding the shares in a French company, paying taxes in The Netherlands (on the basis of declarations made by a Dutch auditor), publishing annual accounts in The Netherlands, and pursuant to the articles of association shareholders' meetings had to be held in The Netherlands.

The Court considered that the following factors – each supporting the mind of management in France and group centre approach – were not sufficient to rebut the presumptions: (i) the director lived and worked in France, (ii) the actual visitors' address was in France (according to the Court this was irrelevant because such an address is unnecessary for shareholders), (iii) the Dutch tax authorities communicated with the French address, (iv) the shares were held in a French company, and (v) the annual accounts were also prepared by a French administration office. The Court also considered it relevant that the main creditor had lent money to Dutch Holdings. these funds were lent onto the French subsidiary. Additionally this creditor had asserted that it intended to deal with Dutch Holdings in accordance with Dutch tax and bankruptcy law. For these reasons, the Amsterdam Court of Appeal confirmed the COMI was in The Netherlands taking into account the limited activities of the letterbox entity and the fact the few creditors knew they were dealing with a Netherlands-registered company, despite the fact that the director was resident in France. This showed a clear entity-by-entity approach, as against instead of looking for a group centre, as had been the case with previous well known UK decisions.

In our view this decision of the Amsterdam Court of Appeal reflects existing European Court of Justice case law.[2] It is clearly essential that potential creditors should be able to ascertain in advance the legal system that would resolve any insolvency affecting their interests. The starting point is the rule that transparency and objective as certain ability are key prerequisites in the determination of COMI.[3] Any party seeking to rebut the presumption that insolvency jurisdiction follows the registered office must demonstrate that the factors relied on satisfy these pre requisites, taking into account the nature of the particular entity, and notwithstanding its strong connection with group companies.

2. Public policy

After main insolvency proceedings had been opened in France, the French administrator of the French subsidiary and the director of Dutch Holdings invoked the public policy exception (article 26 Regulation) in an appeal before the Paris Court of Appeal against the rejection of the request to open French main insolvency proceedings (*redressement judiciaire*) to the Dutch Holdings.

The public policy exception is known as a general principle, which operates to exclude certain results from a given legal system where the effects would be 'manifestly' contrary to the other State's public policy.[4] In the above mentioned case the French administrator of the French subsidiary argued that the nature of Dutch insolvency proceedings could prevent recognition of those proceedings in France. The Dutch proceedings (*faillissement*) are liquidation proceedings, whereas *redressement judiciaire* aims for rehabilitation.

Some procedures are more intrusive than others. However, the Regulation itself is neutral in the sense that it respects national diversity and acknowledges different insolvency proceedings throughout its Annexes.[5] Public policy does not require a general review of the correctness of the foreign proceedings, but it does seek certain procedural safeguards.[6] 'Manifestly' means that the provision should only operate in exceptional cases, where its contrary nature is obvious or unequivocal.[7]

The Paris Court of Appeal ruled that the nature of the Dutch insolvency proceedings concerned (*faillissement*, included in Annex A) was considered to be an insolvency proceeding within the meaning of the Regulation.[8] Hence, the public policy exception was denied. The Paris Court of Appeal ruled that it was unable to open French proceedings, and considered that Dutch proceedings were automatically recognized in conformity with article 16 of the Regulation.
It was helpful that the Supervisory Judge of the Amsterdam District Court had given notice of the Dutch main proceedings by sending a letter directly to the Paris Court of Appeal. It was stated that main proceedings in The

1 Amsterdam Court of Appeal 20 December 2012, LJN: BY6980 (paragraph 3.3).
2 CJ EU 2 May 2006, case C-314/04 (Eurofood); CJ EU 20 October 2011, case C-396/09 (*Interedil*).
3 Virgós-Schmit Report, No. 75; Case C-341/04, Opinion of Advocate General Jacobs, 27 September 2005, par. 118 (*Eurofood IFSC*).
4 Virgós & Garcimartín, *The European Insolvency Regulation: Law and Practice*, Kluwer Law International 2004, p. 214.
5 Idem, p. 73.
6 Idem , p. 215.
7 Virgós/Schmit Report, No. 205.
8 Paris Court of Appeal 26 February 2013, RG no 12/19669, p. 7.

Netherlands and the authority of the Dutch trustee had to be recognized automatically in France. We have no doubt that such court-to-court communications can be very useful in giving explanations of the status of pending proceedings to foreign courts in another Member State. In our view a digital European insolvency register showing court decisions opening insolvency proceedings as recently proposed by the European Committee is essential to the proper functioning of the Regulation.

3. Upstream seizures

A third – and we must admit 'creative' – alternative to challenge the opening of Dutch insolvency proceedings was the action initiated by the French administrator before the Paris Commercial Court regarding the application of the French subsidiary's insolvency proceedings to the assets of Dutch Holdings. Such application was based on the French Commercial Code and substantiated by, among other things, the 'fictitious character' of the Dutch Holdings being letterbox entities.

The Paris Commercial Court approved an 'upstream' seizure of the assets of the Dutch Holdings, i.e. the Dutch estates.[9] It was considered that such seizure was a matter of great urgency because the risk assets, i.e. shares in the French subsidiary, could be disposed. Pursuant to the 'new' French *Petroplus* legislation,[10] it is possible to impose interim relief in respect of the assets of the defendant pending the decision in the substantive proceedings. As a result, Dutch Holdings' 100% shareholdings in the French Subsidiary as well as the 100% shareholdings *in* the Dutch Holdings were seized in order to prevent us as trustee from performing any irreversible actions. The Amsterdam District Court is expected to render a judgment in this respect.

Conclusion

These matters show that not all professionals are ready to accept insolvency proceedings of letterbox entities. We dare say that the issue of sovereignty still plays a role in the sense that there is reluctance to let a foreign trustee or court decide what should happen to the assets of a subsidiary. Apparently it is difficult to put the principle of mutual trust between Member States into practice. However, the main issue is creditors' separate recourse against individual companies which causes substantial conflicts of interest. Why share the assets of your debtor with creditors of empty group companies?

In itself, the ambition to concentrate the COMIs of group companies in the same place – in this case Paris – is not bad. It would lead to the appointment of one administrator, who would take into account the interests of the entire group in supervising the proceedings. However, the decisions of the European Court of Justice – and in the matter at hand from the Amsterdam Court of Appeal – show that separate recourse against individual companies is still the starting point when dealing with groups. Creditors should be able to rely on who their debtors are.

The conflicts of interest between group companies make it difficult to find a unified approach, except when synergy benefits are clear. In our view the European Commission's initiative to extend the coordination powers of a parent company's main administrator to other group entities is an essential step towards the further integration of cross-border insolvency proceedings.

[9] Paris Commercial Court 29 January 2013, 13_169, 13_6220.
[10] No 2012-346, article L 621-2 al. 4 Code de Commerce (Petroplus).

Asset Management Company for Assets Arising from Spanish Bank Restructuring (SAREB)

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As a part of the recapitalization and restructuring process of the Spanish banking sector, in late November 2012 the Fund for Orderly Bank Restructuring (*Fondo de Restructuración Ordenada Bancaria*, "FROB") set up the Asset Management Company for Assets Arising from Spanish Bank Restructuring ("Sareb") as a limited liability stock company for a term that will not exceed fifteen (15) years.

Sareb is governed by the provisions of Law 9/2012, of November 14, on Restructuring and Resolution of Credit Entities ("Law 9/2012"), by the Royal Decree 1559/2012 of November 15. This, which establishes the Legal System for Asset Management Companies and the other private law regulations.

The exclusive purpose of Sareb is the ownership, management and administration (whether directly or indirectly) and the acquisition and sale of distressed assets which have been transferred to it by (i) financial institutions that had required public aid from FROB. This happened when when Royal Decree-Law 24/2012, on Restructuring and Resolution of Credit Entities (now repealed by Law 9/2012) entered into force, and (ii) institutions which require public funds, according to the Bank of Spain's judgment and the result of the independent analysis of the capital needs and quality of the assets of the Spanish financial system. That analysis was carried out within the framework of the MoU excecuted between the Spanish and European authorities on July 20, 2012.

Sareb's capital and shareholder structure has now been completed. In this regard:

a. Sareb is formed by (a) a majority of private shareholders, including (i) two (2) foreign banks (Deutsche Bank and Barclays Bank); (ii) fourteen (14) national banks; (iii) seven (7) national insurance companies; (iv) three (3) foreign insurance companies; and (v) one (1) national energy company; and, to a lesser extent, by (b) public capital. This fulfills the objective of Sareb having a majority of private capital and attracting investment from internationally based shareholders. Overall, the private partners of Sareb have contributed 55%, while FROB has contributed 45% of Sareb's capital.

b. Sareb's equity to date amounts to EUR 4.8 billion of which 25% is shares and 75% subordinated debt.

Sareb will be managing total assets of EUR 50.781 billion after acquiring (i) the assets of entities known as Group 1 (i.e. entities that have already been nationalized. These are: Bankia, Catalunya Bank, NCG Banco-Banco Gallego and Banco de Valencia). The cost of the nationalisation was), an estimated amount of EUR 36.695 billion; and (ii) the assets of the entities known as Group 2 (entities that require public capital injection. These are: BMN, Liberbank, Caja3 and CEISS). Re-estimated amount of that injection is EUR 14.086 billion, all of it made according to the criteria set out in by the restructuring plans approved by the European Commission on November 28, 2012.

In return for the assets transferred by the above mentioned entities, Sareb issued senior bonds guaranteed by the Kingdom of Spain.

The main objective of Sareb will now be to maximize the value of its assets and the return for its shareholders through management and marketing in view of the different nature of such assets. Sareb will consider all avenues of disinvestment and all available channels, including retail, although the latter might not be the most relevant.

Sareb has already begun the process of divestment of the assets transferred to it. To undertake such divestiture successfully, Sareb has, to date:

a. Awarded a due diligence exercise on its assets to a consortium of thirteen (13) firms. This process is expected to take place throughout the first half of 2013.

b. Approved a business plan that will govern the fifteen (15) year term of the entity. Overall, the plan provides general guidelines on which the divestment of Sareb's portfolio will be based. It contemplates that three quarters of Sareb's revenue will come from the sale of real estate assets, with the rest being income from loans. Sareb plans to sell almost half of its residential portfolio within the first five years. This comprises, approximately, 42,500 units. It is also envisaged that some of the real estate assets that Sareb manages will be destined for the rental market. The plan contemplates a 13 to 14 percent return for Sareb's shareholders.

c. Approved the Conflict of Interest and Related-Party Transactions governance (although the content thereof has not yet been made public). In accordance with the information published by Sareb, this seeks to protect the company's interest in the decisions taken by the governing bodies of the entity at all times. This policy prevents directors affected by conflicts of interest from accessing the information on a given transaction or decision. It also establishes a system for the regular reporting of activities that will allow for the prevention and detection of potential conflicts.

Minimum Jurisdictional Threshold for U.S.Bankruptcy Courts in Cross-border Insolvency Cases

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Numerous companies (each, a "foreign entity") rely on the U.S. court system to restructure their debts despite having their principal assets, operations, employees and/or management located outside of the United States. In these situations, complex cross-border jurisdictional and insolvency issues often arise, even in circumstances where U.S.-based investors are not a principal source of capital. For example, a foreign entity with only tenuous ties to the U.S. may nevertheless seek to commence a Chapter 11 proceeding because the entity or its investors prefers the predictability of the Bankruptcy Code[2] when compared to certain insolvency laws in Europe and Asia. These often favour liquidation over restructuring.

However, when a foreign entity commences (or is otherwise subjected to) a U.S. insolvency proceeding, it must meet certain minimum requirements set forth in the Bankruptcy Code that apply to all entities, foreign and domestic. Pursuant to § 109(a) of the Bankruptcy Code, only an entity with a domicile, place of business or property within the U.S. can be a debtor under the U.S. Bankruptcy Code[3]. Nevertheless, the Bankruptcy Code is silent as to the extent of the property interests a foreign entity (that does not have a place of business or domicile in the U.S.) must possess in the U.S. in order to reorganize under the Bankruptcy Code. Moreover, within the context of § 109(a), case law indicates that bankruptcy courts have required only nominal amounts of property to be a debtor in the U.S.[4] Two recent cases in the U.S. Bankruptcy Court for the Southern District of New York, *Almatis B.V.* and *Marco Polo Seatrade B.V. (MPS)*, further illustrate the point.

The *Almatis* Cases

On April 30, 2010, the Almatis debtors filed their Chapter 11 petitions along with a pre-packaged plan of reorganization. Almatis and its affiliates had operations in the U.S., The Netherlands, Germany, China, India and Japan.[5] Together, these companies developed, manufactured and produced premium specialty alumina-based products.

For certain of the Almatis debtors, the lack of jurisdictional ties to the U.S. appeared striking[6]. While some of the Almatis debtors were organized under the laws of Delaware, others were organized under the laws of The Netherlands or Germany. Additionally, a majority of the company's production facilities and employees were located outside the U.S. and it did not appear that all of the debtors had property located in the U.S.[7] However, the first-day affidavit in support of Almatis's Chapter 11 cases indicated that it was appropriate for the courts to assume jurisdiction over the Almatis debtors because they held some property interests in the U.S.[8] Despite the tenuous jurisdictional connections applying to certain Almatis debtors, no party objected to the courts assuming jurisdiction during the Chapter 11 proceedings. Almatis' private equity owner, however, did request that the Dutch Enterprise Chamber enjoin Almatis from filing a petition for bankruptcy in the U.S., but this request was denied.[9]

Although the record does not expressly state whether the Bankruptcy Court of the Southern District of New York ("SDNY") ever formally addressed the issue of jurisdiction, a driving force behind Almatis' s decision to file in the U.S was the view that the insolvency laws of The Netherlands and Germany were not suited to facilitate a global restructuring of the debtors' diverse capital structure. Apparently, the SDNY court determined that it had jurisdiction based on the low threshold set forth in § 109 of the Bankruptcy Code. Perhaps the SDNY court was also influenced by the fact that the formal insolvency procedures in either The Netherlands or Germany would have likely forced the debtors into a liquidation without the opportunity to explore any reorganization alternatives.

The *MPS* Cases

Just three months after the *Almatis* case, on July 29, 2011, another Netherlands-based company, MPS, and three of its affiliates commenced Chapter 11 proceedings in the SDNY court. MPS, an international maritime shipping company, had nearly $210 million of secured debt at the time of its filing. Immediately after filing, MPS's two principal lenders, Crédit Agricole and Royal Bank of Scotland (together, the "principal lenders"), each filed a motion to dismiss the Chapter 11 cases contesting the propriety of U.S.

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2 Title 11 of Chapter 11 of the United States Code, 11 U.S.C. §§ 101-1532.

3 11 U.S.C. § 109(a). Section 109(a) of the Bankruptcy Code deals with the question of jurisdiction, while 28 U.S.C. § 1408 deals with the question of venue.

4 U.S. bankruptcy courts have a history of using nominal domestic property to assert jurisdiction over foreign entities. *See In re Global Ocean Carriers, Ltd.*, 251 B.R. 31, 37-40 (Bankr. D. Del. 2000); *In re Globo Comunicacoes e Participacoes S.A.*, 317 B.R. 235, 249 (Bankr. S.D.N.Y. 2004) ("For a foreign corporation to qualify as a debtor under Section 109, courts have required only nominal amounts of property to be located in the United States, and have noted that there is 'virtually no formal barrier' to having federal courts adjudicate foreign debtors' bankruptcy proceedings.") (quoting *In re Aerovias Nacionales de Colombia S.A. (In re Aviance)*, 303 B.R. 1, 9 (Bankr. S.D.N.Y. 2003); *In reMcTague*, 198 B.R. 428, 431-32 (Bankr. W.D.N.Y. 1996) (noting that "Congress has elected in § 109(a) not to use a phrase like 'property that is of consequential value.'"). *But see Georges Affaki, A European View on the U.S. Courts' Approach to Cross-Border Insolvency – Lessons from Yukos, in Cross-border insolvency and conflict of jurisdictions 13*, 13 (Georges Affaki, ed., 2007) (taking the position that the "extensive and extraterritorial jurisdiction over non-U.S. debtors and their assets located both in the U.S. and abroad" is not always desirable).

5 Decl. of Remco de Jong, Chief Exec. Officer of Almatis B.V., in Support of the Debtors' Chapter 11 Petitions and First Day Motions and in Accordance with Local Rule 1007-2 ¶¶ 7, 11, *In re Almatis B.V., et al.*, No. 10-12308 (MG) (Bankr. S.D.N.Y. Apr. 30, 2010), ECF No. 3.

6 While the SDNY court did not discuss under what circumstances venue was proper in the Southern District of New York, for the Almatis debtors, it is likely that the lead debtor's (Almatis B.V.) New York bank account with Commerzbank NY containing $47,260.00 qualified as a "principal asset" sufficient to satisfy the Bankruptcy Code's venue requirements. See Amended Schedules of Assets and Liabilities and Statements of Fin. Affairs, 17, *In re Almatis B.V., et al.*, No. 10-12308 (MG) (Bankr. S.D.N.Y. Sept. 15, 2010), ECF No. 417 (describing Almatis B.V.'s U.S. bank account); see also 28 U.S.C. § 1408 (stating in relevant part that: "a case under title 11 may be commenced in the district court for the district – (1) in which the domicile, residence, principal place of business in the United States, or principal assets in the United States . . . have been located . . . or (2) in which there is a pending case under title 11 concerning such person's affiliate, general partner, or partnership."). Importantly, once the propriety of Almatis B.V.'s venue was established in New York, and assuming the U.S. had proper jurisdiction over all of the Almatis debtors, all of the other Almatis debtors could properly establish venue in New York by relying on their status as affiliates of Almatis B.V. *See id.*

7 Decl. of Remco de Jong, *supra* note 5, ¶ 11 n.3.

8 *Id.* ¶ 60.

9 *Id.* ¶ 51.

jurisdiction on the basis, among other things, that the MPS debtors did not meet the requirements of § 109(a) of the Bankruptcy Code.[10]

In support of this argument, the principal lenders noted that (1) MPS and its affiliates were foreign entities lacking places of business in the U.S., (2) MPS's vessels all operated under foreign flags, (3) MPS had no domestic employees, (4) MPS had no satellite offices or employees in the U.S., (5) MPS's businesses operated primarily in foreign waters, (6) the loan documents were governed by foreign law and provided for foreign courts to have exclusive jurisdiction over disputes thereunder, (7) MPS"s secured creditors were foreign entities, and (8) the members of the unsecured creditors' committee were foreign entities.[11] Indeed, the principal lenders noted that MPS's "ties" to the U.S. consisted mainly of an interest in a coming led pooled working capital reserve account maintained by MPS's New York-based pool manager[12] and an unused fee retainer in the amount of $250,000 held by its counsel in New York.[13] The principal lenders asserted that these property holdings were too insubstantial to provide proper jurisdiction.[14] Nonetheless, the SDNY court found that MPS's property interests in both the pooled account and in the unearned portion of the retainer were sufficient to satisfy "the relatively low bar that is necessary under Section 109 for there to be property sufficient to establish eligibility."[15]

Interestingly, not all four MPS debtors possessed U.S. property interests at the time of the Chapter 11 filing. Only one of the MPS debtors paid for, and thereby owned an interest in, the retainer, and yet another individual MPS debtor was the sole owner of an interest in the pooled account. In the light of these facts, the SDNY court strived to find a theory that it could use to explain how a property interest of one debtor could extend to its co-debtors.[16] Ultimately, perhaps persuaded by the engagement letter indicating that all four MPS debtors were clients,[17] the SDNY court concluded that the retainer was on behalf of all the MPS debtors and thus created a U.S.-based property interest for each MPS debtor. This, in addition to the money contained in the pooled account, was sufficient for the SDNY court to find that jurisdiction was proper.[18] Finding otherwise would have prevented the SDNY court from exercising jurisdiction over all of the MPS debtors.

The SDNY court was equally unpersuaded by the principal lenders' argument that MPS's retainer payment, made on the same day that MPS filed the Chapter 11 cases, was a bad-faith effort to "manufacture jurisdiction."[19] The SDNY court did note, however, that if the payment were to have been made solely to manufacture jurisdiction, the SDNY court would not have ruled in the same way.[20]

Alternatively, the principal lenders argued that the SDNY court should suspend or dismiss the Chapter 11 proceeding under § 305(a) of the Bankruptcy Code because "the interests of creditors and the debtor would be better served by such dismissal or suspension."[21] In their view, there was "no prospect of a recovery for unsecured creditors or equity holders."[22] However, the SDNY court denied the principal lenders' request for abstention, stating that "at least for the time being, the interests of the creditors are better served by maintaining the case as a fully active Chapter 11 case, not dismissing it."[23] The bases supporting the SDNY court's decision may have included the fact that there was no foreign insolvency proceeding pending and the fact that there were some U.S.-based unsecured creditors.[24]

Implications

The SDNY court's exercise of jurisdiction in both the *Almatis* and *MPS* cases appear to continue the past practices of U.S. bankruptcy courts in imposing low thresholds when reviewing challenges to a foreign entity's nexus to the U.S. Even the enactment of Chapter 15 has apparently done little to change this. The implications are clear: Chapter 11 remains a viable solution for many foreign entities, even those possessing but a kernel of domestic property.

The next several years, however, may foster a change in the jurisdictional landscape for extra-territorial insolvency cases and give foreign entities more flexibility when determining whether Chapter 11 is the most viable, beneficial and preferred insolvency statute. For example, at present, many foreign entities, such as Almatis, seek restructuring within Chapter 11 because the Bankruptcy Code lends itself to efficiency and formality when dealing with multi-national debtors and the disparate goals of their diverse creditors. Although many other international insolvency regimes do not currently afford debtors the restructuring capabilities that the Bankruptcy Code does, numerous countries have either recently implemented, or began the process of implementing, modified insolvency laws that are, in some cases, modelled after the Bankruptcy Code. Accordingly, as foreign jurisdictions continue to refine their insolvency laws, fewer non-U.S. debtors may choose to avail themselves of Bankruptcy Code protection.[25]

10 Transcript of (i) Motion of the Royal Bank of Scotland PLC Pursuant to 11 U.S.C. §§ 105(a), 362(d), and 1112(b) for Entry of Order (I)(A) Suspending Chapter 11 Cases or Granting Relief from the Automatic Stay and (B) Dismissing Chapter 11 Cases, or Alternatively, (II) Dismissing Chapter 11 Cases or Granting Relief from the Automatic Stay (the "RBS Dismissal Motion"); and (ii) Motion for Entry of Interim and Final Orders (I) Authorizing the Debtors to Obtain Post-Petition Financing, (II) Granting Adequate Protection, (III) Scheduling a Final Hearing and (IV) Granting Related Relief at 481:5-82:16, *In re Marco Polo Seatrade B.V.*, No. 11-13634 (Bankr. S.D.N.Y. Oct. 21, 2011) (hereinafter "Transcript").

11 *RBS Dismissal Motion*, at 2.

12 Post-Hearing Brief of the Royal Bank of Scotland PLC in Support of its Motion for Entry of Order (I)(A) Suspending Chapter 11 Cases or Granting Relief from the Automatic Stay and (B) Dismissing Chapter 11 Cases, or Alternatively, (II) Dismissing Chapter 11 Cases or Granting Relief from the Automatic Stay at 4, *In re Marco Polo Seatrade B.V.*, No. 11-13634 (Bankr. S.D.N.Y. Oct. 19, 2011) (hereinafter "RBS Brief").

13 Post-Trial Brief of Debtors and Debtors in Possession at 3, 5, *In re Marco Polo Seatrade B.V.*, No. 11-13634 (Bankr. S.D.N.Y. Oct. 19, 2011).

14 *See generally id.* at 2-9.

15 Transcript, at 488:13-14. While the bar may be low, the court did not accept, for purposes of establishing jurisdiction, that ship radio licenses issued by the Liberian office in the U.S. were property of MPS in the U.S. Further, the court refused to find that MPS's relationship with the manager of the pooled account created an agency relationship under which MPS did business in the U.S. See Transcript, at 487:16-88:3.

16 *Id.* at 427:2-10.

17 *Id.* at 428:11-17.

18 *Id.* at 491:12-15

19 *Id.* at 491:2-5.

20 *Seeid.* at 491:3-5. The court stated that it was "satisfied that the debtors, at the time that they made the decision to commence Chapter 11 cases . . . after consultation with counsel, came to the conclusion that there were contacts with the United States beyond the payment of a retainer . . . that would qualify for purposes of the 109 test." *Id.* at 491:6-15.

21 11 U.S.C. § 305(a)(1).

22 *RBS Brief*, at 13-14.

23 *Transcript*, at 494:5-12.

24 See *RBS Brief*, at 13 ("The Debtor's unsecured creditors hold no more than 15% of the Debtors' outstanding debt (as much as $38 million of at least $250 million outstanding.)").

25 The authors gratefully acknowledge the assistance of Thomas Shiah with this article.

Ian Strang

First President of INSOL International 1982-1985

Sadly we have to announce the death of Ian Strang on the 7 April, 2013.

A full obituary will appear in the next edition of INSOL World.

Our sympathies go to his wife Cynthia and family.

Delaware Chancery Court Clarifies Fiduciary Duties Owed by Directors of Foreign Corporations Domiciled in Delaware

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Despite the ever expanding global footprint of many American companies, the use of Delaware as a jurisdiction for incorporation of foreign operating subsidiaries remains popular. Among the many reasons cited for choosing Delaware as the forum for incorporating a new business, the robust volume of corporate governance jurisprudence coupled with an exceptionally sophisticated judiciary are often paramount. While much of this jurisprudence defines the protective nature of a Delaware corporate form, the Chancery Court occasionally seizes an opportunity to establish the outer bounds of the protection afforded to directors of a Delaware corporation, and to send a clear warning to those who may be lulled into a false sense of security about the vigilance demanded of Delaware directors.

In *In re Puda Coal, Inc. Stockholders Litigation,* Chancellor Leo E. Strine, Jr. analyzed breach of fiduciary duty claims brought against independent directors of a Delaware-based corporation with overseas operations and assets and articulated far-reaching oversight responsibilities for directors of such entities[1]. The scope of these responsibilities may exceed the expectations of even the most diligent director. Chancellor Strine was also quick to refute what he viewed as a common misconception that Delaware courts fail to hold management accountable for breaches of fiduciary duty, finding that such a claim is "astonishingly outdated and simple-minded . . ." . He had even noted that many other states had *stronger* insulations against director liability than those provided by Delaware's body of corporate law. In that regard, *Puda Coal* continues a recent trend in corporate governance jurisprudence where Delaware Courts have fashioned relief for plaintiffs seeking redress from directors for particularly egregious breaches of fiduciary duty. In so doing, the Courts have limited the ability of Delaware directors to insulate themselves from personal liability.

Puda Coal involved a pervasive and categorical breach of fiduciary duty by a foreign director who secretly transferred the company's entire foreign asset base to himself without notifying the independent directors residing in the U.S. in a purported attempt to leverage the company for expansion (and, presumably, personal gain). The transfer effectively left Puda Coal as an empty shell company and resulted in hundreds of millions of dollars in investor losses after the company's shares dropped in value from nearly $17.00 per share to just pennies. The theft went undetected for nearly two years when a report by the anonymous short selling web site Alfred Little revealed the wrongdoings. Only then did the U.S.-based independent directors and shareholders learn of the massive theft perpetrated by the Chinese management team.[2]

A group of Puda Coal shareholders commenced derivative actions in the Delaware Chancery Court against the board, including the independent directors who had no knowledge of the theft. Chancellor Strine granted a default judgment against the foreign directors, although the ability to enforce the judgment against the Chinese nationals remains open to debate. With respect to the claims against the U.S.-based indepdendent directors, drawing on the Court's earlier decision in *Caremark International*,[3] Chancellor Strine's bench ruling offers a valuable glimpse into how the judiciary views the role of an independent director in overseeing a Delaware corporation that does business overseas:

> *[Y]ou better have your physical body in China an awful lot. You better have in place a system of controls to make sure that you know that you actually own the assets. You better have the language skills to navigate the environment in which the company is operating. You better have retained accountants and lawyers who are fit to the task of maintaining a system of controls over a public company.*
>
> *. . .*
>
> *Independent directors who step into these situations involving essentially the fiduciary oversight of assets in other parts of the world have a duty not to be dummy directors.*
>
> *. . .*
>
> *[Y]ou're not going to be able to sit in your home in the U.S. and do a conference call four times a year and discharge your duty of loyalty. That won't cut it. That there will be special challenges that deal with linguistic, cultural and others in terms of the effort that you have to put in to discharge your duty of loyalty.*

Chancellor Strine's repetitive reference to the duty of "loyalty" in the above passage is particularly insightful when coupled with other recent Delaware case law. Most notably, in *Stone v. Ritter*[4] the Delaware Supreme Court

1 See *In re Puda Coal, Inc.* Stockholders Litigation C.A. No. 6476-CS (Del. Ch. Feb. 6, 2013) (bench ruling).
2 Puda Coal Chairman Secretly Sold Half the Company and Pledged the Other Half to Chinese PE Investors, Alfred Little (Apr. 8, 2011), http://www.scribd.com/doc/52587569/Puda-Coal-Final-Report.
3 *Caremark International Inc. Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996) (former Delaware Chancellor Allen, in dicta, held that the fiduciary duty of care of corporate directors included an obligation for directors to take some affirmative compliance measures).
4 911 A.2d 362, 370 (Del. 2006) ("[T]he fiduciary duty of loyalty is not limited to cases involving a financial or other cognizable fiduciary conflict of interest. . . . Where directors fail to act in the face of a known duty to act, thereby demonstrating a conscious disregard for their responsibilities, they breach their duty of loyalty by failing to discharge that fiduciary obligation in good faith.")

characterized so-called *"Caremark"* claims for lack of director oversight – like those at issue in *Puda Coal* – to be in the nature of a claim for breach of good faith and loyalty, rather than a breach of care. The distinction is a critical one for directors for two reasons. *First*, claims premised on breaches of the duty of loyalty are not analyzed using the deferential business judgment rule; and *second*, the standard exculpation provisions of a typical Delaware corporate charter do not shield directors from monetary liability for breaches of loyalty.[5] By eliminating these two lines of defense, directors may be personally liable for a wholesale failure of oversight as was alleged in *Puda Coal*. In such situations, directors may be unable to invoke the business judgment rule or corporate exculpation in defense of shareholder lawsuits. Additionally, as global economic conditions continue to deteriorate in certain regions of the world, these risks may be exacerbated by the fact that *creditors* of insolvent Delaware corporations may have derivative standing to bring these derivative causes of action, potentially expanding the universe of plaintiffs.[6]

The imposition of these heightened responsibilities imposes additional risks to any director of a Delaware corporation with significant operations overseas. While financial literacy is a fundamental qualification for any corporate director, at a minimum *Puda Coal* arguably imposes the additional dimension of cultural literacy. Chancellor Strine also warned that individuals have a "duty to think" prior to accepting a position as a director. Potential red flags raised by Chancellor Strine include: an individual's lack of understanding of the underlying business complexities; an inability to communicate in the language commonly used in the business operations; and a lack of understanding of prevailing legal strictures and ethical mores of the culture in which the business operates.

Accepting an appointment to serve as a director is merely the beginning of the process. Once appointed, an individual must engage in the active oversight of the corporation no matter where it does business. Moreover, directors must ensure that adequate procedures are in place – and compliance with such procedures documented – to detect anomalous behavior by the company's management. As Chancellor Strine succinctly stated from the bench, "[i]f I'm trying and I miss stuff, you get credit for that . . . what you can't be is a dummy director in the sense of . . . somebody who allows themselves to be appointed to something without any serious effort to fulfill the duties."[7]

5 See *Alidina v. Internet.com Corp.*, No. 17235, 2002 WL 31584292 at *8 (Del. Ch. Nov. 6, 2002) ("When a duty of care breach is not the exclusive claim, a court may not dismiss [the duty of care claim] based upon an exculpatory provision.") (emphasis in original); Bridgeport Holdings Inc. Liquidating Trust v. Boyer *(In re Bridgeport Holdings Inc.)*, 388 B.R. 548 (Bankr. D. Del. 2008) (same).

6 See, e.g., *North American Catholic Educational Programming Foundation, Inc. v. Gheewalla*, 930 A.2d 92 (Del. 2007).

7 See *Bridgeport Holdings Inc.* (directors' abdication of their oversight responsibilities to a restructuring professional constitutes a breach of the duty of loyalty) (citations omitted).

*A Democratic Solution: Managing the Headcount Test in Schemes of Arrangement Offshore**

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The Scheme of Arrangement ("Scheme") was introduced into British Virgin Islands law in 2006 and has extended the range of options available to companies under the *BVI Business Companies Act 2004*, already known for its flexibility. Perhaps because of the stage of the economic cycle at which it was introduced, the principal use of the Scheme in the BVI to date has been in the context of corporate insolvencies, and the Scheme has been welcomed as a creative and efficient mechanism for effecting a compromise between a company and its creditors.

The Scheme has its origins in 19th century English legislation as a means for a company in liquidation to compromise with its creditors and was extended in 1908 to include companies other than those in liquidation and compromises with members as well as creditors. From its English origins, the Scheme has become a feature of corporate legislation worldwide: alongside the BVI, the laws of Hong Kong, Singapore, Malaysia, Australia, India, Bermuda, Ireland, Guernsey, Jersey, and the Cayman Islands, amongst others, now all make provision for Scheme-based compromises derived from the English prototype, and to similar effect.

The Scheme provides a tried and tested mechanism which permits a company, with the consent of the relevant class or classes of members or creditors and the sanction of the Court, to enter into a binding compromise or arrangement with its members or creditors, or any class of them, respectively. There is no need for them to enter into separate contractual arrangements with every individual which it wishes to bind. If sanctioned, all of the relevant members or creditors with whom the arrangement was proposed will be bound by the terms of the Scheme, whether or not they voted in favour of it. This allows the company to reorganise or restructure itself within a commercially realistic timetable and with a degree of certainty of outcome that would generally be unavailable if the company needed to negotiate and to reach agreement separately with every interested party. It also facilitates complex, multi-level restructurings where different classes of members or creditors are dealt with in different ways and for junior creditors, whose claims are, in reality, economically worthless, to be "crammed down".

Where a compromise or arrangement is proposed by a company, the court may order a meeting of the members or creditors or of a class or classes of them to be convened to consider the proposal. If at the meeting(s) the proposal is approved by the requisite Statutory Majority, the scheme will be binding on all members or creditors whose rights are affected and on the company provided that the scheme is sanctioned by the court. The "Statutory Majority", for this purpose, means the double majority of a majority in number ("the Headcount test") representing 75% by value ("the Value test") of members or creditors or of the classes of members or creditors present or represented and voting at the relevant meetings. The Statutory Majority overrides for the purpose of the approval of a Scheme any contractual provision which may prescribe any other voting threshold for amendment of the contract.

The Scheme therefore packs a powerful punch: capable as it is of rewriting rights and liabilities contracted for, and it is the twin requirement that the Statutory Majority approve the Scheme and the Court sanction it, which together give it that power.

The requirement that a Statutory Majority be achieved in favour of an arrangement originated in the 19th Century legislation and passed into law at a time where share and debt holders typically held their interests both beneficially and legally so that there was rarely a significant difference between the persons whose names appeared on the relevant register of interests and those ultimately beneficially entitled to those interests. In that context, the logic of the double majority makes sense: the purpose of the Headcount is to prevent a minority with a large stake prevailing over the wishes of the majority. The Value test prevents a numerical majority with a small stake outvoting a minority with a large stake[1]. The balance was therefore struck between those with large economic interests (the majority in value) and those with smaller interests (the majority in number).

However, the Statutory Majority has in recent years come under increasing scrutiny, at least to the extent of the Headcount test. Both Hong Kong and Australia have amended their legislation so as to replace (Hong Kong) or to mitigate the effect (Australia) of the requirement that a majority in number support a Scheme proposed between a company and its members. The Headcount test has been criticised as being inconsistent with the principle of "one share one vote", and as giving a small holder of shares or debt an influence on the outcome of the Scheme disproportionate to his economic stake.

It has also been criticised in its application to both member and creditor schemes as operating to the detriment of stakeholders who, whilst beneficially entitled to the debt or share, hold their interest through nominees, custodians or

* This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information.

1 Brooking J in the Supreme Court of Victoria in *ANZ Executors and Trustees Ltd. v. Humes Ltd* [1990] VR 615 at 622 summarised the dual majority test as follows:
"… the result is achieved that mere numbers on a count of heads will not carry the day at the expense of amount invested and on the other hand that the weight of invested money may not prevail against the desires of a sizeable number of investors."

trustees, each of whom counts as a single head for the purposes of the Headcount test, however numerous or valuable those whom he represents.[2] This may be the case both in member schemes, for example, where uncertificated securities are held through intermediaries or a central clearing house, and in creditor schemes, for example, where bondholders hold through custodians or trustees.

As a matter of law, it is usually the case in such a situation that the only person entitled to vote on the Scheme is the person whose name appears in the relevant register as the holder of the share or debt instruments. Whilst, in relation to the value test, this makes no difference to the outcome of a vote, as the underlying value of the debt or securities held is calculated in reaching the totals cast, it does have an impact in calculating the persons voting from the point of view of the Headcount test.

Various approaches have been applied with the aim of resolving the conundrum which the Headcount test presents. At one end, these solutions have included the direct enfranchisement of the beneficial owners through the issuing of voting cards or certificates to all beneficial owners, or to those wishing to vote, recognising the beneficial owners as contingent creditors who are thus entitled to vote on the Scheme.[3] Alternatively, amendments have been made to the terms of bonds so as to bring the holders within the statute as "creditors" who are thus entitled to vote on the Scheme. At the other end of the spectrum, recognising that a holder may cast parts of his vote in different ways,[4] the legal owner has been treated as having two heads, one voting in favour and one against, thus cancelling each other out. Clearly, all of these solutions have their difficulties, legal and practical.

The neatest solutions have been those which seek to recognise the representative nature of the legal holder's title and to give effect to the wishes of the beneficial owners, without ignoring the legal position that it is the legal title which confers the right to recognition for voting purposes. One such solution, adopted by the Royal Court in Jersey in the *Computer Patent Annuities Holdings Limited* Scheme[5], is for each share or debt holder to be allocated a single vote but for each such vote to be subdivided into fractions of a vote in accordance with the number of beneficiaries which are represented by that holder. Those fractions can then be voted by the holder for or against the Scheme and the fractions aggregated to determine whether the majority in number is for or against the Scheme.

The difficulty with this approach[6] is that it is inconsistent with the traditional line taken by in Common Law jurisdictions where company law takes no notice of any trust or beneficial interests attaching to shares nor, usually, the terms under which debt instruments have been issued.

Another approach[7] to a similar effect, but more satisfactory from a legal perspective, is to allow the custodian or nominee a single vote, either for or against, to be determined by his setting off the number of beneficiaries for whom he holds supporting the Scheme against those opposing, with the majority determining which way the single vote is to be treated as cast.

Undoubtedly, for as long as the Statutory Majority, including the Headcount test, remains a condition for the sanction of a Scheme, other approaches will emerge from time to time to deal with the issue which it raises in situations where shares or debt are held through nominees. In the BVI context, the issue is liable to arise with Schemes, as many expect them to prove the mechanism of choice for the compromise of competing rights of creditors and shareholders in the insolvent Funds. What is important, however, is that such solutions have been found, tested and accepted in different circumstances so that those wishing to use the Scheme in complex restructurings, solvent and insolvent, both in the BVI and elsewhere, can be confident that they are available and that the Headcount test presents no obstacle to the success of an otherwise well-founded proposal.

2 In 2006, during the consideration by the UK Parliament of what became the Companies Act 2006, two attempts were made to remove the majority in number requirement with respect to Schemes. On the first occasion (*House of Lords Hansard*, 28 March 2006, column GC326), the Attorney general said that Government said that the Government was not persuaded that the amendment struck the right balance between small and large stakeholders. The second attempt *House of Lords Hansard*, 16 May 2006, column 217, put forward on the footing that "the majority in number, focusing on a majority of registered holders, is an anachronism, now that most retail holders hold through the CREST nominees, where one registered holder may represent many thousands of beneficial owners. It is also open to abuse by shareholders who could subdivide their holding through a number of nominee companies." Again, the Government's response was that removal of this requirement would mean that "larger creditors and members could impose their will unfairly on smaller creditors and shareholders".

3 Which was the approach permitted by Hart J in *Re Castle Holdco 4 Limited* (unreported) in connection with the Countrywide Plc Scheme and by the Royal Court of Jersey in *Investkredit Funding Limited* [2012] JRC 121.

4 See *Re Equitable Life Assurance Society* [2002] BCC 319.

5 [2010] JRC 011

6 As recognised by Cresswell J in the Grand Court in Cayman in Re Alibaba.com (unreported) 20 April 2012.

7 Canvassed but rejected by the Grand Court in Cayman (Jones J) in re Little Sheep (unreported 20 January 2012) for reasons arising out the particular terms of the applicable Practice Direction.

Jim Luby interviews past winners of the Richard Turton Award

By Jim Luby
McStay Luby
Dublin, Ireland

The Richard Turton Award provides an educational opportunity for the best and brightest young insolvency and restructuring professionals from emerging nations to develop a research paper on an academic topic of their choice, attend the INSOL Europe conference and achieve recognition amongst their peers.

I caught up with some of the past award winners to see how their involvement had helped their careers, how insolvency and restructuring has developed in their countries and how they see the future of our profession.

Lavinia Iancu, a partner with SCP MIRIANA MIRCOV RELICONS SPRL in Timisoara, Romania, won the first award in 2005, the same year in which she became a qualified IP. Attending the conference in Amsterdam opened up a world of new contacts both professional and academic. These have helped her career. *"I completed a degree in business law, followed by a Post Graduate Diploma in International Insolvency Law organised by INSOL International and Nottingham Trent University. As well as my day job as an IP, I am now an assistant professor at Tibiscus University."*

Lavinia says that insolvency and restructuring case law and practice is relatively undeveloped in Romania, although there has been a modern insolvency law in place since 2006. *"The reorganization procedure is very rarely accessed by debtors (less than 4% of the total of insolvency procedures at a national level) due to the reluctance of debtors to admit when they are experiencing financial difficulties and to refer to a specialist sufficiently early; the unwillingness or inexperience of creditors willing to negotiate; and the lack of support for an insolvent debtor from financial and public institutions."*

How does Lavinia see the future of restructuring in Romania and in Europe generally? *"In spite of the difficulties, I am positive that in Romania, in the next 10 years, creditors will change their attitude towards insolvent debtors, and debtors will be encouraged to access the insolvency procedure earlier, when their activities may still be restructured."*

More broadly, Lavinia is interested in the current EC proposals for amendment of the European Insolvency Regulation, particularly with regard to Groups, and the proposals for exchange of information. *"Presently, cross-border insolvency cases in which Romania is involved are very few and there is no public information about the way they are carried out."*

In 10 years? *"I see myself in Court practising the profession of insolvency practitioner and teaching students at the University. I see myself still being involved in the INSOL projects so as to have up-to-date information about new developments at an international level, information that will be useful for me in both my professions."*

Maurycy Organa, an IP and a member of the legal advisor's Bar with Organa & Karbowski IP's in Poznan Poland, won the award in 2010.

He is a lawyer in a very busy expanding practice, dealing with the large increase in insolvency work which has arisen in Poland in recent years, as well as acting for creditors and other stakeholders.

A radical revision of insolvency law is presently being worked on in Poland to cater for the increased complexity of restructuring cases, both local and cross-border.

He is involved in the Polish National Chamber of Insolvency and helped organise INSOL Europe's successful Eastern Europe restructuring conference in Poznan in 2012. One of the ideas emanating from that conference was the promotion of lower cost seminars tailored more specifically to young practitioners, including the Turton Award participants. Maurycy's view is that this will increase the profile of the Turton Award and capitalise on the valuable research experience which the participants have developed.

In 10 years? *"I hope to develop my career and be involved in more complex cross-border restructuring cases, supported by the multi-disciplinary team here in this firm."*

Ieva Baranauskaite of Swedbank in Vilnius, Lithuania, was the 2011 award winner for her research paper on Fraudulent Bankruptcy.

Having worked in public sector law previously, and graduating in law and business in the UK, Ieva pursues Swedbank's interests through the Courts, and has much interaction with insolvency professionals and problem debtors.

How did you hear about Richard Turton Award competition? *"It was the second day of my new work at Swedbank when I saw on the wall an advertisement inviting an article about insolvency. I am very happy that such a simple circumstance led to my work being evaluated by leading professionals. This confirms the importance of faith and trust in your own abilities, which will lead to success!"*

"Getting the award was a significant achievement for me as a person, because it led to increased self-confidence. This prestigious award also played an important role in advancing my knowledge about insolvency and bankruptcy and gave me the opportunity to realize my secret desires of PhD studies majoring in bankruptcy law."

Ieva believes the main benefit of being involved in the Turton award was exposure to leading professionals, including academics and lenders. *"Listening to the top level professionals at the conferences I have been able to attend because of the award, has been a great learning experience."*

Lithuania has seen a considerable increase in the number of administrations and bankruptcies in recent years, with the biggest change being an individual (personal) bankruptcy law which will take effect from 1st of March, 2013. *"I hope that the Baltic States follow the experience of foreign countries and will lead a major reform of bankruptcy / insolvency law. And I intend to contribute to this!"*

"10 years from now, I will master my profession within Swedbank, because I see this job as an opportunity to become a talent in my field, by enhancing my professionalism while learning new skills, interacting with different people and integrating new work methods. I definitely see this job and this company as integral parts of my plans for the future."

Edvins Draba from Riga, Latvia is the most recent award winner, in 2012. He is an associate in Bunkus law firm, performing insolvency and restructuring work, as well as civil and commercial law. He is pursuing qualification as an insolvency administrator this year. *"I would like to further my skills and experience in international insolvency and restructuring matters, conduct research in this field and go for a PhD degree."*

Having heard about the Turton award in Eurofenix, the journal of INSOL Europe, he developed a well-received paper on Latvian insolvency and restructuring experience. Edvins has had articles published in Eurofenix and elsewhere.

While corporate insolvency numbers have fallen in recent years, due to a higher entry threshold combined with the greater expense involved in starting proceedings, the number of personal bankruptcy proceedings have increased significantly following the implementation of the new Insolvency Law in 2010. *"The most recent change was introduced in June 2012, when the legislature amended the order under which claims of employees are satisfied from the state guarantee fund in case of insolvency of the employer. Other reforms will follow."*

Edvins has exchanged views with numerous IPs from across Europe because of his involvement in the award, and recently attended the Scandinavian / Baltic Network on Insolvency in Denmark. He sees a move away from formal proceedings: *"I think restructuring proceedings will get less complicated and bureaucratic in terms of procedure across Europe, as all the stakeholders, including national legislators, gain more experience in these proceedings and learn from each other's success or mistakes. They will give more tools and more flexibility to entrepreneurs when solving financial difficulties."*

"At the same time, a number of countries will search for a reasonable balance between restructuring and insolvency, ie debtor's and creditors' interests. Of course, cross-border issues are of paramount importance nowadays and must definitely be improved within the next 10 years. The idea of a European rescue plan among members of the same group of companies, partly found in the recently proposed amendments to the EIR, is very sound and is one of the solutions. The other one lies within the harmonization of laws."

I could have spent much more time with these young, enthusiastic people. Moreover, there are many more Turton Award winners with equally interesting and valuable views and experience to offer our profession.

I came away from our discussions with high hopes for the future, and I am convinced that the Turton Award is a valuable contribution to the future of insolvency. The late Richard Turton would be proud.

Brazil: Superior Court of Justice and Exporters Financing Under Reorganization

By Francisco Satiro and Sheila Christina Neder Cerezetti
University of Sao Paulo
Sao Paulo, Brazil

Introduction

In a long-awaited decision, the Brazilian Superior Court of Justice (STJ) has ruled that advance payments under foreign exchange contracts (*Adiantamentosobre Contrato de Câmbio–ACC*) will not be subject to the Brazilian reorganization procedure. The decision puts to an end the prolonged debate over whether these types of loans, granted to exporters, should be regarded as bankruptcy claims.

The Court of Appeal had earlier accepted the debtor's argument, that the purpose of a reorganization case is to preserve the enterprise, and that bankruptcy rules should be construed in the light of this objective. Therefore, even though article 86, II, of the Brazilian Bankruptcy Law states that ACCs do not constitute credit affected by bankruptcy, the Court of Appeal ruled that claims arising from ACCs are to be listed in a bankruptcy case.

By a majority of 3 to 2, the STJ rejected this argument, ruling that the advanced payments do not constitute property owned by the debtor and hence should fall outside the debtor's bankruptcy estate, if a bankruptcy petition is filed. For that reason, the Court held that such amounts must be directly surrendered to the creditor, falling in consequence outside the reorganization procedure.

This decision sheds light on one of the most sensitive issues relating to the relatively recent Bankruptcy Law. Given that Brazilian Courts are, for the first time, facing many of the principal controversial topics in bankruptcy law, the judgment provides significant guidance to both debtors and creditors as to the treatment of debts.

ACC

ACCs are a means of financing exporters. When Brazilian companies enter into export agreements with forward payments, they are able to anticipate their revenues by contracting, with any commercial domestic bank, to receive an advance on their credit as represented by foreign exchange contracts (ACC). This is a very common way of financing a domestic business; foreign credit, registered as a future foreign exchange contract before the Brazilian Central Bank, will serve as the collateral for the financial transaction. Moreover, when the importer uses a local bank for funding purposes, this financing process will become even more attractive to the exporter's bank.

The most important characteristic of ACCs is their privileged treatment under Brazilian bankruptcy law. This began in 1965, when the first law on capital markets (Law 4,728) was enacted. Congress used the statute to address other issues of importance to the enhancement of the business environment in Brazil, and stimulating exports was one of them. Aiming to provide a better structure for exporters' funding, Law 4,728/65 exempted the ACC claims of banks from the bankruptcy process. The strategy adopted was curious.

When liquidation proceedings take place, the appointed trustee must, consistent with normal practice, list all assets belonging to the debtor and/or in his possession. If a third person's asset is scheduled as part of the debtor's assets simply because it was in the debtor's possession when the court made the bankruptcy decree, the Law provides its owner with the right to petition for its "restitution". This would not be considered a submitted claim because the asset should have fallen outside the bankruptcy estate – it actually belongs to someone else, and it is being given back to its owner.

This is precisely the case with leased equipment, which belongs to the lessor although it may be in the possession of the lessee during the Evaluation of claims[1]. Law 4,728/65 provides that ACC creditors are also entitled to "restitution". By providing for the different treatment of ACC creditors, the Statute reduced the risk of the financial institution becoming associated with the bankruptcy of the debtor or exporter. As a claim falling outside the estate, ACC credit became very attractive to banks; they were expected to have more frequent recourse to ACC agreements, and in so doing, to make financing easier and cheaper for exporters.

When the ACC provisions first came into force, Decree 7,661/45 was the Brazilian Statute for bankruptcy. While interpreting the special ACC regime under Decree 7,661, STJ decided that ACC credits should be paid before any other credit in bankruptcy ("Sumula" STJ 307[2]) because it was a restitution case instead of a credit payment. At the time, the ACC special regime was not challenged.

When the new Bankruptcy Law came into effect in 2005 (Law 11,101/2005), the provision for the special regime in the case of ACC was maintained.[3] However, the new

1 Section 85. - The owner of an asset scheduled in the bankruptcy proceedings or that is in the debtor's possession on the date of the decree of bankruptcy may petition, for its restitution.

2 "Sumula" is a Precedent by the Superior Court that defines the Court's interpretation of a recurrent issue.

3 Section 86. - Restitution in cash shall be made:
(...)
II. - of the amount delivered to the debtor, in domestic currency, resulting from an advance on an export exchange contract, pursuant to Section 75, paragraphs 3 and 4, of Law 4728 of July 14, 1965, provided the full term of the transaction, including any extensions, does not exceed the terms established in specific rules of the proper authority;

Statute contained a number of provisions, which provided scope for challenging the limits of the exception. First, Law 11,101/2005 brought into force conventional restructuring proceedings, which had not previously existed in Brazil. This is the case of *Recuperação Judicial* (judicial reorganization), the most well-known and most used of such proceedings. This is a reorganization proceeding based on typical provisions, such as the automatic stay, the reorganization plan approved by creditors, contractual autonomy, etc. In addition, the new insolvency environment created the new reorganization procedure (which was considered as sufficient for some debtors to dispute the former STJ Precedent).

There were three other important matters:
First, Section 47 defined the purposes of judicial reorganization and went beyond the simple protection of a company's assets, mentioning the importance of social and employees' interests in respect of a going concern.[4] "Preserving the enterprise" became the most important principle in the new regime.

Second, the terms of the ACC exemption maintained its close relationship with liquidation proceedings. There is a single direct reference to the general exception in judicial re-organization rules. It is not mandatory to submit ACC claims.[5]

Finally, Section 151 created super priority for certain labor claims, by reference to their perceived social importance. Employees must receive payment in priority to any other creditor[6], the priority applying to the level of a prescribed minimum wage.

The main arguments

Considering the large amount of money usually associated with ACCs, some debtors claim that excluding ACCs from reorganization cases, and requiring their immediate refund, would make it impossible to rescue the debtor. They also argue that the purpose of preserving the enterprise, which, according to them, is the core principle underlying the Bankruptcy Law, may not be achieved if the amounts advanced under ACCs are to be paid back by the debtor as against being compromised under a reorganization plan.

Facing the increasing amount of ACC credits, and the obstacle that they posed for the reorganization of companies, some State Courts began to reinterpret the provisions of Law 11,101 in order to consider that the exception should not apply to judicial reorganization, based on: i) the mandatory application of the principle of the preservation of the enterprise, which suggests that the company's and its creditors' and employees' interests will not be submitted to a sole creditor's interests; ii) the

4 Section 47. - The object of judicial reorganization is to make it possible for the debtor to overcome its economic and financial crisis in order to be able to maintain the production source, the employment of workers and the interests of the creditors, thus contributing to preserve the company and its social function and to foster economic activity.

5 Section 49. - All claims existing on the date of the petition are subject to judicial reorganization, even if not yet due.
(...)
Paragraph 4. - The amount referred to to in Section 86, II, hereof shall not be subject to the effects of the judicial reorganization.

6 Section 151. Labor-relatedclaimsstrictlyrelated to wages falling due during the three (3) months prior to the decree of bankruptcy, to a limit of five (5) minimum wages per worker, shall be paid as soon as cash is available.

perceived inadequate use of the exemption for ACC credits – which, excepting their peculiar export origin, are essentially similar to any other invoice based financing - during judicial reorganization, largely because the precedents were developed under a quite different legal environment that did not take into account the reorganization procedure and its economic implications; and finally iii) the existence of a new class of super priority creditors (employees) would recommend not allowing ACC payments during reorganization because, in the case of further liquidation, there would be no resources for them.

Justice Nancy Andrighi adopted these arguments in voting for ACC credits to be made the subject of a judicial reorganisation. Justice Massami Uyeda concurred with her. Justices Ricardo Villas Boas Cuevas, Sidnei Beneti and Paulo de Tarso Sanseverino each voted for the continuing exclusion of ACC credits from the effects of a judicial reorganization. Justice Cuevas described the limited role of legal principles in the interpretation of statutes, stressing that a very clear rule, like section 49, §4th, should not be unenforceable based on a general principle such as enterprise preservation. Justice Sanseverino added that it was impossible to harm a creditor by denying that creditor a clear legal right based on the possibility of a future liquidation and the potential of damage to labor creditors (who also had preferential rights situation in judicial reorganization proceedings[7]).

Conclusion

The ruling by the STJ discussed in this article marks the beginning of a new phase in the financing structures of companies and in achieving certainty for debt collection practices. A more reliable range of tools is now available to creditors looking for protection from the effects of a reorganization. The ruling also affords a certain degree of predictability to these cases, so that creditors and debtors can, with relative accuracy, evaluate the legal consequences of their business practices.

There is in consequence reason for optimism among bankruptcy practitioners and financial institutions with respect to the use of ACC as a credible and reliable financing device. Given that lenders can now rest assured that their interests are reasonably protected from renegotiation in reorganization procedures, there is room for them to reflect this by having recourse to ACC funding or allowing debtors some leeway in restructuring negotiations.

The ruling might also shed light on other unresolved bankruptcy matters. Given that it rejects the idea that principles – particularly the principle of enterprise preservation – prevail over bankruptcy rules, the STJ ruling might be of use in other polemical debates on the distinctions between principle and practice in bankruptcy cases and the circumstances in which one might take precedence over the other.

[7] Section 54. – The judicial reorganization plan shall not provide for a term longer than one (1) year for payment of -labour related claims or occupational accident claims falling due by the date of the judicial reorganisation petition.
Sole Paragraph . – The plan shall not, further, provide for a term of more than thirty (30) days for the payment, to a of five (5) minimum wages per worker, of strictly wage-related claims fallen due during the three (3) months prior to the judicial reorganization petition.

Cross-Border Insolvency: Third Edition

Editor: Richard Sheldon QC, Bloomsbury Professional,
ISBN 978-1-84592-104-0

Review by Joe Bannister

Hogan Lovells International LLP, London, UK

To the writer, like so many others striving to master the complex and occasionally arcane world of cross-border insolvency, Professor Smart's book of that name was a godsend. The third edition of *Cross-Border Insolvency* is thus timely. The proposed reforms to the European Insolvency Regulation and the on-going conflict between Lord Hoffmann's espousal of the principle of modified universalism and the more restrictive approach to recognition taken by the Supreme Court in *Rubin* are examples of this.

Against that volatile background, the format adopted by this third edition is particularly useful. It successfully combines general editorial with in depth analysis of each of the key legislative and jurisdictional concepts with which practitioners must deal. The work is particularly rich because it is spread between seven different contributors. Hence the reader benefits from the widest possible range of ideas and experience.

The writer found the opening coverage of the European Insolvency Regulation and the Cross-Border Insolvency Regulations 2006 especially useful. The step by step analysis of individual provisions gives the reader a useful foundation for the discussion of broader, yet critical, ideas such as the meaning of "collective insolvency proceedings" and the term "law relating to insolvency".

The difficult question of jurisdictional thresholds is thoroughly addressed with a lucid explanation of the low jurisdictional requirement for winding up an overseas company and the way in which that threshold has facilitated the use of Part 26 Schemes of Arrangement as a restructuring tool. This is followed by a meticulous review of the scope of the English court's discretion to recognise ancillary proceedings.

This coverage of the legislative framework and the position in corporate insolvencies is balanced by equally full consideration of the basis upon which English courts will accept jurisdiction for individual bankruptcy proceedings. The factual requirements for an individual to establish "domicile" or to be "carrying on business" here are fully summarised. Throughout this part of the book, as with the treatment of corporate insolvencies, are references in both the text and footnotes to a substantial number of English and Commonwealth authorities. These provide the broadest possible range of sources for even the most complex pieces of research or advice.

The work concludes with coverage of some of the more frequently encountered yet difficult areas of cross-border insolvency. These are the provisions on the enforcement of judgments, the hotchpot rule and last but not least, the treatment of set-off. There is a careful exposition of the differences between *BCCI (No.10)* emphasising the primacy of the mandatory set-off regime in an English liquidation and some of the later pronouncements of Lord Hoffmann, stressing the extent of the English courts' common law discretion.

The book concludes with an appendix setting out in full the text of the European Insolvency Regulation and the Cross-Border Insolvency Regulations. There is also a section in the appendix including copies some of the principal forms and notices that must be used in compliance with the requirements of the Cross-Border Insolvency Regulations and the European Insolvency Regulation.

In the 18 months since this third edition of *Cross-Border Insolvency* was published, the changes and proposed reforms to cross-border insolvency jurisdiction and practice have snowballed. The Supreme Court ruling in *Rubin -v- Eurofinance* is merely the latest illustration of this trend. Against that backdrop, the extensive quotations from leading judgements and the copious references to supporting authorities and legislation will ensure that this edition of *Cross-Border Insolvency* remains a valuable reference work for practitioners over many years to come.

It is nevertheless to be hoped that the editor and his contributors will not keep us waiting for too long before producing a supplement or a reworked book that takes all of these far reaching changes into account. They have indeed set themselves a hard act to follow.

Conference Diary

June 2013				
13	INSOL International Sao Paulo One Day Seminar	Sao Paulo, Brazil	INSOL International	www.insol.org
July 2013				
11-13	ABI Northeast Bankruptcy Conference	Newport, Rhode Island	ABI	www.abiworld.org
18-21	ABI Southeast Bankruptcy Conference	Amelia Island, FL	ABI	www.abiworld.org
August 2013				
15-18	CAIRP Annual Conference	St. John's, Newfoundland	CAIRP	www.cairp.ca
September 2013				
19-20	CBA Pan-Canadian Insolvency and Restructuring Law Conference	Calgary, Alberta	CBA	www.cba.org
26-29	INSOL Europe Annual Conference	Paris, France	INSOL Europe	www.insol-europe.org
October 2013				
3-5	TMA Annual Conference	Washington, D.C.	TMA	www.turnaround.org
25	ABI International Insolvency & Restructuring Symposium	Berlin, Germany	ABI	www.abiworld.org
November 2013				
7	INSOL International Cayman Islands One Day Seminar	Cayman Islands	INSOL International	www.insol.org
21	INSOL International Tokyo One Day Seminar	Tokyo, Japan	INSOL International	www.insol.org
February 2014				
5-7	TMA Distressed Investing Conference	Las Vegas, NV	TMA	www.turnaround.org
March 2014				
23-25	INSOL Hong Kong Annual Regional Conference	Hong Kong	INSOL International	www.insol.org
March 2015				
22-24	INSOL San Francisco Annual Regional Conference	San Francisco, CA	INSOL International	www.insol.org

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Non-Commercial Partnership Self-Regulated Organisation of Arbitration Managers "Mercury" (NP SOAM Mercury)
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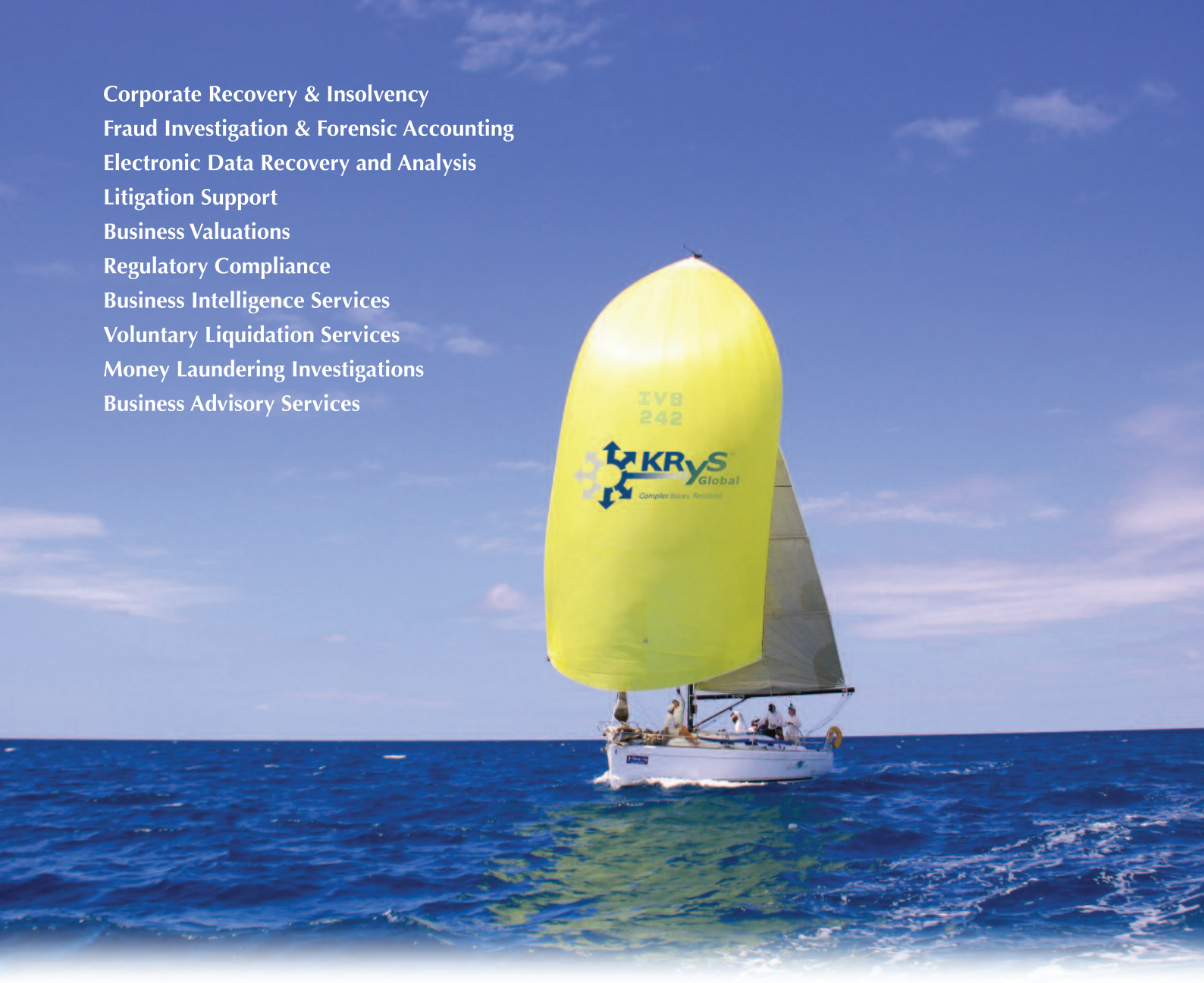

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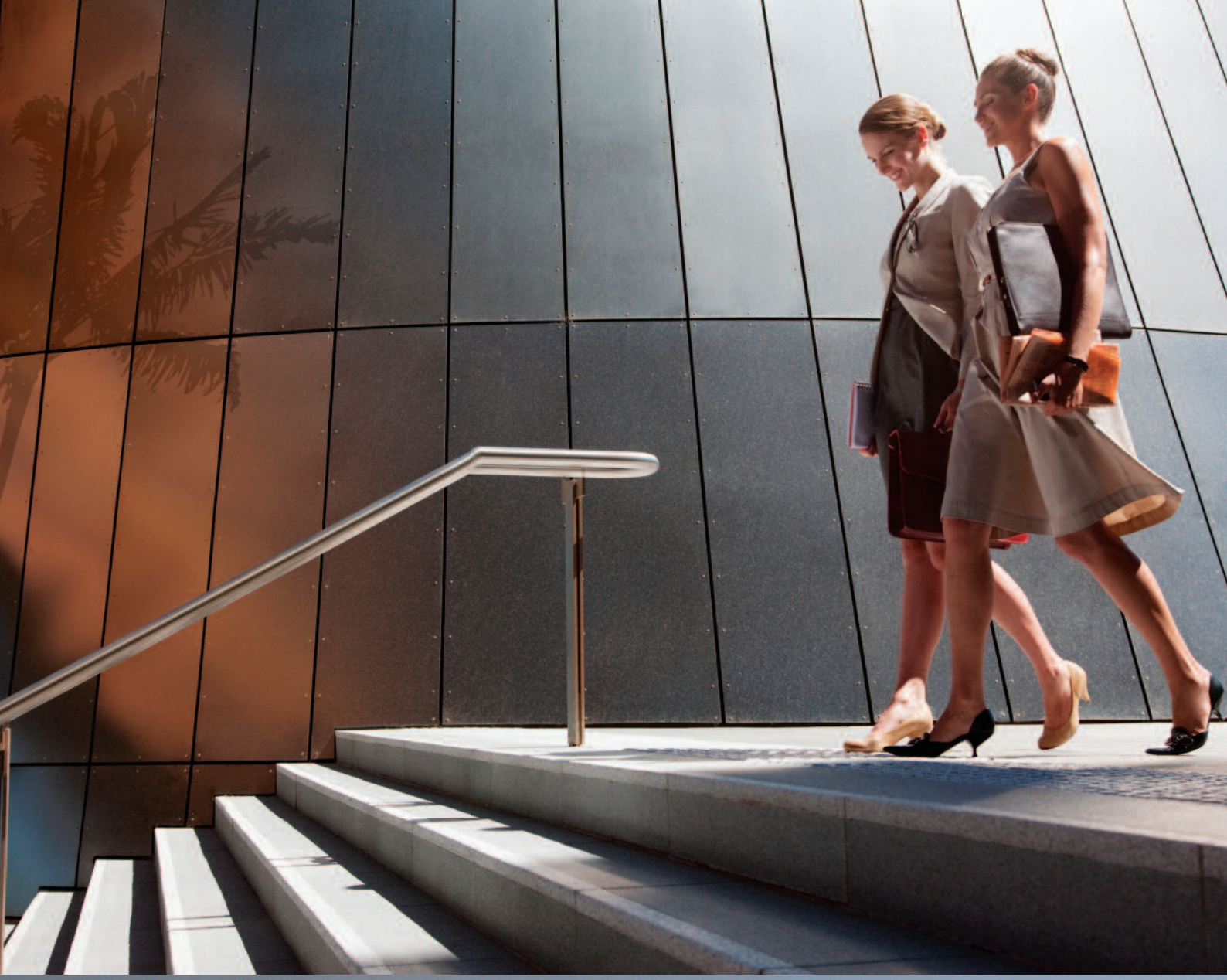

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