

Ep.86 Preventive restructuring in Germany, the Netherlands and India: a Case Study

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Ishana Tripathi (IT) (00.23): Hello and welcome to INSOL Talks. Today we're going to put what we learned about the STARUG, WHOA and CIIRP in our previous episode. Listen to that first before this one. And put to test the applicability of the WHOA, STARUG and the CIIRP and CIRP through a case study. A mid-sized manufacturing group with a parent in Netherlands, a major operating subsidiary in Germany, and a large Indian subsidiary supplying components is in financial distress. It's not yet insolvent, but will run out of cash in four to six months without a restructuring. Secured lenders are spread across all three jurisdictions. There are trade creditors, and there is even one hedge fund holding distressed debt in the mix.

My first question then is to Saurav. The Indian subsidiaries largest supplier is owed money. Would you advise them to trigger a CIRP, the newer creditor initiated process, or neither? What would that choice do to the group's broader restructuring?

Saurav Panda (PAN) (01.40): If I'm advising the Indian supplier, the Indian supplier has practically only an option to trigger a corporate insolvency resolution process, considering it's not a financial creditor. That's the only route available to it. Triggering the CIRP will take the Indian subsidiary completely out of the parents control. Now, as I told you earlier, once the CIRP commences, the resolution professional takes over the entire management of the Indian subsidiary and the parent, the offshore parent will completely lose the control over the management of this company.

The threat of the trigger, the threat of triggering the CIRP, I think, will be a very good leverage for the Indian subsidiary supplier to negotiate a restructuring of its payment schedule. And that really is the way to go for the Indian subsidiary supplier, according to me.

See, while that is the trigger for finding hopefully a good negotiated settlement for the supplier. But one must not lose sight of the fact that an operational creditor in India can practically lose everything during the insolvency process, because the way the protections are geared up in the insolvency process, the operational creditor only can get a minimum guaranteed value of only the liquidation value. And if there are financial creditors or secured creditors in the mix at the Indian subsidiary level, then the operational creditors will get nothing in case the CIRP is actually triggered.

But the threat of the CIRP and the kind of impact it can have on the broader restructuring plans in the group, I think, is the way to negotiate and find a solution for the supplier. Whether the supplier can ultimately trigger a CIRP will also depend on whether there is an actual default. As I said earlier, an imminent stress going forward really may not suffice, but that's how I think the Indian supplier can play out.

IT (04.02): Now, Robert, we've got a German subsidiary in the mix. So could this subsidiary use the STARUG given it's not yet insolvent? And how would you handle the dissenting hedge fund through a cross-class cramdown.

Robert Haenel (RH) (04.17): Well, assuming that the German subsidiary runs out of cash within the next four to six months, it could, of course, make use of the STARUG because it's imminent, insolvent within the next twenty four months. And so, yes, that's the answer. Yes, it could use the STARUG proceedings prior to that. Of course, I think it should be investigated whether a STARUG is really the best option or whether it's out of court negotiations, maybe, or even an insolvency proceedings where you have the possibility to have some operational restructuring as well.

Normally, if you can avoid any kind of these proceedings, then it's the best way to go. Normally also if one of the group companies starts to fall, then there is that domino effect which might force you into some kind of proceeding. Well, maybe one interesting um, option possibly is um, I think that's the same instrument in the, in the Dutch WHOA, you have the third party release that you can use in your plan. And so if you need only one of the group companies to go into insolvency proceedings and release the other group companies within that proceeding or WHOA proceeding, STARUG proceeding, whatever, that may also be an option.

Now, coming to the to the hedge funds claims, Most probably you would be able to put the hedge fund with their claims into a simple class, within the voting process. And then if they're outvoted, the court can cram down and they are forced to accept the plan. So if they don't have any securities, it's quite easy to deal with them.

IT (06.15): Now for the last word Sid, the parent sits in the Netherlands. Would you send the group's restructuring around the WHOA, and how would you coordinate what's happening in India and Germany?

Sid Pepels (SP) (06.31): Yeah, yeah. I think generally speaking, if it makes sense to try and centralize a restructuring in a single jurisdiction or in a limited number of jurisdictions, depends on whether there's value to be maintained if you keep the group as a whole. So I think that's usually the first analysis that the financial advisors will make. And if that is the case, then often it doesn't make sense to try and liquidate or realize through DIP proceedings that a group of companies through local individual proceedings. But then the second question is, is it possible to centralize the restructuring in a single, in a couple of jurisdictions? And in my experience, if it's just a financial restructuring, that will often be the case. If a more comprehensive restructuring or even a reorganization, operational reorganization is necessary, it can be, but doesn't need to be more difficult.

So if, for instance, the group's main financing debt needs to be restructured and all three group companies are liable for that same debt, then the WHOA as a main focus point for restructuring would be an option through that same third party release mechanism that Robert just mentioned. There are examples with *Vroon* and with *Diebold*, for instance, where the, a single WHOA or two WHOA's in respect of a limited number of debtors, was used to release the group debt for group debtors all over the world. So Singapore companies, Shanghai companies, Dutch companies, US companies all, all benefited from the release in that in that single plan. So that would be an option. If we would do so, you would have to figure out a way to keep the German opco out of German insolvency proceedings due to the obligation to file.

He would also have to figure out a way to prevent the Indian process from becoming a standalone process, which I just heard. It's probably going to be difficult one. But in any event, in relation to the German situation, I've seen cases where in practice that just meant that additional financing would need to be made available for the German opco to make sure that they have sufficient funding to prevent the directors from having to file insolvency under their national regimes.

So that's probably how I would try and tackle this in the beginning. And if it doesn't work, the idea would be file parallel proceedings in the multiple jurisdictions and make sure that the plans that you file in those jurisdictions are interlocked and sort of contain the same restructuring to the extent possible and necessary.

IT (09.13): Thanks for that, Sid. And to wrap this case study up, I just want to ask each one of you a very straightforward question. If this ran as parallel proceedings in all of your jurisdictions, what's the first thing that breaks? And maybe we go revers. Sid, can I start with you?

SP (09.35): Yeah, sure. Sure. In my experience, one of the difficulties with cross border restructurings, if there isn't an English lawyer referencing the Rule in Gibbs, is that at least on the European end of things, there are a couple of jurisdictions that currently provide for the obligation to file for insolvency proceedings. Germany is a well-known example, but Spain, Spain, for instance, is one as well. And in the near future, in some shape or form, we will all have the duty to file for insolvency based on the European Harmonization Directive that has been recently adopted. But that obligation to file if a German company is included, for instance, may require directors of individual companies to sort of separate themselves from the more global process. And that that I think that's one of the issues that I would see walking into our imaginative case.

RH (10.29): I would just like to mention that even if there is a necessity, an obligation to file for insolvency proceedings in Germany in such a cross-border group situation, that doesn't necessarily mean that you cannot include the German entity in a group restructuring because insolvency proceedings also offers opportunities to restructure and cooperate with other proceedings across the border.

Now the question what breaks first? I would say what breaks first is the entity that needs the money most and doesn't get it anymore because it can be hard to continue a cash pool, for example, as soon as companies are in formal proceedings. And then the company that requires the cash, which is often the holding company, but sometimes also one of the opco's, they get a problem and then have to, well, maybe even liquidate.

IT (11.29): Now for the final question and answer for this case study. Saurav, what breaks fast from your jurisdiction?

PAN (11.40): See, I think Sid probably referred to it. India is very unique in the sense that, uh, even till date, we don't have, uh, the CIRP notified yet. So practically in today's insolvency regime, the only option is, uh, corporate insolvency resolution process. What that effectively means is the very initiation of the process of the proceeding, you lose the control and the resolution professional comes in and a committee of creditors come.

There is no cross border recognition, formal cross border recognition tool such as the UNCITRAL Model Law. And so therefore, you are really dependent on principles of comity and the kind of cooperation you can get, uh, with the resolution professional. And the interests of the Indian creditors, if they are in a way different from the interest of the wholeco and the rest of the group, then it is possible that this can completely veer away from the larger restructuring plans of the group. So one will have to be really mindful of that. And so in my opinion, a parallel proceeding, if not well thought through in India especially, will have very unique set of challenges and can perhaps be one breaking away first.

IT (13.01): Now, as we close and we've wrapped the case study and what we've studied about these three jurisdictions through this podcast, I want all three of you to go around and give me a

rapid closing on one feature that you will import from each of your jurisdictions and why. And for this Saurav, let me start with you.

PAN (13.29): See, I'd rather want to import from the WHOA and the STARUG one critical feature, which is the speed. India has recently been plagued with delays in resolutions. And that's really the theme that all insolvency practitioners want to work towards, and something for us to learn from some of the other jurisdictions is how to get speed. And time is so critical in situations of distress that you can lose value very fast and you can create value very fast in these digital situations. So that's one thing that I'd like to import actually from WHOA and STARUG.

IT (14.07): Now Robert.

RH (14.11): Okay. Um, I would say I know some of the Dutch judges and I could imagine that I exchanged them for some of the German judges I know. Um, that is one issue maybe apart from that, a topic which we haven't touched yet. I would love to import the Dutch WHOA system of remuneration of the restructuring expert because the German is a nightmare.

IT (14.39): And finally Sid.

SP (14.41): Definitely not giving away any of our judges from the WHOA pool, but good to hear that they're well perceived. I think if there's one element that we've missed in the Netherlands and that the STARUG has is, as I understand it from Robert, is the option to appeal. The Dutch WHOA doesn't provide for it. And the idea behind that is deal certainty, which I think in a lot of the cases makes sense. But we've also been involved in a couple of cases where the outcome wasn't necessarily as fair as parties may have hoped at the beginning. And in those cases, an appeal option would make sense.

IT (15.20): And for my final question for this session, what is the one piece of advice that you would give a legal practitioner handling their first ever cross-border case involving any of these frameworks? Here, I want to start with you Sid.

SP (15.40): I think the main piece of advice is don't make jokes about the lack of World Cup victories for the Dutchies. And I think to a large degree, just make sure that you pick up the phone and that you communicate as much as you can with anyone involved.

IT (15.59): Saurav

PAN (16.02): See, I think communication is obviously key, but you need to get the right people on the ground. Every jurisdiction has its unique set of challenges, unique practices. You need to find the right people who can navigate through the jurisdictions complexities and find the practical way out in difficult situations. I mean, the short marketing pitch would be go for the right lawyers, go for the right consultants in every jurisdiction. Maybe I'll end with that.

IT (16.35): Now for the final word of the day, Robert.

RH (16.39): Well, what can I add? I fully agree with both my colleagues. Communication and finding the right people. Maybe just to complement that, go to international conferences, meet the people that you will be likely to meet on those cases. Because if you have spent one or two hours at the bar with somebody, it's much easier to work with them on, on the field.

SP (17.04): Hear hear!

PAN (17.05): I agree.

IT (17.06): On that note, I think INSOL International is going to put this as the tagline for the next conference. And I want to very much thank the three of you. This was a fantastic episode, and I know our listener feedback is going to be great for sure. I want to say thank you to our listeners because INSOL Talks has essentially grown strength to strength. And I'm very grateful to have been a part of it. Without keeping you any longer, I want to bid you adieu. And I want to say tot ziens, til you hear from us next time.

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