

**C L I F F O R D
C H A N C E**



**A GUIDE TO RESTRUCTURING AND
INSOLVENCY PROCEDURES IN EUROPE**

FOREWORD



FOREWORD

We are delighted to publish an updated version of our Guide to restructuring and insolvency procedures in Europe. The Guide is designed to provide you with an overview of the relevant law in the diverse legal systems that operate across Europe. It will assist in ensuring that transactions (whether being originated or restructured or enforced) are structured in a way that maximises returns whilst minimising risks and exposures.

Recent amendments have taken place in the context of national insolvency regimes, for example in Germany, Italy, Turkey, and Ukraine. These are considered in this latest publication. Others, such as in The Netherlands, are expected in due course.

The Recast European Regulation of Insolvency Proceedings remains an important EU wide framework for allocating jurisdiction and for automatic recognition of insolvency and restructuring proceedings in cross border cases.

Also of importance is the European Commission's legislative proposal for harmonisation of restructuring framework first published in November 2016. The proposal has now been finalised and is due to be adopted in the form of an EU Directive on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedure. It aims to establish well balanced restructuring regimes across EU members (the EU Restructuring Directive). The EU Restructuring Directive introduces common principles for restructuring procedures, but Member States will have some flexibility as to how they implement the changes. The key changes include: (1) access and availability to preventive restructuring frameworks and their legal effects on creditors; (2) a new cram down mechanism which will facilitate the adoption of restructuring plans, overcoming minority creditors and shareholders; and (3) new protections for interim and rescue finance. The final text was adopted by the European Council on 6 June 2019 and Member States now have until 17 July 2021 (with possible extensions of up to 1 year) to implement the principal measures at a national level.

The application of these important pieces of EU legislation in the UK, has been thrown into doubt by the Brexit vote. With a further extension to the exit day granted until 31 October 2019, much will depend on whether a deal and transitional arrangements will be agreed as to whether the current EU legislative framework will continue to apply in the UK.

This Guide captures all the latest reforms, providing you with the most up to date position. In keeping with previous editions, the guide aims to assist you when assessing credit risk and the potential impact of restructuring and insolvency procedures on realising security or seeking to rely upon pre-insolvency rights. At the start of the guide we have included a summary table that compares the restructuring and insolvency trends taking place in each of the jurisdictions, including the impact of local stays, the ability to cram down dissenting creditors, the position of management, and mandatory time limits imposed in some jurisdictions to file for insolvency.

The Guide provides just an element of the expertise and technical knowledge that we have accumulated over the years in Europe and beyond. It exemplifies the power of collaboration, collegiality and teamwork that is recognised in our offices worldwide as we strive to become the global law firm of choice for the world's leading businesses. If you would like any further information or advice on anything included in this guide or have any specific queries, please feel free to contact us and we should be happy to assist.

Clifford Chance Global Restructuring and Insolvency Group

CONTENTS



CONTENTS

Comparison table	6
The Recast European Insolvency Regulation	17
Belgium	23
The Czech Republic	33
England and Wales	43
France	59
Germany	79
Italy	91
Luxembourg	113
The Netherlands	119
Poland	135
Romania	151
Russia	165
The Slovak Republic	189
Spain	197
Turkey	211
Ukraine	225
Clifford Chance Contacts	236

COMPARISON TABLE: AUTOMATIC STAY AND RESCUE PROCEDURES

Belgium	The Czech Republic	England & Wales	France	Germany	Italy	Luxembourg	The Netherlands
<p>Yes, during judicial reorganisation, a temporary stay for a period of up to 6 months (which can be extended to maximum 18 months in case of a transfer of assets) applies. A definitive moratorium can last up to 5 years as from the judgment approving the collective plan.</p> <p>Exceptions exist for secured creditors and for enforcement processes which already reached an advanced stage at the time the petition for judicial reorganisation was filed.</p>	<p>Yes, stay kicks in upon the filing of the insolvency petition, applies to both unsecured and secured creditors. In reorganisation, the stay is not limited in time, but, save for very large debtors commencement of reorganisation is subject to creditor approval. Also secured creditors are protected by interest payments on the value of their security.</p>	<p>Yes, in administration. Exceptions for secured creditors (who may enforce security with leave or consent).</p>	<p><i>Mandat ad hoc</i> and conciliation proceedings do not feature an automatic stay, but note that a debtor can make a request to court for deferral of payment for a duration of up to 2 years with respect to individual creditors.</p> <p>Safeguard, accelerated safeguard, accelerated financial safeguard, judicial rehabilitation and liquidation proceedings feature an automatic stay with respect to the payment of pre-filing debt and to the commencement of legal actions (such automatic stay only affects financial creditors in accelerated financial safeguard proceedings).</p>	<p>During preliminary proceedings, a provisional stay of execution may be ordered by the insolvency court.</p> <p>After the opening of insolvency proceedings with the exception of claims assigned for security purposes and assets in the possession of the administrator, enforcement of security is possible – unless prohibited by court order (if the assets are required to continue the debtor's business; in such cases interest and compensation for loss in value is to be paid to the secured creditor)</p>	<p>Yes. In Composition with Creditors and Restructuring Agreement, 2 yrs maximum.</p> <p>Security (other than pledges, which can be enforced according to their terms) cannot be enforced.</p> <p>The new 2019 insolvency reform (will come into force in August 2020), to address frequent perceived abuses by debtors, provides that such stay will no longer be automatic, but will be granted upon request in the petition for the admission of the <i>concordato preventivo</i>. After 30-45 days, the court must confirm or revoke. If confirmed, stay must be for maximum of 12 months.</p>	<p>Yes, during the controlled management procedure until a final decision is taken by the court (except where specific laws provide differently).</p>	<p>Potential for a stay, but not automatic.</p> <p>Initially for 2 months. May be extended for an additional 2 months. Secured creditors may (continue to) enforce their security rights unless enforcement is prohibited by court order.</p> <p>The Dutch legislator has provided draft legislation on a court-approved composition (<i>dwangakkoord</i>) outside of bankruptcy between the company and its creditors and shareholders' court order. Inspired by the English law Schemes of Arrangement and the US Chapter 11 proceedings, this would allow a financially distressed company to cram down all or some of its creditors in order to avoid bankruptcy.</p>

AUTOMATIC STAY AND RESCUE PROCEDURES

Poland	Romania	Russia	The Slovak Republic	Spain	Turkey	Ukraine
<p>In bankruptcy proceedings – yes (stay of actions and executions).</p> <p>In arrangement approval proceedings – no.</p> <p>In accelerated arrangement proceedings and standard arrangement proceedings – no stay of actions, but automatic stay of executions, except for execution of claims excluded from arrangement (such as labour or claims secured in rem; their stay may be ordered for up to 3 months if the asset is necessary for the running of the enterprise).</p> <p>In remedial proceedings – no stay of actions, but automatic stay of all executions.</p>	<p>Yes, during judicial reorganisation. A secured creditor can request that the stay be cancelled if, among others, the assets are not crucial to the success of the plan. The stay does not affect (i) appeals lodged by the debtor against claims of its creditors which had been initiated prior to the opening of the insolvency proceedings; (ii) the civil actions carried out during a criminal trial or (iii) the actions carried out against co-debtors or third-party guarantors; and (iv) extrajudicial procedures in front of sporting commissions concerning labour contracts or civil conventions with respect to players and sanctions available to players.</p> <p>Yes, in the judicial moratorium procedure, after the communication of the court resolution homologating the judicial moratorium.</p>	<p>Once insolvency proceedings are commenced, creditors' claims are dealt with in the insolvency process. Any monetary claims or steps to enforce against the assets of the company are suspended (save for a limited number of exceptions, prescribed by law).</p> <p>Enforcement of pledges and mortgages is also prohibited. Pledged (or mortgaged) assets are segregated from the other assets and cannot be sold without the consent of the secured creditor. At the financial rehabilitation and external administration stages security may be enforced subject to certain court driven process.</p>	<p>Yes, during restructuring including the enforcement of security.</p>	<p>Enforcement of security suffers delay up to 1 year if the assets are required to continue the debtor's business.</p>	<p>Once the court declares the debtor bankrupt debt collection proceedings (excluding the foreclosure of security) are terminated and new proceedings cannot be opened.</p> <p>Turkish law provides for different restructuring procedures, i.e. a (ordinary) composition of debt, composition through the abandonment of the debtor's assets, composition following bankruptcy and out of court restructuring with Turkish banks, factoring, financial leasing and finance companies.</p> <p>All enforcement procedures are suspended automatically if the court orders a temporary period as a result of a request for composition.</p> <p>In case of out-of-court restructuring, all enforcement proceedings are suspended and no new enforcement proceedings can be opened upon the debtor's application for restructuring.</p>	<p>Yes, moratorium on claims and default interest until the end of the insolvency proceedings, subject to certain exceptions for secured claims.</p> <p>The Insolvency Code provides for the possibility of enforcement of a security during insolvency.</p>

CRAM DOWN OF CREDITORS

Belgium	The Czech Republic	England & Wales	France	Germany	Italy	Luxembourg	The Netherlands
<p>Pre-insolvency/near insolvency: In judicial reorganisation proceedings a recovery plan must be approved by more than half in number and value of all the creditors. The plan cannot provide for debt forgiveness in excess of 80% of any creditor's claim (unless justified by compelling motives). It must also be approved by the court. It binds dissenting creditors, including secured creditors, subject to certain limits on the suspension of payment of their claims to interest and principal.</p>	<p>In a reorganisation a majority in number and by amount of claims voting in each class is needed to approve. The Court may also confirm the reorganisation plan if not approved by all classes subject to specific criteria being met.</p>	<p>Pre and post insolvency: Schemes of arrangement under Part 26 of Companies Act 2006. A majority in number of creditors, three quarters in value of claims can be used to bind dissentient minorities. Schemes may be used in conjunction with a formal insolvency process or separately. Company voluntary arrangements (CVAs). CVA proposal needs to be approved by more than half in value of the shareholders and more than three quarters in value of the creditors. Subject to these majorities being achieved, they can bind the dissenting minority, unless they are secured or preferential creditors.</p>	<p>Pre-insolvency: For safeguard, accelerated safeguard and accelerated financial safeguard proceedings subject to majority votes by each of the two creditors' committees (only the financial creditors for accelerated financial safeguard) representing not less than two thirds of the debt and the same majority of bondholders for ordinary safeguard (where no creditors' committees are created), the court cannot impose any write down of debt on non-consenting creditors but can impose a rescheduling of the debt.</p> <p>Post insolvency: In rehabilitation, the same 3 classes of creditors as for safeguard must vote in favour, the same majorities apply.</p>	<p>Post insolvency: Insolvency plan must be approved by majority of creditors in each class who must hold more than half of the claims in value in each class. Court can override if non-concurring group would be worse off without the plan.</p>	<p>Pre-insolvency: In <i>Concordato Preventivo</i>, the composition plan must be approved by majority of classes of voting creditors. If a minority opposes they can be crammed down by the court as long as they are no worse off than in a liquidation. In Restructuring Agreement under Art 182-bis a majority of 60% of creditors by value is required.</p> <p>Post insolvency: For large companies, only the relevant Minister needs to approve the restructuring plan; in the same context, a settlement can be proposed to creditors and must be approved by the majority of them (or by the majority of classes, if any).</p>	<p>Pre-insolvency only: Controlled management requires adherence of a majority of creditors in number and more than half in value to the restructuring plan or the draft plan relating to the realisation and distribution of assets. Pre-insolvency composition arrangements require consent of a majority in number of creditors and three quarters in value.</p>	<p>Post insolvency: In the context of bankruptcy and suspension of payment proceedings where a composition is proposed a cram down of creditors needs the approval of a normal majority of creditors representing at least half of the total amount of claims.</p> <p>A composition does not affect secured or preferential creditors.</p> <p>Pre-insolvency: the Dutch legislator has provided a draft act on a court approved composition out of insolvency (similar to the English Scheme of Arrangement and US Chapter 11) which is expected to be implemented in 2021/2022.</p>

CRAM DOWN OF CREDITORS

Poland	Romania	Russia	The Slovak Republic	Spain	Turkey	Ukraine
<p>Yes, near insolvency and post insolvency (in restructuring or bankruptcy proceedings):</p> <p>A proposed arrangement needs to be approved by the majority of voting creditors in each class whose claims in aggregate represent at least $\frac{2}{3}$ of the aggregate claims in the class. If there is no required majority in one or more classes, the arrangement will still be approved if (i) creditors representing in aggregate at least $\frac{2}{3}$ of the total sum of claims held by the voting creditors have voted in favour of the arrangement, and (ii) creditors from dissenting groups would not be worse off than in the case of bankruptcy.</p> <p>Similar rules apply in arrangement approval proceedings.</p>	<p>Pre-insolvency/near insolvency only: The possibility to engage in extrajudicial negotiations for the restructuring of debts is recognised by the Romanian law.</p> <p>An alternative to the insolvency proceedings, are the moratorium (<i>concordat preventiv</i>) and the ad-hoc mandate, contractual mechanisms for a company in distress to reorganise its activity with limited involvement from the court.</p> <p>Post insolvency: In a judicial reorganisation a majority by number and amount of creditors in each defined class is needed to approve a reorganisation.</p> <p>After approval by the creditors, the reorganisation plan is also subject to the approval of the Court provided certain other conditions are satisfied.</p>	<p>Post insolvency only: A voluntary arrangement if sanctioned by the court, after it has been approved by a majority of registered creditors and received the unanimous consent of any registered secured creditors, will bind the company and its registered creditors irrespective of whether they voted against it or did not vote at all.</p> <p>A debt repayment schedule in financial rehabilitation and a plan for restoring solvency in external administration are approved by a majority of the total number of registered creditors by claims and then must be approved by the court.</p>	<p>Pre-insolvency/near insolvency: In a restructuring a majority by number and by amount of claims in each class combined with the approval of each class of secured claim and the approval of the simple majority of votes (based on the amount of their claims) of the present creditors is needed to approve a restructuring plan. The plan is submitted for final confirmation to the Court which may confirm the plan or substitute the approval of the plan subject to specific criteria being met.</p>	<p>Pre-insolvency: In out of court refinancing, the refinancing must be approved by 60% of all liabilities or alternatively meet conditions agreed to protect against claw-back claims. The refinancing needs a 51% majority of the financial liabilities so that it can be authorised by a Judge. If it does not obtain the support of 60% of the total liabilities it can be subject to claw back. In both cases the agreement must be granted in public deed.</p> <p>Refinancing agreements approved by the court may bind dissenting creditors if they have been approved the requisite majority which varies (between 60% – 80%) depending on the case.</p> <p>Post/near insolvency: In a formal process an arrangement (<i>convenio</i>) may be entered into with creditors based upon a vote by the majority.</p>	<p>Pre-insolvency: Creditors may propose a composition (<i>adi konkordato</i>) which must be approved by (i) the majority of the creditors holding the majority of total claims in value; or (ii) more than one quarter of the creditors holding two-thirds of the total claims. The composition must satisfy certain other conditions and must also be approved by the court. It does not affect secured creditors in terms of initiating security enforcement proceedings (however, the security cannot be foreclosed during the composition period).</p> <p>Capital stock companies and co-operatives also benefit from restructuring by conciliation (<i>uzlaşma yoluyyla yeniden yapılandırma</i>) which must be approved by the majority in number of those creditors affected with at least two thirds of the claims in value, in each separate class of creditors.</p>	<p>Pre-insolvency: Before the commencement of insolvency proceedings, if both the debtor's shareholder(s) and those creditors controlling at least 50% of the debtor's indebtedness consent, the court may instigate the expedited restructuring. The consent of 75% of secured creditors would be required.</p> <p>Post insolvency: In rehabilitation plan creditors must approve by a simple majority and then it must be approved by the Court. However, secured creditors' claims may not be forgiven or written off without the consent of each relevant secured creditor.</p>

POSITION OF MANAGEMENT

Belgium	The Czech Republic	England & Wales	France	Germany	Italy	Luxembourg	The Netherlands
<p>Management in principle retains its powers during the judicial reorganisation process, unless it is displaced by the court (e.g. in case of gross negligence or serious misconduct). Management can request for the appointment of a mediator or court officer to assist it with the preparation/ implementation of a judicial reorganisation.</p>	<p>In all procedural phases other than liquidation, the debtor's management remains in control, but is monitored by a court-appointed trustee and the creditors' committee.</p>	<p>Effectively displaced, unless otherwise agreed by administrator. Administrator selected by the company or secured creditor.</p>	<p><i>Mandat ad hoc</i> and conciliation proceedings: management stays in possession, assisted by a court-appointed officer in order to facilitate the restructuring of the liabilities.</p> <p>Safeguard, accelerated financial safeguard and accelerated safeguard proceedings: management stays in possession under the surveillance or assistance of a court-appointed officer.</p> <p>Judicial rehabilitation proceedings: appointment of a judicial administrator, who either assists or replaces management.</p> <p>Judicial liquidation proceeding: management is replaced by the judicial liquidator.</p>	<p>Usually management:</p> <p>(1) continues to manage business during the preliminary proceedings subject to the consent of the preliminary administrator;</p> <p>(2) is displaced by court appointed receiver after the opening of insolvency proceedings.</p> <p>However the court may:</p> <p>(1) during preliminary proceedings order the transfer of management to the preliminary administrator;</p> <p>(2) upon the debtor's request, order the opening of debtor-in-possession like proceedings with the management continuing to manage the business under supervision of a specific creditors' trustee.</p>	<p>During the "concordato proceedings" management continues to manage its business under the supervision of the appointed judicial commissioner for acts of ordinary administration; whereas authorisation of the court will be needed for act of extraordinary administration.</p> <p>After the opening of insolvency proceedings, management of the company is displaced by court appointed receiver.</p>	<p>During the first phase of controlled management, the directors remain in place, but actions are supervised by magistrate appointed by the court. In the second phase a "commissaire" is appointed that supervises management in accordance with the mandate of the court. In bankruptcy proceedings a "curateur" displaces management.</p>	<p>During bankruptcy, management is displaced by a court appointed trustee in bankruptcy.</p> <p>During suspension of payments management and administrator can only act jointly, although in practice the administrator has control.</p>

POSITION OF MANAGEMENT

Poland	Romania	Russia	The Slovak Republic	Spain	Turkey	Ukraine
<p>In bankruptcy proceedings the management is displaced by a court appointed trustee. In restructuring proceedings, as a rule the management continues to manage the business subject to supervision by a court appointed officer, except for remedial proceedings where the management is displaced by a court appointed administrator (but exceptionally, the court may decide otherwise).</p>	<p>During the observation period the debtor may continue its current activities and make payments to the known creditors within the common terms of exercising the current activity, either under the supervision of the judicial administrator (if the debtor maintains the right of administration of its business) or under the management of the judicial administrator (if the debtor loses the right of administration of its business). The right of administration of the business consists of the right to manage the activity, the assets and to dispose of such assets – including those assets acquired subsequent to the opening of the proceeding. The right of administration terminates de jure on the date the bankruptcy proceeding is commenced.</p>	<p>During the supervision stage, the company's management stays in place (although with limited authorities) and an interim administrator is appointed by the court following its nomination by a creditor filing for the company's bankruptcy or the choice made by the court when filing is made by the company itself. For financial rehabilitation an administrator is chosen by the creditors' committee and then approved by the court, but management again remains in place (although with limited authorities). If the company is subject to external administration or liquidation, then the management is replaced by an administrator proposed by the creditors' committee and approved by the court.</p>	<p>In a restructuring, the debtor's management remains in control, but is monitored by a trustee and the court.</p>	<p>In cases of voluntary insolvency, the receivers supervise the directors' decisions. In case of compulsory insolvency, the management is effectively displaced by receivers.</p>	<p>With the opening of insolvency proceedings, the debtor loses its capacity to dispose of its assets and the management and liquidation of the estate is carried out by the bankruptcy administrator (court appointed insolvency administrator).</p> <p>Upon granting the temporary and definite period for composition, the relevant court appoints one to three commissars to manage the composition process and supervise the management and operations of the debtor.</p>	<p>Management normally remains in place during property administration stage but may be replaced by court upon request of the creditors. In any event, its actions will be supervised by the property administration manager. During rehabilitation the rehabilitation manager replaces management.</p> <p>During liquidation the management is dismissed, and the liquidator takes over the management of the debtor.</p>

PERSONAL LIABILITY OF DIRECTORS

Belgium	The Czech Republic	England & Wales	France	Germany	Italy	Luxembourg	The Netherlands
<p>Yes, for breaches of duty of care or statutory duties, in case of wrongful trading or if grossly negligent in a way that contributes to the bankruptcy.</p> <p>Directors are also liable for the costs required in order to rectify materially incorrect financial statements and may be liable for unpaid social security contributions if they have been involved in prior insolvency proceedings with unpaid social security contributions</p>	<p>Yes, for breaches of fiduciary duties owed to creditors while in office after commencement and for damages caused to creditors by delay in filing an insolvency petition.</p> <p>As of 1 January 2014, new rules on director conduct in the pre- insolvency period have been introduced with an ensuing risk of new grounds of civil liability. It is not clear how these rules will interact with the insolvency act's rules described above – directors should beware.</p>	<p>Yes, for breaches of duties, wrongful trading and fraudulent trading (ss212-214 IA 1986).</p>	<p>Yes, in particular in case of mismanagement that has contributed to the deficiency of assets of the debtor or to the insolvency of the debtor (e.g. late filing for insolvency proceedings). This applies to de jure or de facto directors.</p>	<p>Yes, for failure to file for insolvency, for any payments made to third parties after the company becomes insolvent and for any new agreements which the company is unable to fulfil.</p>	<p>Yes, for breaches of duty and failure to preserve the company's value if that failure results in a loss to creditors.</p> <p>Criminal liability of directors in the event the director(s):</p> <ul style="list-style-type: none"> • distracted, disguised or voluntarily lost the assets; • took imprudent actions to delay the declaration of bankruptcy; and • disguised the company's financial distress or its insolvency state in order to obtain financing. 	<p>Yes, for any wrongdoing or negligence under general corporate law. Criminal liability in respect of certain actions which have led to the insolvency (including lack of declaration, wrongful or fraudulent trading). Other sanctions include extension of liability for some or all debts incurred.</p>	<p>Yes, for mismanagement, wrongful distribution, fraud or if the directors have contributed to provoke the company's insolvency.</p>

PERSONAL LIABILITY OF DIRECTORS

Poland	Romania	Russia	The Slovak Republic	Spain	Turkey	Ukraine
<p>Yes, for breaches of fiduciary duties, contractual duties or statutory duties (e.g. for a failure to file for bankruptcy).</p> <p>Wrongful or fraudulent trading triggers civil liabilities and may in certain circumstances lead to criminal liability.</p> <p>Directors are criminally liable for preferential treatment of creditors.</p>	<p>Yes, for breaches of fiduciary and statutory duties and where directors have contributed to the debtor's insolvency. Criminal sanctions exist for certain acts.</p>	<p>Depending on the type of action and the gravity of the situation a director (or any other controlling person) may be subject to civil, administrative or criminal liability.</p> <p>For civil liability, losses for breach by directors (administrators) and shareholders of duties and restrictions of insolvency law and subsidiary liability in the lack of bankruptcy estate sufficient to discharge creditors' claims in full when insolvency was caused by actions or failure to act by those who are in control of a company (including when entry into suspicious transactions caused harm to creditors) unless the controlling persons can show that they acted in good faith and reasonably, and in the interests of the company.</p> <p>Bespoke criminal offences and administrative offences also attract liabilities to pay fines or impose criminal sanctions.</p>	<p>Yes, for breaches of fiduciary duties, diminishing value of assets and circumventing the success of the restructuring process.</p>	<p>When insolvency has been considered as negligent, and provided that the directors have contributed to provoke the insolvency.</p>	<p>Pre-insolvency: Creditors may propose a composition to be approved by (i) the majority of the creditors holding the majority of total claims in value; or (ii) more than 25% of the creditors holding two thirds of total claims. It must satisfy certain other conditions and be approved by the court. Capital stock companies and co-operatives may restructure by conciliation which must be approved by the majority in number of those creditors affected with at least two thirds of the claims in value, in each separate class of creditors.</p> <p>Post insolvency: A debtor may propose a composition after being declared bankrupt. Creditor approval must be achieved in the same majorities as for ordinary composition (see above), certain conditions must be satisfied, it must be approved by the court.</p>	<p>Yes, criminal and administrative liability for fraudulent, deliberate bankruptcy, concealing insolvency and illegal actions before or during bankruptcy. There is no well-established practice, however, of attaching liability to a director for a failure to commence insolvency.</p>

TIME LIMITS FOR FILING

Belgium	The Czech Republic	England & Wales	France	Germany	Italy	Luxembourg	The Netherlands
Directors must file within 1 month of the company (i) no longer having credit available to it and (ii) being unable to pay its debts.	No express time limit but must file without delay after they have determined the company is insolvent. Insolvency is defined objectively, including express time periods of default with payment. Under the 2017 Amendments, debtors are able to mitigate apparent cash-flow insolvency by showing that a “cash mismatch” (i.e. the difference between the amount of the debtor’s overdue liabilities and amount of its liquid assets) which the debtor is suffering does not exceed 10% of the amount of its overdue liabilities (or that such “cash mismatch” will drop below this limit within the period which is being analysed).	No express time limit for filing for insolvency but failure to do so which results in a loss may give rise to action against directors personally.	Obligation to file for either a judicial rehabilitation or liquidation proceeding within 45 days following the date on which the company became cash-flow insolvent (except if the opening of a conciliation proceeding has been filed for).	Obligation to file immediately upon company being unable to pay its debts currently due or over-indebtedness occurring; filing may be postponed for up to 21 days if reasonable expectations exist that insolvency can be overcome.	No express time limit for filing for insolvency but failure to do so which results in a loss may give rise to action against directors personally.	Obligation to file within 1 month of cessation of payments	No express time limit for filing for insolvency but failure to do so which results in a loss may give rise to action against directors personally.

TIME LIMITS FOR FILING

Poland	Romania	Russia	The Slovak Republic	Spain	Turkey	Ukraine
<p>Directors must file within 30 days of the date that a reason for bankruptcy declaration occurred (i.e., either the liquidity test or the balance sheet test was not passed).</p>	<p>Obligation to file within 30 days from the date of the occurrence of the state of insolvency.</p>	<p>The chief executive officer of the company must petition for bankruptcy within 1 month of it meeting the insolvency tests (i.e. (i) is unable to perform its payment obligations in full; or (ii) is subject to enforcement proceedings that make it impossible for the operations to continue; or (iii) the company ceases to pay its matured debts on account of insufficient funds or has insufficient assets to pay its monetary liabilities.) Filing by the CEO is subject to a prior notification to creditors of the intention to file for bankruptcy within a set period of time.</p>	<p>Obligation to file within 30 days after the directors have determined that the company is insolvent.</p>	<p>Obligation to file within 2 months of when the debtor has or should have become aware of its insolvency. Failure to comply assumes that bankruptcy is carried out negligently.</p>	<p>Immediate notification to the court once the company cannot settle all of its debt that are due or will become due within one year if the debtor's liabilities exceed its assets.</p>	<p>No express time limit for filing for insolvency but failure to do so which results in a loss may under certain conditions give rise to a personal liability of directors.</p>

THE RECAST EUROPEAN INSOLVENCY REGULATION



THE RECAST EUROPEAN INSOLVENCY REGULATION

Key Elements:

- Recast Regulation applies to proceedings commenced after 26 June 2017
- To promote recognition and co-operation between different insolvency regimes of individual member states within the EU
- Unified code for governing law rules and automatic recognition of proceedings across member states
- Concept of “centre of main interests” to determine opening of main proceedings
- Jurisdiction for the opening of territorial or secondary proceedings
- Carve-outs include rights *in rem* and rights of set-off
- Recast European Insolvency Regulation
 - extends scope to pre-insolvency and rescue proceedings
 - clarifies centre of main interest and establishment
 - introduces group company co-ordination proceedings
 - introduces standard claim form and publicly accessible registers
- Separate insolvency regimes continue to apply in member states

Introduction

This publication primarily focuses on the insolvency considerations and legislation in specific European jurisdictions, however, before considering the individual jurisdictions, it is

important to recognise that since 2000 there has been a European wide framework of recognition, for insolvency proceedings taking place in EU member states except Denmark. This framework has now been replaced by the Recast European Insolvency Regulation (EU) No 2015/848 (the Recast Regulation).

Like its predecessor (the European Regulation on Insolvency Proceedings Council Regulation 1346/2000) the Recast Regulation does not provide uniform substantive law provisions for members of the EU. The purpose of the Recast Regulation is primarily to codify how a member state should determine whether it has jurisdiction to open pre-insolvency or insolvency proceedings, whilst also imposing a uniform approach to the governing law which is applicable to those proceedings. Once these factors have been determined, the procedural rules of the member state in which proceedings are opened will generally apply. The Recast Regulation also provides for the automatic recognition of insolvency proceedings throughout the EU.

Scope

The Recast Regulation applies to all pre-insolvency and insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator or similar insolvency officeholder or proceedings where a debtor remains in possession. Schemes of arrangement under English law are not within the scope of the Recast Regulation. The Recast Regulation primarily applies to corporates and individuals within the member states. This encompasses various corporate entities such as trading companies, special purpose vehicles and group treasury companies. Its scope of application is confined to parties with their centre of main interests within a member state of the EU. (It therefore applies to entities whose place of incorporation may be outside of the EU, but whose centre of main interests is within a member state.)

The Recast Regulation does not apply to entities which do not have their centre of main interests within a member state. The extent to which insolvency proceedings from outside of the EU are recognised depends upon the domestic legislation and practice of each particular member state (in relation to which, please see the separate sections for individual member states).

The Recast Regulation does not apply to banks, credit institutions, insurance companies, investment undertakings which hold funds or securities for third parties, or collective investment schemes. The reorganisation and winding-up of credit institutions is addressed in Council Directive 2001/24 which as amended by the Recovery and Resolution Directive 2014/59/EU and the reorganisation and the winding-up of insurance undertakings is addressed in Council Directive 2001/17. These directives are beyond the scope of this note.

Jurisdiction

The primary jurisdiction for insolvency proceedings, as provided by the Recast Regulation, is the court of the member state where the debtor's centre of main interests is located. In the case of a company or other legal person, in the absence of proof to the contrary, there is a rebuttable presumption that this is where the registered office of the company is located. In order for the presumption to be relied upon the registered office must not have been moved within the 3-month period prior to the request for the opening of the proceedings.

The Recast Regulation allows for the courts in countries other than the home state to open "territorial" insolvency proceedings or, after the commencement of main proceedings, "secondary" proceedings, in the event that such debtor possesses an establishment in the territory of such other member state. The applicable law of such territorial or secondary insolvency

proceedings will be the law of that other member state. However, territorial insolvency proceedings or secondary insolvency proceedings (which can be pre-insolvency or rescue style proceedings) are limited in scope to the debtor's assets in that member state and so will not extend beyond the member state where they are opened. There are also provisions within the Recast Regulation designed to discourage secondary proceedings. Such provisions allow the officeholder of the main proceedings to provide an undertaking to protect creditors in the local secondary jurisdiction, without the need to open a formal secondary process. These are sometimes referred to as synthetic secondary proceedings.

Governing Law

The Recast Regulation imposes a unified code for the governing law which, in conjunction with the mandatory regime of jurisdiction rules, aims to enable those who have dealings with a debtor whose centre of main interests is within the EU to identify with greater certainty the substantive legal provisions by which their rights will be determined in the event of that debtor's insolvency. The general rule is that the law applicable to the insolvency proceedings and its effects shall be that of the member state within the territory in which such proceedings are opened.

So, unless secondary or territorial proceedings can be initiated as well, the law of the main proceedings is likely to dominate. Once the proceedings are opened the specific jurisdictional considerations set out in the latter part of this note assume relevance.

The Recast Regulation recognises that there will be cases where strict adherence to the general rule will interfere with the rules under which transactions are carried out in other member

states, and therefore the general rule is subject to a number of exceptions and carve-outs.

These exceptions include '*rights in rem*' including, amongst other things, rights of security (to include holders of floating security over a fluctuating pool of assets), rights of set-off permitted by the law applicable to the insolvent debtor's claim, rights under a reservation of title clause, contracts relating to immovable property, rules of payment systems and financial markets and contracts of employment. The Recast Regulation also includes location of asset rules, these clarify where an asset is located for the purpose of insolvency proceedings.

Recast Regulation – focus on pre-insolvency and rescue

It is designed to improve the efficiency and effectiveness of cross border insolvency proceedings. In particular it seeks to facilitate the survival of businesses and offer a second chance for entrepreneurs. There is a shift in emphasis from the previous European Regulation on Insolvency Proceedings to promote pre-insolvency and rescue procedures under the Recast Regulation. The Recast Regulation also recognises some of the practical challenges faced in cross border insolvency cases and seeks to increase the extent to which insolvency officeholders and courts can cooperate in those cases including in a group company situation. It includes a new part which seeks to address group company situations, introducing the potential to have group co-ordination proceedings in addition to the individual company proceedings taking place in different member states. In addition, the Recast Regulation provides for the introduction of an Internet register for insolvency proceedings and for there to be interconnections between national registers. The Recast Regulation also introduces standard notices and claim forms for creditors.

Disagreements between member states

Any disagreements between member states as to the operation of the Recast Regulation ultimately have to be resolved by the Court of Justice of the European Union ("CJEU").

References to the Court of Justice of the European Union

A number of references have been made to the CJEU in relation to the interpretation of centre of main interest under the previous European Insolvency Regulation.

The CJEU held that the registered office presumption could only be rebutted if there were factors ascertainable by those dealing with the company that objectively established that its administration was conducted elsewhere. Such clarifications are now included in the Recast Regulation.

The Recast Regulation also includes additional criteria on debtors wishing to rely on the registered office presumption, who will not be able to rely on that presumption if they have moved their registered office within 3 months of the opening of the proceedings.

Harmonisation Directive

In November 2016, the European Commission published a legislative proposal which seeks to introduce minimum standards for restructuring laws with a view to harmonising the approach across member states. The draft directive includes rules relating to pre-insolvency moratoria and restructuring plans by creditors (which include the ability to cram down different classes of creditors), rules relating to second chance provisions for individuals; and a harmonisation of the periods for the discharge of debts. The legislation has slowly made its way through the amendment and ratification process. The European

Parliament committee agreed the text of the proposal on 23 January 2019 and the European Council adopted the Directive without any further amendments on 6 June 2019. National implementation of the directive will then be necessary by 17 July 2021 with possible extensions of up to one year.

Brexit

In March 2017 the UK government triggered Article 50 Treaty of the European Union to leave the European Union. The negotiation process has been ongoing with a final agreement on the terms of withdrawal agreed upon by EU Member States and the UK. However, the withdrawal agreement is subject to Parliamentary approval in the UK. Parliament has continually rejected the withdrawal agreement as it currently stands, whilst simultaneously voting against a no-deal Brexit. It has been agreed that exit day may be delayed for up to 6 months until 31 October 2019. Until then it remains unclear what the impact of Brexit will be on cross border insolvency cases.

Much will depend upon what replacement legislation the UK puts in place, and whether the EU Member States are prepared to continue with a regime of mutual recognition. Schemes of Arrangements, under Part 26 of the Companies Act 2006, should not be affected by a withdrawal from the EU although there may be greater reliance on private international law in terms of overseas recognition for such schemes.

Without the benefit of the Recast Regulation, recognition of proceedings taking place in other EU member state within the UK could still be achieved through either the principles of comity, or under the Cross Border Insolvency Regulations 2006 (pursuant to which the UK has adopted the UNCITRAL Model Law on Cross Border Insolvency (CBIR)) or, in the case of proceedings in Ireland only, s.426 of the Insolvency Act 1986. It is relevant that these principles and provisions do not allocate jurisdiction between countries but provide for recognition and assistance of proceedings taking place outside of the UK. Moreover, the assistance provided under the CBIR is much more limited than the effects of automatic recognition under the Recast Regulation. Of other EU member states, only Greece, Poland, Romania and Slovenia have adopted the UNCITRAL Model Law on cross border proceedings, so in terms of recognition of UK insolvency proceedings elsewhere, absent a European-wide framework being put in place for the UK, those proceedings would be reliant on local rules.

BELGIUM



BELGIUM

Key Elements:

- Considers the two main types of insolvency procedure:
 - Bankruptcy
 - Judicial reorganisation
- Considers the rescue regime applicable to certain financial institutions
- Looks at the impact of insolvency on the rights of third parties
- Deals with the challenges that can be made to transactions made within the “suspect period”

General – insolvency proceedings

There are two types of court-controlled insolvency proceedings under Belgian law, bankruptcy and judicial reorganisation (the Belgian moratorium procedure). An insolvent debtor may also, with the agreement of its creditors, proceed to a voluntary liquidation or be dissolved and liquidated by court order. A specific rescue regime applies to financial institutions.

Bankruptcy

Bankruptcy proceedings facilitate the liquidation of the debtor's assets and the distribution of the proceeds amongst its creditors. A debtor must (and the creditors and the public prosecutor may) file for bankruptcy when it has consistently stopped paying its debts as they fall due and no longer has credit available to it.

A company is declared bankrupt by a judgment of the court. Upon the declaration of bankruptcy, the directors' powers

lapse and a court-appointed liquidator takes control over the company.

Judicial reorganisation

A judicial reorganisation offers creditor protection and is aimed at saving distressed economic activity. A debtor may apply for judicial reorganisation if its business is or will in the short term become threatened by financial difficulties (a debtor's business is presumed to be under threat if its net assets have fallen below half of its stated share capital).

The debtor in principle retains its management powers but it may request the appointment of a mediator or court officer to assist it with the reorganisation. Creditors and other interested parties may, either in case of mismanagement threatening the continuity of the debtor's business, in case of serious misconduct or in case there are serious indications that the conditions for bankruptcy are met, seek injunctive relief (including the appointment of an administrator to take control of the debtor's business). The appointment of an administrator can be sought both prior to and pending judicial reorganisation proceedings.

Under a judicial reorganisation, the debtor can make a voluntary arrangement with one or more of its creditors, submit a collective reorganisation plan to a vote of its creditors, apply for court consent for the transfer of all or part of its business, or do any combination of the foregoing.

A voluntary arrangement can take the form of an out-of-court or a court supervised settlement between a debtor and two or more of its creditors. An out-of-court settlement will only be subject to very limited publicity. Save for certain limited exceptions, a bankruptcy receiver will not be able to challenge an (in)formal settlement in subsequent bankruptcy.

Under a collective reorganisation, the debtor must devise and, if approved by more than half of the creditors in both number and value, implement a reorganisation plan. The plan may include measures to reduce or reschedule liabilities and interest obligations, swap debt into equity, or reduce its headcount. The plan may not however provide for debt forgiveness in excess of 80% of any creditor's claim unless this is justified based on compelling motives relating to the continuity of the company's business. It may also not provide for a discriminatory treatment or treat creditors benefitting from a general privilege worse than ordinary creditors. An approved reorganisation plan binds dissenting creditors, including secured creditors or creditors-owners, provided that the plan provides for payment of interest on their claims and that repayment of their claims is not suspended for more than 24 months or, if at the end of the initial suspension the debtor requests an extension and demonstrates that the suspended claims will be paid in full, 36 months as from the date the collective plan is approved by the court.

If successfully implemented, the debtor is released from all debts included in the reorganisation plan.

A judicial reorganisation which takes the form of a transfer of business involves a competitive bidding process under court supervision. The most favourable offer (both in terms of preservation of employment and pricing) will prevail. A potential transferee may elect to bid for contracts which are not *intuitu personae* (although the liabilities under such contracts will not count towards the calculation of the purchase price offered by the bidder). The law also provides that a transferee can select which employees it will take-over provided that the choice is based on technical, economic or organisational motives and is not discriminatory. This feature of the Belgian insolvency law has, however, recently been found by the European Court of Justice to violate Directive 2001/23. Insiders such as

shareholders and (former) directors may take part in the bidding process, subject to certain measures aimed to protect the equality between the bidders.

The judicial reorganisation regime does not apply to credit institutions, insurance and re-insurance undertakings, fund management companies, investment firms, settlement institutions and financial holding companies.

Rescue regime for financial institutions

The rescue regime allows for certain measures to be taken by (i) the board of directors of these institutions, (ii) the National Bank of Belgium (the "NBB") or the Financial Services and Markets Authority ("FSMA"), as the case may be, and (iii) the Government, when a financial institution is facing financial difficulties.

First of all, the board of directors of insurance undertakings and settlement institutions in financial difficulties can deviate from any statutory restrictions on its powers (e.g. a requirement to seek the approval of the shareholders in case of a disposal of certain assets).

Furthermore, if a credit institution, insurance or re-insurance undertaking, investment firm, fund management company or settlement institution has to cope with financial difficulties, the NBB or the FSMA, as the case may be, can impose a grace period within which the situation must be remedied. If the situation is not remedied within this period, special measures can be imposed (such as, e.g. additional solvency, liquidity and profitability requirements, suspension of the exercise of the institution's business for a specific duration or replacement of directors or managers for a specific duration). Immediate measures can be taken, and the grace period can be dispensed with, in case of serious threat to the financial system.

Lastly, for insurance undertakings and settlement institutions, if the financial difficulties result in a financial stability risk for Belgium or for the international financial system, the Government is authorised to (i) nationalise this type of financial institution; or (ii) force their transfer to a third party. The nationalisation or transfer can take the form of an asset deal or a share deal. The decision must be submitted for approval by the courts.

Moreover, for insurance undertakings, the NBB may under certain circumstances, including in the case of extreme financial difficulties, prohibit or restrict the transfer of the insurance undertaking's assets to third parties.

Belgian credit institutions are also subject to a specific resolution regime when the failure of the credit institution is established or foreseeable, no other prudential or private action could remedy the failure in a reasonable timeframe and a resolution is necessary in light of the public interest. When these conditions are met, the Resolution Board (a specific resolution authority for credit institutions) may take several measures, including selling the business, setting up a temporary bridge bank to operate critical functions, separating good assets from bad ones, converting shares or writing down the debt.

Voluntary liquidation

A voluntary liquidation may be used as an alternative to court-controlled insolvency proceedings, provided that it is supported by a sufficient consensus among the creditors.

A liquidator is appointed by the shareholders to liquidate the assets of the debtor to satisfy the creditors' claims. To the extent the liquidation is expected to show a deficit and has other creditors aside from its shareholders, the enterprise court must confirm the appointment and the proposal for distribution of the proceeds from the liquidation must be submitted to the enterprise court for approval.

Counterparty's ability to exercise rights of termination under a contract with the debtor

Bankruptcy

The existing agreements to which the debtor is a party are not automatically terminated by virtue of the bankruptcy, but:

- (a) the counterparty may terminate an agreement with the debtor during a bankruptcy if the agreement gives it the right to do so. An event of default or right of termination triggered by an application for or declaration of bankruptcy is valid and enforceable (save for certain specific contracts, e.g. lease agreements); and
- (b) the liquidator has the power to terminate any existing agreement. The counterparty may demand that the liquidator make his decision whether to terminate or continue a contract within fifteen days. If no decision is taken within that time, the agreement is deemed terminated by the liquidator. If the liquidator decides to continue an existing agreement, newly accrued payment obligations of the debtor under the agreement will be accorded a "super-priority" and will be paid first out of the proceeds of the bankrupt's estate.

Judicial reorganisation

The application for, or grant of judicial reorganisation to a debtor does not by itself terminate existing agreements. In fact, the application for or grant of judicial reorganisation cannot be the reason for the termination.

A counterparty may also not terminate an existing agreement with a debtor subject to reorganisation for prior default of the debtor provided that the debtor cures the default within fifteen days' notice by the counterparty.

The debtor may, by notice to its counterparty within eight days of the opening of the reorganisation, decide not to perform certain agreements in the interest of the continuity of its business, in which case the creditor can likewise suspend performance. Any termination indemnity resulting from such non-performance is in turn subject to the terms of the reorganisation.

Rescue regime for financial institutions

The special measures that may be taken by the NBB or the FSMA if a financial institution is experiencing financial difficulties can result in the partial or complete suspension of agreements concluded by the institution concerned (e.g. for a bank, this can result in the suspension of the obligation to return customer deposits).

In addition, in the context of the exercise of its resolution powers, the Resolution Board may decide to suspend the termination rights of a party to a contract with a credit institution or, under certain circumstances, with a subsidiary of a credit institution, provided that the essential obligations under the contract continue to be performed.

In case of a nationalisation or transfer of assets of a financial institution by the Government, the existing agreements of the financial institution will remain in place. The Government will, however, not be bound by any statutory or contractual approval or change of control clauses or any contractual pre-emption right or call option of a third party in respect of such transfer or nationalisation. The transfer or nationalisation cannot result in the termination or a right to terminate for the counterparties under the agreements concluded by the financial institution.

Voluntary liquidation

The commencement of liquidation proceedings does not terminate the existing agreements of a debtor. Contractual termination by the parties remains possible, even if the termination is motivated by the liquidation.

Proprietary rights security Bankruptcy

Upon bankruptcy, all enforcement action against the debtor is suspended, except that, notwithstanding the bankruptcy:

- (a) secured creditors (mortgagees, pledgees and holders of floating charges) can enforce their security after completion of the bankruptcy claims verification process (this is the process where the liquidator checks all submitted claims against the books and accounting records of the debtor). This normally implies for these creditors a stay of enforcement of about two months. In addition, the liquidator may ask the court to suspend individual enforcement for a maximum period of one year from the bankruptcy judgment, during which time the liquidator himself may sell the assets which are the subject of the security, if this is in the interest of the bankrupt's estate, and if this course of action is not detrimental to the secured creditors;
- (b) owners can claim repossession of their goods in the debtor's possession. This includes lessors who are thus not subject to a stay of enforcement. Claims for repossession must be filed prior to the completion of the bankruptcy claims verification process, failing which the ownership right may be lost. Special requirements apply to retention of title clauses;
- (c) security over assets in other jurisdictions remains enforceable in accordance with local rules;

- (d) contractual set-off arrangements remain enforceable;
- (e) security over financial instruments and cash accounts remains enforceable; and
- (f) an enforcement sale can proceed if it reached an advanced stage at the time the bankruptcy was initiated and provided that it is not suspended or cancelled by the bankruptcy court.

Rights of enforcement against third party guarantors or security providers are not affected by the suspension.

Judicial reorganisation

Upon application for reorganisation, all pre-reorganisation liabilities are frozen (but the debtor may still voluntarily pay these liabilities). New liabilities must be paid by the debtor on their due date and will be payable ahead of all ordinary and, in special circumstances, secured creditors, if the debtor subsequently becomes bankrupt.

During reorganisation proceedings, parties cannot apply for the bankruptcy or forced liquidation of the debtor. Enforcement action against the debtor, including the recovery by creditor-owners of their assets in the possession of the debtor, is generally suspended.

By way of exception:

- (a) security over assets in other jurisdictions remains enforceable in accordance with local rules;
- (b) contractual set-off arrangements remain enforceable (except that close-out netting provisions can only be enforced upon payment default of the security provider or in connection with certain derivatives or other financial transactions);
- (c) security over specifically pledged receivables (other than bank receivables) and financial instruments remains enforceable;
- (d) security over bank receivables remains enforceable (except that security over bank receivables can only be enforced upon payment default of the security provider or in connection with certain derivatives or other financial transactions); and
- (e) an enforcement sale can proceed if the sale is scheduled to take place within two months from the date of the filing of the petition for judicial reorganisation.

Rights of enforcement against third-party guarantors or security providers are not affected by the suspension. Security may be discharged by reason of a court authorised sale of the debtor's business in the context of a reorganisation, in which case the security will attach to the proceeds of the sale of the relevant assets.

Voluntary liquidation

A liquidation does not trigger any automatic stay of enforcement. Creditors will need to refrain voluntarily from taking action against the debtor in order not to frustrate a successful liquidation.

Voidable transactions

Bankruptcy

The Belgian bankruptcy law contains voidable preference rules that challenge certain actions made by or with a bankrupt debtor during the pre-bankruptcy suspect period of up to six months. The following actions and payments are caught by the voidable preference rules:

- (a) disposals of assets made without consideration, or at a significant undervalue;

- (b) payments made in respect of liabilities that were not yet due and payable;
- (c) payments in kind, unless the payment in kind is an agreed enforcement method of a financial collateral arrangement;
- (d) all transactions with a counterparty who had knowledge of the insolvency of the debtor; and
- (e) new security granted for pre-existing debts.

Rescue regime for financial institutions

Belgian law protects the measures taken by the Government in respect of distressed financial institutions against a subsequent insolvency challenge. The insolvency rules that disallow payments in respect of unmatured debts, payments in kind, and transactions with counterparties who have knowledge of the insolvency of the debtor, are disapplied.

Judicial reorganisation

Belgian law protects certain payments and transactions made in the context of a judicial reorganisation against a subsequent insolvency challenge. The insolvency rules that disallow payments in respect of unmatured debts, payments in kind, and transactions with counterparties who have knowledge of the insolvency of the debtor, are disapplied.

Creditors can moreover not be held liable for cooperating with a voluntary arrangement which in the end has not succeeded in safeguarding the company's continuity, or for financing new activities of a debtor whose assets have been transferred in the context of judicial reorganisation, or of its directors.

Directors

Belgian company law imposes certain duties on the formal directors of a company by virtue of their office. Generally, officers who do not hold a directorship must duly perform and execute their employment contract with the company, but company law does not impose any other specific legal duties on them. Belgian company law does not impose positive duties on *de facto* shadow directors, but specific liabilities attach to shadow directors who as a matter of fact hold managerial power in a company.

A new company code which entered into force on 1 May 2019 with respect to newly incorporated companies and will gradually become applicable to existing companies as from 1 January 2020 until 1 January 2024 provides for caps on the liability of directors ranging between EUR 125,000 and EUR 12,000,000 depending on the size of the company, subject to certain exceptions such as, *inter alia*, in case of recurring mistakes fraud or gross misconduct.

As agents of the company, the directors owe their duties primarily to the company. Yet, the improper execution of their mandate in certain circumstances exposes the directors to liability to third parties for losses suffered as a result. In principle, any person other than the company can be an interested third party, save that a shareholder of the company will often not be able to bring an individual claim as a third party because his interests are, unless proven otherwise, deemed to be identified with the interests of the company.

Under Belgian company law, directors have a duty to act in the best interest of their company and to promote its corporate object. In particular, directors have:

(a) A duty of care as director

Directors are liable to their company for the improper execution of their mandate. The requisite standard of care and skill is that of a reasonably prudent and diligent businessperson.

The courts have only limited review powers and may not second-guess business decisions. Only obviously unacceptable behaviour can trigger the directors' personal liability. An action for liability on the basis of a breach of the duty of care can only be brought by the company, or the company's liquidator upon insolvency.

(b) A duty to abide by the company's statutes and company law

Directors are liable to the company and to third parties on a joint and several basis for breaches of the company's statutes or company law. Examples include a violation of the company's statutory object or corporate benefit, a violation of the publication rules relating to certain corporate information, a breach of the conflicts of interest rules, a failure to comply with the procedures applicable to important losses of shareholder equity, etc. An action for liability on the basis of a breach of the statutes or company law can be brought either by the company or by third parties who have incurred a loss as a result of the breach.

(c) A general duty of care

Like any other person, directors may be liable in tort for wrongful acts which cause damage to someone. An action for liability in

tort can be brought by any person who has suffered a loss as a result of the tortious act but can only in limited circumstances be instituted by a person who also has a contractual relationship with the tortfeasor (such as, for instance, the company).

(d) Specific liability upon bankruptcy

A specific form of liability applies in the case of bankruptcy of a company with insufficient assets available to meet the liabilities. The directors, former directors, daily managers, executive committee members or shadow directors of the bankrupt company may, if they were grossly negligent in a way that contributed to the bankruptcy, be held personally liable for all or part of the liabilities of the company up to the insufficiency of the assets. This liability does not apply to directors in companies whose average turnover for the three years preceding the bankruptcy did not exceed EUR 620,000 and whose balance sheet did not exceed EUR 370,000, or to non-profit organisations who only draw-up simplified accounts.

The directors, former directors, daily managers, executive committee members or shadow directors of the bankrupt company may also be held liable for part of the unpaid social security contributions if, during the five years preceding the bankruptcy, they have been involved in at least two prior insolvencies or liquidations with unpaid social security contributions. This liability will not be capped if the new company rules enter into force.

Lastly, in the case of bankruptcy of a company with insufficient assets available to meet the liabilities, the directors, former directors, daily managers, executive committee members or shadow directors of the bankrupt company may be held

personally liable (subject to the above-mentioned caps) for all or part of the liabilities of the company up to the insufficiency of the assets if:

- (a) that person knew or should have known, at any time prior to the bankruptcy, that the company had no reasonable prospect of avoiding a bankruptcy;
- (b) it did not act as a normal and prudent director placed in the same circumstances.

(e) Liability for failure to prepare and submit proper financial statements upon bankruptcy

Belgian bankruptcy law provides that the liquidator of a bankrupt company must upon his appointment proceed with the auditing and correction of the financial statements of the company. If no financial statements are available, or if substantial corrections are required, the directors may be held personally liable for the costs of preparing or correcting the financial statements.

General issues

Intragroup transactions

The same duties as set out above must be observed in connection with intragroup transactions. In addition, the directors should ensure that the intragroup transactions are on arm's-length terms and that intragroup services are remunerated at a normal market price. It should be noted that mandatory conflicts of interest procedures apply to situations where a director has a direct or indirect personal financial interest in a proposed transaction with his company (this could for instance be the case of directors holding an equity participation in the counterparty of the intragroup transaction).

Ongoing compliance obligations

Directors must comply with a number of ongoing obligations, such as to hold regular board meetings, to draw up and publish annual accounts and to file tax returns, etc. These obligations give rise to various criminal penalties and possible civil liability.

In difficult times or in the period leading up to insolvency, these obligations often tend to be neglected. Irregularities in respect of these obligations may alert the bankruptcy monitoring service of the enterprise court which conducts preventative investigations into financially troubled companies.

Obligation to propose liquidation to shareholders meeting

Belgian company law requires the board of directors of a company when, as a result of losses suffered, net equity falls below half of the company's share capital, and again when it falls below a quarter of the share capital, to call a meeting of shareholders which must decide whether to continue the operations of the company or to cease the operations and liquidate the company. Failure to do so in principle triggers the liability of the directors in respect of all liabilities that continue to arise or accrue after the date when the shareholders meeting should have been held. Furthermore, where the net assets of the company have fallen below the applicable minimum statutory capital requirement, any third party will be able to petition the court for the liquidation of the company. The court may either grant a remedy period to rectify the situation or pronounce the immediate dissolution of the company. This means in practice that the directors should on a regular basis assess the net equity position of their company.

Filing and audit of statutory accounts

If a company fails to file its corporate statements with the National Bank of Belgium within seven months as from the end of its accounting year, the public prosecutor or any third party may petition the court for the liquidation of the company. The court may either grant a remedy period to rectify the situation or pronounce the immediate dissolution of the company.

If, at the occasion of the performance of their statutory duties, the auditor discovers consistent and corresponding facts which endanger the continuity of the company, it must notify the company. The board must subsequently convene within one next month to discuss the measures which need to be taken to safeguard the company's continuity for a reasonable period of time. If, within a month of the notification, the auditors are not informed about a deliberation by the board on the required remedial measures, or if they consider that these measures are insufficient to safeguard the continuity of the company's business, they can communicate their concerns to the president of the enterprise court. In practice, this is likely to lead to the monitoring service of the enterprise court which conducts preventative investigations into financially troubled companies to examine the company's situation and might ultimately lead to the opening of bankruptcy proceedings (at the public prosecutor's initiative or further to a bankruptcy filing by the company itself).

Recognition of foreign insolvency proceedings

Within the EU

The Recast Regulation applies, see the first part of this note.

Outside of the EU

A judgment obtained in foreign insolvency proceedings that falls outside the scope of the Regulation would be recognised and enforced by the courts of Belgium without review on the merits and subject to certain conditions, which mainly require that the recognition or enforcement of the foreign judgment should not be a manifest violation of public policy, that the foreign courts must have respected the rights of the defendant, that the foreign judgment should be final, and that the assumption of jurisdiction by the foreign court has not breached certain principles of Belgian law.

In addition, a foreign insolvency judgment cannot have any effect in Belgium which would be contrary to certain rights of the parties arising under the Belgian conflicts law rules on insolvency, including notably the rule that the effects of the opening of insolvency proceedings on rights *in rem* of third parties in respect of the assets of the debtor which are located in another jurisdiction are governed by the law governing such rights *in rem* (the "*rights in rem*" rule).

THE CZECH REPUBLIC



THE CZECH REPUBLIC

Key Elements:

- Reorganisation procedures available since January 2008
- Increase in creditor control
- Automatic stay applies
- Set-off is allowed subject to limitations
- Netting arrangements work

Introduction

As of 1 January 2008, the Czech Republic completely overhauled its insolvency law, replacing its Bankruptcy and Composition Act of 1991 with a new Insolvency Act (Act No.182/2006 Coll., the “IA”). The legislative process leading to the new codification was long and difficult, but one can say with a reasonable degree of confidence that, quibbles aside, it has resulted in a modern insolvency law regime for corporate debtors. The IA also introduced discharge proceedings available to not-for-profit organisations and individuals but this area of the law, although interesting, is beyond the scope of this publication. In July 2009, the IA underwent the first set of substantive amendments (the “2009 Amendments”), aimed at easing the impact of the economic downturn on businesses and households. In March 2011, the IA was amended in response to a Constitutional Court judgment from July 2010 which found certain provisions regulating the allowance/contestation of claims wanting in constitutional terms. Substantial amendments (the “2014 Amendments”) reflecting the existing practice and case law took force on 1 January 2014. Being grounded in extensive data gathering and consultation exercises, the 2014 Amendments are aimed at reinforcing solutions that have proved viable and improving rules and reversing those judicial interpretations that failed to meet the original intentions of the IA.

A further set of significant amendments came into force in mid-2017 (the “2017 Amendments”).

Insolvency and restructuring processes

Under the IA, there are two main types of proceedings available to corporate debtors: liquidation (*konkurs*), i.e. a sale of the estate (piecemeal or as a going-concern) with satisfaction of creditors through distribution of the proceeds, and reorganisation (*reorganizace*), i.e. a non-liquidation reorganisation measure, typically a re-capitalisation, based on a reorganisation plan approved by creditors and the court.

In theory, the proceedings under the IA start as unitary with a general phase meant to determine insolvency and the method of its resolution (i.e. liquidation or reorganisation). In actual fact, the majority of corporate debtors will proceed straight into liquidation, upon court determination of their insolvency. This is because reorganisation (unless pre-approved by the majority of secured and unsecured creditors) is available only to debtors who meet a certain size threshold, being either minimum annual net turnover of CZK 50m (approximately €1.8m) or minimum staff of 50 full-time employees. The original thresholds of CZK 100m turnover or 100 full-time employees have been decreased by the 2014 Amendment as an attempt to make reorganisation as a method of solution to a debtor’s insolvency more broadly available (in the years 2008 to 2013, only 76 reorganisation attempts have been allowed). The IA also allows pre-packaged reorganisations whereby the initial phases of the proceedings would be accelerated as the result of the debtor filing a plan pre-approved by the majority of secured and unsecured creditors.

In respect of groups of companies, the insolvency court should appoint the same trustee for all debtors who belong to the same corporate group. If such an appointment results in

potential conflict between the affiliated companies, the court will appoint a separate *ad hoc* trustee to deal with the particular conflicting situation. A related provision of the IA on Courts and Judges achieves the concentration of insolvency cases of debtors belonging to the same corporate group before the same insolvency judge. The 2017 Amendments aimed to curb intra-state shopping for insolvency courts by making the territorial jurisdiction of the insolvency court independent of changes to the debtor's registered seat effected within 6 months prior to the filing of the case.

Liquidation

In liquidation, a trustee will displace management, gather the assets, list and verify liabilities (both subject to the possible adjustment via adversary proceedings where ownership of assets or the amount or rank of claims is disputed), convert the assets into cash through a sale (piecemeal or going concern) and distribute the cash to creditors in an order of priorities that follows, subject to certain exemptions, the ranking of claims under non-insolvency law. Several significant liquidation going-concern sales have taken place since the IA came into force.

The 2014 Amendments brought about clarification with regard to the powers to decide on the sale of collateral in liquidation, vesting the power clearly in the secured creditor(s), not the secured creditor(s) and the creditors' committee, as would have followed from some case-law on the pre-2014 Amendments law. They also brought more certainty to buyers of assets out of liquidations by providing that actions to set aside such sales may only be filed during the 3 months following the disclosure of the transaction documents in the insolvency register. The 2017 Amendments pushed against that trend, providing that the 3-month limit will not apply where the buyer acted in bad faith.

Reorganisation

The reorganisation provisions were heavily inspired by Chapter 11 of the U.S. Bankruptcy Code, but with significant departures from this model especially as regards the entry into reorganisation (see the "size test" above, and the creditors' right to determine the type of proceedings described further below in this section).

In a reorganisation, the debtor's management will (as a rule) remain in control, being monitored by a trustee and a creditors' committee and will, upon the court allowing a reorganisation attempt through an initial ruling, propose and negotiate a plan, while the company's business continues. Shareholders will be stripped of their voting control with one exception – they will keep the right to elect the management (subject to confirmation by the creditors' committee). However, in reorganisations proposed by a creditor (or in debtor-initiated reorganisations in which the debtor was deprived, by a creditor vote, of the right to propose and negotiate a plan), the shareholders will be stripped of their voting control completely and the right to elect the management will pass onto the creditors' committee.

Creditors will be able to pre-empt the court's decision on whether a reorganisation attempt should be allowed through a vote, however, such decision must be approved either by a significant majority across classes (90% of all claims present or represented) or by both secured and unsecured creditors voting separately (in each of these groups through a simple majority of claims present or represented). If creditors decide that the debtor's business should be liquidated, the court will convert the proceedings into liquidation, despite the debtor meeting the size test, described above. If the creditors agree with the reorganisation plan (or, in relation to a debtor who meets the size test, do not agree but fail to obtain the requisite majority of

votes against the debtor's proposal), the court will allow a reorganisation attempt if it is satisfied that the reorganisation is proposed in good faith.

This decision must be taken within three months of the debtor being declared insolvent by the court. The debtor's management (or a creditor assigned by the court in the decision) will then have an exclusivity period of 120 days to submit a proposal of a plan to the court, together with a disclosure report. The courts may extend the deadline for the plan submission by a further 120 days, and empirical data shows that they readily do so and that plans tend to be submitted during the extended term. Upon the court's approval of the report, but not earlier than 15 days after the report being published, a creditors' meeting will vote on the plan. The plan may propose any lawful measure of resolution of the company's insolvency – the IA allows flexibility in this respect. Creditors will vote on the plan by classes; a majority in the number and in value of voting creditors is needed for the plan to be approved. Creditors will be placed in classes according to criteria proposed in the plan, however, each secured creditor will always be in a class of its own, as will be the debtor's shareholders. The 2017 Amendments brought new rules disqualifying certain creditors – in particular those related to the debtor – from voting with their claims.

Creditors whose claims are not affected by the plan will be deemed to have approved the plan. As regards classification of other claims, claims grouped in any one class must be substantially the same as regards their legal rights and their commercial nature. A plan approved by all classes will be confirmed by the court subject to several tests, most importantly legality and good faith, and a minimum pay-out test on an individual rather than a class basis (in U.S. bankruptcy law, this

would be called the “best interest” test), being the likely pay-out in a liquidation.

The court may also confirm a plan not approved by all classes (the so-called “cram-down”) but only if at least one affected class distinct from the shareholders voted in favour of the plan and if the plan (i) leaves the security interests of secured creditors substantially unaltered and pays to secured creditors the net present value of their collateral, as determined by an expert valuer, and (ii) adheres to the “absolute priority rule” with respect to other classes, meaning that the opposing unsecured creditor class must be paid in full before any class junior to its claims may receive any pay-out under the plan. This may entail wiping out the current equity and replacing it with new registered capital. Post-commencement claims (and certain preferred pre-commencement claims treated by the law as *pari passu* with post-commencement claims) will not be affected by the plan and will generally have to be paid in full upon the confirmation of the plan, unless the relevant creditor agrees otherwise.

Upon confirmation of the plan (and unless stipulated otherwise therein), the pre-confirmation claims will be extinguished and replaced by new claims, as determined in the plan, and assets will be freed from pre-confirmation encumbrances. The proceedings will not be terminated upon confirmation. They move into the “performance” phase in which the management (the original one or the one installed by the creditors' committee) will remain in control but will still be monitored by the trustee and the creditors' committee. If the plan is performed as confirmed, the court will close the proceedings. If the plan is not performed, the court will convert the proceedings into liquidation where creditors' claims are at the level previously agreed in the plan.

Impact on third party rights

An insolvency petition will be registered by the insolvency court and published in an online publicly accessible insolvency register within two hours of the filing. Upon the publication, the enforcement of creditors' claims (secured as well as unsecured) becomes subject to an automatic stay. The 2017 Amendments gave the insolvency court the power to suspend publication of a creditor petition if the court has legitimate doubts about the merits of the petition; in these cases, the stay will not kick in. In such case, the court will have 7 calendar days from the day of filing of the petition to review the petition more thoroughly and possibly dismiss it as evidently groundless. Otherwise, it will have to publish the petition on the 8th calendar day from the day of filing of the petition at the latest and the automatic stay will kick in then. In this context, it should also be noted that the 2017 Amendments brought about further curbs on creditor petitions, including a requirement that the petitioning creditor's claim be certified by an auditor or other independent expert, an advance on the cost of proceedings in the amount of CZK 50,000 payable upon the filing of a creditor petition, and an increase in the maximum penalty for filing of a groundless petition, up to CZK 500,000.

In a liquidation, the stay is de facto limited by a rule that allows the secured creditor to issue instructions to the insolvency trustee with regard to the realisation of the collateral. The 2014 Amendments brought about an important clarification, stating explicitly that neither the creditors' committee nor the court has a right to co-decide on the issuance of the instructions. Once an instruction has been issued, the court may reverse it only where it would prejudice the common interest of all creditors on the highest possible realisation of the estate.

In a reorganisation, enforcement of creditors' claims (including secured creditors' claims) will be subject to the stay throughout the reorganisation proceedings. The mitigating factors are the creditors' right to preclude a reorganisation attempt and take away the debtor's exclusive right to propose a plan (as explained above) and the debtor's obligation to pay interest to the secured creditors at contract rate from the value of their collateral as determined by an external valuer. A failure to meet these payments would mean a conversion to liquidation.

Unlike in some other jurisdictions, the automatic stay does not extend to shield executory contracts from termination by the debtor's counterparty. These were originally subject to rather unclear rules, which have been substantially amended and clarified by the 2014 Amendments. Under the amended rules, in liquidation the trustee will be able to assume or reject executory contracts, but if he does neither within 30 days from the court's decision that the proceedings will be liquidation proceedings, the contract will be deemed rejected. In a reorganisation, the right to assume or reject executory contracts remains with the debtor (subject to the consent of the creditors' committee); however, if the debtor does not reject the contract within 30 days from the court's decision that the proceedings will be reorganisation, the contract will be deemed to be assumed.

If an executory contract is rejected, the counterparty will have a special new period during which it will be able to file a claim for damages caused by the rejection, a point about which there has been serious uncertainty in the pre-2014 Amendments case law. The counterparty's claim in respect of performance provided by it under an executory contract in the period between commencement of the insolvency proceedings and the contract being rejected by the insolvency trustee or debtor will rank as an administrative priority claim.

Priority ranking of creditors

Until March 2011, only the trustee and the debtor – but not creditors – could challenge creditors' proofs of claim. As a result of an intervention by the Constitutional Court, the IA was amended such that creditors are entitled to challenge each other's claims, subject to various checks and limitations aimed at controlling the risk of abuse of that right. A challenge of a creditors' proof of claim by the debtor or another creditor does not (unlike in case of a challenge by the trustee) restrict the creditor from exercising voting rights associated with the challenged claim.

Creditors who file inflated claims still face the risk of being penalised financially and having their claims disregarded in the proceedings.

With certain exceptions, the IA respects the ranking of claims under pre-insolvency law, i.e. it respects both the priority of secured claims and the subordination of junior claims.

With respect to secured claims, the priority is absolute in liquidation, save for capped deductions for the costs of maintenance and sale of the collateral (these should not amount to more than 9% or (depending on the reading of the law) 11% of the gross proceeds of the realisation of the collateral). The insolvency court has the power to allow costs higher than those limits. In a reorganisation, secured creditors may, under certain circumstances, have to suffer a dilution as a consequence of post-commencement finance claims which may rank *pari passu* with pre-commencement secured claims. But this would only be so where (i) the post-commencement financing was provided following the court's approval of the reorganisation attempt and in furtherance of the goals of the reorganisation, (ii) the relevant financing contract was approved by the creditors committee,

and (iii) the secured creditor did not make use of the right of first refusal, granted by the IA, to provide the post-commencement financing itself.

Unsecured claims will be subject to secured pre-commencement and administrative (i.e. post-commencement) claims as well as certain preferred pre-commencement claims, most notably unpaid wages and other employee claims and to personal injury claims.

Subordinated claims will be paid subject to the terms of their contractual subordination. The IA did not introduce equitable subordination of shareholder or other connected party claims, however, under the 2017 Amendments, connected creditors may not be able to vote with their claims. Based on the 2014 Amendments, no voting rights are associated with subordinated claims.

Directors' duties

These can be grouped into duties relating to the opening of the proceedings and duties that directors have in the proceedings where they remain in control.

The former duties mainly include the directors' duty to file for the commencement of proceedings without delay after the directors have determined, or should have determined, that the company is insolvent. Insolvency is tested both on the cash-flow basis (i.e. the company's ability to meet current debts) and the balance sheet (i.e. the market value of the company's assets against the total amount of its liabilities). This duty is subject to very stringent liability for damages – directors who are in default of the duty will be liable to creditors for damages whose amount will be presumed to be equal to the difference between their proven claims and the insolvency dividend. Under the 2017 Amendments, the cash-flow test may be mitigated by an

analysis produced on behalf of the debtor showing that a “cash mismatch” (i.e. the difference between the amount of the debtor’s overdue liabilities and amount of its liquid assets) which the debtor is suffering does not exceed 10 % of the amount of its overdue liabilities (or that such “cash mismatch” will drop below this limit within the period which is being analysed).

The latter duties can be described as the fiduciary duties to the creditors similar to those applicable to the insolvency trustee. The directors who remain in control of the company will have to act diligently and will be obliged to put the creditors’ interests first.

The new Business Corporations Act (Act 90/2012) which took force on 1 January 2014 has introduced new rules on director conduct in the pre-insolvency period with an ensuing risk of new grounds of civil liability. Five years on, it is still not clear how these rules will interact with the IA’s rules described above – directors should beware.

Lender liability

As Czech law stands, lender liability law does not really exist in the Czech Republic. Having said this, even prior to 1 January 2014, there were rules in Czech corporate law that could have possibly resulted in lender liability. The new Business Corporations Act introduced new statutory provisions which could possibly be used to make a creditor liable to the company and indirectly also to its creditors and shareholders if the creditor significantly and decisively influences the company’s actions to its detriment. The rules are rather open-ended and creditors will need to proceed with great caution, especially in situations in which they step outside plain-vanilla lending and collection activities.

Challenging antecedent transactions

The IA allows the insolvency trustee (but not the debtor’s management or other creditors) to sue in order to avoid antecedent transactions that can be shown to constitute a preference, an undervalue, or a transfer with actual fraudulent intent. The trustee may bring the action within one year from the opening of insolvency proceedings. The standard claw-back period is one year for preferences and undervalues and five years for transactions with actual fraudulent intent. For preferences and undervalues, the trustee must show that the debtor was either insolvent or became insolvent as the result of the transaction. For transactions with connected parties, the claw-back period for preferences and undervalues is extended to three years and the debtor’s insolvency will be presumed.

Set-off

The IA has substantially liberalised insolvent set-off which was fully precluded under the previous Bankruptcy and Composition Act. Under the IA in its original version, a creditor could set off its mutual claims vis-à-vis the debtor provided that the substantive conditions for the set-off were met prior to the date of determination of the type of bankruptcy proceedings. For all practical purposes, this means that a creditor was entitled to offset pre-commencement claims although a creditor must formally prove its claim and pay any net sums due to the debtor. Also, a creditor was not entitled to the set-off if he knew of the debtor’s insolvency when he acquired his claim.

The 2009 Amendments tightened the rules on set-off significantly. They banned set-off after a court order declaring a moratorium (a special protective measure which the court may, with the approval of majority of creditors’ claims, order for up to

3 months prior to, or following, the opening of the proceedings) and after the filing of an application for reorganisation. The insolvency court is entitled to grant exemptions from the ban. Furthermore, upon the application by a party in interest and where this is not contrary to the common interest of creditors, the insolvency court has the power to ban set-off in other procedural phases as well, albeit only in specific cases and for specified periods of time.

While the restriction after a court-ordered moratorium may be of limited use given that the court may only declare a moratorium with the prior approval of the majority of creditors, the restriction kicking in as of the filing of an application for reorganisation may help protect the cash-flow of those debtors who are eligible for reorganisation under the IA's size test described above.

Guarantees

Guarantees of creditors' claims are not affected by the debtor's insolvency – i.e. the guarantor will pay the creditor (and the creditor can demand and enforce payment) outside the insolvency proceedings and the guarantor will become subrogated into the creditor's procedural position.

There has been great uncertainty due to Supreme Court case law as to the status of security granted in order to secure the recourse claims that an issuer of a guarantee will have against the debtor whose debt has been secured under the guarantee. The 2017 Amendments have tried to alleviate that uncertainty. It remains to be seen to what extent that attempt will bring real change when tested in the insolvency courts.

Also, another peculiarity with respect to guarantees (and security in general) that one needs to bear in mind is that Czech

corporate law traditionally prohibited financial assistance not only to joint-stock companies (*akciová společnost*) but also to limited liability companies (*společnosts ručením omezeným*). It remains the case even under the new Czech Business Corporations Act.

New money lending

New loans made to the insolvency trustee in liquidation will have priority over general creditors but not secured creditors. In a reorganisation, the situation is somewhat more complicated. As was mentioned in the section on “Priority Ranking of Creditors”, secured creditors may, under certain circumstances, have to suffer a dilution by new loans made after the commencement of the reorganisation proceedings which may rank *pari passu* with pre-commencement secured claims. However this would only be so where (i) the post-commencement financing was provided following the court's approval of the reorganisation attempt and in furtherance of the goals of the reorganisation, (ii) the relevant financing contract was approved by the creditors committee, and (iii) the secured creditor did not use the right of first refusal, granted by the IA, to provide the post-commencement financing himself.

Recognition of foreign proceedings

With respect to European Union countries (other than Denmark), the Recast Regulation applies.

On 1 January 2014, a new Private International Law Act (Act 91/2012) came into force, introducing into Czech law rules on recognition of foreign insolvency proceedings applicable in cross border situations involving non-member states.

The rules are succinct

Essentially, where Czech courts have jurisdiction under the Regulation, the rules extend the effects of Czech insolvency proceedings to non-member states as well, provided that those states recognise such effects.

The rules also equip Czech Courts with independent grounds of jurisdiction to open territorial proceedings in the Czech Republic if the foreign non-EU debtor has got an establishment in the Czech Republic (the definition of “establishment” will have to be borrowed from the Regulation as the IA does not provide one). The territorial proceedings may only be opened upon the request of a local Czech creditor or a creditor of a claim arising in connection with the establishment. Their effects will be limited to the territory of the Czech Republic.

Foreign non-EU proceedings will be recognised in the Czech Republic if (i) reciprocity is assured, (ii) the debtor has got COMI in the state from which the decision whose recognition is sought originates (a definition of “COMI” will again have to be borrowed from the Regulation as the IA does not provide one), and (iii) the territorial proceedings described above have not been commenced. However, the rules are not specific on what such recognition means, other than the release of the debtor’s chattels to the foreign insolvency trustee. In particular, the rules provide for no means of support or collaboration by Czech authorities with respect to assets located in the Czech Republic.

On the other hand, the new rules allow for the use of the Regulation’s conflicts-of-law’s provisions to cross border situations involving non-member states as well.

ENGLAND & WALES



ENGLAND & WALES

Key Elements:

- Recent reforms announced including:
 - A standalone moratorium
 - Prohibition on contractual termination provision based on insolvency event
 - A new restructuring plan with the ability to cram down creditors across classes
- Limited application of administrative receivership regime
- Administration procedure with focus on company rescue
- Practical guidance for lenders and shadow directors
- Ranking of claims in different procedures

Introduction

This section is designed to provide a general outline of the main corporate insolvency procedures in England and Wales. Most of the legislation relevant to insolvency is contained in the Insolvency Act 1986 (the “Act”) and the Insolvency Rules 2016.

There is significant emphasis of business rescue and restructurings in England and Wales. Many restructurings take place either consensually or using restructuring techniques outside of the formal insolvency procedures.

The main formal procedures encountered in corporate insolvencies are company voluntary arrangements, administration, liquidation and administrative receivership. We also consider schemes of arrangement pursuant to the Companies Act 2006 which are frequently employed in restructuring cases. We consider each of these procedures in

turn, the legal basis for challenges to antecedent transactions, and the personal liability of directors.

New corporate insolvency reforms

In August 2018, the Department for Business, Energy and Industrial Strategy announced proposals to introduce measures designed to promote opportunities for distressed debtors to restructure. They include: (1) a standalone (28 day) moratorium which is extendable for companies facing the prospect of insolvency; (2) the introduction of legislation to prohibit reliance on termination clauses in contracts which are based on insolvency events; and (3) a new restructuring plan which is to be a separate restructuring tool, similar to a scheme of arrangement but providing for greater flexibility in terms of the ability to bind minority creditors by way of a cross class cram down mechanism.

Special resolution regime for banks, investment firms and clearing houses

The Banking Act 2009 (the “Banking Act”) introduced a special resolution regime to address a situation where a UK bank (a UK incorporated institution with permission to accept deposits under the Financial Services and Markets Act 2000 (a “UK Bank”)) or a building society has encountered, or is likely to encounter, financial difficulties. The Banking Act gives H.M. Treasury, the Financial Conduct Authority and the Bank of England wide powers to implement stabilisation measures, set out in the Banking Act in respect of a UK Bank and, in limited circumstances, certain matters related to group undertakings of the relevant UK Bank. The powers include the ability to transfer all or some of the property, rights and liabilities of a UK Bank or a building society to a commercial purchaser or a Bank of England entity. The Banking Act also provides for two new special insolvency proceedings, referred to as “bank

insolvency” (a modified form of liquidation) and “bank administration” (a modified administration procedure with respect to a residual bank where there has been a partial property transfer to a bridge bank or a private sector purchaser), which may be commenced by specified UK authorities in respect of relevant UK authorised deposit-taking institutions. The Investment Bank Special Administration Regulations 2011 provide for further modifications to “bank insolvency” and “bank administration” in certain circumstances for investment banks. In addition, the Financial Services Act 2012 extended the special resolution regime to certain investment firms, UK clearing houses and certain group companies of UK banks and UK investment firms. Further changes were made to add a specific bail-in power which aligns existing provisions with the EU Bank Recovery and Resolution Directive.

There are also bespoke resolution and insolvency regimes for certain other types of companies, for example insurance companies and public utilities. These special regimes are beyond the scope of this note.

Administration

Administration is principally a procedure intended to rescue companies which are or may become insolvent. A company can be placed into administration by way of an application to the court for an administration order made by either: the company; its directors; a creditor (including contingent and prospective creditors); or in certain circumstances by a clerk of a Magistrates Court.

Administration may also be commenced without the need for a court order, by being initiated by the filing of requisite notices by the holder of a qualifying floating charge (as defined by paragraph 14 of schedule B1 of the Act); the company; or its directors.

The overriding purpose of an administration is to rescue a company as a going concern. If this is not reasonably practicable, then an administrator may perform his functions with a view to achieving a better result than would be achieved if the company were wound up. Again if this is not reasonably practicable, he may realise the property in order to make a distribution to one or more secured or preferential creditors.

Pre-pack administration

Pre-packaged administrations became a useful restructuring tool in the last economic downturn, and this trend has continued with recent high profile pre-packs such as House of Fraser in August 2018 and Debenhams in April 2019. They involve the negotiation of an agreement for the sale of some or all of the business and assets of an insolvent company prior to the instigation of a formal appointment, which then is executed immediately following (usually on the same day) as the appointment of an administrator. Key to the strategy is a swift and seamless handover of the business to the incoming purchaser. In some financial restructurings, pre-packs are used to right size the balance sheet, and funders may as a result become the new owners of the business. A full analysis of future developments of pre-packs is beyond the scope of this note. Further details can be provided upon request including information on the reserve power contained within the Small Business, Enterprise and Employment Act 2015 which is designed to legislate specifically in relation to sales to connected parties, including pre-packs.

Effect of administration

Administration creates a moratorium during which no insolvency proceedings or other legal proceedings, including enforcement of security, can be taken without the consent of the administrator or the permission of the court.

The effect of this moratorium is to provide the administrator with sufficient breathing space to formulate proposals for rescuing the company, or in the event that this does not prove possible, an orderly realisation of the company's assets.

Qualifying floating charge holder has choice of administrator

A qualifying floating charge holder has the power to choose the identity of an administrator, whether by making the appointment himself (if the floating charge is enforceable) or by intervening in an application to court. An administrator appointed by a qualifying floating charge holder however, owes a duty to act in the best interests of the general body of creditors, not simply his appointer. A qualifying floating charge holder may also be able to block the appointment of an administrator in certain circumstances by appointing an administrative receiver (see below).

Powers of an administrator

The powers vested in the administrator are extensive. He is authorised to do all such things as may be necessary for the management of the affairs, business and property of a company. He may dismiss directors. Also, any powers of directors which might interfere with the exercise by the administrator of his powers will only be exercisable with his consent. Most importantly, an administrator has the power to sell the assets of the company, even if they are subject to security (see below). He also has the power to make distributions to the creditors of the company.

Property subject to fixed charge

Where the property which the administrator seeks to dispose of is subject to a fixed charge, or is property held by the company under a hire purchase agreement, the administrator is first required either to obtain the leave of the court (who will need to be satisfied that the disposal is likely to promote the legitimate purposes of the administration) or the consent of the charge holder.

It will be a condition of the court permitting the disposal of property subject to a fixed charge or hire purchase agreement that the net proceeds of the disposal must be applied by the company first towards meeting the debt of the secured creditor. The administrator must sell the assets at "market value", failing which he will have to make up the deficiency to the secured creditor.

Property subject to a floating charge

If the security, as created, took the form of a floating charge, the administrator is free to deal with and dispose of the property without permission of the charge holder and without the sanction of the court. The floating charge holder's claims transfer to the proceeds of sale of the charged property but his claims rank after (a) administration liabilities, (b) costs and expenses of the administrator, and (c) claims of preferential creditors.

Importantly, the administrator is entitled to use floating charge assets to fund the continuation of the business during the administration. This is one of the reasons why administrators sometimes challenge the legal nature of fixed charges (i.e. contending the charge to be floating rather than fixed).

At the end of the administration, the company may be returned to financial health and continue to trade, or be placed into liquidation or dissolved.

Liquidation

There are two forms of liquidation, namely:

- (a) winding-up by the court (sometimes called compulsory winding-up); and
- (b) voluntary winding-up.

Winding-up by the court

A compulsory liquidation begins by a winding-up order of the court made on the presentation of a petition by a creditor, the company, its directors, or a shareholder.

Grounds for a winding-up order

A company may be wound-up by the court in a number of circumstances although the two most common are:

- (a) that the company is unable to pay its debts; or
- (b) that the court considers that it is just and equitable that the company should be wound-up.

Although it is unusual for a solvent company to be wound-up by the court, it can happen in certain circumstances on the 'just and equitable' ground – for instance, where minority shareholders are being unfairly treated or where there are, for example, only two shareholders neither of whom has effective control and who cannot agree how the affairs of the company should be conducted. Winding-up is, however, an extreme remedy and minority shareholders who are being unfairly treated are usually better advised to seek alternative remedies under section 994 of the Companies Act 2006, which gives the court

a broad discretion so that it can, for example, order the purchase of a minority shareholding.

Inability of a company to pay debts

A company is deemed unable to pay its debts if:

- (a) a creditor, to whom the company is indebted in a sum exceeding £750 then due, has served on the company a written demand (known as a statutory demand) requiring the company to pay the sum so due, and the company has for three weeks neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor;
- (b) a judgment against the company is unsatisfied; or
- (c) it is proved to the satisfaction of the court that the company is unable to pay its debts as they fall due.

In order to obtain a winding-up order it may not be necessary for a creditor to have served a statutory demand on the company or to have an unsatisfied judgment debt, if it has other evidence to demonstrate that the company is insolvent.

A company is also deemed unable to pay its debts if it is proved to the satisfaction of the court that the value of the company's assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities, often referred to as the "balance sheet test". A Supreme Court case, *BNY Corporate Trustee Services Ltd v Eurosail UK 2007-3BL PLC & Ors* [2013] UKSC 28, held that in order to invoke the balance sheet test, it would be necessary to consider more than just the audited accounts and that an assessment of whether a company can meet its liabilities, taking into account all the relevant factors in relation to the company, including the nature of prospective and contingent liabilities, would be required by the Court.

Provisional liquidation

After the presentation of a petition, where the company's property is in danger or where it is alleged that those in control of the company are misappropriating or wasting the company's assets, an application may be made by any creditor or contributory or by the company itself for the appointment of a provisional liquidator, and the court in a proper case will, at any time before the making of a winding-up order, appoint one.

Duties and powers of the liquidator

The liquidator in a compulsory liquidation is an officer of the court and subject at all times to the control of the court. He is responsible to the creditors for the conduct of the liquidation and remains so responsible until his release as liquidator. The functions of a liquidator in a compulsory liquidation are to ensure that the company's assets are got in, realised and distributed to the company's creditors, and to pay any surplus to the persons entitled to it. The liquidator or the provisional liquidator (as the case may be) takes into his custody, or into his control, all the property to which the company is or appears to be entitled. The powers of the directors cease. The liquidator has very broad powers, save that he has a limited power to carry on the business (to the extent necessary to collect and realise the assets) and in practice it is relatively unusual for a liquidator to achieve a sale of the business as a going concern.

Power of disclaimer

In addition to his general powers, a liquidator has a special power to disclaim onerous property. It is important to note that the power to disclaim applies to any unprofitable contract or any other property of the company which is unsaleable, or is not readily saleable, or is such that it may give rise to liability to pay money or perform any other onerous act. Property subject to onerous burdens may be disclaimed even though it is not

actually unsaleable. The most typical exercise of disclaimer is in respect of a low value leasehold. The effect of disclaimer is that it effectively terminates the rights and liabilities of the company on the property disclaimed but does not affect the rights and liabilities of any other person. Any interested party is entitled to request the liquidator to decide whether he intends to disclaim and can apply to the court to have the disclaimed property vested in him. A person suffering loss or damage as a result of the liquidator exercising his statutory power of disclaimer will have an unsecured claim for any loss or damage in the liquidation.

Secured creditors may enforce rights

Although liquidation has the effect of suspending legal proceedings against the company, liquidation does not override the rights of secured creditors who remain free to enforce their security and to retain the proceeds of enforcement in priority to the claims of unsecured creditors.

Unsecured creditors are generally paid *pari passu*, although preferential creditors, as defined by section 386 and schedule 6 of the Act, have a priority over general unsecured creditors, and there is a limited class of deferred creditors.

Voluntary winding-up

There are two types of voluntary winding-up, a members' voluntary winding-up and a creditors' voluntary winding-up, the essential difference being that the former applies to solvent companies and the latter to insolvent companies. Accordingly, voluntary liquidation is not always an insolvency procedure.

Members' voluntary winding-up is often used to effect a corporate reorganisation or reconstruction.

Liquidation, with the appointment of the Official Receiver supported by Special Managers has been a recent feature of failures such as Carillion plc and British Steel Limited where health and safety concerns have made the appointment of a private officeholder impractical due to the potential significant exposures.

Powers of the liquidator

One consequence of both a members' and creditors' voluntary liquidation is that the powers of the directors cease. The liquidator has a number of powers set out in the Act. There are also a number of enabling provisions which entitle the liquidator to, for example, apply to the court for guidance on questions arising in the winding-up. As with a compulsory liquidation, the liquidator's general function is to realise the assets and to pay creditors in accordance with their entitlements (in a voluntary winding-up, the liquidator also has a similar power regarding the disclaimer of onerous property). The order of priority of debts is the same as in a compulsory liquidation.

Company voluntary arrangements

A Company Voluntary Arrangement ("CVA") might take the form of a rescue plan or may simply be used to facilitate a distribution to creditors. The objective of such arrangements is to bind dissenting creditors to the proposals.

The Insolvency Act 2000 introduced, amongst other things, a new regime for CVAs of small companies which are eligible for a moratorium period of up to three months when a CVA is proposed by its directors. A small company is one which currently satisfies at least two of the following three requirements: (i) turnover of not more than £10.2m; (ii) assets of not more than £5.1m; and (iii) fewer than 50 employees. Although the moratorium is only available to small companies, a CVA can be used by the directors of any company to come to an arrangement with its creditors.

For larger businesses that do not qualify for the small company moratorium, the administration process (which has the benefit of a moratorium) may be used in conjunction with a CVA. It is worth noting that the Small Companies Moratorium is to be repealed and companies irrespective of their size will be able to apply for a standalone moratorium being promoted in the latest reforms.

There are, however, a number of exceptions, and certain companies will not be treated as eligible for a small companies' moratorium, for example, insurance companies, banks, and building societies. (These special entity types will not be eligible for the proposed standalone moratorium.) During the moratorium, amongst other things, security cannot be enforced, and proceedings cannot be commenced or continued against the company or its property except with the consent of the court. Again, the effect of this moratorium is to allow a company time to formulate a proposal so that it can come to an arrangement with its creditors.

The proposal

The proposal cannot affect the rights of secured creditors to enforce their security without the concurrence of the creditors concerned, which effectively gives the secured creditors a veto on an arrangement if it affects their rights. A meeting may not approve a proposal under which a preferential debt of the company is to be paid otherwise than in priority to non-preferential debts, unless the preferential creditor consents to such a change in priority. In order for the proposal to be approved, a majority in value of the shareholders and more than three quarters in value of the creditors must vote in favour of the CVA (it should be noted, however, that if the decisions of the creditors and the shareholders differ, the decision of the creditors will prevail subject to the right of a member to apply to the court).

Schemes of arrangement

This is not an insolvency procedure, but a mechanism contained in Part 26 of the Companies Act 2006 which allows the court to sanction a “compromise or arrangement” that has been agreed between the relevant class or classes of creditors or members and the company.

A scheme of arrangement binds members or creditors within a class, including unknown creditors who fall within a class of creditors. The power of the majority to bind a minority in the class operates regardless of any contractual restrictions (e.g. requirements for amendments and variations set out in the loan document which governed the debt being compromised). For the scheme to be approved, there needs to be a majority in number, representing three quarters in value, in each class of those voting for the scheme.

A scheme of arrangement requires the sanction of the court to summon a meeting or meetings of the relevant class or classes of creditors or members and is also required to sanction the scheme itself. Assuming the scheme has been approved by the requisite majority of creditors at the meetings, and the scheme is one that an intelligent and honest creditor (or member) would approve, the court should sanction the scheme.

The English court has jurisdiction to sanction a scheme of arrangement in relation to a company liable to be wound up under the Act. Broadly speaking, in order to satisfy this jurisdictional threshold, the company must have a connection with England and Wales that is sufficient to demonstrate that there is a practical purpose to the Court sanctioning a scheme. In the matter of *Rodenstock GmbH [2011] EWHC 1104 (Ch)*, this test was satisfied by virtue of English law governed finance documents, which provided for the English courts to have

jurisdiction in the event of any dispute. More recently, the English court has extended its jurisdiction to allow for a scheme to be sanctioned where the majority of scheme creditors are not domiciled in England and Wales, but where the scheme in question has a reasonable prospect of being recognised and given effect in another jurisdiction.

Further innovations as to the use of schemes in an international context was exemplified in the case of *Re Apcoa Parking Holdings GmbH and Others [2014] EWCH 3849* which saw a change in the governing law from German to English law contained in the finance documents being used to establish jurisdiction for an English scheme. We have also used schemes to restructure New York law governed notes for a group of companies operating primarily in Spain and Latin America. In the case of the Codere Group, for example, an English special purpose vehicle was used to establish a sufficient connection to England and propose a scheme, with a view to compromising the New York law governed notes.

As mentioned above, the recent government proposals include a restructuring plan which has many similarities to a scheme. It promises to be even more flexible than a scheme, with the additional ability to bind all creditors affected by the plan, on the basis of at least one class of creditor voting in favour. The draft legislation is not yet available, but it will be interesting to see the extent of the creditor’s safeguards as the law is developed.

Challenges to antecedent transactions

Transactions at an undervalue: section 238 of the Act

An administrator or liquidator may apply to the court to set aside transactions entered into at an undervalue within two years of the onset of insolvency. For this purpose a transaction is at an “undervalue” if it constitutes a gift or if the

value of the consideration received (in money or money's worth) is significantly less than the consideration provided by the company.

It is a defence to a challenge under section 238 to show that the company was solvent at the time it entered into the relevant transaction or that it was entered into in good faith and that there were reasonable grounds for thinking the transaction would benefit the company. Although historically the view of the court was that granting security did not deplete a company's assets and therefore did not constitute an undervalue, secured creditors should be aware that, following the Court of Appeal's decision in *Hill v Spread Trustee Company Limited* [2006] EWCA 542, the granting of security may now be the subject of a challenge as a transaction at an undervalue.

Preferences: section 239 of the Act

An administrator or liquidator may apply to set aside transactions which occurred within six months of the onset of insolvency (this period is extended to two years for transactions involving connected parties) which had the effect of putting the creditor, surety or guarantor in a better position in the event of a liquidation than would otherwise have been the case and where the company was influenced by a desire to produce that (i.e. preferential) effect. In deciding to give the preference, a company must have been influenced by a desire to produce the effect of putting the creditor in a better position. If this desire is missing the relevant action – such as the taking of security – will not be invalidated. It is a defence to a challenge under section 239 to show that the company was solvent at the relevant time (taking account of the effect of the relevant transaction, act or omission).

Transactions defrauding creditors: section 423 of the Act

Under section 423 of the Act the court may, on the application of the liquidator of a company (or with the leave of the court, on the application of a "victim of the transaction" even if the company is not in liquidation), set aside a transaction entered into by the company "at an undervalue" if the company entered into the transaction for the purpose of putting assets beyond the reach of a person who is making, or may at some time make, a claim against it, or of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make. It is not a condition of the making of such an order that the company was insolvent at the time of the transaction.

A transaction at an undervalue is defined under section 423 of the Act in substantially the same terms as under section 238 of the Act (i.e. lack of/inadequate consideration). The principal differences are:

- (a) to set aside a transaction under section 423, the court must be satisfied that it was entered into for the purpose of putting assets beyond the reach of creditors or otherwise prejudicing the interest of creditors;
- (b) the remedy is available not only to administrators and liquidators, but also to "a victim of the transaction"; and
- (c) there is no requirement that the company be subject to a formal insolvency proceeding.

Avoidance of floating charges: section 245 of the Act

A charge, which was created as a floating charge, entered into by a company within 12 months (the period is extended to two years if the transaction was in favour of a connected party) of the onset of insolvency is invalid except to the extent of any new money advanced (or the value of goods or services provided) or

the discharge or reduction of indebtedness which occurs at the same time as or after the creation of the charge.

It is a defence to a challenge under section 245 to show that the company was solvent when it entered into the charge.

Extortionate credit transactions: section 244 of the Act

An administrator or liquidator may challenge credit transactions entered into within three years of the onset of insolvency if, having regard to the risk accepted by the counterparty, the terms were such as to require “grossly exorbitant” payments (whether unconditionally or in certain circumstances) or if the terms of the transaction otherwise “grossly contravened” ordinary principles of fair dealing.

Ability to assign insolvency claims

Since October 2015, liquidators and administrators have had the power to assign a right of action and its proceeds, for claims arising out of extortionate credit transactions, preferences, and transactions at an undervalue. It will be interesting to see whether more claims are brought under these provisions as a result of these changes.

Personal liability for directors

Directors’ duties

Part 10 of the Companies Act 2006 codifies the duties of directors. It provides a list of seven general duties aimed at providing greater clarity to directors, and also a non-exhaustive list of factors that directors must take into account when exercising their duties. In particular, the factors include a duty to consider not just shareholders, but employees, suppliers, consumers and the environment. The statement of duties in the Companies Act 2006 is not comprehensive. In particular, it does not include the duty which is owed to creditors when

the company is insolvent or on the verge of insolvency, though this is preserved.

The Companies Act 2006 also contains a new procedure for the enforcement of directors’ duties by shareholders on behalf of the company, although the claimant must show a *prima facie* case before being given permission to proceed with a claim. In practice there has not been any increase in litigation to date against directors as a result of these changes to the legislation.

Directors can incur civil and criminal liability for the debts of an insolvent company in a number of ways under the Act. For this purpose, “director” includes shadow directors – any person in accordance with whose directions the appointed directors are accustomed to act.

The principal areas of risk for directors are breach of duty, fraudulent trading and wrongful trading.

Breach of duty: section 212 of the Act

This section enables the court, on the application of a liquidator, creditor or shareholder, to make an order requiring any officer of the company (or any person who has taken part in the promotion, formation or management of the company), liquidator or administrative receiver who has misapplied, misappropriated or wrongfully retained money or property of the company or has been guilty of misfeasance or breach of any fiduciary duty, to repay or restore the misapplied, misappropriated or wrongfully retained property, or contribute to the company’s assets by way of compensation for breach of duty.

Fraudulent trading: section 213 of the Act

This section enables a liquidator to apply for contributions from any persons (i.e. not just directors and shadow directors) who

were knowingly parties to the carrying on of business with the intent to defraud creditors. The section requires “actual dishonesty involving, according to current notions of fair trading among commercial men, real moral blame”.

The facts supporting a claim under section 213 will also render every person knowingly party to the carrying on of the business with intent to defraud creditors liable to criminal penalties under section 993 of the Companies Act 2006.

Wrongful trading: section 214 of the Act

A liquidator may apply to the court for contributions towards the assets of the company from any person who held office as a director (this includes shadow directors) from the point at which that person “knew or ought to have concluded that there was no reasonable prospect of avoiding insolvent liquidation”.

It is a defence to a challenge under section 214 for a director to show that from the point that he knew or ought to have known that insolvent liquidation was unavoidable he “took every step with a view to minimising the potential loss to the company’s creditors”. This may include but does not oblige the directors to initiate insolvency proceedings.

It should be noted that resigning does not necessarily enable a director to avoid liability under section 214 and that under section 214 there is no need to prove an intention to defraud creditors.

The Small Business, Enterprise and Employment Act 2015

Since October 2015 administrators have had the power to commence fraudulent and wrongful trading claims. Liquidators and administrators are also able to assign those claims. This potentially means that directors may be susceptible to more claims for fraudulent or wrongful trading.

Disqualification

Under the Company Directors Disqualification Act 1986 (“CDDA 1986”), the Secretary of State for Business, Innovation and Skills may bring disqualification proceedings against a director of an insolvent company. The Court is obliged to impose a disqualification if it is satisfied that the person is or has been a director of an insolvent company and that his or her conduct as a director of that company makes such person “unfit to be concerned in the management of a company”. Matters which may be taken into account by the Court will include misfeasance, breach of fiduciary duty, misapplication of company property, the director’s responsibility for entering into any transaction liable to be set aside and failure to comply with the accounting and registration requirements of the CA 2006. Incompetence, as well as commercially or morally culpable behaviour, can be sufficient to enable the Court to disqualify a director. If the case is proven, the Court will disqualify the director for a period of between 2 and 15 years and enter the director’s name on the public register of disqualified directors. During the period in which a person is subject to disqualification, it is a criminal offence for that person to be a director of a company or take certain other roles relating to company management. The grounds for disqualification are also going to be extended to include “the extent to which the person was responsible for the causes of [insolvency]”, and the “nature and extent of any loss or harm caused, or any potential loss or harm which could have been caused, by the person’s conduct”. The Secretary of State has a discretion to accept an undertaking that a person will not act as a director for a specified period either before or during court proceedings for disqualification. A director giving an undertaking will still be entered on the register of disqualified directors and the undertaking will have the same effect as a disqualification order, but the process may be more efficient and less

expensive for all parties involved. In addition, the Secretary of State has the power to apply for a compensation order against a person who is the subject of a disqualification order/undertaking where his conduct has caused loss to one or more creditors of an insolvent company. The generic list of factors for disqualification are set out in Schedule 1 of the CDDA 1986 and are to be taken into account in every case.

They also apply to shadow directors. It is also worth noting that a disqualification order can be made in relation to an individual who has an overseas conviction in connection with the promotion, formation, management, insolvency or striking off of a company outside Great Britain.

Lender liability

Generally speaking, the risk in England of lenders being held liable to pay their customers' debts is small. The principal risk for a lender, however, arises where it is found to be acting as a shadow director of a company that becomes insolvent. In such circumstances it is conceivable that a lender may be made liable to make a contribution to an insolvent company's assets for wrongful trading under section 214 of the Act.

"Shadow Director" is defined in section 251 of the Act as amended by the Small Business Enterprise and Employment Act 2015, as meaning "...a person in accordance with whose directions or instructions the directors of the company are accustomed to act (but so that a person is not deemed a shadow director by reason only that the directors act on advice given by that person in a professional capacity)". Certain exemptions apply, e.g. some professionals, or Ministers of the Crown.

Consequences of being a shadow director

A liquidator or creditor of an insolvent company might seek to pursue a lender on the basis that it is a shadow director. As previously mentioned, a lender may be liable to make a contribution to an insolvent company's assets for wrongful trading where it is held to be a shadow director of that company. Wrongful trading occurs from the point in time that a reasonable director ought to have concluded that the company would not avoid insolvent liquidation. From that point on, the directors, including shadow directors, run the risk of being ordered to contribute to the company's assets in its liquidation.

Defences available to lenders

One line of defence for a lender accused of shadow directorship lies in the wording of the definition. The directors of the insolvent company are required to be accustomed to act in accordance with directions or instructions received from the shadow director. The word "accustomed" implies that there has been a course of dealings between the parties. If the lender has a constant presence in the company, for example where the lender has appointed a company director who is exercising management authority, the position may be different. The key to the definition is the idea that it is the shadow director, not the Board of directors, who is exercising the management discretion of the company.

Practical advice for lenders

There is no authority as to what activities are safe for a lender to conduct and the question remains largely unanswered by the courts. Although yet to be tested by the courts, lenders to a company in financial difficulty may be entitled to take action to protect their interests, such as sending in an investigating team; demanding a reduction in the company's indebtedness; demanding security or further security; calling for information, valuations of fixed assets, accounts, cash flow forecasts, etc;

requesting customers' proposals for the reduction of its indebtedness, including the submission of a business plan, schedule of proposed sales, etc; advising on the desirability of strengthening management, and seeking fresh capital. In doing all these things the lenders may well expect their demands to be met, firstly because they are likely to be commercially sensible, and secondly because the customer has no option if it wants its financing continued. This should not be sufficient to constitute the lenders being regarded as shadow directors.

So long as the lenders can be viewed to be merely setting out what conditions attach to their continued support, they should not incur liability. Crucially, the decision as to whether to continue trading in the face of these conditions, or to cease trading and go into liquidation, rests with the directors. Recent pensions' legislation may also affect a lender's liability where there is a defined benefit pension scheme. Lenders should take care not to become "connected with" or associates of a borrower with such a scheme, as doing so could put them at risk of incurring obligations under financial support or contribution notices issued by the Pensions' Regulator. One of the tests of whether a lender is connected or associated is the ability to control one third of the voting rights in a relevant borrower. Security over shares, therefore, needs to be carefully drafted to avoid a lender being liable.

Guarantees

Guarantees are available in most circumstances, for example downstream (parent to subsidiary), upstream (subsidiary to parent) and cross-stream (between sister companies within a group).

Corporate benefit issues need to be addressed especially in the context of upstream and cross-stream guarantees.

A guarantee is a secondary obligation by a third party relating to a primary obligation by a contracting party (i.e. a borrower under a loan agreement). If the primary obligation is altered, discharged or fails, the guarantee may not be enforceable. Usually the document containing a guarantee will also contain a direct indemnity as an independent primary obligation. This should survive even if the guarantee is not enforceable.

A guarantee must be in writing to be enforceable.

Generally speaking, if security or guarantees are granted at the time a loan is drawn, and at that time it is not contemplated that the company will become insolvent, the requisite desire to prefer the creditor/guarantor is usually missing and therefore it should not constitute a preference (see above).

Following the decision of the Court of Appeal in *Hill v Spread Trustee Company Limited*, the granting of security and/or a guarantee may be challenged as a transaction at an undervalue (see above).

Priority

Security usually ranks by order of creation, but to preserve the priority position, notice may need to be given. For some assets, registration is required in an asset register and security will rank by date of registration.

Subject to the rights of the creditors to agree their relative priority, the order for payment of claims depends upon the type of insolvency procedure. There are also special rules on priority that apply to banks and insurance companies. These are beyond the scope of this publication.

Broadly speaking, in the context of receivership, the charged assets rank as follows:

- (a) holders of security which ranks prior to the security under which the receiver is appointed;
- (b) holders of security (from the proceeds of which the receiver will recover costs, remuneration and expenses (as prescribed in the charge appointing the receiver));
- (c) preferential creditors (ranks ahead of floating charge only, fixed charges take priority);
- (d) unsecured creditors up to a maximum of £600,000 if the company's net property is £10,000 or more (ranks ahead of floating charge only, fixed charges take priority);
- (e) holders of a floating charge; and
- (f) any surplus is payable to subsequent charge holders (if any) or to the company or its liquidator.

Claims in a liquidation rank as follows:

- (a) holders of fixed charge security (usually dealt with outside of the liquidation process);
- (b) costs and expenses of the liquidation in accordance with the order stipulated by the enacting legislation;
- (c) preferential creditors;
- (d) unsecured creditors up to a maximum of £600,000 if the company's net property is £10,000 or more (payable out of floating charge assets);
- (e) holders of a floating charge;
- (f) unsecured creditors;
- (g) post liquidation interest on debts;

- (h) deferred creditors; and
- (i) shareholders (only if there is a surplus after the debts are paid).

Claims in administration rank as follows:

- (a) fixed charge security;
- (b) costs and expenses of the administration in accordance with the order stipulated by the enacting legislation;
- (c) preferential creditors;
- (d) unsecured creditors up to a maximum of £600,000 if the company's net property is £10,000 or more;
- (e) holders of a floating charge;
- (f) unsecured creditors;
- (g) post administration interest on debts;
- (h) deferred creditors; and
- (i) shareholders (only if there is a surplus after the debts are paid).

New money lending

Normally lenders will insist on additional security or priority (ahead of debts incurred prior to the proceedings) before any new monies are advanced to companies after the opening of any insolvency proceedings.

Recognition of foreign insolvency proceedings

Within the EU

Until the UK leaves the EU, the Recast Regulation will continue to apply. After the UK leaves the EU, this will depend largely on the terms of that withdrawal.

Recognition of foreign insolvency proceedings outside of the EU

The Model Law on Cross Border Insolvency promoted by UNCITRAL was adopted in Great Britain on 4 April 2006 in the form of the Cross Border Insolvency Regulations 2006. This extends the English Court's ability to recognise foreign insolvency proceedings outside of the EU, to jurisdictions such as the US.

In addition to the Cross Border Insolvency Regulations 2006, there are statutory provisions allowing the English court to exercise its jurisdiction if the foreign entity has a sufficient connection with England (section 221 of the Act) or if a specific request for assistance is made by the court from one of the territories specified in section 426 of the Act (largely Commonwealth countries). For example, the House of Lords, in the case of *McGrath and others v Riddell and others* [2008] UKHL21, held that pursuant to section 426 of the Act, the English Court could direct the remittal of assets realised in an English liquidation to another jurisdiction and absent any manifest injustice to creditors, the English Court has the ability to make an order, even if the effect of that order will facilitate the application of an insolvency regime which differs from English insolvency law. Where remittal is to a jurisdiction whose court cannot make a request pursuant to section 426, the English Court's inherent jurisdiction may only facilitate a transfer where the foreign court's rules do not infringe the principles of English insolvency law.

Under the general principles of comity, foreign proceedings may also be recognised. It should be noted however that the development of the common law principle that the English courts should provide judicial assistance to persons empowered under foreign bankruptcy law to act on behalf of an insolvent company has been curtailed by the Supreme Court's decision in *Rubin & Lan v Eurofinance S.A. and others* [2012] UKSC 46, which refused to give effect to default judgment obtained in separate claw back proceedings related to a US bankruptcy. In that case it was held that a foreign judgment, whether given in an insolvency or in ordinary commercial proceedings will only be enforced in England if it meets the conventional rules, in particular a judgment may only be enforced against a person in England where that person was present in the foreign jurisdiction at the relevant time, participated in the proceedings or otherwise submitted to that foreign jurisdiction. A new Model Law on recognition and enforcement of insolvency related judgments has been finalised by UNCITRAL, to fill this gap. It will be interesting to see which jurisdictions seek to adopt it.

Brexit

Until the basis for withdrawal is agreed, uncertainty remains in relation to the UK legislative framework, including in the context of cross border insolvency.

Without the benefit of the Recast Regulation, as mentioned previously, recognition of EU member state proceedings could still be achieved in the UK through the principles of comity, under the Cross Border Insolvency Regulations 2006 or, in the case of proceedings in Ireland only, section 426 of the Act. The assistance provided under these mechanisms is much more limited than the effects of automatic recognition under the Recast Regulation. In relation to UK insolvency proceedings, unless provision is made, recognition will be dependent upon local law rules applicable in each of the member states.

FRANCE



FRANCE

Key Elements:

- Consensual proceedings: mandat *ad hoc* and conciliation proceedings;
- Collective proceedings: safeguard, accelerated safeguard, accelerated financial safeguard, judicial rehabilitation and judicial liquidation proceedings;
- Creditors' ranking;
- Challenge of pre-filing transactions; and
- Liabilities and sanctions

Reform of French Insolvency Law

French law has been the subject of reform many times over the last 15 years. The last significant reform dates back to 2014, and re-balanced the bargaining power in favour of creditors, to a certain extent. A new reform is currently being considered, the purpose of which would be, in particular, to replace the existing “creditors’ committees” (in safeguard proceedings), where secured, unsecured and subordinated creditors vote together, by homogeneous classes of creditors.

Introduction

This section provides a general outline of the main issues relating to French insolvency law as dealt with in Part VI of the French commercial code. Part VI of the commercial code spells out the existing consensual and collective proceedings that may be opened to the benefit of any entity governed by private law – as opposed to an entity governed by public law – such as corporations, partnerships and trade unions, any individual conducting commercial or artisan activities, any farmer and any other individual conducting an independent professional activity

including those having a regulated status (e.g., lawyers, physicians, etc).

This section will thus not deal with the insolvency law that applies to individuals who do not fall within the scope of Part VI of the commercial code (e.g. employees) and to credit and financial institutions (dealt with in Directive (EC) n°2001/24) and insurance companies (dealt with in Directive (EC) n°2001/17).

Cash flow insolvency test

Under French law, the insolvency test is based on an assessment of cash-flow. A debtor is considered to be insolvent (“*cessation des paiements*”) when it is unable to meet its due and payable debts (excluding those subject to moratoria) with its immediately available assets (being cash plus assets that can be immediately turned into cash and credit reserves).

Alert procedure

In order to anticipate a debtor’s difficulties to the greatest extent possible, French law provides for alert procedures (“*procédures d’alerte*”). The statutory auditors of a company can request the management to provide an explanation when there are elements which they believe put the company’s existence as a going concern in jeopardy. Failing satisfactory explanations or corrective measures, the auditors can request that a board of directors (or the equivalent body), and, at a later stage, a shareholders’ meeting be convened. Depending on the answers provided to them (and the type of company), the auditors can or must inform the president of the relevant commercial court of the alert procedure. The workers’ committee (or, in their absence, the employees’ representatives) have similar rights. Depending on the type of corporation, shareholders representing at least 5% of the share capital may also have similar rights. The president of the commercial court may also call in the director for a confidential meeting. Then, irrespective

of whether or not the director attends the meeting, the president of the commercial court can obtain information from certain persons (the company's statutory auditors, public administrations, organisations for social security and welfare, workers' representatives, services in charge of centralising information on banking and default-payment risks) which may provide him/her with an accurate image of the economic and financial situation of the company.

Grace periods (“*délais de grâce*”)

Pursuant to French contract law, any creditor may be subject to a “grace period” imposed by the court. Indeed, French contract law provides that, within the course of any proceeding involving a payment with respect to a contract, French courts may defer or otherwise reschedule the payment obligations over a maximum period of two years.

Note that, when the debtor benefits from the opening of a conciliation proceeding, French insolvency law provides for a special mechanism of grace period. A debtor has the right to request a grace period if during the conciliation proceeding, a creditor has initiated proceedings against the debtor or given the debtor formal notice to pay. In that case, the judge who opened the conciliation proceeding has jurisdiction and will take his/her decision upon the recommendation of the conciliator.

As a creditor cannot contract-out of such grace periods, debtors can in practice use the right to request grace periods as a tool to encourage creditors to find an agreement on debt restructurings within the framework of consensual proceedings. Such grace period can also be imposed by the president of the court after the conciliation proceedings (during the time the conciliation agreement is executed) to creditors who refused to participate in such agreement.

Consensual proceedings

French law provides for two types of consensual proceedings: *mandat ad hoc* and conciliation proceedings.

Consensual proceedings are intended to facilitate negotiation between the debtor and its main creditors, with a view to reaching an agreement and avoiding the opening of insolvency proceedings.

The opening of consensual proceedings does not trigger any stay of payment, nor does it impose any restriction on the rights of creditors to take legal action against the debtor to recover their claims. Yet, in practice, they usually refrain from doing so for the time of the negotiation, especially since the debtor may make a request that the court imposes a grace period of up to 2 years on creditors (see above). Moreover, debt may only be restructured on a consensual basis. Dissenting creditors will not be affected nor bound by the agreement among the debtor and its other creditors.

Contractual provisions triggering consequences that are detrimental to the debtor on the sole ground that *mandat ad hoc* or conciliation proceedings have been opened are invalid (for instance, this will apply to acceleration clauses which are based on the opening of such proceedings).

Mandat ad hoc proceedings

Mandat ad hoc proceedings are available to a debtor (and upon the sole initiative of the debtor) that is facing any type of difficulties without actually being cash-flow insolvent.

It is thus not strictly an insolvency proceeding, although it is frequently used in the context of companies facing financial difficulties. It rather is a confidential mediation procedure,

initiated upon the request of the directors, and involves the appointment of a mediator (*mandataire ad hoc*) who is appointed by the president of the local court to assist the company in solving its difficulties (e.g. negotiation of a debt restructuring; implementation of a severance plan; closing of a working site etc). The *mandataire ad hoc*'s duties are defined by the appointing court. He/she usually helps the debtor assessing its situation (e.g. whether the opening of insolvency proceedings would be appropriate) and/or assists the debtor in its negotiation with its main creditors or stakeholders and possibly with the employees or the public authorities.

The *mandataire ad hoc* does not interfere in the management of the company. The directors remain in place and retain all their powers.

The *mandataire ad hoc* is generally chosen from the register of insolvency administrators. The debtor may suggest the name of the person it would like to see appointed; this suggestion is usually followed by the president of the court. The appointment initiates the *mandat ad hoc* proceeding, which is not limited in time and is subject to the discretion of the president of the court.

The *mandataire ad hoc* is appointed by the local court and his role is to help the debtor in its negotiations; he will have significant experience of companies facing financial difficulties. In particular, he/she is able to explain to the creditors that they have an interest in finding a consensual solution with the debtor by describing the potential consequences of insolvency proceedings if an agreement is not found. The *mandataire ad hoc* keeps the president of the court informed of evolution of the situation on a confidential basis. If an agreement is reached by the parties, it is reported by the *mandataire ad hoc* to the president of the court but not sanctioned by the court.

In practice, debtors frequently combine the use of *mandat ad hoc* and conciliation proceedings. They first request the opening of a *mandat ad hoc* (the length of which is not limited). Then, when they believe they are about to reach an agreement with their creditors, they petition the president of the court to convert the *mandat ad hoc* proceeding into a conciliation proceeding. Once the conciliation proceeding is opened, debtors are able to seek approval or acknowledgement of the conciliation agreement.

Conciliation proceedings

Conciliation proceeding ("*procédure de conciliation*") is available upon the sole initiative of debtors, which (i) are not cash-flow insolvent, or have been cash-flow insolvent for less than 45 days and (ii) face actual or foreseeable legal, economic or financial, difficulties.

Conciliation proceedings are very similar to *mandat ad hoc* proceedings. The main differences with *mandat ad hoc* proceedings are the following:

- (i) The conciliator can only be appointed for a maximum period of 4 months and this may be extended but subject to the total duration of the conciliation proceedings not exceeding 5 months;
- (ii) If the debtor has already benefited from the opening of a conciliation proceeding, it is not able to file for another consecutive conciliation proceeding for at least three months after the termination of the earlier proceeding;
- (iii) If an agreement is reached by the parties (the conciliation agreement), it may either be acknowledged by an order of the president of the court ("*constat*") upon the request of any party or approved by a formal judgment of the court ("*homologation*") if certain conditions are met. (i.e. (i) the debtor

is not cash-flow insolvent or the conciliation agreement puts an end to the debtors' cash-flow insolvency; (ii) the agreement effectively ensures that the company will survive as a going concern; and (iii) the agreement does not infringe upon the rights of those creditors who are not a party to the agreement). While the mere acknowledgement of the conciliation agreement keeps the conciliation proceedings confidential, its approval renders the existence of the conciliation proceedings and the conciliation agreement public. Yet, the content of the agreement remains confidential except for any new guarantees, priority ranking and amount of any "new money". While such loss of confidentiality may appear as a drawback to the approval of the agreement, it also implies that the debtor has successfully addressed its difficulties and restructured and is not insolvent (or no longer insolvent).

However, approval of the conciliation agreement gives a certain comfort to the parties thereto in that, if a collective proceeding is subsequently opened:

- (i) creditors lending new money and/or suppliers making trade credit available to the distressed debtor (other than shareholders providing new equity) will benefit from a priority of payment over all pre-petition and post-petition claims (except certain post-filing employment claims and legal costs); and
- (ii) in the event of subsequent judicial rehabilitation or liquidation proceedings, the insolvency date cannot be set by the court at an earlier date than the date of the formal judgment approving the conciliation agreement (except in the case of fraud).

In case of a breach of the conciliation agreement, any party to the agreement can petition the court for its termination. The

commencement of a subsequent collective proceeding automatically puts an end to the conciliation agreement, in which case the creditors will recover their claims and security interests in full – to the exception of those amounts already paid to them.

Collective proceedings: general overview

French law provides for different types of collective proceedings: safeguard ("*procédure de sauvegarde*"), accelerated safeguard ("*sauvegarde accélérée*"), accelerated financial safeguard ("AFS" or "*sauvegarde financière accélérée*"), judicial rehabilitation ("*redressement judiciaire*"), and judicial liquidation ("*liquidation judiciaire*") proceedings.

Commencement of collective proceedings

If a debtor is not insolvent but faces difficulties it is unable to overcome on its own, the debtor (and only the debtor) may file a petition with a view to opening a safeguard (or, under certain circumstances, an accelerated safeguard or an AFS proceeding).

If a debtor is insolvent, its director(s) must file a petition with a view to opening a judicial rehabilitation or liquidation proceeding within 45 days of the date when it became insolvent (unless it has filed for a conciliation proceeding within such time frame). A petition can also be filed by an unpaid creditor or the public prosecutor. When a creditor files such a petition, it has to prove that the debtor is insolvent, which is difficult in practice.

The choice between rehabilitation proceedings and liquidation proceedings depends in whether recovery is possible (in which case rehabilitation proceedings are appropriate) or not (in which case liquidation proceedings are appropriate).

Restructuring options available to the debtor

In safeguard or judicial rehabilitation proceedings: The judgment opening these proceedings will trigger a 6-month observation period which may be renewed once and exceptionally twice (i.e., for a maximum period of 18 months). This observation period will give the debtor the breathing space necessary to prepare and submit to the court a restructuring plan (“safeguard plan” or “rehabilitation plan”) that will provide the measures necessary for the continuation and reorganisation of the operations of the debtor and the restructuring of its debt. The plan needs to be approved by the Court.

In rehabilitation proceedings, if the debtor is unable to prepare a viable restructuring plan, the court can order the sale of the business as a going concern (free of debts, and including employees and key contracts), in a so-called “sale-of-business plan” (*“plan de cession”*).

If recovery is manifestly impossible: a judicial liquidation proceeding must be opened, either *ab initio* or during the course of judicial rehabilitation proceedings. If the business cannot be sold as a going-concern (in a so-called “sale-of-business plan”), the assets will be sold piecemeal.

Insolvency officers

Collective proceedings are essentially court-driven proceedings where key decisions have to be authorised by the court.

The supervising judge (*“juge-commissaire”*)

A supervising judge is appointed by the court in the judgment opening any collective proceeding. He/she is in charge of taking certain decisions (e.g., admitting claims against the insolvency estate) and authorising certain transactions (e.g. concluding agreements that are not within the ordinary course of business;

selling assets piecemeal). However, the court itself retains jurisdiction over the key decisions, in particular (i) the adoption of a safeguard or rehabilitation plan; (ii) the sale of the business as a going concern pursuant to a sale-of-business plan; and (iii) the termination of the collective proceeding.

The judicial administrator (*“administrateur judiciaire”*)

A judicial administrator has to be appointed by the court in any AFS, accelerated safeguard, safeguard or judicial rehabilitation proceeding and, in the case of judicial liquidation, when the court orders a temporary pursuit of activity, if the debtor meets different thresholds. In practice, courts almost systematically appoint judicial administrators if it appears necessary considering the size of the business.

He/she is chosen from the register of insolvency administrators, and in the case of safeguard, accelerated safeguard and ASF proceedings, the debtor may suggest to the court the name of a judicial administrator who it would like to see appointed; this suggestion is usually followed by the court.

The judicial administrator assists, supervises or, under exceptional circumstances in the case of rehabilitation proceedings, replaces the debtor in the management of the business.

The representative of creditors (*“mandataire judiciaire”*)

In parallel, the court also appoints a representative of creditors (chosen from the register of representative of creditors). The representative of creditors has a duty to receive and verify the lodgement of claims by the creditors. In the context of drafting a safeguard or rehabilitation plan, the representative of creditors is responsible for consulting with creditors on the proposed rescheduling and/or writing off of the debtor’s debt.

More generally, the representative of creditors represents and defends the collective interest of all creditors of the debtor and is entitled to initiate legal actions on behalf of the creditors as a whole. However, in cases where individual creditors are prejudiced, the representative of creditors has no jurisdiction and only the individual creditor may initiate proceedings.

The judicial liquidator (“liquidateur judiciaire”)

A judicial liquidator is necessarily appointed by the court in any judicial liquidation proceeding. He/she is generally chosen from the register of representative of creditors. If a judicial liquidation proceeding is opened by conversion of judicial rehabilitation proceedings, the representative of creditors will take the role of judicial liquidator.

He/she bears the same duties as the representative of creditors. To that extent, he/she is in charge of initiating legal actions against third parties that have harmed the debtor’s estate and have thus prejudiced creditors as a whole (e.g., liability action against the debtor’s directors for shortage of assets). He/she also represents the debtor since the debtor is divested in judicial liquidation proceedings. Consequently, he/she is also in charge of realising the debtor’s assets (selling its movable and immovable assets, realising its security interests, etc.).

The controllers (“contrôleurs”)

Any creditor may request to be appointed controller in collective proceedings. The supervising judge can appoint up to 5 controllers among the creditors that so request. Controllers bear the duty to supervise the proceedings and to assist the representative of creditors and the supervising judge. This appointment gives controllers privileged access to information. Controllers additionally have the right to initiate legal actions against third parties on behalf of the creditors as a whole if the representative of creditors fails to do so.

The representative of employees

The court opening a collective proceeding invites the workers’ council or, if none exists, the delegate of employees, or if none exists, the employees to elect one employee as representative of the debtor’s employees.

He/she is entrusted with all the powers and rights that the enterprise committee or delegate of employees is granted by Part VI of the commercial code; therefore he/she has to right to seek remedies or appeal in certain circumstances. He/she is also in charge of monitoring the lodging of the employees’ claims and bears the role of acting as intermediary between the employees and the representative of creditors or judicial liquidator.

Automatic stay of payments and other restrictions on creditors’ rights

During collective proceedings, the rights of the creditors are restricted, *inter alia*, as follows:

- (i) subject only to very limited exceptions (e.g. set-off of certain related claims and debts), the debtor may not repay any debts incurred prior to the insolvency judgment. The right to set-off reciprocal debts with the insolvent debtor is limited to “related debts” (“*créances connexes*”) i.e. debts which arose in the framework of the same contract (or, to a certain extent, of the same group of contracts);

Under certain conditions, the supervising judge may authorise the payment of pre-filing debt in order to discharge a lien on an asset or right that is crucial to the pursuit of the operations of the debtor;

- (ii) as a principle, the commencement of a collective proceeding freezes all legal actions in relation to payment obligations incurred prior to the insolvency or security enforcement

measures over the assets of the debtor (any enforcement proceedings filed by creditors in respect of movable and immovable properties shall be stayed or prohibited). However, there are some limited exceptions to this rule even during an observation period; and some secured creditors recover their right to enforce their security arising if the debtor is placed in judicial liquidation;

- (iii) contracts cannot be terminated for reasons originating prior to the insolvency judgment, and clauses providing for termination or acceleration (or other detriment effects) in the event of insolvency are of no effect;
- (iv) insolvency officers have the power to choose which agreements entered into by the debtor prior to the insolvency judgment should continue. Contracts which an insolvency officer elects to continue must be performed in accordance with their terms;
- (v) creditors must prove their claims arising prior to the judgment opening insolvency proceedings within 2 months (4 months for creditors residing outside of France) from the date of publication of such judgment in the designated legal gazette. Where the creditor has failed to file its proof of debt in a timely manner, it will not be allowed to participate in the distribution of proceeds. Certain post-judgment claims must also be proved. The reform in 2014 provides a new way to lodge claims: the debtor has to provide a list of all claims to the creditors' representative, following the opening of the proceedings. All the listed claims are deemed to have been lodged. The creditors are informed about the list and have the right to correct the filing by sending a proof of claim within the period described above; and
- (vi) when the insolvency proceedings are closed and there is a shortfall between the assets of the debtor and its liabilities,

the remedies of the creditors to obtain repayment are, as a general principle, extinguished even if their claims were not satisfied in full. This is subject to certain exceptions e.g. fraud, "insolvency second offenders", etc.

During Accelerated Financial Safeguard Proceedings, such restrictions concern the rights of financial creditors only (credit institutions' committee and, as the case may be, bondholders' committee). Neither suppliers, nor public authority creditors such as tax or social security administrations are directly impacted.

Their debts continue to be due and payable according to their contractual or legal terms.

Creditors' ranking and priorities for repayment

Pre-filing unpaid salaries, certain pre-filing employment-related and post-filing administrative expenses (legal costs) have super priority over all secured and unsecured creditors.

Post-filing debts incurred to meet the needs of the running of the collective proceeding or observation period are given preferential status if they are not paid as they fall due. They must be repaid in priority over secured and unsecured creditors, but after repayment of certain employment-related claims and administrative expenses and after repayment of the creditors benefiting from the "new money privilege".

In the framework of conciliation proceedings, any creditor that provides new money or goods or services to the debtor with a view to ensuring the continuation of its operations, is given priority over most secured and unsecured creditors (except for certain employment-related claims and administrative expenses) if such new money/goods/services have been provided for

within the conciliation proceedings which leads to a court-approved plan (“homologation”) (see above). However, note that this “new money priority” does not benefit shareholders and partners of the debtor who contribute to a capital increase.

More generally, the priority of mortgages and other types of security interests over real estate depends on the date of registration of the lien at the land registry.

Preferred creditors rank ahead of pledgees unless they had requested the attribution of ownership of the pledged assets.

Extension of proceedings to another entity

Upon the request of the judicial administrator, the creditors’ representative or the attorney general, a court may extend the safeguard (as well, in theory, as the ASF and accelerated safeguard), judicial rehabilitation or liquidation proceedings opened to the benefit of the debtor to one or several other individuals and/or entities (for example, which belongs to the same group as the insolvent entity) on the following two limitative grounds:

- (i) if the property of the debtor and the extendee are intermixed (“*confusion des patrimoines*”); or
- (ii) if the debtor is an entity and its legal personality is fictitious (“*société fictive*”).

These two legal grounds for extension are not defined by the law and are subject to the sovereign interpretation of the courts on a case-by-case basis.

The European Court of Justice has ruled that a court of a Member State that has opened main insolvency proceedings with respect to a debtor, may, on the ground that their property

has been intermixed, extend this insolvency proceeding to a second legal entity whose registered office is in another Member State only if the COMI of the second legal entity is situated in the first Member State (ECJ Case C-191/10, *Rastelli Davide e C. Snc v. Jean-Charles Hidoux*, 15/12/2011).

Collective proceedings: safeguard proceedings

Safeguard proceedings are available to debtors which are not insolvent but face difficulties that they are unable to overcome. The purpose of safeguard proceedings is to facilitate the restructuring of the operation of the debtor while its difficulties are still at an early stage in order to allow the continuation of its business, the maintenance of employment and the discharge of debt.

The court appoints a judicial administrator to supervise or assist the debtor (see above). However, the management remains in place.

The judgment opens an observation period (see above) for the purpose of preparing and submitting to the court a safeguard plan, which will provide for a reorganization of the operation, restructuring and/or rescheduling of debts. At any time during a safeguard proceeding, at the request of the debtor, the judicial administrator, the representative of creditors, the public prosecutor or at its own motion, the court may convert such proceeding into a judicial rehabilitation proceeding if the debtor is insolvent, or, if the conditions are met, open a judicial liquidation proceeding.

Redundancies

French insolvency law does not provide for simplified redundancy procedures for safeguard proceedings, which

contrasts with the position in rehabilitation and liquidation proceedings. The redundancy regime is the same as for a non-distressed business.

Safeguard proceedings are therefore more appropriate for financial restructurings and debt work-outs (e.g., over-leveraged situations, distressed LBOs, etc) rather than operational reorganisations, which require not only debt restructuring but also broad scale redundancies.

Creditors' committees and adoption of the safeguard plan

All creditors affected by the safeguard plan shall be consulted and may vote on the plan, either individually or collectively through a committee. Consequently, creditors do not participate in the vote on the plan if their claim is (i) not affected by the plan or (ii) fully reimbursed under the plan at the date of the adoption of the plan or of the admission of the claim.

During the observation period, two committees of creditors are created to vote on the safeguard plan if (i) the debtor employs more than 150 people or has a turnover greater than €20 million, and its accounts are certified by a statutory auditor or carried out by a certified public accountant; or if (ii) the debtor does not meet the criteria set-up in (i) but is authorised to create such committees by the supervising judge. The powers of the committees are mainly to approve or reject the safeguard plan proposed by the debtor.

The first committee will comprise the credit institutions and assimilated institutions and entities that have granted credit or advances to the debtor as well as their successive assignees. The second committee will comprise the suppliers of goods and services of the debtor that hold a claim representing more than 3% of the total amount of the claims held by all the suppliers. If the debtor had issued bonds and/or notes, a "third committee"

will be created for all bondholders and noteholders ("*assemblée unique des obligataires*"), which shall approve the plan once voted on by the two other committees.

The debtor has great flexibility in drafting its safeguard plan. In particular, a safeguard plan may include rescheduling or write-offs of debt, debt-for-equity swaps and partial closure or disposal of the business and operations. Debt held by the members of the committees can be rescheduled over a period longer than ten years and there is no requirement that the debt be reduced by a certain amount within a certain period. The plan may also treat differently creditors pertaining to the same committee if the objective economic situation so requires. The plan submitted to the committees must also take into account inter-creditor subordination agreements entered into prior to the opening of the proceedings; however, it is unclear whether the plan needs to satisfy all the provisions of such inter-creditor agreements.

Once the debtor has drafted the safeguard plan and before it submits it to the court, the plan is proposed to the creditors' committees.

The members of creditors' committees (except bondholders) are allowed to prepare safeguard plans as an alternative to the safeguard plan prepared by the debtor. In this situation, not only the debtor's safeguard plan, but also the safeguard plan prepared by the creditors must be submitted to a vote in the creditors' committees (and also in the bondholders' general assembly if there is one) before the plan is submitted to the court. The creditors' committees must declare whether they approve or reject the plan(s) during a limited timeframe.

Within each committee, approval is achieved by a majority of two-thirds in value of the claims held by the creditors present

who voted on the plan. Dissenting creditors are bound by the decision of that two-thirds majority. Note that a very limited number of creditors are protected by law against the risk of seeing the committees affecting their rights: mainly creditors secured by *Fiducie* (a sort of French trust) and creditors benefitting from the specific privilege granted to those who provided new credit facilities in the framework of a court-approved conciliation agreement.

In the creditors' committees (and also in the bondholders' general assembly if there is one), creditors that are parties to subordination agreements or agreements relating to the exercise of their voting rights, or that benefit from an agreement whereby a third party shall pay all or part of the debt, must provide this information to the administrator. Then it is for the administrator to determine their voting rights. In the event of a disagreement as to the voting rights, the administrator or the relevant creditor may start emergency proceedings to obtain a decision from the president of the court.

Once a plan is approved by the committees of creditors, it is submitted to the bondholders committee for approval. Approval at the bondholders committee requires the same majority of two thirds in value of the bonds and notes held by the persons present at the vote.

In parallel to this collective consultation and vote through the committees, creditors that do not pertain to any committee are consulted individually on the plan(s). Individual consultation of creditors also occurs if any of the committees have refused to approve a plan or have not rendered a decision within 6 months of the judgment opening (unless the court decides to extend this period). After approval of the plan by the creditors (within committees or/and individually), the court will sanction the

safeguard plan if it finds that the plan sufficiently protects the interests of all creditors. Once the court has sanctioned the plan, all creditors (including dissenting members of a committee) are bound by the plan.

If creditors' committees are not created (or have been dissolved because no plan was adopted), the court can still adopt a safeguard plan without need for a vote of creditors. Creditors are consulted individually regarding the debt remissions and payment schedules proposed by the debtor. The court that approves the safeguard plan (*plan de sauvegarde*) can impose a uniform rescheduling of the claims of creditors having refused the proposals that were submitted to them, over a maximum period of ten years.

Conversion

Safeguard proceedings can be converted into rehabilitation proceedings at the request of the judicial administrator, the representative of creditors or the public prosecutor even if the debtor is not in a state of cessation of payments, if no plan has been adopted by the creditors' committees and the bondholders' general assembly and provided that (i) the adoption of a safeguard plan is manifestly impossible, and (ii) the termination of the safeguard proceedings would shortly and certainly lead to a cessation of payments.

Therefore this provision allows for a conversion of safeguard proceedings into rehabilitation proceedings without the consent of the debtor, thereby allowing for the possibility of an asset sale against the will of the debtor (by means of a sale-of-business plan, as explained below).

Collective proceedings: accelerated financial safeguard (AFS) proceedings

The AFS proceeding has been introduced in French law to facilitate “pre-pack” bankruptcies and “fast-track” purely financial difficulties of large companies. This proceeding allows a debtor to rapidly implement a restructuring plan without affecting the position of its non-financial creditors. Only financial creditors are involved in this proceeding and are impacted by the restructuring plan.

This AFS proceeding resolves a practical issue. In the framework of consensual proceedings (*mandat ad hoc* and conciliation), the unanimous consent of creditors whose claims are being restructured is necessary. Before the introduction of the AFS proceeding in French law, the only way to impose a restructuring on dissenting creditors was to commence an “ordinary” safeguard proceeding (see above), which involves all creditors, i.e., financial creditors but also suppliers, employees, etc. From that standpoint, safeguard proceedings had appeared an ill-adapted tool for financial restructuring.

Scope

AFS is available to companies of a certain size (those with at least 20 employees, € 3 million in turnover or total assets in its balance sheet of at least € 1.5 million).

In order to file for an AFS proceeding, a company must (i) have opened a conciliation proceeding, (ii) not be cash-flow insolvent or have been insolvent for less than 45 days before their request for conciliation proceedings, and (iii) face financial difficulties which it finds itself unable to overcome. In addition, when the debtor files for an AFS proceeding, the debtor must (i) have prepared a draft plan in the context of the conciliation proceeding, which aims at protecting its operations in the long

term, and (ii) demonstrate to the court that such plan is likely to receive the support of a sufficiently large number of financial creditors.

Features

Many features of AFS proceedings are similar to traditional safeguard proceedings. For instance, the draft plan proposed in the context of an AFS proceeding may provide for and sometimes impose, rescheduling debt, debt write-offs or debt for equity swaps under the same conditions as in safeguard proceedings.

For the purpose of the AFS proceeding, the conciliator is appointed judicial administrator and the court which has opened the conciliation proceeding has jurisdiction for the AFS proceeding.

Regarding the lodging of claims, the situation depends on whether or not creditors have participated in the conciliation proceeding. Creditors that participated are deemed to have lodged their claims within the AFS proceeding; yet, they may update the amount of their claim. Creditors that did not participate shall lodge their claims as they would in a safeguard proceeding (see below).

Approval of the restructuring plan

Only financial creditors defined as members of the committee of credit institutions (or similar types of entity) and of the committee of bond and note holders are involved in the AFS proceeding. Unlike in traditional safeguard proceedings, no committee of suppliers is created.

The other creditors, which are not financial creditors (including public creditors, such as the tax or social security administration and suppliers) are not directly impacted by the AFS. Their debt

is not automatically stayed and continues to be due and payable according to their contractual or legal terms.

As the AFS proceeding is by nature an accelerated procedure, very tight deadlines are imposed. The plan must (i) be voted on by the creditors within a minimum period of 8 days following its submission to them by the debtor; and (ii) be sanctioned by the court (after the approval by the creditors) within 1 month (renewable once) following the opening of the AFS proceeding. If no plan is approved by the creditors and sanctioned by the court within these deadlines, the court is obliged to terminate the procedure (i.e. the court cannot impose a rescheduling of the debts).

Collective proceedings: accelerated safeguard (AS) proceedings

The AS proceedings are similar to the AFS proceedings, except as to their scope. It enables the debtor to impose on dissenting creditors a pre-packaged restructuring plan negotiated with a majority of creditors in the framework of a confidential conciliation but, contrary to the AFS proceedings, the AS proceedings involve all creditors (subject to limited exceptions) and not only financial creditors.

Features

Like the AFS, the AS proceeding presupposes the opening of a conciliation proceeding and is only applicable to companies of a certain size (those with at least 20 employees, € 3 million in turnover or total assets in its balance sheet of at least € 1.5 million). The debtor must have prepared a draft plan in the context of the conciliation proceeding, and this plan must be likely to receive the requisite level of approval from the creditors within a 3-month period. If the AS proceeding is not concluded with the adoption of a plan within 3 months, the proceeding is necessarily terminated.

Collective proceedings: judicial rehabilitation proceedings

Judicial rehabilitation proceedings are available to debtors who are insolvent but whose business appears viable. The judicial administrator is required to make an assessment of the financial situation of the company, the causes of that situation and the potential solutions, i.e. he/she must inquire whether the business should be continued under a rehabilitation plan (similar to a safeguard plan) or assigned, in all or in part, to a third party.

Most of the features of safeguard proceedings apply to judicial rehabilitation proceedings (in particular the restrictions imposed on the rights of the creditors).

Rehabilitation plan

The process to implement a rehabilitation plan is very similar to that of a safeguard plan:

- (i) after verifying the eligibility of the debtor to file for a judicial rehabilitation proceeding, the court opens the proceeding and orders the commencement of the observation period (6 months renewable once and exceptionally twice, i.e. a maximum period of 18 months). During the observation period, the debtor continues to operate its business under the protection of the court whilst its financial and business situation is assessed and an arrangement with creditors is sought;
- (ii) creditors' committees may be created to vote on a draft plan (see above);
- (iii) if there are no committees of creditors, or if the plan is not approved within the necessary time period by the committees, and in any event, with regard to creditors who are not members of a committee, the court may impose a debt rescheduling, which cannot exceed 10 years (15 years

for agricultural businesses), on creditors rejecting the debtor's proposals, but cannot impose a debt write-off.

For a rehabilitation plan to be sanctioned by the court, the debtor must show that (i) its recovery scheme is viable and that, (ii) based on the past and forecasted operations' accounts, the debtor will be able to generate sufficient operational profits to repay the rescheduled liabilities and finance its day-to-day operations and business plan.

A significant difference between a judicial rehabilitation proceeding and a safeguard proceeding is that, if the debtor proves unable to prepare a viable rehabilitation plan, the court may impose the sale of part or all of its business as a going concern under a sale-of-business plan (see below). If this route is taken, the judicial administrator makes a call for tenders and the court chooses the offer that best meets the three goals provided for by the law (see above).

Redundancies

The law provides for expedited redundancy procedures. If the debtor is not in a position to finance the redundancies, a state organised insurance system ("AGS") makes advances, subject to certain criteria.

Debt for equity swap

Before 2014, shareholders were protected against any debt for equity swap because the court could not impose upon them a dilution of or a forced sale of their shares – except in extremely rare situations when the public prosecutor would order the forced sale of shares owned by the de facto managers as a sanction for their mismanagement.

The law was reformed to provide for an exceptional capture of the shareholders' voting rights if in judicial rehabilitation

proceedings the debtor's capital equity falls below half of the debtor's social capital. In this situation, the administrator may request the appointment of an official that will be entitled to convene a shareholders' meeting and to vote, instead of the opposing shareholders, for a share capital increase in favour of persons that undertake to comply with the safeguard plan that aims to re-establish the debtor's capital. If certain other conditions are met (relating to the risks that a freefall insolvency would represent for a significant number of employees), such a court-imposed dilution, or even a court-imposed sale of the shares, can also be decided. In practice, though, those legal mechanisms are generally not implemented, probably because their implementation would be cumbersome.

Collective proceedings: judicial liquidation proceedings

The purpose of judicial liquidation proceedings is to end the operations of the debtor or sell the debtor's estate either by a sale of the business as a going concern or by a piecemeal sale of its assets and rights, whichever is approved by the relevant court, i.e., there is no observation period (*stricto sensu*) and the outcome of a judicial liquidation proceeding is decided by the court, without a vote of the creditors.

The judicial liquidator has a duty to sell the assets of the debtor at the best available price, and then distribute the sale proceeds to the creditors according to their respective priority ranking.

Judicial liquidation by means of a sale-of-business plan

The court may approve a sale-of-business plan ("*plan de cession*"), which provides for a sale of all or part of the business and assets of the debtor as a going concern (free of debt and including employees and key contracts).

As a matter of principle, the opening of a judicial liquidation proceeding puts an end to the operations of the debtor.

However, if a sale-of-business plan is considered by the court or if the interest of the public or the interest of the creditors is at stake, the court can authorize a temporary continuation of the operations of the debtor for a maximum period of 3 months (renewable once at the public prosecutor's request). For this reason, the possibility of selling the business of the debtor as a going concern is considered at the hearing for the opening of a judicial liquidation proceeding.

The period of maintenance of the operations of the debtor is similar to an observation period. Consequently, the court, which decides to temporarily maintain the operations of the debtor, may appoint, under certain circumstances, a judicial administrator.

Third parties (including creditors, but with some exceptions) may make offers for the acquisition of the entire business, or of a substantial part thereof.

A sale-of-business plan is in essence an asset transfer approved by the court. The purchaser is in principle only liable to (i) pay the price approved by the court and (ii) comply with the undertakings included as part of the offer and taken at the court hearing (e.g. commitments in relation to the level of employment, the level of investments, etc). Subject to very limited exceptions, the purchaser of the business pursuant to a sale-of-business plan is not liable for the liabilities of the debtor. In particular, the payment of the price clears the assigned assets from all mortgages, charges and other security interests except for the security interests taken by the creditor(s) over the assets whose acquisition they financed. In the latter case, the purchaser of such secured assets must assume the debt instalments remaining due as from the date of its coming into possession of the assets.

When considering a sale-of-business plan the court may order the transfer of the contracts are “necessary for the rehabilitation of the business”, as identified by the bidder in its offer. These contracts are transferred to the assignee of the business notwithstanding any contractual prohibitions, and must be carried out on the terms applicable as at the date of the opening of the proceeding.

Employees whose employment is not continued by the purchaser are made redundant at the expense of the debtor. If necessary, the cost of redundancy is assumed by the AGS (*see above*).

Judicial liquidation by means of a piecemeal sale

The piecemeal sale of the assets and rights of the debtor shall be authorised by the supervising judge (as opposed to the sale-of-business plan, which shall be approved by the court).

Simplified judicial liquidation proceeding

When a judicial liquidation proceeding is opened, French insolvency law provides for a simplified proceeding for companies meeting certain criteria.

Debtors *will* be subject to this simplified proceeding if they do not possess immovable assets, if their turnaround excluding tax is equal or less than €300,000 and if they had one or no employees in the six months preceding the judgment opening the judicial liquidation proceeding.

Debtors *may* be subject to this simplified proceeding if they do not possess immovable assets, if their turnaround excluding tax is equal or less than €750,000 (but more than €300,000) and if they had between two and five employees in the

six months preceding the judgment opening the judicial liquidation proceeding.

This simplified judicial liquidation proceeding shall be closed within 1 year of the judgment opening such simplified proceeding. This 1-year period may be extended by 3 additional months.

In a simplified judicial liquidation proceeding:

- the judicial liquidator can, without the prior authorisation of the supervising judge, privately sell the movable assets of the debtor ("*vente de gré à gré*") and then publicly auction the unsold movable assets;
- only certain claims are verified, i.e. employment related claims and claims that are likely to be reimbursed out of the proceeds.

Other issues

Claw back and hardening period

In the framework of judicial rehabilitation or judicial liquidation proceedings, the court shall determine the date on which the debtor is deemed to have become insolvent. It can be any date within the 18 months preceding the date of the judgment opening the proceedings. This marks the beginning of the "hardening period". Certain transactions entered into by the debtor during the hardening period are automatically void or voidable by the court.

Automatically void transactions include in particular transactions or payments made during the hardening period, which may constitute voluntary preferences for the benefit of some creditors to the detriment of other creditors (in particular, a transfer of assets made for no consideration; a contract under which the

reciprocal obligations of the debtor significantly exceed those of the other party; a payment of a debt that is not due at the time of payment; a payment of a due debt that is made in a manner which is not commonly used in the ordinary course of business; a security interest granted in consideration of a pre-filing debt; any preservation measures (unless the attachment or seizure predates the date of insolvency); the transfer of any asset or right to a trust arrangement ("*fiducie*") (unless such transfer is made as a security for debt incurred at the same time); and any amendment to a trust arrangement ("*fiducie*") that dedicates assets or rights as a guaranty of pre-filing debt). With regards to the transactions made for no consideration, they may be voided by the court if they occurred within 6 months preceding the hardening period.

Certain transactions are voidable if those persons who dealt with the debtor were aware of its state of insolvency (any payments or agreements; notices of attachment made to third parties ("*avis à tiers détenteur*"); and seizures ("*saisie-attribution*").

Liabilities and sanctions

Civil Liability of lenders

French insolvency law includes a specific legal provision whereby, if a borrower becomes subject to collective insolvency proceedings, lenders cannot be held liable in connection with the facilities they granted to such a borrower, even if the circumstances in which they granted or maintained these facilities were actually inappropriate (e.g. providing credit facilities to a debtor that is already in a desperate situation, thus allowing the company to continue trading artificially and increasing its liabilities: concept of so-called "abusive support"). It should be noted that this specific legal protection can be lost by a lender in three cases only: (i) fraud; (ii) blatant interference

in the management of the company; and (iii) manifest disproportion between the facilities granted and the security or guarantee taken to support such facilities. If a lender is held liable on the latter grounds, security securing the relevant debt can be nullified or reduced.

The limitation of liability does not seem to apply in the event of “abusive” termination of credit facilities (“*rupture abusive de crédit*”) (i.e. termination of credit without prior notice) unless (i) the borrower’s behaviour is “seriously reprehensible” or (ii) the borrower is in an “irremediably deteriorated situation” (“*situation irrémédiablement compromise*”).

French criminal law provides that an entity commits the offence of fraudulent bankruptcy if it obtains ruinous means to finance the operations of a business with the intention of avoiding or delaying the opening of rehabilitation proceedings or judicial liquidation (see below). Lenders that provide such ruinous financing can incur both civil and criminal liability as accomplices on this basis.

Civil liability of insolvent individuals under Book VI of French Commercial Code

Insolvent individuals whose creditors have approved a safeguard plan or a rehabilitation plan can continue to run their business so long as they comply with the terms of the applicable plan. Failure to comply with the plan can result in the rescission of the plan and the opening of a judicial liquidation.

Individuals who were subject to judicial liquidation are released from all their pre-proceeding’s debt when the judicial liquidation is closed, except as regards:

- (i) debts resulting from rights deriving from the creditor’s identity, e.g. alimony;

- (ii) the obligation to repay guarantors that have paid debts in the debtor’s place; and
- (iii) debts resulting from a judgment establishing that the debtor is guilty of a criminal offence.

In addition, the debtor is not released of any pre-proceedings debts if (i) he has been held guilty of certain of the criminal sanctions described below, or (ii) he (or a legal entity of which he was the director) has already been subject to a judicial liquidation which was closed less than five years before the opening of another judicial liquidation, or (iii) he committed a fraud against any creditor.

Civil liability of directors of an insolvent legal entity

Those who are in effect responsible for the running of a legal entity, including *de facto* directors (or “shadow directors”) and *de jure* directors, are potentially exposed to liability in the insolvency proceedings of that legal entity. A *de facto* director is a person (individual or corporate) who performs positive acts of management. *De jure* directors can be held liable even if they did not themselves perform any positive act of mismanagement.

Experience shows that one of the most common grounds for directors’ liability is the failure to have taken, when financial difficulties materialized, preventive measures to remedy the situation (or at least avoid it getting worse), and avoid the company being cash-flow insolvent; all the more so since French law provides, as explained above, a number of “*preventive*” proceedings available to the debtor. Hence, if a company comes to face difficulty, its directors should act early in order to take the appropriate steps to prevent the difficulties from worsening. If the company is already insolvent, directors have the duty to file for insolvency within 45 days with the competent court unless the opening of a conciliation proceeding has been filed for.

Failure to do so exposes the directors to personal liability for any damage caused to the general body of creditors as a result of the late filing, including the loss of the possibility to find a rehabilitation solution for the company. In addition, the directors may be barred from managing a company or business for up to 15 years (see below).

If a liquidation proceeding shows a deficiency of assets against liabilities and the court determines that any shortfall is attributable to management faults and that such faults have contributed to the insolvency of the company, the court may decide that such de jure or de facto directors/managers/officers shall bear jointly or severally whole or part of the deficiency of assets. The action may be brought by the Judicial Liquidator or the public prosecutor. A majority of the creditors appointed as “controller” (“*contrôleur*”) are entitled to initiate such a claim if they unsuccessfully requested the Judicial Liquidator to initiate such claim.

Criminal liability or quasi-criminal liability

Personal liability of the directors of an insolvent entity for “*faillite personnelle*”

If a court orders “*faillite personnelle*” against a director, this director is prohibited from, directly or indirectly, running, managing, administrating or controlling any enterprise or legal entity for the duration defined by the court but limited to 15 years. This director may additionally be barred from carrying out any public mandate as resulting from an election (for a maximum duration of 5 years).

When a judicial rehabilitation or liquidation proceeding has been opened, the court may order “*faillite personnelle*” against any director if the court finds that he/she has:

- carried out commercial, craftsman or agricultural activities or his/her duties in breach of any legal prohibition;
- purchased goods in order to resell them at an under value or used ruinous means to obtain funds, with the intent to avoid or delay the opening of a judicial rehabilitation or liquidation proceeding;
- undertaken, on account of a third party and without consideration, commitments, which were found, at the time they were entered into, to be excessive in light of the situation of the debtor;
- knowingly paid a creditor, or arranged for a creditor to be paid, after the date of cash-flow insolvency of the debtor, to the prejudice of other creditors;
- hindered the good running of a collective proceeding by willingly abstaining from cooperating with the insolvency officers;
- disposed of accounting documents, has not complied with the accounting obligations required by law, or has maintained fictitious, manifestly incomplete or irregular accounting records with regards to the applicable law and regulations;
- disposed of the assets of the debtor as if they were his/her own;
- carried out acts of commerce in his/her personal interest while acting in the name of the debtor concealing its acts;
- used the assets or means of the debtor in a way that is contrary to its interest in order to serve his/her personal interest or favour another legal entity or enterprise in which he/she is interested;
- abusively continued, in his/her personal interest, a loss-making operation, which could have only led the debtor to cash-flow insolvency; or

- embezzled or concealed part or all of the assets of the debtor, or fraudulently increased its liabilities.

The court may also bar a director from, directly or indirectly, running, managing, administrating or controlling any enterprise or legal entity for a duration of up to 15 years, if he/she has:

- acted in bad faith, has not provided to the representative of creditors, the judicial administrator or liquidator, the information he/she is obliged by the law to provide within 1 month of the judgment opening the collective proceeding;
- failed to request the opening of a conciliation, judicial rehabilitation or liquidation proceeding within 45 days of the date of cash-flow insolvency; or
- not paid the amounts he/she was ordered by the court to pay pursuant to an action in liability for deficiency of assets.

This action may be brought by the representative of creditors, the judicial liquidator or the public prosecutor or, under certain conditions, a creditor appointed as “controller” (“*contrôleur*”).

“Banqueroute” in case of judicial rehabilitation or liquidation proceeding

When a judicial rehabilitation or liquidation proceeding has been opened, a debtor and/or its director may be found guilty of “*banqueroute*”, if the court finds that it/he/she has:

- purchased goods in order to resell them at an undervalue or used ruinous means to obtain funds, with the intent to avoid or delay the opening of a judicial rehabilitation or liquidation proceeding;

- embezzled or concealed part or all of the assets of the debtor;
- fraudulently increased the liabilities of the debtor;
- held a fictitious accounting, or disposed of accounting documents of the debtor, or abstained from maintaining any accounting records when the applicable law prescribed for such obligation; or
- held accounts that were manifestly incomplete or irregular with regard to the applicable law.

This offence is punished by imprisonment for a duration up to 5 years and by a fine of an amount up to €75,000 (which is increased to 7 years and €100,000 when the debtor provides investment services).

Debtors and their directors found guilty of “*banqueroute*” may further be subject to the following penalties:

- deprivation of civic, civil and family rights;
- prohibition, for a duration of up to 5 years, from carrying out public mandates or/and certain professional activities;
- exclusion from public contracts for a duration of up to 5 years;
- prohibition from issuing cheques for a duration of up to 5 years;
- being the subject of the posting or publishing of the decisions finding him/her guilty; or
- “*faillite personnelle*” (see above).

Other criminal liability

A debtor and/or its director faces imprisonment for a duration up to 2 years and a fine of an amount up to €30,000 if it/he/she has:

- paid pre-filing claims;
- granted a mortgage, pledge or security interest over, or disposed of, certain assets without obtaining the consent of the supervising judge as required by the law;
- paid a creditor, or disposed of certain assets, in breach of the terms of the discharge of liabilities provided in an approved safeguard or rehabilitation plan; or
- fraudulently lodged alleged claims to the estate of the debtor, which opened a safeguard, judicial rehabilitation or liquidation proceeding.

The beneficiaries of such breaches (creditor, mortgagee, pledgee, etc.) are liable to the same extent that the debtor and/or its directors are.

A debtor and/or its director faces imprisonment for a duration of up to 5 years, a fine of an amount up to €75,000 and the complementary penalties as listed above, if he/she, acting in bad faith and with the intent to remove part or all of his/her estate from the proceedings initiated by (i) the debtor, which opened a safeguard, judicial rehabilitation or liquidation proceeding; or (ii) the partners or creditors of the debtor, has (1) embezzled or concealed, or has attempted to embezzle or conceal, part or all of his/her assets, or (2) fraudulently arranged to be found the debtor of payment claims, which he/she was not the debtor of.

The directors' relatives face imprisonment for a duration up to 3 years and a fine of an amount up to €375,000 if they have removed, disposed or concealed the assets of the debtor, which was subject to the opening of a judicial rehabilitation or liquidation proceedings.

GERMANY



GERMANY

Key Elements:

- One type of proceedings, providing for liquidation, reorganisation or sale of the business
- Proceedings divided in preliminary and main phase
- Balance-sheet and cash-flow insolvency
- Directors' duty to file for insolvency within three weeks
- Special treatment of shareholder loans

Insolvency Regimes

The German Insolvency Code (*Insolvenzordnung*) entered into force on 1 January 1999 and was significantly changed in 2012 with the aim of facilitating the restructuring of operative companies, especially by the introduction of protection scheme proceedings (*Schutzschirmverfahren* – “Protection Scheme Proceedings”). It applies to all types of company, e.g. partnerships (GbR, OHG and KG), limited liability companies (*GmbH*) or stock corporations (*AG*). However, there are certain specific rules for the insolvency of financial institutions and insurance companies which are beyond the scope of this summary. Furthermore, this summary is only concerned with corporate insolvency proceedings and does not address the particularities of insolvency proceedings over the assets of individuals.

All types of insolvency proceedings commence with a formal filing for insolvency. There are no statutorily regulated insolvency remote restructuring proceedings available under German law.

Generally, the Insolvency Code foresees that a court appointed insolvency administrator decides on how to restructure or liquidate the insolvent company. However, the Insolvency Code

also provides comprehensive rules regarding the implementation of an insolvency plan (*Insolvenzplan*) through which the company as such can be reorganised if this seems feasible (“Insolvency Plan Proceedings”) and allows for the management of the distressed company to continue to manage the company if certain requirements are satisfied (*Eigenverwaltung* – “Self-Administration Proceedings”). Under certain conditions, the debtor can file for Protection Scheme Proceedings and thereby pave the way for Insolvency Plan and Self Administration Proceedings.

With the law for the facilitation and management of the insolvencies of groups of companies (*Gesetz zur Erleichterung der Bewältigung von Konzerninsolvenzen*) – finalised on 13 April 2017 and announced on 21 April 2017- Germany has created new insolvency law for groups of companies. The provisions came into force on 21 April 2018 and were integrated into the existing German Insolvency Code. The group insolvency law and the respective regulations aim to keep a group of companies together in order to either restructure the group as a whole or to utilise or liquidate the group's asset value in the best interest of all parties involved. However, the general principle of one insolvency proceedings for one legal entity will remain unchanged.

A particularity of German insolvency proceedings is the chronological division into:

- firstly, the so called preliminary insolvency proceedings (*vorläufiges Insolvenzverfahren* – “Preliminary Proceedings”) or, alternatively, Protection Scheme Proceedings; and
- secondly, the (main) insolvency proceedings which are initiated by the court order for the opening of insolvency proceedings.

German insolvency law does not offer any kind of pre-insolvency restructuring proceedings so far. All kinds of regulated proceedings require a filing for insolvency as a first step. Against the background of the Directive on preventive restructuring frameworks it is likely that pre-insolvency restructuring proceedings will be implemented in Germany within the next two years.

Filing for insolvency and test for insolvency

A petition for the commencement of insolvency proceedings may be made to the competent local court (*Amtsgericht*) either by the insolvent debtor or by a creditor. The petitioner has to find its filing for insolvency proceedings on one of the three statutory reasons for insolvency: illiquidity; impending illiquidity; and over-indebtedness. While a debtor's filing can be made on all of these three grounds, a creditor's filing cannot be based on impending illiquidity but only on illiquidity or over-indebtedness. If a company is illiquid or over-indebted, the directors have a duty to file a petition for insolvency without undue delay and within a maximum period of three weeks. A failure to do so can lead to civil and criminal liability (please refer below to the section "Directors' Liability"). In the case of impending illiquidity, the directors are entitled, but not obliged, to file a petition for the initiation of insolvency proceedings.

Illiquidity is defined as the debtor's inability to honour its payment obligations (now) due. This is generally indicated by the fact that the debtor has ceased to make payments. The debtor's illiquidity cannot be presumed if there is only a temporary delay in payments, for example, when the debtor's gap in liquidity can be closed at least to 90% by expected payments, new loans or the liquidation of assets within a short period of time (usually no more than two weeks).

Impending illiquidity means that the debtor will not be able to honour existing payment obligations when they become due. Since this is based on a prognosis, the court may require the debtor to submit a "liquidity plan".

Over-indebtedness as a ground for insolvency is only applicable with regard to limited liability companies, stock corporations and comparable entities but not to civil or commercial partnerships (such as a GbR or an OHG). The principal prerequisite for over-indebtedness is that the debtor's assets no longer cover its liabilities. This is determined by way of a pre-insolvency balance sheet (*Überschuldungsbilanz*), which must value assets at their present liquidation values. Shareholder claims deriving from a loan provided to the debtor (or legal acts corresponding economically to a loan) must be taken into account as a liability of the debtor unless the shareholder-creditor has formally subordinated his claim.

Even if it turns out that on the basis of the pre-insolvency balance sheet that the assets no longer cover the liabilities, the company is not over-indebted if, under the given circumstances, a continuation forecast demonstrates that the company's financial strength is sufficient to ensure its economic survival at least for the current and the following business year.

Preliminary proceedings

Preliminary Proceedings are initiated by the filing of the petition and they usually last up to three months. The purpose of Preliminary Proceedings is to allow the court to gather all the information necessary to determine if the prerequisites for commencing insolvency proceedings are met. These prerequisites are (i) a reason for insolvency, and (ii) the existence of sufficient assets/liquidity in the estate to cover the costs of

insolvency proceedings. These costs include court fees and the estimated fees and expenses of the (preliminary) insolvency administrator and the members of the (preliminary) creditors' committee. If the available resources are not presumed to be sufficient to cover these estimated costs, the court will dismiss the petition unless an adequate advance payment in cash is made by, for example, a lender/creditor.

In general, the filing of a petition, and thus the beginning of Preliminary Proceedings, does not affect the legal relationship between the creditors and the debtor by triggering a moratorium. The insolvency court may – and will in practice – however, take any measures that appear necessary to protect the debtor's estate against any adverse change in the debtor's position until a decision with respect to the petition has been taken. The court usually orders those measures immediately after the filing (sometimes on the very day of the filing) and these orders (as well as the majority of court orders within insolvency proceedings) are publicised on the website www.insolvenzbekanntmachungen.de.

Such orders normally include the appointment of a preliminary insolvency administrator (*vorläufiger Insolvenzverwalter*) and an order stipulating that transfers shall only be effective with the administrator's consent and/or an order preventing creditors from executing their claims individually into the debtor's assets (unless immovables are concerned). The preliminary administrator is not allowed to begin the liquidation of the debtor's business without the court's prior consent.

The insolvency court will be required to set up a preliminary creditors' committee (*vorläufiger Gläubigerausschuss*) if the debtor has ongoing business operations (*laufender*

Geschäftsbetrieb) and has satisfied at least two of the following requirements in the preceding business year:

- a balance sheet sum of at least EUR 4,840,000;
- revenue of at least EUR 9,680,000; and
- at least 50 employees.

If these requirements are not met, the court may still set up a preliminary creditors' committee upon application. The preliminary creditors' committee will have a significant influence on the course of the (preliminary) insolvency proceedings, in particular as regards the identity of the (preliminary) insolvency administrator: a unanimous proposal of the preliminary creditors' committee will have a generally binding effect for the insolvency court to appoint the proposed person as insolvency administrator as long as the candidate fulfils the legal requirements (e.g. being independent of the creditors and the debtor, having sufficient experience in business affairs).

Protection scheme proceedings

Protection Scheme Proceedings can only be initiated by an order of the insolvency court if (i) a debtor files a petition for the opening of insolvency proceedings on the grounds of impending illiquidity or over-indebtedness; and (ii) also applies for the institution of Self-Administration Proceedings. The debtor must enclose with the insolvency petition a restructuring certificate, provided by a tax advisor, accountant or lawyer with experience in insolvency matters or a person with comparable qualifications, confirming (i) the impending illiquidity or over-indebtedness; (ii) the absence of illiquidity; and (iii) that the intended restructuring does not manifestly lack a prospect of success. Within the Protection Scheme Proceedings the debtor will be granted a certain period of time, not exceeding three months, to work out the details of an

insolvency plan. The competent insolvency court will also appoint a preliminary creditors' trustee (*vorläufiger Sachwalter*) who is responsible for supervising the management. When appointing the trustee, the court may only deviate from the debtor's proposal if the candidate is not sufficiently qualified for this position.

Protection Scheme Proceedings provide protection during the period granted for the preparation of the insolvency plan. The debtor can develop an insolvency plan without risking the proceedings being disturbed by individual enforcement measures. Additionally, upon the debtor's application, the court can decide that the debtor can create preferential claims against the insolvency estate which generally have to be satisfied in full. This may provide comfort to creditors, existing suppliers and potential new contractual partners with the result that new investments can be made which promote the process of restructuring. Within insolvency plan proceedings, a creditor group objecting to the insolvency plan, which, in an out-of-court scenario would require a unanimous decision of the creditors, can be crammed down. In order to provide for the successful development of an insolvency plan during the short period of Protection Scheme Proceedings, the collaboration of at least 51% of the major creditors is required.

Insolvency proceedings

Preliminary Proceedings and Protection Scheme Proceedings end when a court order initiating the commencement of the main insolvency proceedings is released. The preliminary insolvency administrator (*Insolvenzverwalter*) or insolvency trustee will generally be appointed to continue its engagement throughout the main insolvency proceedings. The order also leads to a general stay of execution with regard to the claims of all creditors. Creditors may now only pursue their claims according to the provisions governing insolvency proceedings. In addition, any

security interest which has been created by execution within one month prior to the filing of the petition will be void.

The insolvency administrator is in charge of managing the debtor's business and making all necessary dispositions with respect to the estate (please see below for further details on Self Administration Proceedings). However, before entering into transactions which substantially affect the estate, he or she must obtain the consent of the creditors' committee, or alternatively, the creditors' meeting.

The final decision whether to liquidate or reorganise the debtor's business also remains with the creditor bodies.

Creditors' meetings are summoned by the insolvency court. The court sets a date for a first creditors' meeting, the information hearing (*Berichtstermin*), usually within the first six weeks (but not later than three months) after the court order opening insolvency proceedings. At the information hearing, the administrator reports on the debtor's business situation and the causes of insolvency. He also reports on the possibility of reorganising the debtor's business by means of an insolvency plan. The creditors decide whether the debtor's business is to be terminated or provisionally continued.

Furthermore, they may instruct the administrator to prepare an insolvency plan. The creditors may later reverse or amend their initial decisions. A creditors' resolution will be adopted if the sum of the affirming creditors' insolvency claims will be more than 50% of the total sum of all voting creditor claims. The court will also set a date for the examination hearing (*Prüfungstermin*), at which registered claims are examined to determine their value and rank. This meeting usually takes place on the same date as the information hearing, but not later than two months after the date on which the period for the registration of claims expires.

Self-administration proceedings

Self-Administration Proceedings (*Eigenverwaltung*) are to a certain extent comparable with debtor-in-possession proceedings. If the debtor has applied for Self-Administration Proceedings and it is considered that this will not result in any disadvantage to the creditors, the court may order that virtually all responsibilities with respect to the estate remain with the debtor. In this event, the powers of the appointed creditors' trustee (*Sachwalter*) are generally limited to the supervision of the debtor's economic circumstances, the debtor's management, and personal expenditures. The Reform Act has limited the insolvency court's ability to refuse to order Self Administration Proceedings. The preliminary creditors' committee will have decisive influence on both the institution and revocation of Self Administration Proceedings.

Although Self-Administration Proceedings do not occur very often in general (2.6 percent in 2016), they have been increasingly important for insolvency proceedings of larger companies in the past (58 percent of the largest 50 companies in 2016) and this trend is likely to continue in the future.

Insolvency plan proceedings

The objective of an insolvency plan is mainly to achieve a restructuring solution which is supported by the majority of creditors, but may also be used to liquidate a company. The Reform Act has introduced the possibility to include the conversion of debt into shares of the insolvent company (debt for equity swap) and the corresponding corporate actions into the insolvency plan, even against the will of the former shareholder(s).

An insolvency plan can be formulated and submitted to the insolvency court by the insolvency administrator or the

insolvency debtor itself. The insolvency creditors can mandate the insolvency administrator to draft an insolvency plan by resolving to do so in the creditors' meeting. There are few rules regarding the content of the plan (it is effectively a settlement between the parties). Nevertheless, the Insolvency Code does regulate the plan's formal make-up, such as a requirement to divide creditors into different groups, provided that the plan treats their respective legal positions in a different way. Within each group they must be treated equally.

The adoption of the insolvency plan is subject to creditor approval. The majority of creditors in each group must consent and these consenting creditors must hold more than half of the value of claims within the group. In the event that a creditor group does not consent, the plan may still be adopted if (i) the insolvency court establishes that the dissenting creditor group would not be worse off with the plan than without the plan, and (ii) the dissenting creditors within such group have a reasonable share of the economic benefits of the plan. Once agreed, the insolvency plan must be formally confirmed by the insolvency court in order to be effective.

The execution and termination of the insolvency plan takes place according to its own provisions and is not part of the statutory insolvency proceedings. In the past, Insolvency Plan Proceedings had only rarely been used as dissenting creditors were in the position to delay the implementation of the plan – this has changed with latest legislative reforms. Insolvency Plan Proceedings and Self Administration Proceedings have been strengthened by the introduction of Protection Scheme Proceedings (see above).

Priority of payment and preferential creditors

Under German insolvency law, the creditors may be distinguished by their degree of participation in the insolvency proceedings, the extent to which their claims are secured and the rank of their claims within the order of priority.

- (a) Creditors with rights to the segregation of an asset (*Aussonderungsrecht*), such as in the case of goods subject to retention of title or held by the debtor as trustee (depending on the specific trust agreement), can separate these assets from the estate. However, the insolvency administrator has powers to prevent a creditor from exercising its right to segregation of goods subject to retention of title.
- (b) Creditors of the estate (*Massegläubiger*) do not participate in the actual insolvency proceedings, i.e. their claims will neither be registered nor examined within the proceedings. Claims of creditors of the estate include administrator's costs and liabilities and court costs, liabilities incurred by activities of the administrator, liabilities resulting from executory contracts that have been assumed by the insolvency administrator and liabilities arising from the unjust enrichment of the estate.
- (c) Creditors with a right to separate satisfaction (*Recht zur abgesonderten Befriedigung*) are creditors who participate in the insolvency proceedings, but at the same time are secured by collateral that constitutes part of the estate. The right of separate satisfaction allows such secured creditors to claim the proceeds generated on the realisation of the collateral up to the amount of their secured claim. Any surplus belongs to the estate. Movable assets transferred for security purposes can also be realised by the insolvency administrator if in his or her possession. The same applies to

claims assigned for security purposes. In this case, an estate contribution payable by the secured creditor to the insolvency estate of usually around 9% accrues. There is no such statutory realisation right of the insolvency administrator regarding land charges and pledges over shares and claims (such as account pledges) which means that the 9% estate contribution does not apply.

- (d) Insolvency creditors (*Insolvenzgläubiger*) are unsecured creditors who have an established claim against the debtor at the time of the opening of the insolvency proceedings. The assets of the estate which remain after the claims of the creditors of the estate have been completely satisfied are distributed on a *pro rata* basis among all insolvency creditors. One of the major reforms of the Insolvency Code was to include employees and tax authorities in this group, which had previously enjoyed preferential status.
- (e) The claims of subordinated insolvency creditors (*nachrangige Insolvenzgläubiger*) have the lowest priority among all claims in the proceedings. They are only satisfied after the claims of all insolvency creditors have been completely satisfied. Claims of subordinated insolvency creditors include claims for the reimbursement of shareholder loans and claims for which subordination in insolvency proceedings has been agreed upon between creditor and debtor.

Directors' Liabilities

As soon as the directors of a company have reason to believe that the company is in financial difficulties, they are legally required to establish the extent of such difficulties and to continue to keep the company's financial situation under review. In particular, they are obliged to ascertain whether the company

has already lost half of its share capital or whether grounds for the opening of insolvency proceedings exist.

If the company's equity has been reduced to half or less of its share capital, the directors are required to inform all of the company's shareholders immediately. Failure to do this may lead to personal civil liability for the directors and constitutes a criminal offence punishable by imprisonment of up to three years.

If a company is illiquid or over-indebted, the directors have a duty to file a petition for insolvency without undue delay and within a maximum period of three weeks. If attempts to rescue the company during the three-week period fail, the directors have to file immediately. Failure to do so can result in criminal sanctions. In addition, they may be personally liable to the company and its creditors for any losses incurred due to the delay in filing. Note that each director is individually responsible for filing the petition.

In the case of impending illiquidity, the directors are entitled, but not obliged, to file a petition for the initiation of insolvency proceedings. However, it should be noted that directors who apply for insolvency proceedings prematurely (before they have explored all other possibilities) risk being personally liable to the company and its shareholders. Therefore, an application for insolvency proceedings based only on impending illiquidity should not be filed unless the shareholders, by means of a formal shareholders' resolution, have consented to the application or issued instructions to that effect.

Directors who enter into new agreements on behalf of the company, which the company is unlikely to be able to fulfil, risk being held personally liable for any arising damages if they do not inform the other party of the company's financial situation. Entering into any such agreement may also constitute a criminal offence.

In principle, the directors are required to reimburse the company for any payments which they make to third parties out of the company's assets after the company has become over-indebted or illiquid, unless such payments would have been made by a prudent businessman in similar circumstances.

Directors may be held liable for payments made to shareholders whilst the company is in financial crisis or if they make dividend payments in contravention of capital maintenance rules under company law. Supply, service or similar agreements also have to be carefully scrutinised to ensure they were made on an "arm's length" basis.

Guarantees

Downstream guarantees are available in most circumstances. Upstream and cross-stream guarantees are subject to capital maintenance rules under company law. To avoid liability risks for its directors, a limited liability company (*GmbH*) will normally require documentation to be drafted to limit its obligations to any amount over and above its statutory capital.

If a stock corporation (*AG*) grants an upstream or cross-stream guarantee, this may be regarded as a return on capital in breach of maintenance of capital rules even though its statutory capital remains untouched. An *AG* can usually only enter into a guarantee on the same terms as a third party would enter into such a guarantee (e.g. by being paid a market rate fee).

A guarantee by an *AG* to secure the acquisition of its own shares would be generally void under financial assistance provisions.

There is no need for a company to show corporate benefit when entering into a guarantee.

Lenders' Liability

Lending to a distressed borrower

German case law and legal literature do not consider the granting of a loan to a company in a crisis as a reprehensible act if it can be seen as a restructuring loan granted after a careful and competent assessment of the viability of a restructuring plan.

Only under specific circumstances can lenders be held liable for third party damages incurred as a result of a delay in filing for insolvency (*Insolvenzverschleppung*), based on the overriding legal principle of the violation of moral principles (*Sittenwidrigkeit*). In order to be held liable, the lenders must have acted in a way which is incompatible with good faith.

Such incompatibility with good faith may be assumed if new credit is granted which, in the end, does not help to overcome the crisis but only delays the debtor's insolvency. In such a case, there is also a risk of criminal liability through aiding and abetting the directors' delay in filing for insolvency.

If lenders are liable for third party damages under the above principles, creditors who had existing claims against the company before the granting of a new loan are entitled to compensation equal to the amount by which the dividend, they receive in the company's insolvency is reduced as a result of the delay in filing. Creditors whose claims arose after the credit was granted can be entitled to full compensation.

To avoid the risks described above, the lender will have to examine carefully the chances of a reorganisation of the borrower. A plausible business plan (*Sanierungsplan*) together with a workout opinion will be necessary, which must demonstrate that the company will be able to survive in the

medium term if certain measures are met. Furthermore, a binding commitment by the parties involved in these measures will be required.

This business plan is usually drawn up by independent accountants. To avoid a risk of becoming liable for exerting harmful influence (e.g. shadow directorship), it should normally be ensured that the borrower itself appoints the accountant.

As it requires some time to prepare a restructuring plan and to obtain an expert opinion on the feasibility of such plan, a bridging loan (*Überbrückungskredit*) to a company in crisis will not generally be considered contrary to public policy. Such a loan will not result in the lender being held liable if it is made in order to prevent illiquidity during the period required for the preparation and examination of the restructuring plan. However, the purpose of such a loan must only be to provide bridging finance during the time required to assess the feasibility of a restructuring of the company. A loan granted only to postpone insolvency and to enable the lender to improve its own position in comparison with other creditors would be considered contrary to public policy and could result in liability for the lender.

As a typical step during a crisis of a company, a credit institution often does not exercise its termination rights of a loan agreement in order to prevent grounds for an insolvency petition (*Standstill*). This approach generally does not lead to a liability of the creditor.

Control of borrower

In general a lender will not be liable *vis-à-vis* the borrower and/or its other creditors, provided that the borrower retains control of its operations. However, liability may arise for the lender if:

- (a) the lender deprives the borrower's management of its power to act for the company;

- (b) a person close to the lender (or the lender itself) assumes management powers; or
- (c) a person close to the lender (or the lender itself) exerts substantial influence over the borrower.

In order for liability to arise, the lender's influence must be substantial and, ultimately, comparable to the influence of a shareholder.

Equity-replacement and capital maintenance rules

Shareholder loans

A shareholder loan (or a legal act corresponding commercially to a loan) will be generally subordinated to claims of other creditors by operation of law in the case of an opening of insolvency proceedings over the company's assets. This rule does not apply, however, if (i) an existing creditor acquires shares with the intention to restructure the company (restructuring privilege), or (ii) a shareholder who is not involved in the management of the company only holds a participation of up to 10% of the shares (*de minimis* privilege).

Any repayment of a shareholder loan (or a legal act corresponding commercially to a loan) within a period of one year prior to the filing of the petition to open insolvency proceedings is subject to insolvency avoidance rules. The same is true for collateral provided for a shareholder loan within a period of up to ten years prior to the filing of the petition to open insolvency proceedings.

Capital maintenance rules

The German capital maintenance rules are intended to maintain the share capital of limited liability companies and stock corporations as a fund for creditors (*Stammkapital bzw.*

Grundkapital). They prohibit a German limited liability company from making payments to its shareholders at a point in time when, from a balance sheet perspective, the statutory published share capital is affected or would be affected by such a payment. If the prohibition is infringed, the shareholders must repay what they received, and the company's managing director will become personally liable for the repayment. Also considered as payments to a shareholder are the enforcement of a guarantee or of security rights granted by the subsidiary limited liability company for a loan granted to its sister companies or its shareholders (typically the "HoldCo"). In order to avoid personal liability, the limited liability company's managing directors (or their legal counsel) usually insist on the inclusion of so called "limitation language" into the loan and security documentation. The limitation language limits the payment obligations of a company resulting from an assumed liability and/or the creditors' right to enforce collateral. It entitles the guaranteeing or securing company (the "Security Provider") to refuse payment or to raise an objection to the realisation of the security if this would affect the statutory creditors' guarantee fund by leading to an adverse balance (*Unterbilanz*), or by extending an already existing adverse balance.

Limitation language typically contains an exception if the borrowing company (the HoldCo) forwarded all or parts of the loan to the Security Provider ("On-lent Clauses"). In such cases, the amount that was passed on by the borrowing company is not covered by the limitation language. Consequently, with regard to the amount forwarded, the Security Provider cannot refuse payment or object to the realisation of the collateral in the event of the borrower's default.

Limitation language may in particular complicate a creditor's insolvency filing against the Security Provider. If the Security Provider can assert that its statutory share capital would be

affected by a payment of the realisation of the security rights and the creditor cannot provide evidence for the amounts on-lent to that Security Provider, the limitation language may impede the existence of a ground for insolvency. If the insolvency court therefore rejects the insolvency request, the court fees, which may be of a considerable amount, have to be borne by the creditor. Filing for insolvency where limitation language exists thus may constitute a significant cost risk.

Insolvency avoidance risks

Transactions entered into prior to or after the filing for the opening of insolvency proceedings may be subject to insolvency avoidance rules within certain hardening periods. Upon the insolvency administrator's claw-back declaration (*Anfechtungserklärung*), a transaction may be declared void and unenforceable if it could be considered detrimental to other insolvency creditors. Any of the debtor's assets of which the estate has been deprived by means of a voidable transaction are to be returned to the estate.

As a general rule, the likelihood of a successful defence against the insolvency administrator's challenge depends on the following criteria:

- Temporal aspect: The longer the period between the transaction to be challenged and the filing for insolvency proceedings the less likely a successful claw back becomes. The most critical time frame is the period of three months before the filing.
- Arm's-length character: A payment or other transaction made in fulfilment of a due and payable claim will be much harder to challenge compared to payments made in the absence of a due and payable claim. Furthermore, certain

insolvency avoidance provisions allow for the so called "cash transaction defence" (*Bargeschäftsprivileg*) which applies if a fair consideration to the insolvency debtor was made by the other party within a short timeframe. Gratuitous transactions can be challenged without any further requirements within a hardening period of four years.

- Financial difficulties and the other party's knowledge of these difficulties: The claw back risk will be considerably increased if the insolvency debtor was already financially distressed (in particular illiquid) at the time of the relevant transaction and the other party was aware (or was deemed to be aware) of these difficulties.

Transactions falling under the insolvency avoidance rules therefore include payments or collateral granted in the last three months prior to the filing for the opening of insolvency proceedings if the beneficiary knew of the debtor's illiquidity or of circumstances that could lead to this conclusion, as well as to gratuitous payments or services granted within a hardening period of four years. Transactions that were perceived to "intentionally harm creditors" can typically be challenged within a period of four years, sometimes even ten years, provided the beneficiary had knowledge of the debtor's intention. A hardening period of one year applies to repayments of shareholder loans or legal acts that are commercially corresponding to a shareholder loan, and even of ten years in the case of collateral provided as security for such shareholder loans.

Set-off

The general rule is that set-off (*Aufrechnung*) which was available to a creditor prior to the initiation of insolvency proceedings remains available afterwards.

In the case where the creditor holds a debt which came into existence before the initiation of insolvency proceedings, but which could not be set-off prior to the initiation of insolvency proceedings, set-off may become possible during insolvency proceedings if certain conditions are met.

However, certain exceptions exist to this general rule. For example, a creditor may not use a claim for set-off that has been transferred to him from a third party after the initiation of insolvency proceedings, even if set-off was previously available to that third party. Set-off may also generally not be effected against a claim which has only arisen against the creditor after the initiation of insolvency proceedings.

Further exceptions apply which can only be analysed on a case-by-case basis.

Recognition of foreign insolvency proceedings

Member States of the European Union (other than Denmark)

For member states of the European Union (other than Denmark), the Recast Regulation applies, see the first part of this note.

Other states

The German international insolvency law applies to states outside of the scope of the Regulation. It is an autonomous legal domain, fundamentally based on the Regulation's basis and system.

The opening of foreign insolvency proceedings in another state not being a member state of the European Union is, as a general principle, recognised directly in Germany without any specific formality. This is, however, not the case when,

- the court which opened the proceedings does not have jurisdiction according to German law; or
- recognition would lead to a result which would be manifestly contrary to essential principles of German law, in particular its fundamental rights (*Grundrechte*).

Although the opening order of a foreign court will generally be automatically recognised in Germany, foreign court orders or security measures rendered in the recognised insolvency proceedings of another state may only be executed after being approved by a German court to be enforceable in accordance with the provisions of the German Civil Procedural Code (*Zivilprozessordnung*).

Creditors may file a petition for the commencement of separate domestic insolvency proceedings in Germany if the debtor possesses an establishment in Germany or owns assets that are located in Germany. However, if the debtor has no establishment in Germany, the application for domestic insolvency proceedings can only be based on a special interest of the creditor to open such separate domestic proceedings, especially if the foreign insolvency proceedings would be clearly disadvantageous to the creditor compared to German insolvency proceedings.

ITALY



Key Elements:

- Brand new reform in 2019, introducing the new Code of Business Crisis and Insolvency, which will entirely come into force in August 2020
- Significant legislative reforms 2003 – 2015
- Bankruptcy and Post-Bankruptcy Compositions
- The Extraordinary Administration Procedure for the Industrial Restructuring of Large Insolvent Businesses
- Pre-bankruptcy Creditors' Compositions (*Concordato Preventivo*) with and without plans (*Concordato in Bianco*) and new forms of competitive offers and concurrent proposals
- Out of court reorganisation plan under Article 67, paragraph 3(d) of the Bankruptcy Act and Debt Restructuring Arrangements under article 182 bis of the Bankruptcy Act
- Priority for rescue finance and new interim financing for distressed companies
- Relief from equitable subordination
- Exemption from the rules on reduction or loss of capital if a creditors' composition proceeding or a debt restructuring agreement is pending
- Potential civil and criminal liabilities of directors and exemptions from liability for lenders in respect of criminal sanctions
- "Esdebitazione" (release from debts)

Introduction

Under Italian law a company can be wound up either through a liquidation procedure, applicable when the company is solvent, or through a "*procedura concorsuale*" (procedure affecting creditors' rights generally), applicable when the company is insolvent.

The statutory framework for insolvency related procedures is primarily set out in Royal Decree no. 267 of 16 March 1942 (the "Bankruptcy Act"), in Legislative Decree no. 270 of 1999 ("the Law on Extraordinary Administration") and by Law no. 39 of 23 December 2003 ("Urgent Measures for the Industrial Restructuring of Large Insolvent Businesses", the so-called "Marzano Decree")¹.

The first amendments to the Bankruptcy Act entered into force as of 17 March 2005 and there have been a number of reforms since that date aimed at improving insolvency-related proceedings. This has included the introduction of pre-bankruptcy compositions, debt restructuring agreements, out of court reorganisations and changes to the claw-back regime.

A new reform was Law Decree no. 83/2015 which introduced some important reforms applicable, *inter alia*, to pre-bankruptcy creditors' compositions, insolvency proceedings and debt restructuring arrangements. Some of the amendments apply to proceedings commenced after 27 June 2015, while, other amendments only apply to proceedings started from 21 August 2015.

¹ The Bankruptcy Act has been further amended in 2005 by Law no. 80 and in 2006 by Legislative Decree no.5. Further amendments has been introduced by Legislative Decree no. 169/2007, subsequently by Law Decree 78/2010 and recently a new insolvency related amendment has been approved within Law Decree no. 83 dated 22 June 2012 and within Law Decree No. 69 dated 21 June 2013.

The latest reform is the one enacted on 14 February 2019, when the Legislative Decree No. 14/2019 “*Codice della Crisi di Impresa e dell’Insolvenza*” (Code of Business Crisis and Insolvency) (the “**Code**”) was published in the Italian Official Gazette. The Code, which will enter into force on 15 August 2020, other than for certain few provisions which have become effective on 16 March 2019, contains a comprehensive and organic reform of Italian insolvency proceedings and the rules governing business crisis.

Most important reforms

The changes to the principles of the Italian bankruptcy procedure have been carried out in different phases; the first step was taken in 2004 when the decree “Urgent Measures for the Industrial Restructuring of Large Insolvent Businesses” was enacted. It was aimed at the financial restructuring of large insolvent companies meeting specific requirements as to the number of employees and the amount of their debts; its purpose was therefore to allow such companies to continue their operations and return to a sound financial position on the basis of a two year restructuring plan. Secondly, in 2005, the Bankruptcy Act was partially amended by the reforms relating to claw-back action, the pre-bankruptcy creditors’ composition and the introduction of debt restructuring arrangements.

In 2006 the Italian Government approved a substantial reform of the Bankruptcy Act which amended it entirely (with the sole exception of provisions that contain criminal sanctions) and such a huge reform has been subsequently integrated and completed by Legislative Decree no. 169/2007.

After the implementation of the above-mentioned reforms, the structure of the Bankruptcy Act was much more focused on allowing companies to continue their operations instead of

leading distressed companies to an unavoidable dissolution. This approach adopted by the Italian legislator was aimed at reviving the Italian economy (which had been beset by considerable difficulties in previous years), and protecting and encouraging investments in Italy.

Reforms subsequently approved within Law Decree no. 78/2010 focused on business rescue and introduced, *inter alia*, (i) a new legal priority for rescue finance; (ii) the partial relief from equitable subordination; (iii) exemptions to lenders’ liability in certain circumstances; and an extension to the *moratorium* which is now available in the restructuring negotiations stage.

The principal aim of the reform was to allow companies to continue their operations and many changes have been made to such an end, for example:

- increasing the number of entities excluded from bankruptcy proceedings;
- changing and widening the powers of the bankruptcy receiver; and
- extending the powers of the committee of creditors.

In addition, the position of the debtor has been improved by:

- the abolition of the public register of debtors declared bankrupt; and
- the introduction of the so called “*esdebitazione*” (the discharge of certain debts).

Significant changes have also been made with regard to:

- the provisions relating to claw-back action; and
- the pre-bankruptcy creditors’ composition.

The recent reforms approved by Legislative Decree no. 83/2012 and recently by Law Decree no. 69/2013) were mainly focused on defining a new legal framework aimed at resolving corporate distress. The purpose was to allow businesses to continue operating notwithstanding the existing financial crisis. To this extent the Law Decree no. 69/2013 was aimed at enforcing those rules which are directly related to negotiated solutions involving out of court or court supervised procedures.

The amended rules primarily concerned:

- pre-bankruptcy creditors' composition, the new "*concordato con continuità*" and the so called "*concordato in bianco*" under article 161(6) of the Bankruptcy Act;
- debt restructuring arrangements under article 182 *bis* of the Bankruptcy Act; and
- out of court reorganisation plans under Article 67, paragraph 3(d) of the Bankruptcy Act.

Specific provisions have improved the position of the debtor, such as:

- the opportunity to choose not to perform certain obligations if this would facilitate the restructuring;
- the possibility of applying to the court to commence the creditors' composition procedure before the plan itself has been fully formulated;
- the option to submit a different plan even after having filed a proposal for a debt restructuring agreement; and
- the opportunity for a company to continue its operations following a corporate restructuring, the so called "*concordato con continuità*".

The implications for creditors are as follows:

- creditors who are not a party to the debt restructuring agreement will always be satisfied in full;
- the feasibility of the recovery plan will always be certified by an independent expert; and
- the introduction of the so called "*concordato preventivo in bianco*" which addresses the financial distress at an early stage.

On 27 June 2015 the Italian Government approved Law Decree no. 83/2015, converted into Law 132/2015, which introduced important reforms, *inter alia*, to the pre-bankruptcy composition procedures, debt restructuring arrangements and insolvency procedures. The purposes of this reform are to foster early recovery of businesses in distress and to increase the efficiency of the existing insolvency procedures through a new approach which is more creditor-oriented. Indeed, previous reforms were basically aimed at protecting the debtor's position instead of balancing both debtor's and creditors' interests.

The main amendments for the benefit of the debtor relate to:

- easier access to interim financing for distressed companies;
- a new form of debt restructuring arrangement (introduced with the new art. 182 *septies* of the Bankruptcy Act), available when debts are owed to financial intermediaries (*i.e.* banks) in an amount no less than half of its total indebtedness;
- the possibility to extend the standstill agreement to non-approving financial creditors if and to the extent the standstill agreement has been approved by 75% of the financial creditors.

In addition, the following changes have been made to pre-bankruptcy creditors' compositions for the benefit of creditors:

- the judge has to open a competitive bidding process to allow creditors to submit offers for the purchase of the company in competition with the offer submitted by the debtor;
- creditors representing at least 10% of the overall indebtedness may submit alternative creditors' composition proposals;
- a pre-bankruptcy creditors' composition procedure can be approved by the judge if and to the extent it ensures the payment of at least 20% of the existing debts.

The Italian insolvency latest reform

Following the guidelines set forth by Law 155/2017 which embodied those set by the Recommendation No. 2014/135 of the European Commission and the principles of the UNCITRAL Model Law on cross border insolvency proceedings, the Government adopted a comprehensive and organic reform of the insolvency proceedings and the rules governing business crisis, drafting a new Code of Business Crisis and Insolvency, which will substitute the old Bankruptcy Law.

The Code includes mechanisms from existing insolvency procedures and schemes for businesses and other debtors and a new out-of-court mediation procedure to assist the debtor in his dealings with creditors and aimed at promptly identifying and solving the crisis before it becomes irreversible, thus making the commencement of insolvency or restructuring proceedings the last resort (the so called "*Alert Procedure*").

The Code also introduces an out-of-court crisis settlement procedures before a new special body to be established by the

local Chamber of Commerce to facilitate negotiations with the distressed company's creditors on a confidential basis.

Moreover, the Code finally introduces provisions aimed at coordinating management of a crisis affecting a group of companies to achieve restructuring harmonisation, such as the introduction of a definition of group of companies based on the notion of "direction and coordination" (*direzione e coordinamento*) established under Article 2497 of the Italian Civil Code.

Winding up procedures

Liquidation voluntary and mandatory

The liquidation procedure is governed by company law.

The decision to put a company into voluntary liquidation must be taken by shareholders. A liquidator is appointed at the shareholders' meeting to sell the assets, pay off creditors and prepare a final liquidation balance sheet and report. Shareholders may object to the balance sheet within ninety days. If no objection is raised, approval is deemed to have been given and the liquidator can distribute any proceeds to shareholders.

Ultimately, the company is struck off the companies' register.

Companies are subject to mandatory liquidation when their equity capital is reduced below the legal minimum, and also (at least in principle, although in practice this very rarely occurs) when the object for which the company was formed is attained or for any other reason set out in the by-laws.

Bankruptcy proceedings (*fallimento*)

This court-supervised procedure is governed by the Bankruptcy Act. After the reform introduced by Legislative

Decree 169/2007, the Bankruptcy Act applies to all entities that carry on a commercial activity, except public bodies. To such extent Legislative Decree 169/2007 has also introduced a number of criteria to identify the entities and the businesses (including individuals) that cannot be declared bankrupt. The entities and the entrepreneurs that can be declared bankrupt are the ones that:

- have reached in the last three years (from the date of the bankruptcy petition or from its incorporation) an annual balance sheet revenue of more than €300,000;
- have reached in the last three years (from the date of the bankruptcy petition or its incorporation) annual gross proceeds of more than €200,000; and
- have debts (including debts not yet due) greater than €500,000.

The companies and the entrepreneurs that want to avoid being declared bankrupt must demonstrate that they have not exceeded all the three above-mentioned requirements.

A receiver is appointed who will usually, but not necessarily, be a lawyer or a certified accountant. Following recent reforms, the receiver may also be a law firm as long as there is no conflict of interest. The main goal of the Bankruptcy proceedings (and therefore of the receiver) is to liquidate the assets of the company in order to satisfy the creditors.

Pursuant to the reform approved with Law Decree 83/2015, the provisions of the Bankruptcy Act relating to the appointment requirements for official receivers have been amended. No person who has contributed to cause the insolvency or the distress of a company can ever be appointed as a receiver

and, for the purpose of evaluating the suitability of a receiver before the appointment, the evaluation process has to take into account former reports filed by the relevant receiver in relation to previous insolvency proceedings supervised by him/her.

Bankruptcy administration

The reforms have modified the roles and duties of the administrative bodies that operate in a bankruptcy. First of all, following the reforms, the bankruptcy judge no longer has any managerial powers, but only supervisory and control functions. These supervisory functions have been improved in order to avoid uncontrolled management by the receiver. The receiver on the other hand now has more duties: he administers the debtor's assets and is responsible for the procedure. He must produce a report on the causes of the insolvency to the judge within sixty days of the bankruptcy declaration. The role of the committee of creditors has been greatly modified by the reforms and now possesses powers of authorisation and control over the receiver in addition to its advisory functions.

Once the procedure has commenced, no individual actions by any creditor are allowed. The company's directors lose the right to manage the business or deal with the corporate assets.

Continuation of operations may, however, be authorised by the court if an interruption would cause greater damage to the company, but only if the continuation of the company's operations does not cause loss to creditors. After the reform, it is possible to lease the business or a part of it; the lessee, chosen by the receiver, decides upon the best solution in order to prevent the dispersion of company assets, workers and their professional skills. The aim of the company lessor is to save and restructure the company.

Contracts pending as of the date of the bankruptcy declaration are suspended until the receiver decides whether to continue with them; this is unless the ruling on the declaration of bankruptcy allows the company to continue its operations on a provisional basis. The possibility of allowing the company's operations to continue, as regulated by the new article 104 of the Bankruptcy Act, is one of the most important reform measures aimed at avoiding the dispersal of the insolvent company's assets and protecting creditors.

If the bankruptcy of the company does not allow it to continue its operations, then the loans intended for a specific activity (introduced into the Italian legal system by the recent reform of the Company Law) are terminated. The continuation of such funding is instrumental in the continuation of the company's operations. The receiver shall provide, pursuant to article 107, for the transfer to third parties of the assets in order to allow the company to continue operations. The receiver can decide to delegate to the judge to sell movable, immovable and registered assets. If transfer is not possible, the receiver will provide for the liquidation of the assets in accordance with the liquidation rules of the company to the extent compatible with the procedure. Pursuant to the reform introduced by Law Decree 83/2015, for the purpose of speeding up the liquidation process, purchasers of liquidated assets can ask to pay the purchase price in different instalments rather than in one single tranche. In addition, information relating to the ongoing liquidation process must be made publicly available on the newly created online platform through the website of the Ministry of Justice.

In the liquidation phase, in accordance with the reformed article 105 of the Bankruptcy Act, individual assets of the company may be sold but only when the sale of the whole

company or part of it does not satisfy creditors in a more advantageous manner.

Law Decree 83/2015 introduced measures to hasten the implementation of the liquidation for the purpose of reducing the timing of bankruptcy proceedings. As of today, the liquidation plan must be drafted within a 180-day period starting from the date of the bankruptcy order. Failure to comply within such time will, in the absence of any justification, lead to the revocation of the bankruptcy trustee's appointment.

The bankruptcy proceedings end when:

- (i) all the assets have been distributed amongst the company's creditors or all debts and expenses have been paid; or
- (ii) a post-bankruptcy composition has been finalised (see below);
- (iii) in the fixed term after the bankruptcy declaration, no creditors have filed a claim;
- (iv) all creditors have been paid in full; or
- (v) the company's assets have been liquidated but they are insufficient to satisfy all or a part of outstanding claims.

In (iv) and (v), if the bankrupt entity is a company, it is removed from the Companies' Register. In the past, bankruptcy proceedings could last for more than five years but following the reforms, the procedure is quicker.

Post-bankruptcy creditors' composition

This procedure is an alternative way of bringing the bankruptcy proceedings to an end. One or more creditors or a third party are authorised to propose the composition but it cannot be

proposed by the debtor or by a company in which it holds a stake or companies subject to the same control if less than six months have passed since the insolvency declaration or if less than one year has passed since the order enforcing the insolvency. The proposal for post-bankruptcy composition with creditors can include (article 124 of the Bankruptcy Act):

- the subdivision of creditors into different classes;
- different treatments of different kinds of creditors; and/or
- the restructuring of debts and the satisfaction of claims in any way, including through the supply of goods, takeovers (*Accollo*) or other extraordinary transactions.

The proposal may provide that the creditors that hold a preference, a pledge or a mortgage are not satisfied in full on the condition that the plan provides for their satisfaction in an amount not lower than the best possible price which may be obtained from the winding-up taking into consideration the market value of the goods or rights on which there is the preference as estimated by a qualified consultant. The treatment established for each class of creditor may not have the effect of changing the ranking of the preferential claims as laid down by the law.

In cases where more than one proposal are submitted to the court, the creditors' committee is entitled to decide which proposal would be communicated to the creditors; upon request by the receiver the judge may communicate to the creditors the proposal which the receiver considers convenient at the same level as the one chosen by the creditors' committee.

This procedure must be approved by the creditors that represent the majority of the claims admitted to the vote. In the

absence of any objections, a creditor's consent to the composition is deemed to have been given.

Bankruptcy of companies

According to article 146 of the Bankruptcy Act, the directors and liquidators of companies are subject to the same obligations as imposed upon the debtor. The receiver can bring actions for liability against directors, statutory auditors, general managers and liquidators.

The judgment which declares a company insolvent will also include the members of the company who have unlimited liability, (article 147 of the Bankruptcy Act). Unlimited liability members cannot be declared bankrupt if a year has passed since the end of the relationship or since the end of the unlimited liability.

The summary procedure (governed by articles 155-156 of the Bankruptcy Act) has been abolished as a result of the streamlining of procedures provided for by the Bankruptcy Act. The new articles 155-156 regulate the assets intended for a specific activity (article 2447 *bis* of the Italian Civil Code). The receiver can transfer them to third parties in order to preserve them or he can liquidate them. The proceeds from the liquidation will form part of the assets.

The Extraordinary Administration Procedure and the Marzano Procedure for the Industrial Restructuring of Large Insolvent Businesses

The Legislative Decree 270/1999 regulated the "Extraordinary Administration for Large Insolvent Businesses" ("Extraordinary Administration Procedure").

The Extraordinary Administration Procedure is applicable to large businesses in a state of insolvency when there is the expectation that the company's situation may be restructured either through (a) the sale of its assets, undertakings or going concerns (provided that the duration of the relevant program cannot exceed 1 year); or (b) the execution of a restructuring program, the duration of which cannot exceed 2 years.

The Extraordinary Administration Procedure applies to companies meeting the following cumulative criteria:

- more than 200 employees during the preceding 12 months; and
- aggregate debts no lower than two thirds of each of (i) the value of the assets on the company's balance sheet and (ii) the income from sales and services provided during the latest accounting period.

Whilst the admission to the Marzano Procedure usually precedes the declaration of insolvency, the Extraordinary Administration Procedure requires the petition for the insolvency declaration to be filed before the competent court, which may then be followed, according to the steps set out below, by admission to the Extraordinary Administration Procedure.

A petition for the insolvency declaration and the successive admission to the Extraordinary Administration Procedure may be filed by the company, its creditors, the public prosecutor (*pubblico ministero*) or *ex officio* by the Bankruptcy court.

In the judgment declaring the state of insolvency, the court, *inter alia* appoints one to three judicial commissioner(s) for the management of the company from the date on which it is declared insolvent until the appointment of the extraordinary

commissioner(s), after the company has been admitted to the Extraordinary Administration Procedure. Within 30 days from the declaration of insolvency, such judicial commissioner(s) must file before the Bankruptcy Court a report describing the reasons leading to the insolvency of the company and a reasoned evaluation of the existence of the conditions set forth by law for the admission of the company to the Extraordinary Administration Procedure. A copy of such report is sent to the Minister for Economic Development.

From the date of the report, the Bankruptcy Court has an additional period of 30 days in order to decide whether to commence the Extraordinary Administration Procedure, if there is a genuine expectation that its financial situation can be rebalanced using one of the possible alternatives mentioned above at (a) and (b). Where this is not the case, the Bankruptcy Court declares the company insolvent and the Bankruptcy proceedings will apply.

Within 5 days from the decree of the Bankruptcy Court declaring the opening of the Extraordinary Administration Procedure, the Minister of Economic Development appoints one to three extraordinary commissioner(s) which, within the following 55 days, must deliver to the Minister for Economic Development the recovery plan of the company. Such term can be postponed for a further period of 60 days.

Within 30 days from the date of its delivery, the Minister of Economic Development authorises the recovery plan, which must also contain an indication of the method and timing of repayment of outstanding debts. Once approved, the plan must be carried out by the extraordinary commissioner(s) under the supervision of the Minister for Economic Development.

Assets can be sold according to the plan on a going-concern basis or sold individually. The distribution of the realisation proceeds will be generally carried out in the order of priority provided for in the Bankruptcy Act. However, there may be cases where, should the continuation of the business so require, the extraordinary commissioner is entitled to make advance payments to unsecured creditors in preference to secured creditors on the basis of the estimated available funds.

If its goals have been achieved and the company, after the implementation of the plan, has returned to a sound financial condition and has repaid outstanding debts, the court will terminate the proceeding and the company may return to its normal corporate activity.

If the above mentioned requirements are not met, and if at any other time it becomes clear that the Extraordinary Administration Procedure may not be usefully continued, the Bankruptcy Court may declare the company bankrupt.

On 23 December 2003, the Italian government approved the Decree “Urgent Measures for The Industrial Restructuring of Large Insolvent Businesses” (the so-called “Marzano Decree”), which came into force on 24 December 2003 when it was published in the Italian Official Gazette.

The Marzano Decree introduced a faster procedure which aims to save and turn around an insolvent company in order to maintain its technical, commercial, productive and employment value. The purpose is mainly the continuation of the company’s operations by restructuring the company’s debts and selling assets which are not strategic, or which do not form part of the company’s core business.

The above mentioned extraordinary administration procedure is available to large insolvent businesses which have:

- (a) an actual prospect of recovery, by way of an economic and financial restructuring of the business on the basis of a restructuring plan whose duration cannot be more than 2 years or through a transfer of the company’s assets;
- (b) a minimum of 500 employees for at least one year; and
- (c) debts, including obligations arising from guarantees, for an aggregate amount not lower than €300,000,000.

A company which meets the requirements set out above may request the Minister of Production (“*Ministro delle Attività Produttive*”, formerly the Minister of Industry), with a concurrent application of insolvency to the competent court, for admission to the Marzano Procedure. The admission to the Marzano Procedure may be requested even before the declaration of insolvency by the competent court. In this case, the competent court will verify the insolvency of the company at a later stage. Further to the request of admission, the Minister of Production, who is the procedure’s supervisor, will designate by decree an extraordinary commissioner setting out his/her specific powers. Such decree must be notified to the competent court within 3 days.

With reference to the companies which provide essential public services, pursuant to the amendments introduced by the Law Decree no. 134/2008, the admission to the Marzano procedure, the appointment of the Extraordinary Commissioner (and the determination of his powers) must be approved by the President of the Council of Ministers or by the Minister for Economic Development (*Ministro dello Sviluppo Economico*).

Once the company has been admitted to the procedure, no individual action may be brought by any creditor.

The extraordinary commissioner is in charge of running the company and managing its assets. He/she also carries out the duties entrusted to the preliminary commissioner (*commissario giudiziale*) under the Law on Extraordinary Administration.

In particular, the extraordinary commissioner must notify the creditors of the company, and the parties who have security over assets in the possession of the company, of the deadline by which the company's creditors must file their statements of claim with the competent court.

Within 60 days from his/her appointment, the extraordinary commissioner files a report with the competent court together with the following documents: (i) accounting records; (ii) the balance sheets from the last 2 fiscal years; (iii) an updated financial statement; (iv) the list of the company's creditors and the sums due to them; and (v) a list of parties who have security over assets. The term of 60 days may be extended by the court upon request of the commissioner only once and for a period of no longer than 60 days.

Within the above term, the commissioner may present to the Minister of Production the request for other companies of the group to access the New Extraordinary Administration.

After ascertaining that the company is insolvent, the court will:

- (a) appoint a judge in charge of the procedure (so-called "*giudice delegato*");
- (b) invite the creditors of the company and the parties who have security by way of a general charge to "assets" to file their statement of the claims; and

- (c) establish the date on which the hearing for the examination of the debts of the company will take place.

The extraordinary commissioner will submit, within 180 days from his/her appointment, the restructuring plan and a report including (i) the reasons which caused the insolvency, (ii) the status of the business, and (iii) the list of creditors, with the sums due to them and their priority rights, to the Minister of Production. The term of 180 days may be extended for a further 90 days.

If the Minister of Production does not authorise the implementation of the restructuring plan and there is no possibility of rescuing the company through the sale of developing businesses according to the plan for the continuation of the company's operations (whose duration shall not be longer than one year), the court will declare the company bankrupt. The decree no. 134/2008 also introduced an extension of the deadline for up to 12 months. Thus, the extraordinary commissioner may obtain an extension of the deadlines for the implementation of the plan.

Within 15 days from the appointment of the extraordinary commissioner, the Minister of Production designates a delegated committee, composed of either three or five members, one or two of which (subject to the number of the members) is chosen from amongst the unsecured creditors. In practice, it appears that the 15 day term may be extended. The remaining members are experts in the type of business carried out by the insolvent company or experts in the insolvency field. The Minister of Production elects a chairman from the members of the delegated committee.

The delegated committee is a consulting body, whose comments and opinions are not binding. The committee issues comments/opinions on the actions of the extraordinary commissioner.

In addition to these powers, the delegated committee may:

- (a) inspect, at any time, any financial document relating to the procedure and ask the extraordinary commissioner and the insolvent company for elucidations; and
- (b) request the Minister of Production to dismiss the extraordinary commissioner.

After being requested, the delegated committee issues its comments/opinions within 10 days, except when it is invited to respond earlier, for reasons of urgency. In any event, the delegated committee should be granted at least 3 days to submit its response. Its resolutions are passed by a majority vote of its members.

The extraordinary commissioner's restructuring plan may include an arrangement with creditors (the so-called "*concordato*").

The satisfaction of the creditors' claims by means of an arrangement can provide for the repayment of debts in any form, such as a debt for equity swap, or the allocation of ordinary or convertible debt securities. The arrangement can also provide for the incorporation of a NewCo to which the insolvent company will transfer all its assets and the shares of which will be distributed to the creditors of the debtor company in the context of a debt for equity swap. The distribution of shares in the NewCo to the creditors is achieved through a vehicle (so-called "*Assuntore*") to which the creditors have conferred all their claims against the insolvent company. The *Assuntore* confers the claims to the NewCo as an equity contribution and receives shares into the NewCo, which it distributes to the creditors in accordance with the terms of the arrangement.

The arrangement can formulate separate classes of creditors whose legal and financial interest is aligned (i.e. individual

investors; bondholders, etc.) and provide for a different treatment by class. A different treatment can also be provided for creditors of different corporate entities within the insolvent group. In the event that the arrangement provides for a separate treatment, its fairness is subject to the government's scrutiny and must be approved by the Minister.

Once the Minister has approved the proposed arrangement, the extraordinary commissioner files the arrangement with the court, together with a motion to proceed by way of arrangement; in the next ten days the creditors can file their comments on the proposed list of creditors, the proposed list of claims and relevant amounts and ranking. Within the same timeframe, the creditors excluded from the arrangement can file their claim with the court.

Within the following 60 days, the judge, assisted by the extraordinary commissioner, announces a provisional list of creditors and claims with the relevant amounts and ranking and the extraordinary commissioner notifies the creditors. The creditors in the provisional list are admitted to vote on the arrangement. The holders of securities that have been distributed to the public can be admitted as a class and there is no need to identify each security holder.

Those creditors excluded from the provisional list can appeal the relevant order issued by the court. Pending the appeal they are allowed to vote on the arrangement and will participate in the allocation of shares in the NewCo. However, the bankruptcy judge may order that any shares issued to such excluded creditors are restricted. In that case, the shareholder cannot sell those shares until the court has reached a decision on the appeal.

The arrangement will be finally approved by a vote of creditors representing the majority in value of the claims admitted to the

provisional list. Voting takes place by post. A non-vote is considered to be a consent to the arrangement. In case of several classes of creditors, the arrangement must be approved by creditors representing a majority in value of the claims admitted to the provisional list for each class. However, even if the arrangement is not approved by a majority of the classes of creditors, the court can still authorise the arrangement if it considers that in comparison with the alternatives, it does not prejudice the dissenting creditors.

If the required majority vote is reached, the court issues a judgment approving the arrangement; if such majority is not reached, the extraordinary commissioner must file all the necessary amendments for the arrangement to be approved. The judgment by means of which the arrangement is approved can also provide for the transfer of all the assets of the insolvent company to the NewCo (*Assuntore*) formed for the purpose of implementing the arrangement.

The judgment approving the arrangement is enforceable against all creditors whose claims arose prior to the judicial declaration of insolvency and can be appealed by the company, by the creditors and by the extraordinary commissioner within 15 days of being published. If the appeal is successful, the list of creditors and claims is amended accordingly, although such amendment will not affect the vote on the arrangement.

Once the judgment approving the arrangement is *res judicata*, the proceeding comes to an end.

In case the creditors reject the arrangement, the extraordinary administrator can file with the Ministry a divestiture plan which can be extended for a period of time as long as two years.

If a divestiture plan is not promptly filed or the Ministry does not approve it, the court will issue an order to convert the extraordinary administration into an ordinary bankruptcy proceeding.

Upon the request of the extraordinary commissioner, the Minister of Production may authorise the transfer, use and lease of assets, real estate, businesses and ongoing concerns of the company with the aim of restructuring the company or its group.

The company may not grant security unless (i) it has been authorised by the bankruptcy judge; and (ii) it has also been authorised by the Minister of Production, if the security is for an undetermined value or for a value exceeding €206,582.76.

When authorisation for the implementation of the restructuring plan has been granted, the extraordinary commissioner may also bring claw-back actions, if such actions benefit the creditors.

The procedure ends when its goals have been achieved, i.e. when the company, after the implementation of the plan, is back in a sound financial position. Otherwise, the company will be declared insolvent pursuant to the Bankruptcy Act.

(Please note that the extraordinary administration procedure has been amended by the Legislative decree n. 70/2011.)

Compulsory administrative liquidation

This procedure is only available to public undertakings, insurance companies, banks and certain other regulated entities. The entities which can be subject to this procedure are expressly identified in the law and generally they cannot be declared bankrupt.

Rescue procedures

Pre-bankruptcy creditors' composition

The amendments to the Italian Bankruptcy Act have widened the access to the “*Concordato Preventivo*” (Pre-Bankruptcy Creditors' Composition) by eliminating:

- (a) subjective requirements (insolvency status of the debtor; the registration in the companies' register for at least two years; no declaration of bankruptcy in the previous five years); and
- (b) objective requirements (grant of guarantee or security in order to secure the payment of at least 40% of the unsecured creditors) that were required under the Bankruptcy Act.

The amendments to the Bankruptcy Act have also reduced the creditors' majority required to approve a Pre-Bankruptcy Creditors' Composition and have introduced further requirements for the admission of the Pre-Bankruptcy Creditors' Composition proposal.

Under the new article 160 of the Bankruptcy Act, as amended by Law Decree 83/2015, from 21 August 2015, Pre-Bankruptcy Creditors' Composition proposals may be proposed only if and to the extent such proposals can ensure the payment of at least 20% of the unsecured creditors. Furthermore, the proposal may provide that the creditors that have a priority right, a pledge or a mortgage are not satisfied in full, on the condition that the plan provides for their satisfaction in an amount not lower than the best possible price which could be obtained in a winding-up taking into consideration the market value of the goods or rights on which there is the priority as estimated by a qualified valuer.

In addition, the debtor can apply to the court to commence the creditors' composition procedure before the plan itself has been

fully formulated. The court will allow between 60 and 120 days for the drafting of the plan and the filing of the necessary documents. In so doing, the debtor gets the immediate benefit of the creditors' composition and its protective effect on its assets. Moreover, if authorised by the court, it can carry on its operations and, in case of a subsequent declaration of bankruptcy, authorized payments and transactions made in this context will then be exempt from claw-back. This new procedure (*concordato in bianco*) is regulated under Article 161(6).

The 2013 Reform aims to prevent abuses of the *concordato in bianco* and takes into account certain critical aspects emerging from its first application.

The bankruptcy judge now must impose upon the debtor certain on-going reporting obligations regarding: (i) the management of the business; and (ii) further activities outlined in the proposal and the plan. The debtor must comply with these reporting obligations by providing monthly reports and the debtors will be under the supervision of a judicial commissioner.

This change will encourage genuine businesses to continue their operations and intensify the court's scrutiny of debtors' behaviour during the period preceding the finalisation of the plan.

The reform also introduced a new provision (*concordato con continuità*) which allows the continuation of business, including the continuation of contracts. In this case, the composition plan must satisfy some additional requirements aimed at demonstrating that the continuation of business is reasonable.

The Public Prosecutor must be informed that a Pre-Bankruptcy Creditors' Composition petition has been filed.

Under the new article 177 of the Bankruptcy Act, the Pre-Bankruptcy Creditors' Composition petition must be upheld by the majority of the voting creditors. To the extent that the creditors are divided into different classes, the Pre-Bankruptcy Creditors' Composition petition must be upheld by the majority of the classes of the voting creditors. The creditors that have a priority claim, a pledge or a mortgage for which the Pre-Bankruptcy Composition petition provides for their full satisfaction do not have the right to vote if they do not give up their priority/security.

A huge reform to Pre-Bankruptcy Creditors' Composition procedure has been performed by Law Decree 83/2015 in relation to (i) competitive offers as regulated under the new article 163 bis of the Bankruptcy Act and (ii) concurring proposals pursuant to the new provision of article 163 of the Bankruptcy Act.

As per competitive offers, Law Decree 83/2015 introduced the new article 163 bis which, in order to prevent the devaluation of the debtor's assets, allows the possibility to start a competitive bidding process in the context of a Pre-Bankruptcy Creditors' Composition by allowing the submission of competing bids with the one filed by the debtor. If a bid for the purchase of the distressed company is submitted by one or more creditors, the judge will automatically open a competitive bidding process for the assignment of the company's assets to the best offeror.

Pursuant to the recent reform, one or more creditors representing at least 10% of the creditors shown in the debtor's financial statements can present a composition proposal concurrent with the one presented by the debtor.

Concurrent proposals for composition plans are admissible if the composition plan presented by the debtor does not ensure

payment of at least 40% of the unsecured creditors, or 30% of the unsecured creditors in case of *concordato con continuità*.

Debt restructuring arrangements under article 182 bis of the Bankruptcy Act

The amendments to the Bankruptcy Act have introduced the so-called "*Accordi di Ristrutturazione dei Debiti*" (Debt Restructuring Arrangements), whereby an entity can enter into a composition with creditors (which is binding on all the creditors of such entity) provided that:

- (a) the Debt Restructuring Arrangement is agreed by creditors representing at least 60% of its debts;
- (b) the feasibility of the Debt Restructuring Arrangements and the suitability of such arrangements to ensure repayment of those creditors who did not agree with such Arrangements is confirmed by an independent expert (who must meet the requirements provided by article 67(d) of the Bankruptcy Act); and
- (c) after the filing of the restructuring agreement there is a 60 day stay. In the recent reforms, changes were made to the provision according to which the stay on enforcement and precautionary measures may be extended to the negotiations phase for the period of 60 days preceding the filing of the restructuring arrangements. The Legislative Decree no. 78, further specifies that the court will also prohibit the granting of new security, unless these have been agreed.

Furthermore the Law Decree no. 83/2012 mandates that the plan must provide for the full payment of those creditors who are not party to the debt restructuring agreement within 120 days from its validation by the court, when the relevant debt is overdue by that date, or within 120 days from the due date,

when the due date falls after the date of validation of the same agreement.

Within 30 days from the issue of the Debt Restructuring Arrangement the creditors and any other interested person can challenge it. The court, after deciding on the challenges, homologates the Debt Restructuring Arrangement with an order.

Pursuant to article 182 *ter* as modified by Legislative Decree 196/2007 and by Legislative Decree n. 78/2010, it is possible to file a fiscal arrangement not only together with a Pre-Bankruptcy Composition with creditors but also together with a Debt Restructuring Arrangement. The fiscal arrangement enables the debtor to pay his fiscal debts partially and periodically.

Furthermore, pursuant to article 182 *ter* as introduced by Law Decree no. 78/2010 (which became effective on 31 July 2010), a set of “stability” measures have been adopted by the Italian Government, including a number of significant provisions in the context of rescue procedures as follows:

- (a) super senior financing: provisions have been introduced which allow lenders that provide rescue or interim financing to a distressed company in Italy to acquire priority over the existing creditors of the company, but only to the extent the financing is provided in the context of either:
 - (i) a debt restructuring arrangement under Article 182 *bis*; or
 - (ii) a Pre-bankruptcy creditors’ composition; and

- (b) equitisation risk: the rules on equitable subordination² have been disapplied in the case of shareholders’ loans granted in the context of the above mentioned restructuring procedures but only up to an amount equal to 80% of the amount of the relevant shareholders’ loan(s).

In addition, with the 2012 reform new provisions have been adopted with reference to financing activities in the context of a Debt Restructuring Agreement:

- Article 182 *quater* states that financing granted by the new shareholders are payable in priority for 100% of the amount;
- Article 182 *quinquies* allows so called interim financing so that debtors applying for Creditors’ Composition or for a Debt Restructuring Agreement can ask for a final court approval to enter into interim finance arrangements if an independent expert confirms the best interest of creditors. Law Decree 83/2015 has recently amended this provision whereby a debtor can now ask the court to be authorized to receive interim financing or to continue to use existing credit lines which will acquire legal priority in the credit ranking. Such authorisation can be granted provided that the financing is required to meet urgent operational needs, or the absence of the financing would cause irreparable and imminent harm to the business; and
- Article 182 *sexies* provides that, pending a Creditors’ Composition Proceeding or Restructuring Agreements neither the rules on the obligation to reduce share capital

² Articles 2497 and 2467 of the Italian Civil Code contemplate that shareholders’/intercompany loans granted to an “undercapitalised” company within the same group may be subordinated by operation of law to all other debts of such company, if granted at a time when, taking into consideration also the business carried out by the company: (i) the company’s indebtedness was excessively high compared to shareholders’ equity, or (ii) the company’s financial situation was such that a shareholders’ contribution would have been reasonable under the circumstances.

nor the rules on the dissolution of the company due to reduction or loss of capital shall apply.

The legal framework above has been recently completed by Law Decree 83/2015 which introduced the new article 182 *septies* pursuant to which a new form of Debt Restructuring Arrangement has been created for companies having more than half of the total existing indebtedness with banks and financial intermediaries.

Pursuant to this new form of Debt Restructuring Arrangement, a company which has: (i) debts towards financial intermediaries and/or banks in an amount not lower than half of the overall indebtedness and (ii) applied for the approval of a Debt Restructuring Arrangement under article 182 *bis* of the Bankruptcy Act, can request that the effects of such Debt Restructuring Arrangement be extended also to those financial creditors who have not given their approval.

Such an extension can occur, *inter alia*, if and to the extent (i) financial creditors that have approved the Debt Restructuring Arrangement represent at least 75% of the overall existing indebtedness; (ii) all creditors belonging to the same class of creditors have been informed of the start of negotiations with creditors and were able to participate in the negotiations; (iii) the plan imposed on the financial creditors represents the best alternative for them ensuring that they will receive under the plan at least as much as they would under any other realistic alternative.

The court will validate the Debt Restructuring Arrangement after it has ascertained that the negotiations were held in good faith and the relevant conditions were met.

Lastly, Law Decree 83/2015 also reviewed the regime applicable to standstill agreements entered into between the debtor and one or more financial creditors. Indeed, if and to the extent the standstill agreement has been approved by more than 75% of the existing creditors, then its effects will be extended also to those financial intermediaries who did not approve the agreement in the first place. The standstill or similar agreement cannot, in any circumstances impose new obligations on the non-approving creditors or require them to carry out additional obligations.

Out of court reorganisation plans (*Piani di risanamento*) under Article 67, Paragraph 3(d) of the Bankruptcy Act.

The amendments to the Bankruptcy Act have also introduced the so-called "*piani di risanamento*" whereby a distressed company may restructure its indebtedness and ensure its recovery, by proposing a reorganisation plan to all or some of its creditors.

The terms and conditions of these plans are freely negotiable and usually provide for a moratorium, cram down of claims, debt refinancing and an undertaking to refrain from requesting the commencement of any insolvency proceedings of the debtor. Neither ratification by the court nor publication in the Companies' Register are needed. The only requisite prescribed by the law is that the reasonableness of the plan must be assessed by an independent expert.

Unlike Pre-bankruptcy Creditors' Composition and Debt Restructuring Arrangements, out-of-court reorganisation plans do not offer the debtor any general protection against enforcement proceedings and/or precautionary measures initiated by third-party creditors. The Bankruptcy Act provides that, should these plans fail and the debtor be declared bankrupt, the payments and/or acts carried out in the context of the implementation of the reorganisation plan are not subject to claw-back action provided that the feasibility of the plan has been confirmed by a report drafted by an independent expert.

Law Decree no. 83/2012 reinforces the role of the expert with new and more specific requirements of independence to ensure that he performs the role in a proper manner. He is required to certify the accuracy of the information contained in the recovery plan and the feasibility of the plan, whereas under the former law the expert was only asked to certify whether the plan was reasonable.

Other issues

Directors' responsibilities

Duties imposed on directors apply equally to those who, although not formally appointed to office, carry out managerial activities or are involved in the running of the company.

Civil liability

Directors are jointly and severally liable for breach of their duties. However, a director must be blameworthy to share in this liability. Liability between the directors is divided according to the degree of fault and the damage caused; but where a

director can establish his/her lack of blame for the breach, he/she will not be liable at all.

A claim may be brought against a director by the company, by a shareholder or by a creditor who has suffered a loss as a consequence of the director's misbehaviour. If the company is bankrupt or subject to any analogous procedure, the claim may be brought by the receiver.

Where a director has committed an act or omission contrary to his statutory obligations or duties contained in the articles of association (e.g. has failed to act with normal diligence in supervising the conduct of the company's affairs, or has failed to do his/her best to prevent the occurrence of prejudicial acts or reduce their harmful effects, or has acted with a conflict of interest), and the company suffers damage as an immediate and direct consequence, directors are personally and jointly liable to the company for the damage suffered. Directors must therefore be wary of simply resigning from a company in financial distress, as this will not be sufficient to discharge their duties.

Directors are liable to the company's creditors for non-observance of their duties concerning the preservation of the company's assets which results in loss to creditors. Shareholders or third parties who suffer damage which directly affects their interests as a result of a director's malicious or intentional act may be entitled to compensation.

Directors are under a duty to call a meeting without delay in the event that the share capital has decreased by more than one third as a result of the company's losses. It is unusual for a court to find liability for this breach due to the difficulty in proving

causation. An alternative way of holding the directors to account in this situation is to establish liability for negligent mismanagement in not having acted to prevent losses.

Directors may also be liable for violations which create an over or under valuation of company assets; for falsifying accounts; for failing to make necessary provision for the payment of taxes which causes the liquidation of the company; or failing to make social security payments to employees.

The courts have applied the civil liability regime to de facto directors of a company, on the basis of a test of actual management of, or intervention in the management of, a company by a person who was not formally empowered to act as a director. Thus, in the event that a bank representative was found to have caused damage to a company acting as a de facto director, the bank representative may be held liable to pay damages to the company.

Criminal liabilities

A director of a company may be held criminally liable in respect of actions taken over the company's assets prior to the bankruptcy of the company. The most important of these are where a company has:

- (a) misused assets in order to prejudice its creditors – article 216 of the Bankruptcy Act;
- (b) taken imprudent actions to delay the declaration of bankruptcy – article 217 of the Bankruptcy Act; and
- (c) disguised its financial distress or its insolvency state in order to obtain financing (unlawful recourse to lending) – article 218 of the Bankruptcy Act.

The receivers and the liquidators of a company are also subject to these potential liabilities.

The Law Decree no. 78/2010 introduced exemptions from criminal liability in relation to lenders providing finance to distressed businesses, as long as the finance is provided in the context of a formal restructuring. In particular, the legislative changes provided certain exemptions from criminal liability in relation to the conduct described above under (a) (made for the purpose of preferring certain creditors to the detriment of other creditors) and (b) when carried out in the context of either debt restructuring arrangements under Article 182 *bis*, a Pre-bankruptcy Creditors' Composition, or out of court reorganisation plans under Article 67(3)(d).

The 2012 reform has introduced a new criminal sanction through article 236(a) (false statements and reports) applicable to those experts who omit to comply with the legal requirements mandated by article 67 paragraph 3(d), article 161 paragraph six and article 182 *bis*.

Lastly, with Law Decree 83/2015 the provision set forth under article 236 of the Bankruptcy Act has been amended and, as of 27 June 2015, the criminal sanction set forth therein can be applied also to new forms of debt restructuring arrangements with financial institutions and also in relation to standstill arrangements with the same entities.

Claw-back

Any act of a company, which is subsequently declared bankrupt (including any payments and the granting of security), may be clawed back by the court at the request of the receiver if carried out during a "risk period". The amendments to the Bankruptcy

Act have halved all of the claw-back periods. Such claw-back periods now amount to:

- (a) 1 year, with respect to transactions at an undervalue, or involving unusual means of payment (e.g. payment in kind) or security taken after the creation of the secured obligations, whereby the creditor must prove his lack of knowledge of the state of insolvency of the relevant entity in order to rebut any claw-back action;
- (b) 6 months with respect to security granted in order to secure a debt due and payable, whereby the creditor must prove his lack of knowledge of the state of insolvency of the relevant entity in order to rebut any claw-back action; and
- (c) 6 months with respect to payments of due and payable obligations, transactions at arm's length or security taken simultaneously to the creation of the secured obligations, whereby the receiver must prove that the creditor was aware of the state of insolvency of the relevant entity in order to enforce any claw-back action.

It is important to underline the difference between the situations in (a) and (b) above, whereby, in order to rebut any claw-back actions, the third party must demonstrate that he did not know that the debtor was insolvent; whereas in (c) it is the receiver that must prove that the other party knew the debtor was insolvent.

Furthermore, with regard to (a) above, the amendments to the Bankruptcy Law expressly set out when a transaction is deemed to be at undervalue, i.e. when the asset or obligation given or undertaken exceeds by one quarter the value of the consideration received by the debtor. The amendments to the Bankruptcy Law have, therefore, incorporated the "one quarter

principle" established by the Italian case law in order to limit any discretion of the trustee or the courts.

The amendments to the Bankruptcy Law have also established several exemptions to the application of the claw-back regime.

Under the new regime, a claw-back action cannot be filed in relation to:

- (a) payments made for assets and services within the ordinary course of business;
- (b) payments made into a bank current account, provided that such payments have not considerably reduced over a period of time the indebtedness of the bankrupt *vis-à-vis* the account holding bank;
- (c) the sale of real estate for residential purposes at arm's length, to the extent that such real estate is used as a main house by the buyer or his/her relatives and relatives-in-law;
- (d) transactions involving payments as well as security taken over the assets of the debtor, provided that such payments were made or security was taken in order to implement a plan which is deemed "suitable" to redress the indebtedness of the debtor and to readjust its financial situation;
- (e) transactions involving payments as well as security taken over the assets of the debtor, provided that such payments were made or security was taken so as to implement a Pre-bankruptcy Creditors' Composition, Controlled Management or the Debt Restructuring Arrangements (see paragraphs above);
- (f) payments of the amounts due for the services carried out by the employees and the independent contractors of the debtor entity; and

(g) payments of due and payable obligations in order to obtain services which are auxiliary to the access to the Controlled Management.

As evidenced above, the exemption contemplated under (d) is of particular interest. The reference to the expert's report must be interpreted as a report assessing the reasonableness of the plan which is deemed "suitable" to redress the indebtedness of the debtor and to readjust its financial situation, e.g. in the case of a refinancing plan (where there is no leveraged merger buy-out), the said report must assess the reasonableness of the plan as far as the reimbursement of the refinancing is concerned.

Esdebitazione

An important measure introduced by the reforms is the discharge of some debts in cases where the debtor has behaved well. The discharge is available only if the debtor is an individual and where some of the creditors have not been satisfied. The debtor may benefit from this procedure if:

- he has cooperated with the administrative bodies in the proceedings;
- he has not caused delay in the proceedings;
- he has complied with the order to provide the receiver with the information concerning the relationships involved in the bankruptcy;
- he has not benefited from the same procedure in the last ten years;
- he has not committed criminal offences such as the misappropriation of assets in order to prejudice creditors or the reporting of non-existent liabilities; causing or worsening the insolvency in order to make difficult the reconstruction of the assets and business, unlawful financing;

- he has not been convicted of fraudulent bankruptcy or offences against the economy, industry or commerce if there has been no rehabilitation for these crimes.

Security

Taking a security interest over an asset does not involve a transfer in ownership. Transferring an asset for the purposes of creating something analogous to a security interest is generally forbidden by law and any agreement to such an end is, in principle, null and void.

Security cannot be taken over leasehold interests, and floating charges are not possible (although a "*privilegio speciale*" – a special type of pledge not requiring delivery – may be analogous in some respects). The concept of a trust is not fully recognised by Italian law.

Security usually ranks in order of creation. Where registration is required, security will rank in order of registration. Certain creditors, e.g. tax and social security authorities are preferred by operation of law.

Enforcement of security – in general and in relation to bankruptcy

Other than in respect of pledges (where the parties can agree on specific procedures for enforcement), enforcement of security is normally a court-supervised procedure, and is lengthy and bureaucratic.

The enforcement of a mortgage can only be requested on the basis of an enforceable right for a definite, liquidated and matured amount. Enforceable rights include enforceable judgments, bills of exchange and other credit instruments. Notice of the right to enforce must be served on the debtor

together with the warning to fulfil its obligation within a term not shorter than ten days. Thereafter the creditor may request the sale of the charged asset. This sale is normally carried out by the court or a notary in accordance with the Italian Code of Civil Procedure.

Pledges can be enforced during bankruptcy proceedings provided the secured creditor has filed its statement of claim with the court and the court has ascertained its secured creditor status. Thereafter, the secured creditor must request the authorisation of the judge in charge of the bankruptcy, who will establish the manner and timing of the sale. The judge may also authorise the official receiver to keep the pledged assets and to pay the secured creditors.

Security over real estate cannot be enforced independently of the general liquidation of the assets. The sale of the relevant real estate is made by the receiver, although the secured creditor has a priority right over the proceeds from the sale.

Guarantees

Guarantees are available in most circumstances. However, corporate benefit must be established if a company is granting a guarantee. This may take two different forms:

- (a) the act must not be *ultra vires*, i.e. must be within the objects of the company as stated in the by-laws; and
- (b) any director and any shareholder having an interest in conflict with the interest of the company is not allowed to vote in the meeting on the issue.

These issues must be addressed and can effectively limit the amount that can be guaranteed (e.g. to the net worth of the guarantor). It can be particularly difficult to establish corporate benefit for upstream guarantees. However, some case law has recognised the existence of a “group interest” which goes beyond the interest of the single company. Such “group interest” can justify the granting of upstream guarantees, provided that the grantor obtains some benefit, even if indirectly.

Priorities

In a bankruptcy, the ranking of creditors is regulated by the Bankruptcy Act and the Civil Code. The order is, in summary:

- (a) claims associated with the bankruptcy proceedings as set out in specific legislation (the recent reforms extended this category by including rescue finance);
- (b) debts secured by a pledge or mortgage;
- (c) debts having a general priority such as claims for salaries, social contributions, taxes; then
- (d) unsecured debts.

LUXEMBOURG



LUXEMBOURG

Key Elements:

- Financial Collateral Arrangements
- Considers the two main types of insolvency procedure:
 - Bankruptcy (*faillite*)
 - Controlled management (*gestion contrôlée*)
- The effects of insolvency proceedings on the rights of secured creditors
- Guarantees
- Ranking of creditors' claims
- Lender liability issues
- Directors' duties
- Recognition of foreign proceedings outside of the EU

Financial Collateral Arrangements: disapplication of general rules

The law dated 5 August 2005 on financial collateral arrangements, as amended (the “Financial Collateral Law”), disapplies the provisions of Luxembourg and foreign insolvency proceedings (including controlled management (*gestion contrôlée*) and bankruptcy proceedings (*faillite*)), in relation to financial collateral arrangements. This concerns pledges and transfers of ownership for security purposes relating to financial instruments (including securities, shares, etc.) and claims (including receivables and bank account balances), and repurchase agreements relating to any type of assets, regardless of the status of the parties to the financial collateral arrangements (i.e., none of them needs to be a financial institution). Equally, netting arrangements are fully insolvency remote.

In particular, financial collateral arrangements can be enforced even after the opening of insolvency proceedings of the collateral giver.

This applies not only to Luxembourg financial collateral arrangements entered into by Luxembourg or non-Luxembourg collateral providers, but also (subject to certain additional conditions) to equivalent foreign arrangements entered into by Luxembourg debtors.

General: procedures

The standard insolvency procedure for commercial companies is bankruptcy proceedings (*faillite*).

In addition, a controlled management procedure (*gestion contrôlée*) exists although is rarely used in practice.

Other types of proceedings are the suspension of payments (*sursis de paiement*) and the pre-bankruptcy composition arrangements with creditors (*concordat préventif de faillite*) which will not be analysed hereafter.

Specific insolvency procedures (such as for credit institutions, insurance undertakings or investment funds) are not analysed herein.

Controlled management (*gestion contrôlée*)

Controlled management proceedings (*gestion contrôlée*) can be opened only upon the application of a commercial debtor if such person establishes that its commercial creditworthiness is tainted or that the integral performance of its obligations is at risk and if it can show that the controlled management (*gestion contrôlée*) may allow it to reorganise its business and to return to a normal

activity, or that such procedure will ensure a better realisation of its assets.

The procedure is subject to two different phases. During a first phase, while the management of the company stays in place, the company will in principle not be able to take any measures regarding its assets (in particular any measures of disposal) without the consent of a supervising magistrate appointed by the court. During this phase, the rights of creditors (including secured creditors except where specific laws provide differently) will be frozen. The approval of the appointed supervising magistrate will be required for all acts to be carried out by the debtor.

During a second phase, and following the nomination of a commissioner (*commissaire*), the approval of the commissioner will be required for either all or certain categories of decisions (as determined by the appointing judgment). The rights of creditors will continue to be frozen (as above). The commissioner draws up a reorganisation plan or a plan for distribution, which is subject to approval by a majority of creditors in number and representing with their claims, which are not challenged by the commissioner, more than half in value of the debtor's liabilities.

It must then be approved by the court before becoming compulsory for the debtor and all its creditors.

Controlled management proceedings (*gestion contrôlée*) are excluded: (i) after bankruptcy proceedings (*faillite*) have been opened against the applicant; (ii) if the court considers that such measures would not have the purported effect; or (iii) if the court becomes convinced during the proceedings that the applicant has in fact stopped being able to make payments (in which case bankruptcy proceedings (*faillite*) may be opened immediately).

Bankruptcy proceedings (*faillite*)

Bankruptcy proceedings (*faillite*) can be opened upon the application of either the bankrupt company itself, upon application of any creditor, or upon an ex officio decision of the commercial court. The conditions for the opening of bankruptcy proceedings (*faillite*) are the cessation of payments (*cessation des paiements*) and the loss of commercial creditworthiness (*ébranlement du crédit commercial*). In addition, the failure of controlled management (*gestion contrôlée*) proceedings may also constitute grounds for opening bankruptcy proceedings (*faillite*).

As of the day of the opening judgment, the company's statutory officers (such as the board of directors) and any agents are divested of all powers to represent the company. The only legal representative of the company will be the bankruptcy receiver (*curateur*) who will be the only person entitled to take any decisions in relation to the assets. The bankruptcy receiver (*curateur*) is appointed by the Luxembourg commercial court.

As of the day of the opening judgment of the bankruptcy proceedings (*faillite*), all unsecured creditors have to file their proof of claims (*déclaration de créance*) with the clerk of the commercial court. Secured creditors are not obliged to file their proof of claims but they will have to file their proof of claims if their claims exceed the value of the collateral subject to their security interests and they want to claim for the residual amount. There is no fixed duration for the bankruptcy proceedings (*faillite*), which will in normal circumstances last until such time as all claims have been verified, all assets have been realised, and distributions have been made to the creditors.

Counterparty's ability to exercise rights of termination under a contract with the debtor

The controlled management procedure (*gestion contrôlée*) provides in principle for the freezing of enforcement actions against the debtor during the establishment and until the adoption of the restructuring or liquidation plan or the rejection of the request. Termination clauses, declarations of default and subsequent acceleration are not effective against the debtor and do not prevent operation of the restructuring or liquidation plan. If and to the extent required to enforce a financial collateral arrangement (including close-out netting mechanisms), termination clauses, declarations of default and subsequent acceleration clauses would however be effective.

In contrast, when bankruptcy proceedings (*faillite*) are opened, and this is by far the more common situation, clauses for early termination, acceleration and penalties due to the opening of bankruptcy proceedings are valid and enforceable. Furthermore, the opening of bankruptcy proceedings (*faillite*) automatically accelerates all debts which are not yet due (there may be a discount for any debt not bearing interest and not due for a term of more than one year at the date of opening of bankruptcy proceedings (*faillite*)).

Security & proprietary rights

The Financial Collateral Law disapplies the provisions of Luxembourg and foreign insolvency proceedings in relation to financial collateral arrangements.

As regards other types of security, for example mortgages, during a controlled management procedure (*gestion contrôlée*),

the rights of secured creditors, privileged or not, are frozen until a final decision has been taken by the court, except in limited circumstances where specific laws maintain enforceability.

Furthermore, as soon as a controlled management procedure (*gestion contrôlée*) has been opened, even if the debtor keeps its proprietary rights and the management of its assets, it needs to be authorised by the supervising magistrate (*juge-commissaire*) and, after his appointment, the commissioner for a vast range of actions relating to its business, like selling goods (chattels and real estate), borrowing or lending monies, paying creditors and granting pledges or assignment of claims (the exact scope of which is determined by the opening judgment).

Reservation of title

A doubt may arise for contracts containing a reservation of title clause: bankruptcy law (*faillite*) has made such clauses valid and enforceable, but given the special scope and aim of the controlled management (*gestion contrôlée*) procedure, it is doubtful whether the same rule will apply or if the special claim introduced by that law would be considered an enforcement action which is suspended until the end of the controlled management proceedings (*gestion contrôlée*). Further analysis would be required with respect to specific types of contracts.

Guarantees

A bankruptcy receiver (*curateur*) may have an interest in challenging guarantees granted by the insolvent company (in particular if the guarantee is secured).

Guarantees entered into during the hardening period (i.e. the period preceding the opening of bankruptcy proceedings (*faillite*) by a maximum of six months (and up to ten days in certain

circumstances)) could be challenged if such guarantee was considered to be a gratuitous act or an act at undervalue or if the beneficiary of the guarantee had knowledge of the guarantor's stoppage of payments.

Hardening periods

Security interests, other than those governed by the Financial Collateral Law, may be challenged if they are granted during the hardening period (i.e. the period preceding the actual opening of bankruptcy proceedings of the grantor (*faillite*) by a maximum of six months (and up to ten days in certain circumstances)). If the security is successfully challenged it is unenforceable. Where security has been enforced, such enforcement may be undone.

One ground of voidness is the creation of security for pre-existing debt during the hardening period (for instance, the creation of a new mortgage or pledge) by the failed debtor.

Luxembourg law provides for the unwinding of all payments and transactions for consideration where the party to the transaction was aware that the debtor stopped payments, if they took place during the hardening period.

Security interests governed by the Financial Collateral Law shall not be declared invalid or void on the sole basis that they have come into existence on the day of commencement of winding-up proceedings, but prior to the order making that commencement, or if they have been granted during the hardening period.

Security may be voided if there was a fraud on the creditors of the company regardless of the date.

Priority

There are complex rules on priority in bankruptcy. It is generally considered that certain creditors having general rights of preference (such as preference rights for judiciary fees (including the fees and costs of receiver/liquidator), unpaid salaries, and various tax, excise and social security contributions) may rank ahead of creditors having a security interest over certain assets (in particular if the enforcement is not done by the creditor himself but by a third party such as the bankruptcy receiver (*curateur*)).

According to the Financial Collateral Law, these rules do not apply to financial collateral arrangements which will be given priority even in bankruptcy.

Lender liability

Lenders can be held liable if they have continued to lend in circumstances where the debtor is already in a suspension of payments or its financial position has deteriorated to an irreversible state. The lender is therefore deemed to be adding to the debtor's liabilities and reducing the likelihood of it being rescued (in particular if the lender is considered to have created or allowed to be created a false appearance of creditworthiness).

Lenders can also be held liable if they revoke their commitment to lend funds to a debtor in an unexpected and abusive manner (for instance without giving notice or insufficient notice) thereby reducing the likelihood of the debtor being able to pursue its business by getting the necessary financial means. In addition, liability may arise where the lender is acting as shadow director.

Directors' duties

Directors are liable towards the company for any wrongdoing or negligence in the management of the company. They are furthermore liable towards third parties as well as towards the company for any losses suffered as a result of a violation of the company's articles or company law.

Directors may be criminally liable for any abuse of corporate assets they may have committed (Article 1500-11 of the company law). Other criminal offences such as *banqueroute* and *banqueroute frauduleuse* with respect to actions taken in the context of or having led to the bankruptcy of a company also exist. In particular, directors are obliged to file for bankruptcy within one month of cessation of payments.

Bankruptcy proceedings (*faillite*) may be extended personally to directors having made use of the company's assets for their personal purposes or pursued, for personal reasons, the activity of a company that inevitably leads to its bankruptcy or continued business operating at a loss. Additionally, the court can decide, upon petition by the bankruptcy receiver, that part or all of the company's debts shall be borne by those of the company's directors who are guilty of gross and qualified negligence, if, during the bankruptcy proceedings, the company's assets appear to be insufficient.

Recognition of foreign insolvency proceedings

Within the EU

The Recast Regulation applies, see first part of this note.

Outside of the EU

As a general principle, foreign insolvency proceedings regularly opened in another jurisdiction having the power to open insolvency proceedings on the basis of Luxembourg conflict of laws rules and not being a member state, are recognised directly without any specific formalities except to the extent such recognition would require local enforcement measures, in which case formal recognition needs to be sought from the Luxembourg courts. This would however not necessarily mean that foreign procedures (such as Chapter 11 procedures) opened over a Luxembourg entity would necessarily be recognised in Luxembourg.

THE NETHERLANDS



THE NETHERLANDS

Key Elements:

- Procedures for:
 - Bankruptcy
 - Suspension of payments
- Priority of payment and preferential creditors
- Directors' duties
- Lender liability
- Challenging antecedent transactions
- Set-off

Insolvency Regimes

Bankruptcy and suspension of payments

The Dutch Bankruptcy Act (“*Faillissementswet*”, the “Act”) entered into force on 1 September 1896 and has been amended several times since. At present, it contains three types of proceedings:

- (a) bankruptcy (*faillissement*);
- (b) suspension of payments (*surseance van betaling*); and
- (c) debt reorganisation for natural persons (*schuldsaneringsregeling natuurlijke personen*).

Special proceedings and provisions for the insolvency of insurance companies and credit institutions are provided for in the “*Faillissementswet*” in conjunction with the Financial Supervision Act (*Wet op het Financieel Toezicht*).

In November 2012, the Dutch Minister of Justice announced a modernisation of insolvency laws in The Netherlands, including

new possibilities of the restructuring and rescue of companies and bankruptcy fraud control. Since then, several preliminary drafts have been published or announced. With regard to the reorganisation of companies outside of insolvency proceedings, the plans include (i) a court-ordered ‘silent administration’, and (ii) a court-approved composition between the company and its creditors and shareholders. Following a judgment from the European Court of Justice, with respect to the rights of employees during or following a ‘silent-administration’, the legislation process of this draft bill has been put on hold. It is the expectation that the court approved composition will become effective during the course of 2021/2022.

Bankruptcy

Bankruptcy is a general attachment on (practically) all of the assets of a debtor, imposed by a judgment of the appropriate court (*rechtbank*) for the benefit of the insolvent debtor’s collective creditors. The objective of the bankruptcy is to provide for an equitable liquidation and distribution of (the proceeds of) the debtor’s assets among its creditors. In practice, however, bankruptcy proceedings serve as an important instrument for the reorganisation and continuation of businesses in financial distress.

According to the Act, bankruptcy proceedings can be opened in respect of any debtor, natural or legal person, regardless of whether he carries on a business, practises an independent profession or not. The Act also provides for the opening of a bankruptcy proceeding in respect of a commercial partnership (*vennootschap onder firma*). A commercial partnership does not have legal personality, but its partners are jointly and severally liable and its assets form a separate fund available only for recourse by the partnership’s creditors.

The Act does not provide for the consolidation of bankruptcy proceedings opened in respect of companies belonging to the same group. However, there are some examples of cases in which courts have allowed such consolidation.

If a bankruptcy proceeding is opened, the debtor loses the right to manage and dispose of his assets with retroactive effect from 00.00 hrs on the day the bankruptcy order was issued. The court appoints a receiver (*curator*) who is charged with the management and realisation of the debtor's assets (including by means of a transfer of (part of) the business as a going concern). The receiver acts under the general supervision of a supervisory judge (*rechter-commissaris*). For certain acts of the receiver, the law requires the (prior) authorisation of the supervisory judge, e.g. for conducting legal proceedings and for terminating employment and rental contracts.

Suspension of payments

Suspension of payments is a court-ordered general suspension of a debtor's payment obligations; its objective is to provide an instrument for the reorganisation and continuation of viable businesses in financial distress. It is available only at the request of the debtor and only has effect in respect of ordinary (non-secured and non-preferred) creditors. During the period for which the suspension of payments has been granted, creditors with non-preferential claims cannot take recourse in respect of the debtor's assets.

Despite several amendments made over the years to increase the effectiveness of the suspension of payments proceeding (e.g. the liberalisation of the conditions for the granting of a suspension of payments and the introduction of the possibility of a composition) it has in practice never become a satisfactory instrument for the reorganisation of businesses in financial

distress. Generally, it is nothing more than a first step towards bankruptcy. Although there have been examples of successful suspension of payments proceedings in the early 2000s, e.g. the reorganisations of Versatel, GTS Europe and UPC, as far as the reorganisation of businesses in financial distress is concerned, the bankruptcy proceeding in practice proves to be a more effective instrument than a suspension of payments.

Suspension of payments proceedings can be opened in respect of both natural persons carrying on a business or practising an independent profession and juristic persons. The suspension of payments may be granted by the court for a maximum period of one and a half years and may be prolonged at the request of the debtor (if necessary, more than once) up to a maximum of one and a half years.

As a result of the granting of a suspension of payments, the debtor can no longer manage and dispose over its assets without the co-operation or authorisation of a court appointed administrator (*bewindvoerder*). Likewise, the administrator cannot act without the co-operation or authorisation of the debtor. The suspension of payments order has retroactive effect from 00.00 hrs on the day it was issued. In a suspension of payments proceeding, the court will appoint a supervisory judge, whose role is limited to regulating certain procedural matters and advising the administrator upon his request.

Restructuring outside bankruptcy

Since the start of the credit crisis in 2007, there has been an increasing demand for a mechanism to implement contentious, complex and multi-jurisdictional restructurings. Under Dutch law, two possibilities have been presented in practice by Clifford Chance.

Firstly, a restructuring solution was successfully implemented through a court enforcement of a share pledge in the Schoeller Arca matter. It was the first Dutch court ruling in respect of a restructuring whereby an enforcement sale of a Dutch holding company is pre-agreed between a buyer, the company and its senior lenders, while its subordinated bridge lenders opposed the proposed sale. Since the Schoeller Arca judgment, more similar Dutch restructurings have been implemented by using the “Schoeller Arca route”. Secondly, where possible the Dutch market is using the English Scheme of Arrangement to implement restructurings. The enforceability of such Scheme in the Netherlands has not yet been tested or opposed to in a Dutch court. In the meantime, the Dutch restructuring practice is waiting for the implementation of the Dutch court approved composition, which is expected to be similar to the English Scheme of Arrangement and the US Chapter 11 proceedings. It is expected that the current draft proposal will become effective in 2021/2022.

Obligation to file for insolvency

There is no legal obligation for a debtor to file a bankruptcy petition or to apply for suspension of payments.

The test for insolvency

Bankruptcy

A debtor can be declared bankrupt if it has ceased to pay its debts. The court has relatively wide discretionary powers in assessing whether the debtor has ceased to pay its debts. The court may already have come to such a conclusion if there is more than one creditor and at least one matured debt remains unpaid. Bankruptcy proceedings may also be opened in the case of the debtor’s unwillingness to pay, not only in case of its inability to pay. Balance sheet insolvency is no separate ground for the opening of bankruptcy proceedings.

Suspension of payments

If the debtor, according to its application, anticipates that it will not be able to continue to meet its liabilities as they become due, the court immediately grants a provisional suspension of payments. The court may not grant the definite suspension of payments if (i) a qualified minority of creditors with non-preferential claims objects, (ii) there is well-founded fear that the debtor will prejudice the interests of creditors during the period of suspension of payments, or (iii) there is no prospect of the debtor being able to satisfy its creditors within a certain period of time. That the debtor must be able to satisfy its creditors does not mean that they must be paid in full. It suffices that creditors can be satisfied to some extent, for example by receiving a percentage of their claims within the framework of a composition.

Initiation of insolvency regimes Bankruptcy

The debtor, its creditor(s) or the Public Prosecutor (for reasons of public interest) may petition for the debtor’s bankruptcy by filing a request to the appropriate District Court. Furthermore, in a number of cases the court can open a bankruptcy proceeding following a suspension of payments proceeding.

Suspension of payments

Only the debtor itself can apply for a suspension of payments at the appropriate District Court, on the grounds that the debtor anticipates that it will not be able to continue to meet its liabilities as they become due.

Moratorium

Both in the bankruptcy and the suspension of payments proceedings, the court (and in case of a bankruptcy proceeding, also the supervisory judge) may grant a “cooling down” or “freezing” period (moratorium). During such period, creditors

with rights *in rem* (including rights of pledge and mortgage) cannot repossess or foreclose without prior approval from the court or the supervisory judge. The moratorium does not impose an obligation on financiers to continue to finance the debtor. Furthermore, rights of creditors against third parties are not affected by a moratorium.

A moratorium can be ordered for a maximum period of two months, which can be extended once by a maximum period of two months.

Rules governing priority of payment and preferential creditors

Bankruptcy

In a bankruptcy, creditors with insolvency claims are entitled to the proceeds of the realisation of the debtor's assets. Costs incurred within the framework of the realisation of the assets give rise to claims against the bankrupt estate; these claims have to be satisfied in priority to insolvency claims. Claims against the estate include the receiver's salary, fixed by the court on the basis of a generally accepted hourly rate, and debts incurred by the receiver in continuing the bankrupt debtor's business and/or during liquidation.

Often the proceeds of the realised assets are insufficient to satisfy all claims against the estate. In that case, the claims against the estate are satisfied in accordance with the same ranking that applies between insolvency claims.

Creditors with a right of pledge or mortgage are, in principle, not affected by claims against the estate. As a general rule, there is no apportionment of the general realisation costs over the proceeds of the assets subject to a right of pledge or mortgage.

Unsecured creditors with insolvency claims can only enforce their claims against the debtor in the manner prescribed by the Act, i.e. by submitting their claims to the receiver within the framework of the claims' validation procedure. Creditors with insolvency claims secured by a right of pledge or mortgage can enforce their rights as if a bankruptcy proceeding had not been opened.

The law attaches a priority in the realisation proceeds to certain categories of claims (preferential claims) and determines the ranking of these preferential claims. A claim can have priority in respect of the realisation proceeds of a particular asset (e.g. resulting from a security right or a right of retention) or in respect of the realisation proceeds of all of the debtor's assets (e.g. the claims of tax authorities).

As to the preferential claims in respect of a particular asset, as a general rule, secured claims have a higher ranking than other preferential claims in respect of that particular asset. An important exception to this rule is that, in respect of the proceeds of the realisation of inventory situated on the debtor's premises, the tax authority's preferential claim (in respect of certain taxes) has a higher ranking than a non-possessory right of pledge vested in such assets. A further exception to the above rule is that a right of retention may, in a particular case, have a higher ranking than a right of pledge or mortgage vested in the asset concerned.

Creditors can agree to a lower ranking of their claims. A contract between the creditor and the debtor may stipulate that the claim of the creditor is subordinated to all or to certain other claims of other creditors.

Shareholders have no right to any distribution of the proceeds within the framework of the proceeding as, under Dutch law, they are not creditors. Shareholders' loans are not subordinated by virtue of law.

Suspension of payments

The suspension of payments only affects non-preferential claims existing at the time of the opening of the proceedings. During the proceedings, these claims cannot be enforced against the debtor's assets and payment of these claims can only be made to all creditors in proportion to their claims.

Preferential claims (including claims secured by a right of pledge or mortgage) are not affected by the proceedings and can, therefore, be enforced against the debtor's assets. This also applies to claims against the estate, i.e. obligations incurred by the debtor with the cooperation or authorisation of the administrator after the opening of the proceedings (e.g. in connection with the continuation of the debtor's business).

Other unsecured creditor actions

The Dutch Code of Civil Proceedings provides for a means of pre-judgment attachment, which is referred to as a "conservatory attachment" (*conservatoir beslag*). With a conservatory attachment a creditor can secure payment by the debtor in anticipation of an enforceable judgment against the debtor. Once the proceedings on the merits result in an enforceable judgment against the debtor, the conservatory attachment becomes an attachment in execution by operation of law, i.e. the attached assets can then be executed.

During the period of attachment the transfer or encumbrance of the attached goods by the debtor has no legal effect vis-à-vis the party that levied the attachment, i.e. the party that levied the attachment can proceed with the attachment as if the attached

goods were not transferred or encumbered, unless the purchaser acted in good faith and has acquired possession of the attached goods. Furthermore, the withdrawal of the goods subject to the attachment will constitute an unlawful act and a criminal offence.

The nature of the conservatory attachment can be, amongst others, an attachment by garnishment (i.e. attachment of bank accounts), an attachment of shares or an attachment of assets or real estate.

As a result of the opening of bankruptcy proceedings in respect of the debtor, pre-bankruptcy attachments by creditors are lifted by operation of law and executions of assets included in the bankruptcy proceeding are automatically terminated. As a result of the opening of suspension of payments proceedings, only existing attachments levied by non-preferred creditors are lifted by operation of law; executions of assets included in the proceedings are not terminated but suspended.

Scope for majority voting and/or cram down of minority creditors

Bankruptcy

A bankruptcy proceeding does not always lead to the liquidation of the debtor's assets. The proceeding may also result in the reorganisation of debts by means of a composition. A composition can only be proposed by the debtor and, upon approval and confirmation by the court, only binds creditors with non-preferential claims (ordinary, non-secured and non-preferred creditors). Creditors with preferential claims are not bound by a composition unless they are willing to participate.

Only creditors with non-preferential claims have the right to vote on the proposed composition. A composition needs the approval of a normal majority of the (conditionally) admitted

creditors with non-preferential claims, representing at least half of the total amount of (conditionally) admitted non-preferential claims.

Upon request by the debtor or the receiver, the supervisory judge can decide to hold the proposed composition as approved, if (i) 3/4 of the (conditionally) admitted creditors approved the composition, and (ii) the rejection of the composition is caused by one or more creditors that, taking all circumstances in consideration (especially the percentage of its claim that such creditor would receive were the estate to be liquidated and distributed) reasonably could not have voted against the composition.

Suspension of payments

In a suspension of payments, the debtor also has the option of proposing a composition. A composition only binds the creditors with non-preferential claims. The regulation of this composition (*grosso modo*) corresponds with the regulation of the composition in a bankruptcy proceeding.

Courts' responsiveness to creditors

Bankruptcy

The court may appoint a creditors' committee, which in practice, however, is exceptional. If a creditors' committee has been appointed, the receiver is obliged to provide it with all requested information concerning the bankruptcy. In certain cases, the receiver is obliged to seek the advice of the creditors' committee. The receiver, however, is not bound by the committee's advice.

The Act also provides for meetings of creditors to be convened. With regard to certain matters, the law prescribes a meeting of creditors. Decisions concerning the admission of claims must, for example, be taken in a meeting of creditors, as well as the

decision to continue the company's business if a composition has not been offered or has been rejected.

Creditors may submit a petition to the supervisory judge requesting the supervisory judge to order the receiver either to perform certain acts or to refrain from performing certain intended acts. Furthermore, a creditor may request the court to dismiss the receiver.

Suspension of payments

The influence of creditors in the proceeding is limited. The court is obliged to hear their views when deciding whether or not to definitively grant the suspension of payments; when a certain number of creditors object, the suspension of payments cannot be granted definitively. Any creditor can request the court to dismiss an administrator. Furthermore, any creditor can request the court to take the measures necessary to protect the interests of the creditors. Creditors may also request the court to terminate the suspension of payments.

In contrast with a bankruptcy proceeding, creditors do not have the option to request the supervisory judge to order the administrator to perform or refrain from performing certain acts.

Directors

The law imposes duties on the following persons:

- (a) Managing Directors (*bestuurders*); and
- (b) Supervisory Directors (*commissarissen*).

Directors' duties

The Managing Directors' duties are owed to the company on the basis of the Dutch Civil Code ("DCC") and the articles of association of such company and, as can be derived from such

duties owed to the company, to the shareholders and the employees of such company. Furthermore, duties are, to some extent, owed by the Managing Directors to certain third parties, in particular creditors and counterparties of the company.

The DCC states, in general wording, that “each Managing Director is required to properly execute the tasks entrusted to him”. The DCC does not specifically set out which Managing Directors’ duties exist under Dutch law. Specific tasks include (amongst others) taking decisions to manage the business, reporting and advising the general meeting of shareholders, keeping financial information up to date, filing annual reports and accounts and representing the company in respect of third parties.

Insolvency considerations for directors

The insolvency considerations that exist for Managing (and Supervisory) Directors would relate to any liability that such Directors might incur. Under Dutch law, the following categories of liability of Managing (and Supervisory) Directors can be distinguished:

Director’s liability towards the company

This form of liability results from mismanagement (*onbehoorlijk bestuur*). “Mismanagement” is to be defined as a seriously imputable failure to perform the task entrusted to the Managing Director. Such a claim will have to be instigated by the company, or by the receiver in bankruptcy.

The criteria for establishing mismanagement depends to a large extent on specific circumstances. In general, however, the reproach to be made against the Managing Directors needs to be very serious indeed. In order for a Managing Director to be held liable, he must have acted in a way that no sensible Managing Director would have acted under the same circumstances.

For instance, taking substantial financial risks on behalf of a company is not necessarily considered mismanagement. It is taking unnecessary, or unnecessarily large financial risks that might constitute mismanagement. Conversely, it is not taking great business risks in itself, but doing so without proper preparation or research, or engaging in financial transactions that by far exceed the financial capacities of the company that leads to liability.

The liability for mismanagement is in principle a collective liability; it attaches to all Managing Directors regardless of who actually took part in the improper act or omission. If a matter falls within the field of competence of more than one Managing Director, each of them is jointly and severally liable, except any Managing Director who can prove that the act or omission was not attributable to him and that he did not neglect to take measures to avert the consequences of such act or omission.

Managing Directors are only rarely held liable by the company for mismanagement. Usually the Managing Directors are protected against this form of liability by a discharge concerning the management activities of the preceding year granted by the general meeting of shareholders when it adopts the annual accounts for that year. Such discharge, however, only covers facts that are disclosed in the annual accounts or have been reported to the general meeting of shareholders before the annual accounts were adopted. The (board of) Managing Directors may therefore still be held liable for facts they did not disclose in the annual accounts or in the general meeting preceding the adoption of the annual accounts and the granting of the discharge. Moreover, a discharge granted by the general meeting of shareholders does not prevent the commencement of a claim in bankruptcy (see below).

Additionally, Managing Directors of a private limited company (*besloten vennootschap*) may be held liable collectively for dividend distributions that were carried out at a time when the Managing Directors knew (or ought to have known) that the company would not be able to continue to meet its due and payable liabilities.

Supervisory Directors may face liability when they fail to initiate steps against Managing Directors of the company, who are mismanaging, or fail to take measures when the (business of the) company is in disarray.

Directors' liability towards third parties

Annual accounts

Managing Directors are jointly and severally liable for loss suffered by third parties as a result of misrepresentations concerning the company's condition in the annual accounts, Managing Directors' report or interim figures published by the company. A Managing Director can exonerate himself by proving that he was not to blame for the relevant misrepresentation.

If the annual accounts misrepresent the financial condition of the company, the Supervisory Directors are jointly and severally liable with the Managing Directors for any damage suffered by third parties as a result thereof. Again, a Supervisory Director who proves that he was not to blame for any failure in his supervisory duties shall not be liable.

Pre-incorporation contracts

Any person or legal entity acting in the name of and on behalf of a company which is in the course of being incorporated will be liable for the performance of any obligations undertaken (unless expressly stipulated otherwise) until the company ratifies the act concerned after its incorporation.

The person or entity concerned will be jointly and severally liable with the company for damage if, after ratification of the act by the company, the company is unable to perform its obligations pursuant thereto and the person who contracted on behalf of the company could reasonably have known that the company could not perform such obligations. There is a presumption of knowledge if the company is declared bankrupt within one year of its incorporation.

Registration

After the incorporation of a company, its Managing Directors are jointly and severally liable for any legal acts by which the company is bound as long as its paid-up capital does not amount to the minimum share capital prescribed by law, the required minimum proportion of its issued share capital has not been paid up or the company has not been duly registered with the Commercial Register.

Tort

Managing Directors acting within the scope of their management activities may in certain exceptional circumstances also be held liable in tort. Normally, a Managing Director is deemed to act in the context of his regular duties and responsibilities, even if financially detrimental to third parties. In other words, the mere fact that a Managing Director takes action that causes financial harm to third parties is insufficient to create personal liability in tort towards these third parties. Only in circumstances where the Managing Director can be seriously reproached, i.e. where he is personally at fault, will he be exposed to liability.

This, *inter alia*, is the case where, at the time the company enters into an agreement with a third party, the Managing Director knew (or should have known) that the company would not be able to meet its obligations in due course, and no recourse would be

available to compensate for the resulting damages suffered by the other party. Liability in tort could also arise where a Managing Director wilfully prevents the company from performing its obligations towards a third party, when it is otherwise able to do so. Also, financial distributions to shareholders in violation of statutory requirements can lead to personal liability.

Liability following bankruptcy

General

In the event of a company's bankruptcy, the Managing (and Supervisory) Directors will be jointly and severally liable for all debts remaining unpaid after realisation of the company's assets if they have manifestly neglected to perform their duties properly and this is an important cause (but not necessarily the only cause) of the company's bankruptcy.

"Manifestly neglecting to perform their duties properly" should be interpreted as the making of a serious mistake which goes well beyond the limits of acceptable risk in the ordinary course of the business concerned.

Manifest improper performance is to be proven by the receiver. If, however, the Managing Directors have not complied with their obligations to keep the company's books or to publish the annual accounts on time, they are deemed (without proof of the contrary being allowed) to have neglected to perform their duties properly. In addition, it is then assumed that such inadequacies constitute an important factor and have contributed to the bankruptcy. This is a rebuttable presumption and the Managing Directors may exonerate themselves from personal liability if they can sufficiently demonstrate that an entirely different circumstance was the primary cause of the bankruptcy.

The above-mentioned liability is collectively borne by the Managing Directors. The Managing and Supervisory Directors are jointly and severally liable for the management and supervision of the company respectively. A discharge granted by the general meeting of shareholders to the Managing and/or Supervisory Directors does not prevent the commencement of a claim as set out above. However, an individual Managing or Supervisory Director may exonerate himself from this liability by proving that the act or omission was not attributable to him and that he did not neglect to take measures to avert the consequences of such act or omission. Finally, a Managing or Supervisory Director can only be held liable for manifest improper performance made in the period of three years prior to the bankruptcy of the company. For the avoidance of doubt, such period of three years does not apply to liability towards the company (see above in the general part of this section) and liability following tort (see above in tort section).

Liability towards tax and social security authorities

Legislation allows for the personal liability of Managing Directors for certain taxes (i.e. wage withholding tax and value added tax), social security premiums and compulsory pension premiums, in the case of "obvious mismanagement". If the Managing Directors have failed to notify the tax authorities that the company is unable to pay its debts on account of these taxes or premiums, immediately after such inability arises, statute provides that mismanagement is deemed to have occurred. In general, the remarks made regarding liability in the case of a company's bankruptcy apply here (see above).

Director disqualification

A Managing (and Supervisory) Director who engages in bankruptcy fraud or has committed mismanagement during the

period leading up to a bankruptcy can be disqualified by a Dutch court. Such disqualification needs to be requested in a separate litigation proceeding by either a receiver or the public prosecutor. The disqualified director may no longer manage a Dutch legal entity or be associated as a supervisory director for a maximum period of five years, unless the district court stipulates otherwise. Any appointment during that period will be void. Furthermore, a director's disqualification which has been declared irrevocable is registered on a public list kept by the Dutch Chamber of Commerce (*Kamer van Koophandel*). If a legal entity no longer has a Managing (or Supervisory) Director, the court may temporarily appoint one or more managing or supervisory directors.

Lender liability

A lender could be held liable as a shadow director under Dutch law if it is deemed to have determined company policy as if it were a director. Whilst this is theoretically possible, there is no case law in which a lender has indeed been held liable on this ground. This scenario is generally considered unlikely in relation to a bank or other lender.

Exceptional circumstances could give rise to claims by other creditors or by the receiver in the bankruptcy of the company vis-à-vis the lenders, based on tort. Whether or not the lenders' conduct can be qualified as unlawful depends on all circumstances of the case concerned. Based on case law of the Dutch Supreme Court, the lenders' conduct can be regarded as unlawful especially if the lenders have obtained security over all (or a substantial part) of the debtor's assets, have participated in the keeping up of a semblance of creditworthiness of the debtor, and have not sufficiently taken into account the interests of other creditors whose recourse possibilities have been diminished or have become illusive as a result thereof.

If the lenders' conduct falls within the scope of the statutory provisions on voidable preference (see section below), this also could give rise to a claim in tort of the debtor's creditors whose recourse possibilities have been diminished as a result thereof, or to a claim in tort of the receiver in the bankruptcy of the debtor. A claim in tort can be used as an alternative for an action based on voidable preference.

Voidable preference

Under Dutch law, if certain requirements are met, the receiver (or, outside bankruptcy, any creditor) has the right to nullify a transaction entered into by the insolvent debtor with a third party on the basis of article 42 of the Act: voidable preference (*actio Pauliana*). The consequences of this are that the receiver can take recourse against the relevant assets as if the voided transaction had not taken place, for at most an amount equivalent to the actual disadvantage to other creditors.

Voluntary transactions

The following requirements have to be met to ensure a successful challenge of a transaction entered into by the debtor on a voluntary basis (i.e. in the absence of a legal or contractual obligation):

- (a) the transaction was prejudicial to the recourse possibilities of the debtor's creditors; and
- (b) both the debtor and its contracting party knew or ought to have known at the time of the transaction that such prejudicial effect would arise. If the debtor receives no consideration for the transaction, only the knowledge of the debtor itself needs to be proved. The Supreme Court has ruled that it is not sufficient for the receiver (or, outside insolvency, any creditor) bringing the *actio Pauliana* to argue that the contracting parties knew or ought to have known of

the possibility that the transaction could be prejudicial to the debtor's creditors.

The burden of proof of the above-mentioned elements rests upon the receiver, although a reversal in respect of the "knowledge" requirement is provided in law if the voluntary transaction took place less than one year before the debtor was declared bankrupt in respect of certain categories of "suspect" transactions listed in the Act.

Such suspect transactions include, *inter alia*: (i) transactions by the debtor which are conducted at an "undervalue"; (ii) transactions between the debtor and a group company; (iii) transactions between the debtor and a legal entity where the same legal entity holds (directly or indirectly) at least 50% of the issued share capital both in the debtor and the legal entity; and (iv) the paying of or the granting of security for a non-matured debt.

Involuntary transactions (transactions pursuant to a pre-existing statutory or contractual obligation)

On the basis of article 47 of the Act, the receiver also has the power to nullify any transaction performed by the debtor pursuant to a pre-existing statutory or contractual obligation in the event that:

- (a) the counterparty knew that a petition for the debtor's bankruptcy had been filed with the court; or
- (b) the transaction resulted from concerted action of the debtor and its counterparty, aimed at preferring the latter to the detriment of the debtor's other creditors.

"Hardening" period

The power to invoke the *actio Pauliana* as discussed above is not limited to transactions executed within a certain period

before the commencement of the bankruptcy proceeding. There is no real "hardening period" for the relevant transactions. Voidable preference has a limitation period of three years from the date on which the receiver discovered the detrimental effect of the transaction.

Recharacterisation/liability for debts at subsidiary level

Recharacterisation

Intra-group loan transactions are, for civil law purposes, generally not susceptible to recharacterisation. However, payments under such loans by the company may be challenged by the receiver (or, outside bankruptcy, any creditor) in the same manner as discussed in the sections above which consider voidable preferences and tort.

Liability for the debts of a subsidiary

General

Normally, a shareholder is not liable for debts of the company in which it holds shares, other than through the paid-up share capital (to the extent not yet paid up) in respect of shares held by it.

However, there are exceptions to this principle. Many of the issues dealt with below depend significantly upon factual circumstances.

Specific issues

Assumed unity

In a situation of assumed unity (*vereenzelviging*), the legal distinction between two separate corporate entities (such as the shareholder of a company and the company itself) will be ignored and the corporate entity and its shareholder will be deemed to be one and the same person. This may result in a sharing of liabilities (i.e. both are liable) and making available the

joint assets as objects of recourse (i.e. the assets of both are available for recourse).

If such unity is assumed, liability is necessarily shared. This situation is, however, rarely held to be applicable. The concept of assumed unity is strictly based on case law. In principle, the creditor will have to show that the corporate identity of a company was abused to the detriment of that creditor or creditors in general.

Breakthrough of liability (piercing the corporate veil)

General

Liability of another entity can also occur without the assumption of unity (set out above). The “sharing of liabilities” is then called “breakthrough of liability” (*doorbraak van aansprakelijkheid*) or “piercing the corporate veil”.

A shareholder may be held jointly liable with the debtor-company for (part of) a specific claim of a creditor of such debtor company. Such a breakthrough can occur as a consequence of tort (*onrechtmatige daad*) of the parent company, or on limited other grounds as explained below.

The creditor, in this situation, does not have to prove that the distinction of identity of the companies is abused (see above), but instead has to prove that a tort has been committed. This can be based on, among other things, a “duty of care” on the part of the parent company. This duty of care arises when the parent company is actively involved in (in fact: has taken over) the (financial) management of the subsidiary and the parent company knows or should have known that its involvement with the debtor’s management would prejudice creditors’ rights. If such (active) involvement is established, and a number of additional conditions are met, liability may exist regarding acts

detrimental to the subsidiary’s creditors. Additional circumstances could be:

- unreasonably substantial distribution(s) of profits/dividends to the sole shareholder;
- selective payment of the shareholder as a creditor; or
- creating comfort on the part of the creditors or business partners of the company which causes them to continue delivering goods to the company, which remain unpaid, etc.

A claim against a parent company for debts of a subsidiary would, therefore, normally involve a claim in tort. Any such liability would co-exist with that of the subsidiary company.

Tort: semblance of creditworthiness

Liability may arise because of the creation by the parent company of an unjustified semblance of creditworthiness of the subsidiary. This could for instance be the case when all (or a substantial part) of the assets in the subsidiary have been transferred to itself, thereby making the subsidiary insolvent for any claims from new creditors who entered into transactions with the company on the basis of that (assumed) creditworthiness. In such cases, liability can be established particularly when the parent company has (i) factual control or the power to intervene, and (ii) knew or should have known that the new creditors would be prejudiced because of an absence of recourse.

Tort: asset-stripping

Liability may be established when the parent company has acquired basically all the assets of a subsidiary. Liability can also arise when a company has made irregular dividend distributions or payments to the parent company, or when the parent company, based on factual indications, “should have reckoned

with the serious possibility that the subsidiary would experience such a shortage that other creditors would be prejudiced”.

Set-off

Set-off outside bankruptcy

Outside bankruptcy, two parties that are each other’s mutual creditor and debtor can, by means of a declaration to the other party, in principle set off their mutual claims up to the amount which they have in common. The following requirements will then apply:

- (a) the parties have to be mutual creditor and debtor to each other;
- (b) the claims should correspond to each other (i.e. the debtor should have the right to settle its debt with its claim);
- (c) the party invoking set-off is entitled to pay its debt (e.g. the debt has matured or may be prepaid); and
- (d) the counter-claim of the party invoking set-off is enforceable.

These requirements, however, are of a non-mandatory nature; the parties may agree otherwise.

Set-off in bankruptcy

Under the Act, the creditor of an insolvent debtor may invoke its right of set-off provided that his claim and his debt:

- (a) date from before the date of the insolvency; or
- (b) result from (one or more) transactions entered into with the insolvent debtor prior to the date of insolvency.

The requirements under (a) or (b) apply to both the claim and the debt. In other words, the cross claims must have pre-insolvency roots. Because the Act presupposes that each

creditor of an insolvent debtor may regard his debt as security for the payment of his claim, it may be assumed that all contractual set-off arrangements can be enforced against a receiver, provided that the claim and counter-claim have a pre-insolvency basis. The same applies when the insolvent party is in suspension of payments.

Payments credited to a bank account of the bank’s insolvent client after the bankruptcy date do not reduce that client’s indebtedness to the bank, unless the bank had a right of pledge over the client’s claim *vis-à-vis* a third party, which was paid into the client’s bank account. The same applies if the bank, prior to the client’s insolvency, knew that the bankruptcy of its client was to be expected at the time of crediting the bank account.

Neither the court nor the receiver is required by law to apply set-off *ex officio*, i.e. the creditor of the bankrupt company is required to invoke set-off itself in order for set-off to operate.

Recognition of foreign insolvency proceedings

Within the scope of the EU Insolvency Regulation

Under the Recast Regulation, recognition in the Netherlands of foreign insolvency proceedings (listed in the Recast Regulation) would be automatic.

Outside the scope of the EU Insolvency Regulation

To what extent foreign insolvency proceedings of debtors incorporated outside the European Union (or in Denmark) are recognised in The Netherlands was, for a long time, unclear, until recently. It appears from Supreme Court case law, save international treaty provisions to the contrary, that foreign insolvency proceedings, in principle, only have territorial effect.

A foreign insolvency proceedings judgment will (only) be recognized and is enforceable after a separate recognition proceeding and if the judgment complies with Dutch international private law.

The Dutch Supreme Court formulated certain conditions for the recognition of foreign judgments in the Netherlands; (i) the jurisdiction of the judge who rendered the decision is based on a ground of jurisdiction that is generally acceptable by international standards; (ii) the foreign decision has been concluded in legal proceedings that meet the requirements of a proper judicial procedure that provides sufficient safeguards and (iii) the recognition of the foreign decision is not contrary to Dutch public policy.

This means, first of all, that the foreign general attachment of the insolvent debtor's assets (or similar effects, such as the transfer of the estate to a receiver in bankruptcy) does not include the assets of the debtor that are situated in the Netherlands.

Furthermore, in principle the legal effects of insolvency proceedings commenced under foreign insolvency laws cannot be invoked in the Netherlands.

In its decision of 13 September 2013, regarding the insolvency of the Russian oil company Yukos, the Dutch Supreme Court provided some (more) clarity on the extent to which foreign insolvency proceedings and the insolvency practitioners appointed in them are recognised in the Netherlands. The Supreme Court confirmed its long-standing adherence to the territoriality principle, but at the same time mitigated the consequences thereof.

The Dutch Supreme Court held that, insofar as an international regulation that is binding on the Netherlands does not determine otherwise, an insolvency proceeding opened in another State has territorial effect. According to the court, this entails that the legal effects of an insolvency proceeding under the laws of the State where the proceeding has been opened (*lex concursus*) cannot be invoked in the Netherlands insofar as that would result in unpaid creditors no longer being able to take recourse – either during or after the insolvency proceeding – against the assets of the debtor that are situated in the Netherlands. The court also decided that other legal effects attached to insolvency proceedings under the *lex concursus*, including the powers of the insolvency practitioner to manage and dispose of the debtor's assets, are in principle recognised and given effect to in the Netherlands.

This decision was helpful, as it provided clarity in respect of what had been a controversial issue up to that point, i.e. the question as to whether a foreign insolvency practitioner can sell assets of the debtor that are situated in the Netherlands.

In its Yukos judgement of 2013, the Supreme Court reconfirmed its position that creditors can continue to take recourse against the debtor's Dutch assets, notwithstanding the fact that insolvency proceedings were opened abroad (unless the European Insolvency Regulation applies).

One of the main principles of international insolvency law of the Netherlands is that, as far as insolvency proceedings commenced in the Netherlands are concerned, the Netherlands proceedings have “universal effect”, which (*inter alia*) means that they aspire to comprise all assets of the insolvent debtor, including those situated abroad.

POLAND



POLAND

Key Elements:

- Single bankruptcy proceeding
- Separate restructuring proceedings
- Ranking of claims
- Directors' duties
- Antecedent transactions

Reform of Polish Insolvency Law

With effect from 1 January 2016, a significant reform of Polish insolvency law was implemented under the new restructuring law of 15 May 2015 (the "Restructuring Law").

The reform comprises:

- the introduction of four new restructuring procedures (in lieu of the previous "recovery proceeding"), allowing the restructuring of a debtor's undertaking and preventing its bankruptcy, and
- major amendments to the Bankruptcy and Recovery Law of 28 February 2003 (the "Bankruptcy Law") in order to streamline "classic" bankruptcy proceedings, reduce unnecessary formalities and expedite liquidation and to implement substantive changes (such as redefining bankruptcy tests, removing priority of tax and social insurance claims, implementing procedures facilitating pre-packs, extending hardening periods and improving protection against fraudulent conveyances, etc.).

Restructuring proceedings

Four types of restructuring proceedings

The Restructuring Law introduces four new types of restructuring procedures which aim to avoid bankruptcy of insolvent or distressed businesses by allowing them to restructure by way of an arrangement with their creditors. As a rule, restructuring proceedings will be initiated by the debtor (subject to certain exceptions) with a view to concluding an arrangement (composition³) with all the creditors whose claims are by law covered by the arrangement, once the consent of the required majority has been obtained. These are:

- arrangement approval proceedings, which are available to debtors who are able to reach an arrangement with the required majority of creditors without the court's involvement. This procedure may be used if the sum of disputed claims does not exceed 15% of the total claims. The debtor will continue to manage its estate, but will be required to appoint a licensed supervisor (*nadzorca układu*), who will: (i) prepare a restructuring plan, (ii) cooperate with the debtor in preparing the arrangement proposals, (iii) prepare a list of claims and a list of disputed claims, (iv) assist the debtor in collecting the votes of creditors, and (v) prepare a report containing a feasibility assessment of the arrangement. The debtor will present the restructuring plan to its creditors and collect their votes made in writing (no creditors' meeting is envisaged for the purposes of voting). Once the approving votes of the required majority have been obtained, the debtor will file a motion with the court for the acceptance of the arrangement. The filing should be made within three months of the appointment of the arrangement supervisor;

³ For example, also creditors will be entitled to file a petition for the commencement of remedial proceedings in relation to an insolvent legal person.

- accelerated arrangement proceedings, which are available only if the sum of disputed claims does not exceed 15% of the total claims⁴. The procedure is simplified (in comparison to “standard” arrangement proceedings), especially in relation to the allowance of claims carrying voting rights⁵. Once they have commenced, the debtor is not allowed to perform its obligations, whether pecuniary or non-pecuniary, to be covered by the arrangement (as a rule, this applies to any pre-commencement obligations, except for labour claims and claims secured *in rem* and to post-commencement interest). Execution proceedings relating to claims to be covered by the arrangement will be stayed by operation of law, and the judge-commissioner will be in a position to revoke attachments relating to the debtor’s assets. The court will notify creditors of a creditors’ meeting and the creditors will vote on the arrangement proposals during this meeting (as opposed to arrangement approval proceedings). The debtor’s estate (“arrangement estate”) will continue to be managed by the debtor-in-possession, but a court supervisor (*nadzorca sądowy*) will be appointed to supervise its management (however, the court may decide not to allow the debtor to manage the estate and appoint an administrator (*zarządca*) to assume management). The legislators intended that it should take approximately two months to complete accelerated arrangement proceedings (unless state aid is to be sought to support the restructuring);
- “standard” arrangement proceedings, which are available only if the sum of disputed claims exceeds 15% of the total claims⁶. For the interim period (between the filing and the opening of arrangement proceedings), the court will be able to secure the debtor’s estate by appointing a temporary court supervisor (*tymczasowy nadzorca sądowy*). Otherwise, the scope of protection against creditors afforded to the arrangement estate, the debtor’s right to manage the business and other effects of the initiation of the proceedings will be similar to those applicable to accelerated arrangement proceedings. However, because of the higher percentage of disputed claims, the allowance of claims is more formalized and time-consuming⁷, and there are further consequential differences (e.g. relating to the determination of the components of the estate and the impact of the proceedings on pending litigation and administrative proceedings). It is assumed that, depending on the number of pleas against the list of claims and their complexity, it should take approximately six to 10 months to complete “standard” arrangement proceedings; and
- remedial proceedings (*postępowanie sanacyjne*), which offer the broadest restructuring options and the broadest scope of protection of the debtor’s assets against creditors. The appointment of an administrator (*zarządca*) to manage the debtor’s estate (“remedial estate”) will be mandatory, unless the debtor’s involvement is necessary for successful

4 This threshold determines whether accelerated arrangement proceedings or “standard” arrangement proceedings can be initiated (the debtor is not in a position to freely choose between these two procedures).

5 In accelerated arrangement proceedings, creditors can only make reservations to a list of claims prepared by the court supervisor or administrator. Such a reservation only results in the relevant claim’s being transferred to the list of disputed claims, but does not have an impact on further steps in the proceedings (in particular, on the voting) as long as the sum of disputed claims falls within the threshold of 15%. In “standard” arrangement proceedings, creditors can file objections, which will be examined by the judge-commissioner.

6 See footnote 4.

7 See footnote 6.

restructuring and the debtor guarantees “proper management” (in which case the court may agree to the debtor’s retaining management over the whole or a part of the business within the ordinary scope of management). Remedial proceedings offer certain remedial options previously available only in liquidation proceedings under the Bankruptcy Law in order to facilitate thorough economic restructuring of an undertaking. For example, (i) the court can secure the remedial estate by appointing an interim court supervisor (*tymczasowy nadzorca sądowy*) or an interim administrator (*tymczasowy zarządca*) for the period between the filing and the opening of remedial proceedings, (ii) powers of attorney and commercial procuration (*prokura*) expire by operation of law, (iii) it is possible to adjust the employment level to the needs of the reorganised undertaking, (iv) the administrator is entitled to withdraw from executory contracts (“cherry-picking right”), (v) redundant assets can be sold free of encumbrances (as if they were sold in execution proceedings), etc.

Concurrent petitions for restructuring and bankruptcy

Restructuring cases are handled by commercial divisions of district courts. In the event of conflicting petitions for bankruptcy and for restructuring, the bankruptcy court will refrain from examining the bankruptcy petition until the restructuring court has examined the restructuring petition (and if the restructuring petition is accepted, it will not be possible to declare bankruptcy as long as restructuring proceedings are pending). In exceptional cases, if the withholding of the bankruptcy petition were to be contrary to the interest of all creditors, the

bankruptcy court may decide to consider both petitions at the same time, adjudicating the two petitions in a single order.

Arrangement and voting: creditor grouping

As a rule, restructuring proceedings and arrangement proposals (setting out the method of restructuring the debtor’s liabilities) can only be commenced by the debtor. However, after proceedings commence, alternative arrangement proposals can also be submitted by the council of creditors, the court supervisor (or the administrator), or a creditor (or group of creditors) holding at least 30% of the total claims⁸.

The arrangement may comprise a number of possible workouts, including debt rescheduling or reduction and debt for equity swaps. It may also comprise a liquidation plan.

The proposed arrangement will be voted at a creditors’ meeting (except in the case of arrangement approval proceedings, where the debtor collects votes in writing)⁹. Arrangement proposals may envisage that the creditors will be divided into groups (classes) based on the criteria of “common economic interests”.

In relation to all types of restructuring proceedings (other than arrangement approval proceedings), if creditors vote in a single group, the arrangement will be concluded if accepted by the majority of voting creditors who hold in aggregate at least two-thirds of the total sum of claims held by the voting creditors. If the creditors are split into separate groups (classes) based on the criteria of “common economic interests”, the arrangement will be concluded if accepted in each group by the

⁸ Certain creditors will be disregarded for this purpose, such as creditors related to the debtor (affiliates, relatives, etc.), or creditors who acquire the claim by way of assignment or endorsement after the commencement of restructuring proceedings.

⁹ General procedural rules empower the judge-commissioner to decide to collect votes without a meeting if it is difficult to organise it because of a significant number of creditors. However, there are doubts whether this exception applies to voting on an arrangement.

majority of voting creditors in the group whose claims in aggregate amount to at least two-thirds of the total sum of claims held by the voting group members. But even if there is no required majority in one or more of the groups of creditors, the arrangement will still be deemed concluded if (i) creditors representing in aggregate at least two-thirds of the total sum of claims held by the voting creditors have voted in favour of the arrangement, and (ii) the creditors from the dissenting group or groups would be satisfied through the arrangement to an extent which is not less “favourable” than in the case of bankruptcy.

Similar rules apply to the acceptance of an arrangement in arrangement approval proceedings where the debtor collects votes itself, except that the required majority is measured by reference to the total value of the claims held by the creditors entitled to vote (and not by reference to the value of the claims held by voting creditors).

An arrangement accepted by the required majority of creditors will be subject to approval by the court. The court will reject the arrangement if it violates the law or if it is obvious that the arrangement will not be performed. The court will also be entitled to reject the arrangement if it is blatantly detrimental to creditors who voted against it and submitted reservations.

“Partial” arrangements

In arrangement approval proceedings and accelerated arrangement proceedings¹⁰, the debtor may make arrangement proposals concerning only certain liabilities the restructuring of which has a fundamental impact on the continued functioning of its business. The selection of creditors to be affected by the

partial arrangement must be based on objective, unequivocal and economically justified criteria with respect to the legal relationships between the creditors and the debtor under which the arrangement proposals arise and must not be driven exclusively by the desire to eliminate dissenting creditors.

The following claims in particular may be claims covered by a “partial” arrangement (*układ częściowy*): (i) financing granted to the debtor in the forms of credit facilities, loans and other similar instruments, (ii) claims of fundamental importance to the operation of the debtor’s undertaking, in particular claims in respect of the supply of the most important materials or agreement to lease assets necessary for the business run by the debtor, (iii) claims secured by a mortgage, pledge, registered pledge or over objects and rights essential for the running of the debtor’s undertaking, or (iv) claims that are the largest in terms of value.

A significant novelty is the possibility of having a partial arrangement that relates to claims secured *in rem* without obtaining the secured creditor’s consent. It is permissible if the debtor offers such secured creditor either (i) full satisfaction of the principal claim together with all ancillary claims contemplated by the relevant agreement, on the date specified in the arrangement, even if the agreement has been terminated or expired, or (ii) satisfaction to an extent that is not worse than in the case of enforcement of the claim and ancillary claims against the relevant encumbered asset.

10 Exceptionally, in the course of remedial proceedings it is permitted to file a motion for the approval of a partial arrangement (or file a motion for the opening of accelerated arrangement proceedings contemplating a partial arrangement), provided that the creditors to be covered by the partial arrangement are not covered by it by operation of law and have not agreed to be covered by an arrangement in remedial proceedings.

Impact of restructuring proceedings on contracts

Any contractual provisions stipulating a modification or termination of a legal relationship with the debtor in the event of a filing or commencement of restructuring proceedings is void by operation of law. This also applies in relation to the filing of a petition for the approval of an arrangement as well as the issuing of a decision approving an arrangement in arrangement approval proceedings. This does not mean that it is impossible to terminate or modify a contract with the debtor after a filing is made or after the commencement of restructuring proceedings, but it is impossible to do so by reference to the filing or to the commencement of restructuring proceedings.

Upon the commencement of restructuring proceedings (other than arrangement approval proceedings), it is prohibited to terminate a tenancy or lease agreement relating to the premises in which the debtor's enterprise is operated, unless the council of creditors agrees otherwise. The same restriction applies to bank credit agreements (but only in relation to funds made available to the debtor before the commencement date)¹¹, leasing agreements, property insurances, bank account agreements, suretyships, licences granted to the debtor and guarantees and letters of credit issued before the commencement date. However, it should still be possible to terminate each of those contracts by reference to the debtor's failure to perform or another termination event occurring after the commencement date (subject to applicable contractual and statutory restrictions).

Further, only in respect of remedial proceedings does the administrator have the right to "cherry-pick" executory contracts (i.e., any mutual agreements (*umowy wzajemne*) which have not been performed in full or in part prior to the commencement of the remedial proceedings), subject to the judge-commissioner's consent.

The commencement of restructuring proceedings does not restrict the possibility of terminating master agreements relating to derivative transactions or futures and the sale of securities with an obligation to re-purchase (such as ISDA, GMRA or GMSLA). They can be terminated, subject to contractual provisions relating to the settlement of mutual claims upon termination, and close-out netting is permissible.

The Restructuring Law stipulates that the terms of agreements with the debtor which make it impossible or difficult to achieve the purposes of restructuring proceedings (other than arrangement approval proceedings), are ineffective vis-à-vis the debtor's arrangement estate or remedial estate. That provision, if it is construed quite broadly (especially in the context of the general principle that the purpose of restructuring proceedings is to avoid bankruptcy by allowing the debtor to restructure through an arrangement with creditors) may have far-reaching consequences (because many terms of contracts with the debtor may be seen as potential obstacles to a successful arrangement).

¹¹ Accordingly, the filing for or commencement of restructuring proceedings should constitute a legitimate "draw-stop" event, but not an acceleration event in relation to a bank credit agreement. Additional complications with regard to modification or termination of bank credit agreements, comprising a mandatory grace period and an attempt to restructure the terms and dates of repayment, apply under Art. 75c of the Banking Law, as amended by the Act of 25 September 2015 (Dz.U. 2015. 1854).

If an arrangement is reached in restructuring proceedings, it will cover all claims against the debtor that originated prior to the commencement date, together with interest accruing from the commencement date. As a novelty, claims under executory contracts will be covered by the arrangement only if the counterparty's performance is divisible and only to the extent that the counterparty has performed the contract prior to the commencement date and has not received a consideration ("counterperformance") from the debtor.

The Restructuring Law makes it clear that any arrangement will relate both to pecuniary and non-pecuniary claims (with exceptions, such as certain social insurance contributions, claims under employment contracts or claims for the handover of property). If a creditor objects to the restructuring of its non-pecuniary claim (or if the nature of a non-pecuniary claim is such that it is not capable of being restructured), the relevant claim will be converted to a pecuniary one (with effect from the commencement date).

Preservation of security in restructuring proceedings

As a rule, once restructuring proceedings (other than arrangement approval proceedings) have commenced, it is not possible to create a new security interest to secure a pre-commencement debt (unless the council of creditors agrees otherwise). However, if a motion to register a mortgage or a registered pledge is filed more than six months before the filing of a motion to open restructuring proceedings, the mortgage or pledge will be registered.

As a general rule, the arrangement must not be detrimental to the rights under pre-commencement *in rem* security interests (e.g. mortgage, pledge, registered pledge, security assignment) and the claims secured by any of these security interests are not affected by the arrangement. However, the arrangement will cover secured claims to the extent that these claims are not covered by the value of collateral, or the relevant secured creditor agrees to be covered by the arrangement (although there is an important exception to this rule in relation to partial arrangements, as mentioned above). Secured creditors consenting to the arrangement may be allocated to a separate class of creditors for the purposes of voting and be afforded special treatment in the arrangement (i.e. different from unsecured creditors).

Bankruptcy proceedings

Bankruptcy tests

Bankruptcy can be declared only in relation to a debtor who has become "insolvent". There are two substantive statutory tests of insolvency, i.e. the liquidity test and the balance sheet test.

As regards the liquidity test, the debtor is deemed insolvent if it loses the ability to settle its due and payable liabilities (which will be presumed to be the case if the delay in payment exceeds three months).

The balance sheet test applies to corporate debtors and partnerships¹², which will also be deemed insolvent if their pecuniary obligations exceed the value of their assets¹³.

12 Other than partnerships involving at least one private individual who is liable with his/her entire property for the obligations of the partnership.

13 The Bankruptcy Law does not specify whether this relates to the market value or book value, and this will remain open to interpretation. Arguably (and in line with the intention of legislators), it should be the market value, because the test should measure whether enough money can actually be raised through liquidation in order to satisfy creditors.

However, an important proviso has been added to the balance sheet test: this state of affairs must continue for longer than 24 months, and future liabilities (including liabilities subject to a suspensory condition) and shareholder loans are to be ignored for this purpose.

The court is in a position to dismiss a bankruptcy petition even if the balance sheet test is met, provided that there is no threat to the debtor's ability to settle its due and payable liabilities in the "short term".

Purpose of bankruptcy proceedings; composition in bankruptcy

With the entry into force of the Restructuring Law and the introduction of new restructuring procedures, the provisions of the Bankruptcy Law regulating the recovery proceedings (*postępowanie naprawcze*) have been repealed, along with those contemplating two alternative purposes of bankruptcy proceedings (liquidation or composition). Accordingly, any bankruptcy proceedings are initiated in order to satisfy claims by liquidating the debtor's assets, while restructuring proceedings are aimed at leading to an arrangement. However, there has been no amendment to the general rule that the aim of bankruptcy is not only to satisfy creditors, but also to preserve the distressed business if "rational reasons" so permit. Accordingly, it is still possible to reach a composition in the course of bankruptcy proceedings, although the submission of composition proposals will not automatically result in a stay of liquidation. The provisions of the Restructuring Law apply accordingly to a composition concluded in bankruptcy proceedings and its effects (to the extent not regulated otherwise in the amended Bankruptcy Law).

Pre-packs

The term "pre-packed sale" typically denotes an arrangement under which the sale of key assets or even the whole business of a distressed company is negotiated and pre-agreed with a purchaser prior to the commencement of bankruptcy or enforcement proceedings, and such a pre-agreed sale is completed shortly thereafter. Until 31 December 2015, the legislative framework in Poland did not support pre-packed sales and they were practically impossible to accomplish in insolvency proceedings, although a similar result could have been achieved in relation to assets encumbered with a registered pledge with a foreclosure option or (in exceptional cases) based on "forum shopping" for a "pre-pack friendly" jurisdiction where a foreign court assumes jurisdiction in the case.

The Bankruptcy Law now regulates pre-packs (*przygotowana likwidacja*). It is possible to file with the court, together with a bankruptcy petition, a motion for approval of the terms of sale of the whole distressed business or a substantial part thereof. It must specify the terms of the sale (stating at least the price and the purchaser, although it is also possible to submit a draft sale agreement to be concluded by the trustee), and be accompanied by a valuation report prepared by a certified court expert. It will be possible to request that the debtor's enterprise be handed over to the buyer on the day bankruptcy is declared, in which case the full price will have to be paid in advance to the court's deposit account.

The court will approve the motion if the offered price is higher than the estimated liquidation proceeds that could be raised in "standard" bankruptcy proceedings, less the estimated costs of the proceedings. If the offered price is lower than (but still close to) the estimated net liquidation proceeds, the court will still be in a position to approve the sale if this is supported by an

“important social interest” or if this allows the distressed enterprise to be preserved.

It is expressly permitted to sell the enterprise to a person related to the debtor (i.e. its affiliate or a dominant entity). However, in this case the offered price will have to be higher than or equal to the value determined in a separate valuation requested by the court.

Each creditor will be entitled to appeal against the court's decision approving a pre-packed sale within a week of its publication (whereas only the petitioner may appeal against a negative decision).

Priority of unsecured creditors in bankruptcy

The priority of designating liquidation proceeds and satisfaction of creditors has changed with effect from 1 January 2016 and is simpler. As a rule, the costs of proceedings and (to the extent that the funds of the estate are sufficient) post-petition claims will be satisfied on an on-going basis, before the first category. Pre-commencement labour claims are attributed to the 1st category, while tax and private creditors belong to the 2nd category. Interest is to be satisfied in the 3rd category, and there is a separate category (4th) for shareholder loans.

As a result, tax claims no longer enjoy statutory priority and are to be satisfied pro rata with private creditors (in the same category). It is expected that this should motivate the tax authorities to adopt a more proactive and flexible approach to proposed restructurings because usually, they

tend to be reluctant to vote in favour of an arrangement if its terms do not afford them a better position than in the case of liquidation.

Enforcement of security in bankruptcy

Although the Bankruptcy Law does not give a secured creditor control over enforcement against encumbered assets (subject to certain exceptions, e.g. relating to a registered pledge with a so-called “foreclosure” option), it does adopt a clear and sensible approach to enforcement.

There have been no significant changes to the principle of a separate distribution of proceeds realised on the sale of encumbered assets. Such sale proceeds, after deduction of the costs of the sale, are distributed to the secured creditors according to their relevant priorities, subject to certain exceptions¹⁴.

The sale proceeds are used to satisfy the principal of the secured claims, then interest (to the extent that interest is covered by the security interest) as well as the costs of the proceedings (up to 10% of the principal). Any excess sale proceeds that remain undistributed following the full satisfaction of claims of secured creditors are added to the general funds of the bankrupt estate. Those secured claims that remain unsatisfied after the sale of encumbered assets and subsequent distribution of proceeds are satisfied from the general funds of the bankrupt estate *pari passu* with unsecured claims (to the extent that there are funds available for distribution)¹⁵.

14 In particular, in the case of mortgages over real property, certain claims have priority over the mortgagee's claim, such as alimony claims; claims of the bankrupt's employees who worked on the encumbered real property in the three months preceding the sale (capped at three times the minimum salary); and pensions due as compensation for causing a disease, injury or death.

15 This does not extend to interest accrued after the date bankruptcy is declared. This interest can only be satisfied from the encumbered assets (collateral).

There has been no change to the principle that a pledgee may assume ownership of the pledged asset (foreclose), provided this option was envisaged in the pledge agreement. However, the court may set a deadline for the creditor to exercise the foreclosure option, following which it expires. An express proviso was added that no pre-pack sale will be permitted in relation to assets encumbered with a registered pledge with a foreclosure option, unless the pledgee agrees otherwise in writing.

Impact of bankruptcy on contracts

In the previous regime, any contractual provisions stipulating a modification or termination of a legal relationship with the debtor in the event of a bankruptcy declaration were void by operation of law. The recent reform upholds and further expands this rule to cover also the filing of a bankruptcy petition. This does not mean that it is impossible to terminate or modify a contract with the debtor after a bankruptcy petition is filed or after it is declared bankrupt, but it is impossible to do so by reference to the filing or to the declaration of bankruptcy. Notably, under the Banking Law, banks are able to terminate loan agreements if the borrower fails to comply with the loan agreement or if it loses its “creditworthiness” subject to a shorter (seven days”) notice period if the borrower is threatened with bankruptcy.

The Bankruptcy Law sets out specific rules applicable to termination of certain contracts and it grants the trustee the right to “cherry-pick” executory contracts (i.e. those that have not been performed in full or part before the commencement of the bankruptcy proceedings), but otherwise, if the trustee fails to perform a contract, the

other party should be able to terminate it based on generally applicable provisions of law and subject to the terms of the contract.

The declaration of bankruptcy does not affect the right to terminate master agreements relating to futures or derivative transactions or the sale of securities with an obligation to re-purchase (such as ISDA, GMRA or GMSLA). They can be terminated, subject to contractual provisions relating to the settlement of mutual claims upon termination, and close-out netting is permissible.

The Bankruptcy Law still provides that the terms of agreements with the debtor that make it impossible or difficult to achieve the purposes of bankruptcy proceedings will be ineffective vis-à-vis the bankrupt estate. This provision is still open for interpretation and may give rise to doubts in practice.

Directors

Under Polish law, fiduciary duties are imposed only on *de jure* directors, i.e. (in the case of companies) members of the management board. *De facto* directors (i.e. those to whom certain management powers are delegated) will be responsible only within the scope of their contract with the company (usually, framed as employment contract). The concept of “shadow directors” is not recognised by Polish law, although one cannot exclude that a person who indeed controls the managers of the company may be held liable for damages it has caused, based on the principle of fault.

In relation to the duty to file a bankruptcy petition, the Bankruptcy Law sets out a list of persons obliged to do it, e.g. with regard to legal persons and other organisational entities, it is any person

authorised to represent them individually or jointly with other persons; with regard to partnerships, it is any partner; with regard to an entity being subject to non-bankrupt liquidation, it is any liquidator. The duty to file a petition applies to each representative of a debtor who is a legal person or an entity having legal capacity without being a legal person. For companies, this applies to each member of the management board (i.e. de jure directors).

Management duties and potential liabilities

Members of the management board owe fiduciary duties to the company itself and can be held liable to it for either breach of law or the company's charter. They can also be held liable to the shareholders and third parties (contractors, suppliers, employees, etc.) based on the principle of fault, which is present not only if there is an actual intent to cause harm but also in the case of negligence. In certain circumstances, members of the management board can also be subject to criminal liability.

If the members of the management board fail to file the petition for a bankruptcy contrary to their duty to do so, they are liable for damages incurred by creditors as a result of such failure, unless they are not at fault (and in particular, they will not be liable if, prior to the lapse of the period for mandatory filing of a bankruptcy petition, restructuring proceedings were opened or an arrangement was approved in arrangement approval proceedings)¹⁶. Furthermore, they may also be subject to criminal liability and be deprived of the right to run a business activity, act

as a representative of entrepreneurs and/or sit on the supervisory boards of companies and co-operatives.

Insolvency issues for directors

Wrongful or fraudulent trading triggers civil liability and, in certain circumstances, may also lead to criminal liability. If such facts are established, the court may decide not to allow the management board to keep control over the assets as a “debtor in possession” or may decide not to approve a restructuring petition. Following the declaration of bankruptcy, the trustee will be in a position to take an action for compensation against them if, as a result of wrongful or fraudulent trading, the company has suffered damage.

The directors are criminally liable for transactions considered commercially reckless and leading to bankruptcy, as well as for preferential treatment of certain creditors in the event of an upcoming bankruptcy. Notably, for the purposes of the balance sheet test, one should take into account not only mature obligations but also known and/or foreseeable future obligations.

Lender liability

The notion of lenders' liability for the borrower's debts (construed on the basis of “shadow director” or similar concepts) has not been recognised in the legislation, legal doctrine or court practice in Poland. A lender who controls and directs the debtor's business can be found liable for the debtor's debts based on the general principle of fault. To date, the concept of controlling/directing lenders' liability for the borrower's debts has never been successfully claimed in Poland.

¹⁶ Members of the management board of a limited liability company are additionally liable for all debts of the company if enforcement against the company has proven unsuccessful. However, in this case they can be released from liability to the extent that the relevant creditor suffered no harm resulting from the managers' failure to timely file a bankruptcy petition.

Antecedent transactions

Treatment in bankruptcy proceedings

All gratuitous transactions performed by the debtor within one year before the bankruptcy filing are ineffective. The same applies to transactions where a value received by the debtor is considerably less than the value of the debtor's performance, i.e. transactions at an undervalue. Because the provisions of Bankruptcy Law do not provide for a definition of the "transactions at an undervalue", the transaction should be evaluated with a consideration of the arm's length principle.

The repayment of a debt prior to its maturity date or the establishment of a security interest in order to secure such a debt will not be effective if made within six months preceding the day of the bankruptcy filing. The creditor may request that the repayment or the provision of security be declared effective on the basis that he had no knowledge about the existence of grounds for the declaration of bankruptcy.

Transactions with related parties (relatives or affiliated companies) may be declared ineffective if made within six months before the bankruptcy filing (even if made at arm's length and on fair market terms), unless the debtor's counterparty demonstrates that the transaction has not been detrimental to the creditors

The judge-commissioner may also declare as ineffective the establishment by the debtor of a security interest in rem (including e.g. a pledge and mortgage) as security for a third party's debt if the debtor has obtained in return no value or inadequate value. Irrespective of the value received, the judge-commissioner will declare ineffective any security interest to secure a debt of a related party. In these cases, the "hardening" period is one year.

The trustee may also file an action with the civil court in order to declare any other transaction ineffective if it was made to the creditor's detriment, based on the general "*actio Pauliana*" (in which case the "hardening" period can be up to five years).

A transaction will be declared ineffective on this basis if:

- the transaction was detrimental to creditors, i.e. the debtor, as a result of the transaction, became insolvent (or, if it was already insolvent, became insolvent to a greater extent);
- the debtor was aware of the detrimental effect on the position of creditors; and
- the other contracting party was aware of the detrimental effect or, acting diligently, could have become aware of the detrimental effect (awareness is presumed if the contracting party was in a close commercial relationship with the debtor).

Treatment in restructuring proceedings

Hardening periods apply only in remedial proceedings (and not in the other types of restructuring proceedings). They are analogous to (but not the same as) those applicable in bankruptcy proceedings, although they do not envisage automatic ineffectiveness of transactions with related persons or affiliates, unless such transactions fall within the scope of general provisions relating to preferential conveyances.

A transaction made by the debtor during the year preceding the filing of a restructuring petition is not effective *vis-à-vis* the remedial estate if it results in the disposal of any property without consideration or if the value of the debtor's performance essentially exceeds the value of consideration stipulated in favour of the debtor or a third party. Similarly, creation of security with no direct connection with a performance received by the debtor during the year preceding the date of filing a petition is

not effective vis-à-vis the remedial estate. Finally, any security created over the debtor's property within a year prior to the date of filing will not be effective vis-à-vis the remedial estate to the extent that it exceeds by more than 50% of the value of performance received by the debtor and covered by the relevant security interest.

Apart from the hardening periods based on the Restructuring Law, preferential or fraudulent conveyances made by the debtor may also be challenged in remedial proceedings on the basis of a so-called *actio Pauliana* referred to in the previous section.

Set-off

Restrictions applicable in bankruptcy proceedings

As from the date of the declaration of bankruptcy, set-off is possible only if both debts existed at that date, even if one of them was not due. The creditor's debt will be fixed at the aggregate amount whereas the bankrupt's debt will be fixed as the principal sum with no interest as from the date of the bankruptcy declaration. If the bankrupt's non-interest-bearing debt did not fall due on that date, the amount to be offset will be reduced by statutory interest (at a rate not exceeding 6% p.a.), running from the date of the bankruptcy declaration until the payment date, but for no more than two years.

Set-off is not permitted if the creditor acquired its claim by way of assignment or endorsement after the declaration of bankruptcy or within the preceding year if such creditor knew of circumstances which might have led to the declaration of bankruptcy. However, this limitation does not apply if the creditor has acquired the claim as a result of subrogation i.e., by way of paying off the bankrupt's debt for which it had been personally liable (e.g., as guarantor) or with certain assets (e.g., as pledgee), provided that at the time of assumption of liability

for the bankrupt's debt it was unaware of the causes which might have led to the declaration of bankruptcy. The set-off will be permitted if the assumption of liability occurred one year prior to the declaration of bankruptcy.

Further, the set-off is not permitted if the creditor became a debtor of the bankrupt after the declaration of bankruptcy (unless both debts originated after the declaration of bankruptcy, in which case the setoff will be permitted based on general rules).

A creditor who wishes to exercise the right of set-off must make a declaration to that effect not later than at the time of filing its proof of claim, and such declaration should be attached thereto.

Restrictions applicable in restructuring proceedings

In each type of restructuring proceedings it is generally permitted to exercise a right to set-off mutual claims between the debtor and creditors, provided that both claims existed on the commencement date. However, the set-off right is restricted in each type of restructuring proceedings except for arrangement approval proceedings. As from the date of the commencement of respective proceedings, the set-off is not permissible if the creditor became the debtor's debtor after the commencement date, or (where the creditor was a pre-commencement debtor) it acquired after the commencement date the relevant prepetition claim by way of assignment or endorsement.

A creditor who wishes to exercise the right of set-off must make a declaration to that effect within 30 days from the commencement date (or, if the ground for the set-off originates later, within 30 days from its origination). If the debtor has lost the right to manage the estate, a notice of set-off should be

submitted to the administrator. Otherwise, such a notice should be submitted to the debtor in possession or to the court supervisor.

Recognition of foreign insolvency proceedings

The Bankruptcy Law defines foreign bankruptcy proceedings as any court, administrative or other proceedings supervised by a foreign court and carried out abroad, the subject of which is joint enforcement of claims against a debtor who is insolvent or threatened with insolvency, where the assets and matters of the debtor are surrendered to the control or management of a foreign court or a foreign insolvency representative for the purpose of their restructuring or liquidation. Notably, this definition is broad enough to include both “classic” bankrupt liquidation as well as insolvent or pre-insolvent restructurings and reorganizations.

However, the Bankruptcy Law does not apply to the recognition of decisions opening insolvency proceedings in other EU jurisdictions which are subject to automatic recognition pursuant to the Recast Regulation. It only applies to the recognition of judgments opening foreign insolvency proceedings outside the EU, and it does so in line with the UNCITRAL Model Law on Cross Border Insolvency. Polish courts will recognise only those foreign proceedings that meet the statutory definition presented in the preceding paragraph.

Recognition proceedings can only be instigated upon a motion by a foreign administrator or debtor-in-possession. The Polish court will issue an order on the recognition if the Polish courts have no exclusive jurisdiction, the recognition would not conflict with the basic principles of legal order in Poland, and the motion for recognition meets formal requirements. The order on

recognition will indicate whether the recognised proceedings have the status of main or secondary proceedings.

The recognition of a decision opening foreign insolvency proceedings does not prevent the Polish court from opening parallel bankruptcy proceedings in Poland. If the foreign insolvency proceedings are recognised in Poland as the main proceedings, the proceedings in Poland will have the status of secondary proceedings and can relate only to the debtor’s assets located in Poland, and can only be conducted as bankruptcy proceedings leading to liquidation and not as restructuring proceedings.

The recognition of a judgment opening foreign insolvency proceedings results in the recognition of decisions relating to the appointment, dismissal and change of an administrator, and decisions relating to the conduct of the foreign proceedings, their suspension or completion. Furthermore, the Polish court can also decide on the enforceability in Poland of foreign executory documents issued in the course of the foreign proceedings (e.g. a list of claims, a composition or similar documents), provided that such executory documents are enforceable in the state where they were issued and relate to a matter that is not subject to the exclusive jurisdiction of the Polish courts, and their enforcement would not conflict with the basic principles of legal order in Poland.

However, if a composition (arrangement) has been concluded in foreign proceedings but secondary proceedings have been opened in Poland, recognition of the foreign arrangement will be subject to voting at the creditors’ meeting. The right to vote will be attributed to those creditors whose COMI is situated in Poland, or whose claims result from the debtor’s activity in Poland or whose claims are secured in rem on the debtor’s property located in Poland. The rules as applicable to the

creditors' meeting and voting in Polish bankruptcy proceedings will apply respectively. If no resolution on the recognition of the foreign arrangement has been passed, the secondary proceedings in Poland will be discontinued, and the judgment the recognition of the decision opening foreign insolvency proceedings will be set aside.

If a judgment opening foreign bankruptcy proceedings is recognized, its impact on court, administrative, arbitration or execution proceedings carried out in Poland (and in particular whether such proceedings are to be stayed or suspended) will be assessed under Polish law, taking into account whether the foreign proceedings aim at liquidating or restructuring the debtor's business, whether and to what extent the debtor is deprived of the right to manage and dispose of its assets, and the scope of claims to be covered by an arrangement. Further, the effects of the foreign declaration of bankruptcy as to the assets located in Poland and as to the obligations that have originated or are to be performed in Poland, are subject to Polish law. The ineffectiveness and avoidance of the debtor's transactions relating to its assets located in Poland will also be subject to Polish law.

ROMANIA



ROMANIA

Key Elements:

- The effects of insolvency proceedings on the rights of secured creditors
- Guarantees
- Ranking of creditors' claims
- Lender liability issues
- Directors' duties
- Recognition of foreign proceedings

Concept of insolvency under the Insolvency Law

On 15 April 2014, an insolvency code was adopted in the form of Law No. 85/2014 on insolvency prevention proceedings and on insolvency proceedings (the "Insolvency Law"), which entered into force in June 2014 and was further amended. Pursuant to the provisions of the Insolvency Law, a debtor is "insolvent" if it does not have sufficient available monetary funds for the payment of its uncontested, quantifiable and outstanding debts.

Actual insolvency is presumed where the debtor has not paid a debt within 60 days of its due date. A debtor will also be held to be insolvent if it can be proved that the debtor is unable to pay its outstanding debts in the near future from monetary funds which will be available to it at that date (imminent insolvency).

The Insolvency Law provides for two types of insolvency proceeding:

- (i) a general insolvency proceeding applicable to certain categories of debtors which are (or will imminently be) insolvent (e.g. companies, Economic Interest Groups or any other private law entities performing economic activities); and

- (ii) a simplified insolvency proceeding applicable to other categories of debtors (e.g. individuals (as traders), family associations or certain categories of companies such as companies which do not have any assets, are not able to produce accounting documents, or which are subject to dissolution proceedings, and any person performing professional activities without the necessary authorizations and registrations for such activity).

Commencement of the proceeding

The insolvency proceeding is started by filing a petition with the competent court. The petition can be filed by the debtor, by the creditors, or by certain persons or institutions expressly authorised by law (e.g. the Financial Supervision Authority and the National Bank of Romania).

The debtor

Mandatory filing

The insolvent debtor is compelled by law to file a petition of insolvency in the case of actual insolvency within 30 days from the occurrence of the insolvency.

The debtor may disregard this rule if:

- (a) acting in good faith, he is engaged in out-of-court negotiations to restructure its debts; or
- (b) insolvency occurs during the course of negotiations conducted in the context of the special pre-insolvency negotiation proceedings (*ad-hoc mandate* or judicial moratorium (*concordat preventiv*)), provided that there is a reasonable assumption based on grounded indications that the result of such negotiations could be promptly put in place by entering into an extrajudicial agreement.

Under these two circumstances the debtor acting in good faith should file for insolvency within 5 days of the negotiations' failure.

Optional filing

The insolvent debtor may also file a petition for opening the insolvency proceeding in the case of imminent insolvency.

When the petition for opening the insolvency proceeding is filed by the debtor, the amount of the budgetary receivables must be less than 50% of the total declared debts of the debtor.

The creditors

Any creditor may file a petition for the opening of insolvency proceedings, together with any documents evidencing its claims and the security rights created in relation thereto, provided that its claims: (i) result from the very document establishing the claim or from other documents, whether notarised or not, issued by or acknowledged by the debtor, (ii) are expressed as an obligation to pay a sum of money, and (iii) have been due and payable for more than 60 days. The value of the claim must be a minimum of RON 40,000 (approximately EUR 9,000). This RON 40,000 minimum claim should be the net value resulting from offsetting the creditor's and the debtor's reciprocal debts of any nature.

Other persons or institutions

Other persons or institutions, such as the National Bank of Romania and the Financial Supervision Authority, may begin the insolvency proceeding in respect of entities under their supervision.

Simplified procedure

Under the simplified insolvency proceeding, the debtor falling under the categories provided by the Insolvency Law will directly enter into liquidation proceedings, either upon the opening of the insolvency proceeding, or after an observation period of a maximum of 20 days.

Consequences of commencing insolvency proceeding

After considering the insolvency petition, the syndical judge may decide to open either (i) general insolvency proceedings (and appoint a temporary judicial administrator), or (ii) simplified insolvency proceedings (and appoint a temporary liquidator).

Any acts, operations and payments performed by the debtor after the proceeding is commenced are null and void (if they are performed outside the ordinary course of business), unless authorised by the judicial administrator or syndical judge or expressly provided for by the law.

Thus, the law provides that during the observation period (i.e. the period between the opening of the insolvency proceeding and the date of the confirmation of the reorganisation plan or of the entering into bankruptcy, as the case may be), the debtor may continue its usual business and is permitted to make payments to the known creditors in the ordinary course of business, either under the supervision of the judicial administrator (if the debtor declared its intention to reorganise and has not lost the right to manage its business) or through the judicial administrator who actually manages the activity of the debtor (if the debtor loses the right of administration of its business). The right of administration of the business consists of the right to manage the activities and the assets of the business and the right to dispose of such assets – including those assets acquired subsequent to the opening of the proceeding.

On the commencement of insolvency proceedings, the debtor loses the right of administration of its business, unless the debtor has declared, in certain cases, the intention to reorganise. The right of administration also terminates if the syndical-judge so decides upon appointing a judicial administrator and it terminates de jure on the date bankruptcy is declared by the syndical-judge.

Commencement of insolvency proceedings is notified to all creditors, as well as to the debtor and to the Trade Registry and will be published at the debtor's expense in a newspaper with a wide circulation and in the Bulletin of Insolvency Proceedings.

The decision opening the insolvency proceeding shall establish a term of a maximum of 45 days from the date of the opening of the procedure within which creditors having claims preceding the date of the insolvency proceeding should submit a petition for the admission of such claims in the insolvency proceeding. The judicial administrator examines these claims to determine their legitimacy, exact value and priority. The outcome of such examination is recorded in a preliminary table of claims registered with the competent court and is published in the Bulletin of Insolvency Proceedings. The debtor, the creditors and any other interested person may challenge such preliminary table in court. The preliminary table of claims is finalised and registered with the competent court after all such challenges are settled.

The syndic judge may designate a committee of 3 or 5 creditors representing the largest of claims benefiting from preferential rights (in Romanian "*cauze de preferinta*"), the budgetary claims and general claims. If, due to the small number of creditors, the syndic judge does not consider the designation of a creditors' committee to be necessary, certain attributions of such committee may be exercised by the creditors' meeting.

This committee can be replaced by a committee of 3 or 5 creditors to be designated by the first creditors' meeting from among the first creditors with voting rights from those with the largest claims benefiting from preferential rights, budgetary and general claims in the order of value and which voluntarily offer to be in the committee. The creditors' committee will, amongst other matters, analyse the debtor's situation and make recommendations to the creditors' meeting regarding the continuation of the debtor's activity

and the proposed plans of reorganisation; report to the creditors' meeting on the judicial administrator's or the liquidator's activity and solicit the annulment of any suspect transactions, to the extent this has not been done by the judicial administrator or liquidator.

Judicial reorganisation

Following the commencement of insolvency proceedings, any creditor, the debtor or the judicial administrator has the option (upon meeting certain terms and conditions) to request a judicial reorganisation of the insolvent debtor and propose a reorganization plan. Judicial reorganisation is a court-supervised reorganisation process, where an insolvent entity seeks to satisfy the claims of its creditors in accordance with a plan for the payment of the claims by way of one or several of the following options:

- (i) the operational and/or financial restructuring of the debtor; (ii) the corporate restructuring by amending the share capital structure; and/or (iii) rationalizing the business by carrying out disposals. The plan is submitted for approval to the creditors and confirmed by the court. As a general rule, should the syndic judge approve the plan, the reorganisation procedure may not last more than three years starting with the date of the confirmation. The payment terms established through contract (including credit or leasing contracts) may be maintained in the plan, even when exceeding the three-year term of the reorganization and shall continue to be paid pursuant to such contract also after the completion of the reorganisation.

During the reorganisation, the debtor shall manage its activity under the supervision of the judicial administrator and in accordance with the plan of reorganisation until the syndic judge decides either (i) to close the insolvency proceeding, enabling the debtor to re-commence its normal commercial activity, or

- (ii) to terminate the reorganisation and place the debtor into bankruptcy (e.g. based on the grounds that the

reorganisation plan proved to be unsuccessful and the debtor's owners suffer losses as a result of such plan).

Liquidation

If no plan of reorganisation was proposed or approved or if the plan was unsuccessful, or if the judicial administrator recommends initiation of the bankruptcy proceeding and the creditors approve it, as well as in other specific cases, the syndic judge may order the winding-up of the debtor, the liquidation of its assets and the distribution of the proceeds thereof.

Challenges

Fraudulent transactions

An insolvency official (i.e. the judicial administrator or liquidator) may challenge the transfers or creation of rights which have an economic impact on the debtor which have been performed through the following types of transactions:

- (i) acts and contracts attempting to defraud the interests of the creditors executed two years prior to the opening of the insolvency proceedings;
- (ii) acts of gratuitous transfer executed two years before the opening of the insolvency proceedings, (except for humanitarian donations);
- (iii) where the performance of the insolvent party clearly exceeds the performance of its counterparty, entered into six months before the opening of the insolvency proceedings;
- (iv) made during the two years prior to the opening of the insolvency proceedings with the intention of all the parties involved of hiding certain assets from the reach of creditors or to damage their rights;
- (v) ownership transfers to a creditor to terminate a previous debt towards it or in such creditor's benefit, performed 6 months

prior to the opening of the insolvency proceedings, if the amount that the creditor might obtain in case of winding-up of its counterparty would be lower than the value of such transfer;

- (vi) the establishing of a preferential right (in Romanian "*drept de preferinta*") for an unsecured claim within 6 months prior to the opening of the insolvency proceedings;
- (vii) debt prepayment made within the 6 months prior to the opening of proceedings, if the maturity of such debts was supposed to occur at a date after the opening of insolvency proceedings; and
- (viii) acts of transfer or the undertaking of obligations by the debtor in the period two years prior to the opening of the insolvency proceedings with the intention to hide or delay the state of insolvency or to defraud a creditor;

The transactions under points (v) – (vii) cannot be annulled provided that:

- (a) they are entered into in good faith, following an agreement with the creditors entered into following extra-judicial negotiations to restructure the debtor's indebtedness, provided that such agreement could have reasonably contributed to the financial rehabilitation of the debtor and it did not aim to prejudice and/or discriminate against certain creditors, and
- (b) they are entered into during insolvency prevention proceedings, namely ad-hoc mandate or judicial moratorium proceedings.

Disadvantageous transactions

The following transactions, concluded within the two-year period preceding the opening of the insolvency proceeding may also be cancelled if these are detrimental to creditors:

- (i) in relation to company transactions between the debtor and a shareholder holding at least 20% of the capital or 20% of the voting rights, where the debtor is a limited liability company;

- (ii) in relation to an Economic Interest Group, transactions with a member or director;
- (iii) in relation to the company's transactions between the debtor and a shareholder holding at least 20% of the debtor's shares or 20% of the voting rights, where the debtor is a joint stock company;
- (iv) transactions with a director, manager or member of the supervisory bodies of the debtor, where the debtor is a joint stock company or a limited liability company;
- (v) transactions with any person holding a dominant position over the debtor or its business;
- (vi) transactions with a co-owner over a common asset;
- (vii) transactions with the husband or relatives, up to and including the fourth degree, of the persons listed at paragraphs (i) – (vi) above.

The insolvency official may challenge the above transactions within one year from the date the report on the debtor's insolvency status has been drafted by the insolvency official, but not later than 16 months after the opening of the insolvency proceeding. If the insolvency official fails to take action for the cancellation of the above-mentioned transactions, the creditors' committee or a creditor holding more than 50% of the claims registered with the insolvency estate may as well challenge these transactions before the syndic judge. However, no such challenge made against these transactions will be allowed if such transactions were performed by the debtor in the normal course of its business.

Pending contracts

The Insolvency Law provides for the general rule that ongoing contracts entered into by the insolvent debtors are deemed to be maintained when the insolvency proceeding is opened.

Also, any contractual provisions which provide for termination or acceleration of such ongoing contracts for the reason of insolvency proceedings being opened against a party are null and void. The provisions referring to the nullity of the termination and acceleration clauses do not apply to qualified financial agreements or netting agreements.

In order to maximise the value of the debtor's assets, within 3 months from opening the proceedings, the insolvency official may unilaterally terminate any contract, any unexpired lease or other long term contracts, to the extent that such contract has not been performed entirely or substantially by all the parties involved. The counterparties of such contracts are entitled to send notices to the insolvency official requiring him to terminate such contracts within the same 3-month period. If the insolvency official fails to reply to such notices within 30 days of receipt, he shall not be able to require performance under the respective contracts, as the contracts will be deemed unilaterally terminated.

If a contract is terminated unilaterally by the insolvency official either expressly or due to failure to reply to the counterparty's notice, the contractor may file a claim for damages against the debtor.

During the observation period the judicial administrator can amend the credit contracts so as to ensure equivalence of future performance.

Where a contract provides for periodic payments from the debtor, the maintenance of the contract does not make the insolvency officer liable to pay sums due under the contract which relate to periods prior to the opening of the proceedings.

Security enforcement

As a general rule, starting with the opening of the proceedings, all judicial and extrajudicial actions and the enforcement actions for

the recovery of debts from the insolvent debtor are suspended. As an exception to this rule, the Insolvency Law provides for certain situations where such stay does not apply, including: (i) challenges that the debtor filed against claims filed by its creditors before the proceeding was opened; (ii) civil claims within criminal lawsuits filed against the debtor, (iii) judiciary actions that are filed against co-debtors or third-party guarantors or security providers, or (iv) judicial actions aiming to establish the existence and/or the amount of claims born after the date the insolvency proceeding opened.

Also, claims secured by cash collateral or movable mortgage over bank accounts will be satisfied within 5 days of the creditor's request with the cash in the relevant bank accounts provided that the creditor's claims are due and payable.

In some cases (e.g. when the asset is not material for the success of the proposed reorganisation plan, or the asset belongs to a larger operational system and its independent sale would not affect the value of the system), a secured creditor can make a request that the court cancels such suspension with respect to that asset, provided that (i) the taxes, stamp duties and other expenses determined by the sale of the assets are paid, and (ii) the provisions applicable to the liquidation of assets are observed.

In liquidation proceedings, the proceeds of a secured asset will be applied to satisfy secured creditors with priority.

Guarantees

Romanian law allows downstream and upstream guarantees in most circumstances, provided that the corporate benefit of the transaction to the guarantor can be established. Due to the fact that companies are established for the purpose of obtaining profit, corporate benefit has to be established in all situations. Although downstream guarantees are generally valid, in certain

situations upstream guarantees could be considered null and void if corporate benefit cannot be established.

According to the Romanian Companies' Law No. 31/1990, certain restrictions apply to guarantees provided to directors of companies. For example, a company is prohibited from granting a guarantee in respect of obligations of its directors or his relatives. Also, the prohibitions apply where the beneficiary of the guarantee is a company of which the spouse or the relatives of the guarantor's director is a director or owns more than 20% of the share capital.

Under Romanian Companies' Law No. 31/1990, a company cannot grant any advance of money, lend its own money or charge its own property for the purpose of a third party subscribing for or purchasing its shares. A guarantee provided by a company to a third party which uses the guarantee in connection with the subscription or purchase of shares of such company is considered to be null and void. It is generally thought that this restriction applies only to joint stock companies (S.A.), but there is a view that such restrictions could be held also to apply to private limited liability companies (S.R.L.).

The Insolvency Law provides for the nullity of any transaction which is prejudicial to other creditors entered into during the two years preceding the commencement of the insolvency proceeding with, amongst others, the following persons:

- (a) a shareholder holding at least 20% of the share capital or 20% of the voting rights in the general meeting of the shareholders of a limited liability company;
- (b) a member or a director, when the debtor is part of a Economic Interest Group;
- (c) a shareholder holding at least 20% of the debtor's shares or 20% of the voting rights in the general meeting of the shareholders of a joint stock company;

- (d) a director, a manager or a member of the supervisory bodies of the debtor, where the debtor is a joint stock company of a limited liability company;
- (e) any other person holding a dominant position in respect of the debtor or its business.
- (f) a co-owner, in respect of a common asset; and
- (g) transactions with the husband or relatives, up to and including the fourth degree, of the persons listed at paragraphs (a) – (f) above.

Payment priorities

According to the Insolvency Law, the proceeds of realisation of the secured assets are to be distributed to the secured creditors (for the satisfaction of the principal amount, the interest, penalties and any other costs), after payment of the taxes and other expenses related to the proceeding, including payment of expenses related to the preservation, administration and sale of the assets, up-front expenses made by a creditor for the enforcement process, claims of the utilities providers born after the insolvency proceedings opened and the payment of certain professionals hired for the interest of the creditors (which shall be supported pro-rata related to the value of the claims incurred during the insolvency procedure as part of the implementation of a reorganisation plan and shall be paid in priority to the secured claims incurred before the proceedings have been opened and to the claims arising from leasing agreements (including financial leasing agreements) terminated before the proceeding opened, under certain conditions).

Secured creditors maintain their security rights in respect of the proceeds resulting from the sale of assets subject to their security interests. In case such proceeds are insufficient to fully discharge the secured obligations, the balances due to secured

creditors are treated as unsecured claims and in such cases their unsecured claims will be discharged according to the general order of discharge, which is as follows:

- (a) taxes and other expenses related to the insolvency proceeding, including payment of expenses related to the preservation, administration and sale of the assets, expenses related to the continuation of the debtor's activity and the payment of the remuneration of certain professionals hired within the insolvency proceeding;
- (b) claims resulting from financing granted to the debtor during the observation period for continuing its activity;
- (c) claims resulting from labour contracts;
- (d) claims resulting from the performance of the debtor's activities following the commencement of the insolvency proceeding, together with the damages payable to contractual partners, as established by the syndic judge and to good faith third-parties affected by annulations of certain transactions entered into by the debtor;
- (e) debts to the state budget;
- (f) amounts owed by the debtor to third parties on the basis of alimony obligations, etc.(if applicable);
- (g) sums established by the syndic-judge for the support of the debtor and its family where the debtor is an individual;
- (h) bank loans (including any interest and expenses); amounts resulting from deliveries of products, performance of services or other works, as well as rents;
- (i) other unsecured claims; and
- (j) subordinated debts, in the following order:
 - (i) claims in bad faith of third parties who have acquired assets from the debtor's estate and loans granted by an

associate or a shareholder holding at least 10% of the share capital or of the voting rights, or by a member of the Economic Interest Group; and

(ii) gratuitous acts.

Payments towards creditors having the same rank will be made proportionally. A debt from a certain class, as listed above, will be paid only after complete payment of the debts in the superior class.

The following amounts will be set aside in the case of partial payments:

- (a) proportional amounts owed to creditors with contingent claims;
- (b) proportional amounts owed to bondholders who have not presented the originals for payment;
- (c) proportional amounts for claims admitted provisionally; and
- (d) amounts to cover future expenses in respect of debtor's assets, including those arising out of pending litigation.

Directors' duties

The insolvent debtor is compelled by law to file a petition of insolvency in case of actual insolvency within 30 days from the occurrence of the insolvency. Please refer to section "Commencement of the Proceeding" for relevant exceptions.

At the judicial administrator or liquidator's request, the court may decide that some of the debts should be paid by the members of the management and/or supervisory bodies of the debtor personally or by any other party who has contributed to the debtor's insolvency and has been involved in the following activities:

- (a) using the assets or loans granted to the debtor for their personal use or for that of a third party;

- (b) carrying out production, commercial or servicing activities in their personal interest, in the name of the debtor;
- (c) continuing, in their personal interest, an activity which was clearly leading the debtor to cessation of payments;
- (d) false accounting, concealment of accounting records or failing to observe the legal requirements in respect of accounting;
- (e) embezzling or hiding debtor's assets, or falsely increasing the debtor's debt;
- (f) using ruinous methods to procure funds in order to postpone the cessation of payments; or
- (g) paying or deciding to pay with priority a creditor to the detriment of the other creditors in the month prior to cessation of payments;
- (h) any other intentional deed which contributed to the debtor's state of insolvency and which has been ascertained in accordance with the provisions of the Insolvency Law.

If the judicial administrator or the judicial liquidator did not indicate the persons responsible for debtor's insolvency, such request may also be submitted by the president of the Creditors' Committee pursuant to a decision of the Creditors' Committee.

If the Creditors' Committee has not been created, the above mentioned request may be submitted to the court by the creditor holding more than 30% of the receivables that were registered against the debtor's assets

In the situation described under paragraph (g) above, the legal representative of the debtor shall not be held liable provided that, during the month prior to the cessation of payments, payments have been made, in good faith, following an agreement with the creditors, which has been entered into following out of court

negotiations for the restructuring of the debtor's debts (on the basis that such agreement was designed to lead to the financial redress of the debtor and did not have as its purpose the prejudicing and/or discrimination of certain creditors).

This exception applies also in case of acts concluded within the judicial moratorium proceeding.

Also, certain criminal acts of the directors are punishable with imprisonment or a criminal fine, under the provisions of the Criminal Code.

Lender liability

Although Romanian law does not use the concept of "shadow director" or "de facto director", the Insolvency Law provides that the court may decide that part of the debt be paid by any person who caused the debtor's insolvency through certain actions, as listed above. It could be considered that this provision would include a person exerting powers as a de facto director. Romanian law does not regulate the situation when the lender is in the position of being able to influence the management of the company.

Pursuant to the Insolvency Law, certain types of transaction may be challenged when falling under the definition of fraudulent or disadvantageous transactions, including transactions with any party holding a dominant position in respect of the debtor or its business, or transactions entered into by the debtor during the 2 years preceding the opening of the insolvency proceedings with the intention to conceal the insolvency or delay the onset of insolvency proceedings.

The Romanian Civil Code provides for a certain type of judicial action to be used by a general creditor in order to challenge a transaction entered into by the debtor which has the effect of prejudicing other creditors (*actiune revocatorie*).

New money lending

Loans granted after the commencement of the insolvency procedure, and other debts incurred due to the continuation of the debtor's activity after the commencement of the insolvency procedure, have priority over certain pre-insolvency debts.

According to the Insolvency Law, finance provided to the debtor with a view to sustaining its current activities, with the approval of the creditors, benefits from a priority in repayment. Such finance is secured, as a rule, with money or rights which are not subject to the priority rights of other creditors and, when such money or rights are not available, the finance is only secured with the agreement of the other secured creditors. If prior approval is not obtained, the repayment of the creditors who provided finance during the insolvency proceedings will reduce the amounts available for the creditors benefitting from priority on a *pro rata* basis on the entire value of the assets or rights which are subject to priority claims.

Recognition of foreign insolvency proceedings

Law No. 637/2002 on Private International Law Relations in the Context of Insolvency Proceedings as amended has been repealed by the Insolvency Law, which now governs international private law aspects in respect of insolvency proceedings, both for ordinary corporates and for special entities, such as insurance undertakings and credit institutions. Additionally, the Recast Regulation is directly applicable in Romania.

Other relevant EU directives have also been implemented through separate legislation, in particular:

- (a) Law No. 503/ 2004 on financial recovery and bankruptcy of insurance undertakings implements into Romanian law the provisions of Directive 2001/17/EC of the European Parliament and of the Council of 19 March 2001 on the

reorganisation and winding-up of insurance undertakings; this law has been partially repealed by the Insolvency Law insofar as the provisions concerning bankruptcy procedures are concerned and only remains applicable in respect of the financial recovery measures; and

- (b) The Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions is currently implemented through the Insolvency Law, which contains the specific rules applicable to the bankruptcy of a credit institutions.
- (c) The Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms was implemented through Law No. 312/2015 regarding the recovery and resolution of credit institutions and investment firms, as well as the amendment and supplementation of certain regulations in the financial domain, which contains provisions concerning certain pre-insolvency procedures such as the recovery planning and early intervention, as well as concerning the procedure for the resolution of credit institutions and investment firms.

Bankruptcy of credit institutions

The provisions of the Insolvency Law apply to credit institutions (defined in Government Emergency Ordinance no. 99/2006 regarding credit institutions and capital adequacy, and further amended, as banks and other specific entities such as mortgage loan banks or real estate savings and crediting banks), which are Romanian legal persons, including their foreign subsidiaries.

The request for bankruptcy can be submitted by the credit institution itself, by its creditors or by the National Bank of Romania. The credit institution which is in a state of insolvency

must file for bankruptcy within 30 days from the date on which the state of insolvency occurred.

Where a request is submitted by the credit institution or by its creditors, the opening of the bankruptcy procedure shall be approved by the National Bank of Romania. If the credit institution is subject to resolution measures or fulfils the conditions for the application of resolution measures, the bankruptcy procedure may be started only pursuant to a request submitted by the National Bank of Romania.

Once the bankruptcy procedure has been initiated, it is forbidden for the main shareholders of the credit institution, or for the persons that hold management positions, to dispose of the shares they own in the bankrupt credit institution, without the consent of the syndic judge.

The rights and attributions of the general assembly, the administrative council and the executive board of the credit institution are ceased by operation of the law after initiating the bankruptcy procedure.

The Insolvency Law provides for a special method of liquidation – transactions for buying of assets and assuming liabilities. Such transactions represent a method of liquidation through which a credit institution with a good financial situation can acquire, partially or totally, assets of the debtor credit institution and assume its liabilities. Other liquidation methods prescribed by the Insolvency Law are: sale of assets or other types of disposal, such as assignments of receivables or novations performed in the interest of the procedure, at a negotiated value.

In terms of specific provisions applicable to credit institutions, it is mandatory for the Bank Deposit Guarantee Fund to be part of the Creditors' Committee. Receivables from guaranteed

deposits are satisfied with priority after the payment of the procedure related taxes, stamp duties and fees.

Bankruptcy of insurance/reinsurance companies

The provisions of the Insolvency Law also apply to insurance and reinsurance companies, to their foreign subsidiaries and to branches and subsidiaries of a non-EU insurance company located in Romania. Its provisions are not applicable to a subsidiary of an insurance/reinsurance company or of a mutual company from a Member State of the European Union, which has received its supervision authorization from the Member State of origin.

The bankruptcy procedure for an insurance/reinsurance company is initiated following the request of any one of the Financial Supervision Authority, the debtor insurance/reinsurance company or its creditors.

The insurance/reinsurance company which is in a state of insolvency must file for bankruptcy within 20 days from the date on which the state of insolvency occurred. Before registering such application with the court, the application must be presented to the Financial Supervision Authority, which will analyse the documents and prepare a statement of defence. Such statement of defence states whether the insurance/reinsurance company is subject to any financial recovery procedure.

The syndic judge rules on the initiation of the bankruptcy procedure in one of the following situations:

- the insurance/reinsurance company is in clear payment default in respect of payable debts, considering its cash liquidities;
- the operating permit of the insurance/reinsurance company has been withdrawn as a result of the impossibility of recovery, under the financial recovery procedure, as a result of the impossibility of compliance with the Solvency Capital

Requirement – for companies supervised under Part I “Solvency II Supervision Regime” of Law no. 237/2015 regarding the authorisation and supervision of the insurance and reinsurance activity, as further amended, or as a result of the impossibility of restoring the available solvency margin at least to the minimum solvency margin – for the companies supervised under Part II “National Supervision Regime” of Law no. 237/2015, as further amended;

- withdrawal of the operating permit in the event of the residual insurer resulting from a resolution process according to the provisions of Law no. 246/2015 regarding the recovery and resolution of insurers.

The insolvency practitioners proposed as liquidators by the creditors have an obligation to get prior approval from the Financial Supervision Authority.

Once the bankruptcy procedure has been initiated, it is forbidden for the main shareholders of the insurance/reinsurance company or for the persons that hold management positions to dispose of the shares they own in the bankrupt insurance/reinsurance company without prior approval from the Financial Supervision Authority and from the syndic judge.

The initiation of the bankruptcy procedure leads to the withdrawal of the insurance/reinsurance company’s operating permit issued by the Financial Supervision Authority.

The insurance policies and the reinsurance contracts concluded by the insurance/reinsurance company will be terminated automatically in 90 days from the final judgement for the opening of the bankruptcy proceedings.

The judicial liquidator will notify the termination of the insurance policies and the right of the insurance creditors to recover their

premiums from the Guarantee fund (for the time period in which the risk was not covered by the insurance/reinsurance company). The notice will be published in the Bulletin of Insolvency Proceedings, in two newspapers with a national reach and on the insurance/reinsurance company's website.

The Insolvency Law also provides for special methods of liquidation in the case of bankrupt insurance/reinsurance companies (see the section on credit institutions for details).

Insurance claims have, regardless of the time at which they were constituted, absolute priority over any other claims with respect to the assets that represent the technical reserves of the bankrupt insurance/reinsurance company.

The judicial moratorium (“*concordat preventiv*”) and the ad-hoc mandate

Law No. 381/2009, as amended, introduced the judicial moratorium (“*concordat preventiv*”) and the ad-hoc mandate procedures on 13 January 2010 and implemented, as an alternative to the burdensome and time consuming insolvency proceedings, a contractual mechanism for a company in distress to reorganise its activity outside the insolvency proceedings, with limited involvement from the court. Pursuant to the entry into force of the Insolvency Law, which repealed Law No. 381/2009, these two pre-insolvency proceedings are now regulated in the Insolvency Law.

The provisions concerning judicial moratorium and the ad-hoc mandate are applicable to any legal entity which is in financial distress and is not in insolvency.

The ad-hoc mandate represents a confidential procedure opened upon the debtor's request whereby an ad-hoc proxy, appointed

by the court, negotiates during 90 days of its appointment with the creditors with a view to reaching an agreement between one or more creditors and the debtor for overcoming the financial distress of the undertaking, safeguarding its activity, maintaining the number of employees and covering its receivables.

The judicial moratorium represents an agreement between the debtor and the creditors holding at least 75% of the receivables that are accepted and not challenged, whereby the debtor proposes a plan for the revival of its business and for covering its debt and the creditors accept to support the debtor's efforts to this end.

The judicial moratorium represents a more flexible mechanism, in comparison with the insolvency proceedings, for a company in distress to reorganise its activity, and is contractually enforceable against all creditors. All enforcement proceedings are suspended pursuant to the homologation of the judicial moratorium.

Moreover, the syndic judge may impose on the creditors which did not sign the judicial moratorium an extension of the maturity of their receivable with 18 months, subject to the debtor offering them appropriate security. During this 18-month extension, no interest, penalties or any other expenses shall be incurred in connection with the respective receivable.

Guidelines for out-of-court restructuring

Finally, it is worth mentioning that a group of representatives of the Ministry of Justice, the National Bank of Romania and the Ministry of Public Finance have drafted a set of guidelines for out-of-court restructuring procedures. The guidelines apply to debtors, creditors and the relevant public institutions and deal with concepts such as standstill periods, enforcement moratorium, information flow and transparency, confidentiality, reorganisation plan, new monies, etc.

The guidelines are indicative and not compulsory and they were published on the aforementioned authorities' websites.

Insolvency of Individuals

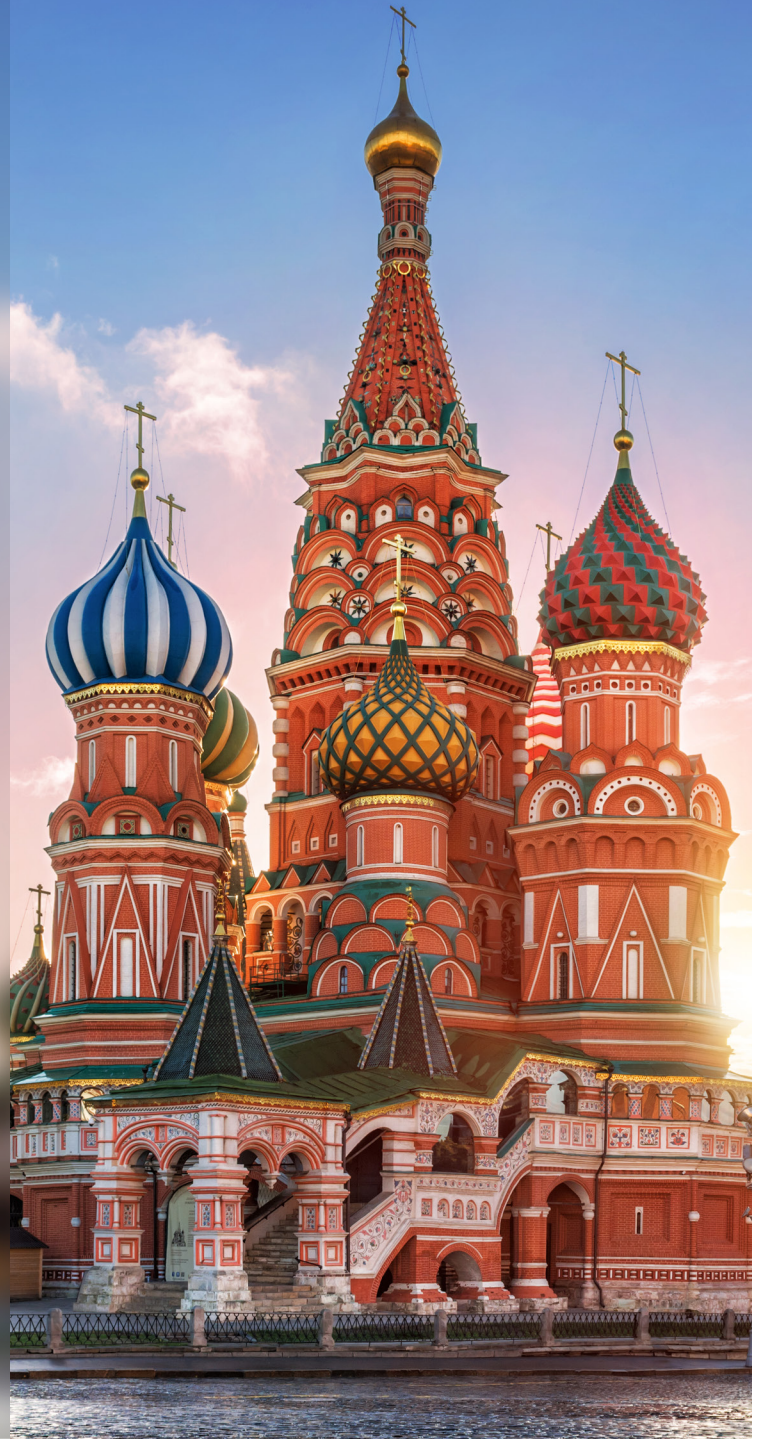
The Romanian Parliament adopted Law no. 151/2015 regarding the insolvency procedure for individuals (the "Personal Insolvency Law"). The law was published in the Official Gazette no. 464 on 26 June 2015 and entered into force on 1 January 2018; it created a proper legislative framework to support the financial recovery of the individuals acting in good faith, satisfaction of their outstanding debts and debt release. Among the most important provisions:

- It provides that a state of "insolvency" occurs when an individual debtor is unable to meet outstanding debts as they fall due with available funds; it is assumed that a debtor is in a state of insolvency when it has not paid its debt towards one or several creditors within 90 days from maturity;
 - A cumulative condition for the opening of the proceeding (aside from the state of insolvency) requires the inexistence of a reasonable probability for the debtor to recover financially within maximum 12 months while maintaining a decent living;
 - There are three insolvency procedure types regulated by the Personal Insolvency Law, as follows: (i) insolvency based on a debt recovery plan; (ii) insolvency based on liquidation of assets; (iii) insolvency based on a simplified form of procedure.
 - Any institutions or companies which have ongoing agreements with the debtor must maintain them; the law deems null and void any events of default that accelerate or terminate an agreement on the sole basis that insolvency proceedings have been started in respect to the debtor;
- From a banking regulatory perspective, depending on the number of retail borrowers using the procedure, it may impact the banks' retail non-performing loans portfolios from a provisioning perspective; this is because the opening of a "bankruptcy proceeding" against a borrower having a debt overdue for more than 15 days would account as "initiation of judicial proceedings" within the meaning of the National Bank of Romania's rules on provisions, triggering the automatic characterization of the relevant loan as "loss" and its provisioning in full;
 - If an insolvency based on liquidation of assets was opened upon creditors' request and a recovery plan failed because of the debtor, the liquidator or any creditor may ask the court to render null and void certain fraudulent transactions, aiming to recover assets envisaged by those transactions;
 - As a rule, interest, default interest, penalties and other accessories of the claim are suspended as of the date of the opening of the proceeding or as of the date of approval of the recovery plan; in case of secured claims, interests and other accessories continue to accrue according to the claim documents within the limit of the charged asset value;

New reforms

A draft law for amending the Insolvency Law proposes to eliminate the requirement that a debtor asking for his own insolvency should not owe more than 50% of his total declared debt towards public entities. This draft has been approved by the Senate on 21 November 2018 and is currently registered with the Chamber of Deputies (the decisional chamber) for debate.

RUSSIA



RUSSIA

Key Elements:

- Impact of insolvency on creditors
- Priority of claims
- Prior transactions
- Liabilities of the management and shareholders

Introduction

Most of the legislation regulating the insolvency of corporate entities in Russia is contained in the Federal Law No. 127-FZ “On insolvency (bankruptcy)” of 26 October 2002 (the “Insolvency Law”) which was subsequently subject to significant amendments. The insolvency of banks and other credit institutions which are subject to a special regime are beyond the scope of this note.

Applicability of Russian insolvency proceedings

Russian insolvency proceedings can generally be commenced only in relation to a Russian registered company. It is also possible that a Russian court would recognise decisions on insolvency proceedings in relation to a foreign entity issued by a foreign court (e.g. a decision of a foreign court restricting the disposal of property located in Russia and owned by a foreign entity against which bankruptcy proceedings had been commenced outside Russia). Recognition by the Russian court of a decision of a foreign court may be either on the basis of an international treaty (although at present there are no treaties relating to insolvency to which Russia is a party) or, in the absence of such a treaty, on the basis of the principle of reciprocity (although there is no established court practice on this point).

Bankruptcy hearings take place before the local *arbitrazh* court (the “insolvency court”) in the area where the company is registered, but decisions of that court may be appealed to courts of higher instance.

Measures to prevent bankruptcy

If a company becomes distressed (see “Signs of bankruptcy” and tests referred to in “Petition by the company”), the shareholders (participants) and the CEO of the company are to take measures to restore the company’s solvency. Measures to restore solvency may also be taken (upon agreement with the company) by its creditors or any third parties. The only measure specified by law is rehabilitation by way of provision of financial assistance in an amount sufficient to satisfy the payment obligations of the company to prevent its bankruptcy and restore its solvency.

The regime of rehabilitation is not sufficiently developed, no liability for failure to take rehabilitation measures is envisaged and therefore rehabilitation is not usually used in practice.

In Russia there is no concept of a sale of a distressed business to a “newco” on a pre-agreed basis, free of residual liabilities which are left behind in the old structure prior to the commencement of bankruptcy proceedings (generally known in other jurisdictions as a “pre-pack”). A sale of a company’s assets prior to instigation of bankruptcy proceedings may be challenged as a “suspicious” or “preferential” transaction.

Is a standstill agreement available outside bankruptcy?

Under Russian law so called standstill agreements, which may be available in other jurisdictions for the purposes of efficient restructuring, or any similar arrangements entered into outside bankruptcy proceedings and introducing a moratorium on

enforcement of creditors' claims and security against a Russian company suffering financial difficulties are unlikely to be enforceable, unless the terms of each relevant agreement under which the relevant debt obligations arose have been formally amended. However, following recent amendments to legislation regulating contracts generally, the concept of a waiver on the exercise of a right (including waivers resulting from a delay in exercising a right within a set period of time) under a contract was introduced. At the moment, until it is tested in practice and in courts it is difficult to predict whether the use of this concept in practice may amount to the fully fledged standstill agreement under which a party may be effectively bound by the waiver of its right (i) to enforce its claim and Security; and (ii) to file for the company's bankruptcy.

Main stages of Russian insolvency proceedings

There are five possible stages of insolvency proceedings that may be applied against a Russian company:

Supervision

- Supervision is the first compulsory stage of insolvency proceedings. It involves the appointment of an interim administrator by the insolvency court whose primary aim is to preserve the company's assets while conducting a financial audit of the company to determine whether the company may be restored to solvency. It includes an initial registration of creditors' claims.
- The interim administrator is approved by the insolvency court (i) following nomination by the petitioner (where the petitioner is not the debtor) or (ii) by selection from a list of candidates presented by the self-regulatory organisation of insolvency administrators (the "SRO") which is specified in a bankruptcy petition. In cases when insolvency is not initiated

by the debtor (e.g. by a creditor), the SRO is proposed by the petitioner in its bankruptcy petition. Where insolvency is initiated by the debtor, the SRO will be determined by the insolvency court when the petition is filed until a special procedure is adopted by the government which will provide for a random SRO to be appointed at the moment a prior mandatory publication of the debtor's intention to file for its insolvency is made.

- During the supervision stage the company's management remains in place (although with limited authority).
- During the supervision stage the first creditors' meeting must be held which, among other things, should decide on the next stage of insolvency proceedings.
- Upon commencement of supervision, payment of creditors' claims which arose before the opening of the insolvency proceedings, and actions or transactions aimed at satisfaction of such claims, are subject to restrictions most of which are extended to the further stages of insolvency (see "*What impact does commencement of insolvency proceedings have on creditors' rights?*").
- The supervision stage can last up to 7 months.

Financial rehabilitation

- Financial rehabilitation which is not a compulsory stage of insolvency proceedings is instigated by the insolvency court (i) at the petition of the first creditors' meeting, and, in the absence of such petition, (ii) at the petition of the company's shareholders or other persons willing to put up collateral for the company's rescheduled debts according to a proposed debt repayment schedule.
- In the course of rehabilitation a debt repayment schedule must be drawn up under which (i) all registered claims are to be satisfied according to the statutory order of priority no

later than 1 month prior to the end of the stage, and
(ii) first and second priority claims are to be satisfied within six months from the date of commencement of rehabilitation.

- Financial rehabilitation is primarily aimed at restoring the company's solvency and the satisfaction of creditors' claims in accordance with a debt repayment schedule.
- If financial rehabilitation is successful, the company emerges from the insolvency proceedings; if not, the insolvency court will move to liquidation unless, to the extent the length of financial rehabilitation allows, there are grounds to move to external administration (see "*External Administration*").
- If the debt on the debt repayment schedule was satisfied out of security provided by third parties, the claims of such security providers against the debtor may only be satisfied after termination of the bankruptcy proceedings (in the event the debtor's solvency is restored) or at the liquidation stage as a third priority claim (i.e. *pari passu* with other unsecured claims of creditors).
- Implementation of the debt repayment schedule and the plan for financial rehabilitation (which is drawn up if collateral supporting the debt repayment schedule was not provided) is supervised by an administrator.
- The administrator is approved by the insolvency court following nomination by the creditors' committee or selection from a list of candidates presented by the SRO proposed by the creditors' committee, but again, the company's management remains in place (although its authority is more limited than at the supervision stage).
- Financial rehabilitation can last no more than 2 years.

External administration

- External administration which is not a compulsory stage of insolvency proceedings is generally instigated by the insolvency court at the petition of the creditors' meeting. It involves the appointment of an external administrator to collect in debt, make an inventory of assets and prepare a plan for restoring solvency (to be approved by a majority of creditors voting at a creditors' meeting).
- The external administration commences if there is a real possibility of restoring the company's solvency within the set time limits, and when it succeeds the financial rehabilitation stage, it may be commenced only if not more than 18 months have passed since the commencement of financial rehabilitation.
- A plan for restoring solvency may include, among other things, (i) a sale of the debtor's asset (as a whole business or in part), (ii) a sale of the debtor's contractual claims (receivables), (iii) an asset substitution involving the contribution of the debtor's assets to a newly-formed subsidiary, which can be sold through public auction or at a stock exchange (provided that the unanimous consent of all creditors whose claims are secured by a pledge or mortgage of the debtor's assets is obtained); and (iv) an issue of additional shares which must be paid in cash; the proceeds from any of the above sale must be applied to discharge the debtor's debts and restore solvency.
- The company's management is removed by the insolvency court and management power is vested in the external administrator.
- An external administrator is approved by the insolvency court by the same procedure as that applicable to financial rehabilitation.

- Subject to the limitation of the aggregate duration of financial rehabilitation and external administration mentioned below, external administration can last up to 18 months but may be extended by a further 6 months on the petition of the majority of registered creditors voting at a creditors' meeting.
- The aggregate term of the financial rehabilitation and external administration may not exceed 2 years.

Liquidation

- Liquidation is the last stage of insolvency proceedings.
- The company may generally enter into liquidation if the insolvency court determines that the company shows "signs of bankruptcy" and there are no grounds to (i) instigate any recovery stages of bankruptcy (i.e. financial rehabilitation and external administration); (ii) approve a voluntary arrangement; or (iii) terminate bankruptcy proceedings or dismiss a bankruptcy petition.
- In addition, the company may enter into liquidation if the creditors at the creditors' meeting:
 - petition at any stage of insolvency to have the company declared bankrupt and for the commencement of liquidation;
 - fail to approve the solvency plan within 4 months from the date of commencement of external administration;
 - reject the plan for restoring solvency and petition for liquidation; or
 - on the basis of the report of the external administrator, fail to take either a decision resulting in termination of insolvency proceedings or a decision on commencement of liquidation, if (a) the insolvency court was petitioned by a creditor participating in the insolvency proceeding for

commencement of liquidation, and (b) the maximum term for which the external administration can last has expired.

- Liquidation starts by declaring the company bankrupt and involves the appointment by the insolvency court of a liquidator to realise the company's assets and satisfy its debts in accordance with the statutory order of priorities.
- The liquidator is approved by the insolvency court by the same procedure as that applicable to the administrator in financial rehabilitation and replaces the management of the company.
- Upon commencement of liquidation, all debts are deemed due, all assets are consolidated in a pool comprising the bankrupt estate (although secured assets are accounted for separately within the pool) and all bank accounts are consolidated into a single account save for (i) a "special account" which is to be established for the purposes of collecting proceeds from the sale of secured property and (ii) the "secured" accounts subject to a pledge of rights over the debtor's bank accounts.
- Upon commencement of liquidation, monetary claims and other claims on enforcement of the debtor's assets can only be made in the course of insolvency proceedings (save for creditors' current claims and claims on recognition of ownership rights, on recovery of property from unlawful possession of the debtor and on court confirmation that void transactions are invalid and application of the consequences of such invalidation which may be pursued outside liquidation stage of the insolvency proceedings).
- In liquidation, a substitution of the debtor's assets for the purposes of the fullest satisfaction of the creditors' claims is available under the same terms and procedure as that applicable for the asset substitution in external administration.

- Liquidation lasts for up to 6 months, although it may be extended by a further 6 months and in practice may be extended even further, although such extension is not expressly provided for by law.
- In practice, in the majority of Russian bankruptcies the liquidation stage follows immediately after supervision and a move to either financial rehabilitation or external administration aimed at the debtor's recovery is quite rare.

A voluntary arrangement

- A voluntary arrangement can be entered into at any stage of insolvency proceedings.
- The creditors' meeting can petition for a voluntary arrangement upon approval by a majority of creditors whose claims are included in the register of creditors (other than creditors of the first and second order of priority), and with the unanimous consent of those creditors whose claims are secured by a pledge or mortgage over the debtor's assets.
- To be legally binding a voluntary arrangement must be approved by the insolvency court and the court may approve it only if the unsecured claims of the first and second priority creditors and current claims are being satisfied.
- A voluntary arrangement binds the company and the creditors whose claims were included in the register of creditors (irrespective of whether they voted against such arrangement or did not vote).
- From the date of court approval of the voluntary arrangement, the insolvency proceedings terminate and the debtor is obliged to start repayment of creditors' claims in accordance with the repayment schedule set out in the voluntary arrangement (which may provide for deferrals and haircuts).

- Existing security (in fact, only pledges or mortgages) over the debtor's assets is retained to secure claims of secured creditors under the voluntary arrangement, unless otherwise provided in the voluntary arrangement.
- The voluntary arrangement can be terminated only with respect to all creditors bound by the arrangement and arguably only in the case of the debtor's failure to perform, or a material breach, affecting creditors whose claims constituted at least 25% of all the registered creditors' claims as of the date of approval of the voluntary arrangement.
- If terminated, the company is brought back to the insolvency stage at which the voluntary arrangement was concluded, with claims restored to the amounts according to the register of claims existing as of the voluntary arrangement approval date.
- If the debtor fails to perform the voluntary arrangement, each creditor has the right to enforce its claims arising from the voluntary arrangement in the court which was initially dealing with the debtor's insolvency, without initiating new insolvency proceedings and without terminating the voluntary arrangement.
- If new insolvency proceedings are subsequently brought against the company, the creditors who entered into the voluntary arrangement will only have the right to claim for the amounts provided for under the voluntary arrangement.

Shortened insolvency proceedings

In certain cases (such as commencement of insolvency proceedings against a company during the process of its voluntary liquidation) the shortened insolvency proceedings apply.

If during voluntary liquidation of a company it appears that the value of the company's assets is not sufficient to settle its creditors' claims, the company's liquidator must file for its bankruptcy. In such circumstances, the earlier stages of insolvency will not apply and the company is declared bankrupt and the liquidation stage of insolvency is commenced immediately after filing the bankruptcy petition, which significantly reduces the duration of the insolvency process.

As a result, in order to participate in the debtor's insolvency proceedings and in order to be included in the register of creditors' claims, creditors should file their claims with the insolvency court within 2 months of public announcement that the company was declared bankrupt. If creditors fail to file within this period, they may not vote at creditors' meetings and the claims outside the register of creditors' claims will be satisfied after discharge of all registered claims.

How can insolvency proceedings be commenced?

Insolvency proceedings can be commenced at the petition of:

- a third party creditor (other than banks and credit institutions) having a monetary claim against the company confirmed by a court decision;
 - an employee (including a former one) having a monetary claim under wages and severance payments;
 - a third party creditor which is a bank or credit institution having a monetary claim against the company without the formal requirement of having its claim first confirmed by a court decision;
 - a government agency in respect of debts owed to the state budget (e.g. the tax and customs authorities); or
- the company itself (in certain cases based on the decision of its directors or shareholders).

Signs of bankruptcy

The company is treated as not being able to satisfy the monetary claims of its creditors (i.e. as showing "signs of bankruptcy") if the unpaid debt is overdue for at least three months from the date when it was due to be repaid.

Substantive tests

Generally, for the commencement of insolvency proceedings by a creditor (including an employee) or a government agency, the unpaid debt should be equal to or exceed EUR 300,000, be overdue by at least 3 months and must have been confirmed by the court as well founded.

Petition by creditors

A creditor (other than a bank or other credit institution) may petition for the debtor's bankruptcy when a court decision or a court order on enforcement of an arbitration award to recover debt owed by the debtor enters into force provided that a notice of the creditor's intention to initiate bankruptcy is published not less than 15 calendar days prior to the filing.

A creditor which is a bank or a credit institution may petition for the debtor's bankruptcy from the date when the debtor shows signs of bankruptcy without the formal requirement of having its claim first confirmed by a court decision. However, such petitioner as well as any other creditor whose claim is to be confirmed by a court decision must comply with a notification procedure to ensure that the debtor and creditors are notified of the creditor's intention to initiate bankruptcy within 15 calendar days prior to the filing. Such notification must be made by publication of a notice in a specialised electronic register, the

Unified Federal Register of Information on Facts Relating to Legal Entities Activity, which is accessible online.

Petition by foreign creditors

For a foreign creditor the following ways of confirming its claim against a Russian debtor for the purposes of filing a bankruptcy petition are available: (i) obtaining a foreign court judgment; (ii) obtaining a foreign arbitral award; or (iii) obtaining a Russian court judgment by initiating proceedings directly in a Russian court.

If foreign creditors obtain a foreign court judgment or a foreign arbitral award confirming their claim against a Russian debtor, a bankruptcy petition against the debtor can be filed with a Russian insolvency court only upon recognition and enforcement of such judgment or award by a court in Russia.

According to recent court practice the simplified rules allowing creditors to file for bankruptcy without a Russian court judgment (e.g. confirming the claim of the creditor or an order of recognition and enforcement of a foreign court judgment or arbitral award) arguably should apply to foreign banks as creditors, if such bank can prove its status as a bank or credit institution its *lex societatis*.

A foreign court judgment: as no international treaty on recognition and enforcement of foreign judgments exists between Russia and most foreign jurisdictions (such as the UK, for example), a foreign court judgment (including foreign insolvency proceedings) can be recognised only on the basis of the principle of reciprocity on a case by case basis. Although there are a few cases when Russian courts have recognised foreign court judgments on the grounds of reciprocity, this practice is far from being considered established.

A foreign arbitral award: to initiate bankruptcy proceedings on the basis of a foreign arbitral award confirming the claim, such award will need to be, if granted in the territory of a contracting state, recognised and enforced in the Russian courts on the basis of the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards.

A Russian court judgment: as an alternative, foreign creditors may take proceedings against a Russian debtor in the Russian courts (provided that a Russian court has jurisdiction to consider such dispute) and a Russian court should accept jurisdiction unless a foreign court has already passed a judgement in a dispute between the same parties where the resolved claim concerned the same subject matter and the judgement had already entered into force. The Russian courts should also dismiss a claim without a hearing on the merits (without prejudice) if a foreign court is already considering a dispute between the same parties on the claim concerning the same subject matter. If a Russian court has jurisdiction to hear a claim against the debtor, it would consider the claim on the merits and once the judgment enters into force, a bankruptcy petition may be filed by a foreign creditor with the Russian insolvency court provided that a notice of the creditor's intention to initiate bankruptcy is published prior to the filing as provided above.

Petition by government agencies

There is a separate regime for dealing with petitions by government agencies. An agency may petition for a company's bankruptcy:

- with respect to debts owed to the state budget or otherwise to the Russian Federation ("Mandatory Payments"), when 30 days have passed after (i) a relevant tax or customs authority took a decision to recover a Mandatory Payment by seizing the debtor's funds or other assets (when a claim is subject

to uncontested proceedings); or (ii) a court decision to recover Mandatory Payments entered into force (when a claim is subject to court proceedings). Within 5 business days after filing a bankruptcy petition with respect to Mandatory Payments with a court, a notice of such filing must be published in an electronic register, the Unified Federal Register of Information on Facts Relating to Legal Entities Activity, which is accessible online; or

- with respect to any other monetary claims, according to the rules applied to any other creditor, i.e. when a court decision to recover the debt enters into force provided that a notice of the intention to initiate bankruptcy is published as provided above.

Petition by the company

Generally, the company (in most cases by the chief executive officer (“CEO”) on its behalf) must petition for bankruptcy within 1 month of it becoming evident that:

- the satisfaction of the claims of one or more creditors results in the company’s inability to perform its payment obligations in full to other creditors;
- the enforcement of claims against the company’s assets will create significant difficulties or make it impossible for the company to continue operations;
- the company owes unpaid wages and severance payments in the amounts due under the labour law, which are overdue by at least three months by reason of insufficiency of funds;
- the company (a) ceases to pay any part of its debts as they fall due on account of insufficiency of funds (“inability to pay”), or (b) has insufficient assets to satisfy its monetary liabilities (“insufficiency of assets”); or

- in the course of a solvent liquidation of the company, either of the “inability to pay” or the “insufficiency of assets” tests referred to in the paragraph above is met (in which case a bankruptcy petition must be filed with an insolvency court within ten days of the test being met).

If the relevant persons fail to file a bankruptcy petition in the cases provided above, they may be subject to administrative and/or civil liability (see “*Liability of “controlling persons” for the insolvent company’s debts*”).

In addition, the company may petition for bankruptcy if bankruptcy is anticipated because of circumstances clearly evidencing its inability to perform its payment obligations to its creditors (including employees with respect to wages and severance payments and government agencies with respect to Mandatory Payments) in accordance with their terms.

Before filing for its bankruptcy, a company must not less than 15 calendar days before the filing notify all of its known creditors of its intention to file for its bankruptcy by publication of a notice in a specialised electronic register, the Unified Federal Register of Information on Facts Relating to Legal Entities Activity, which is accessible online.

How long could it take to commence insolvency proceedings?

The court should decide on whether to accept a petition and instigate insolvency proceedings, or refuse or defer the acceptance of the petition within 5 (five) business days of filing a bankruptcy petition with an insolvency court. The insolvency court must accept the creditor’s petition if the claim on its face satisfies the substantive tests referred to in “*Substantive tests*”. Acceptance of a bankruptcy petition does not inevitably mean that substantive insolvency proceedings will be instigated

against the company as the insolvency court should first hold hearings to verify whether the grounds for commencement of substantive insolvency proceedings are well founded.

Not earlier than 15 (fifteen) business days and not later than 30 (thirty) business days after acceptance of the bankruptcy petition, the insolvency court should hold hearings to verify whether the petitioner's claim is well founded.

If the insolvency court confirms that:

- in case of a creditor's claim, the claim is well founded, continues to meet the test referred to in "*Substantive tests*" and as of the date of court hearings remains outstanding and the debtor is proved to be showing "signs of bankruptcy"; and
- in case of a debtor's claim, any of the tests referred to in "*Petition by the company*" are met,

it must rule on the commencement of substantive insolvency proceedings and instigate supervision (the first compulsory insolvency stage).

How may creditors find out that its Russian debtor has been put in insolvency proceedings?

Information on the commencement of substantive insolvency proceedings against Russian companies (starting from institution of the supervision stage) must be published by the insolvency administrator in the newspaper "*Kommersant*" which may be viewed online.

In addition, information on Russian debtors against which insolvency proceedings have been commenced and other information reflecting the status of bankruptcy proceedings in respect of the debtor can be searched online in the Unified

Federal Register of Information on Bankruptcy (the "Bankruptcy Register") which is a publicly available.

In addition, information on potential bankruptcy proceedings which are intended to be initiated by a creditor or a debtor, can be found in a specialised electronic register, the Unified Federal Register of Information on Facts Relating to Legal Entities Activity, which is accessible online.

It is also usually recommended to make a search with respect to bankruptcy petitions and/or claims filed against a Russian debtor on the website of the relevant local arbitration court in the area where the Russian debtor is registered.

What impact does commencement of insolvency proceedings have on creditors' rights?

Claims of creditors upon commencement of insolvency proceedings

Once insolvency proceedings are commenced (i.e. the supervision stage is instigated) the insolvent company can only discharge its claims that arose before the opening of insolvency proceedings in accordance with the statutory order of priorities. In particular, upon institution of supervision:

- creditors' claims (other than current claims i.e. claims that arose after the opening of insolvency proceedings) may be presented only in accordance with the procedure prescribed by law;
- for the purposes of participation in bankruptcy proceedings and inclusion of creditors' claims in the register, claims which arose on or before the acceptance by the insolvency court of a bankruptcy petition are deemed to be automatically due and payable;

- any debt recovery proceedings and steps to enforce against the company's assets are suspended (except where enforcement is sought under enforcement orders entered into force before the commencement of insolvency proceedings for employment claims, personal injury claims, claims for recovery of property from the debtor's unlawful possession and certain other claims);
- all claims for the purposes of inclusion in the register of creditors' claims are converted into roubles at the exchange rate set by the Central Bank of the Russian Federation (the "Central Bank") as at the date of commencement of the insolvency stage following the maturity of such claim. Once the amount of the claim is fixed in roubles and included in the register of claims, it is not subject to further revaluation in any subsequent bankruptcy stage if the exchange rate changes;
- interest on registered claims during supervision and during each other stage of insolvency accrues at the Central Bank refinancing rate determined as of the date of commencement of each relevant stage; and
- enforcement of pledges and mortgages is prohibited at this stage.

Set-off

From the date of commencement of the first insolvency stage (supervision), set-off against the debtor's claims is prohibited if it would breach the statutory order of priority, or discharge by way of set-off results in the preferential satisfaction of claims of one creditor over another. Such prohibition extends to any further insolvency stage.

Contractual subordination

Historically contractual subordination in respect of a claim against an insolvent Russian company has not been recognised under Russian law. Although recently adopted changes to the

Russian Civil Code introduced a concept and principles of contractual subordination, in the absence of corresponding changes to the insolvency legislation, contractual subordination is unlikely to be effective and binding for the debtor in its insolvency but should be binding as among the creditors participating in it.

Dividends and claims for equity

From the date of commencement of the insolvency proceedings, any distribution of profit to participants, the payment of dividends to shareholders and other payments to holders of issued securities is prohibited.

Claims of shareholders for the return of equity are prohibited upon commencement of insolvency and are repaid after satisfaction of any other creditors' claims.

Debt to equity swaps

Although debt to equity swaps by way of exchanging a company's debts for newly issued shares outside insolvency were recently permitted by amendments to company's laws, such swaps are not available in the course of bankruptcy proceedings against the company. At the insolvency stages where the issue of additional shares by a debtor is allowed, such shares are to be paid for in cash only.

Transfer of claims

Under Russian insolvency law there are no restrictions for the transfer of claims against a debtor by its creditor in the debtor's insolvency to any other creditor or person (including when such claims are already included in the register of creditors' claims).

Security enforcement

Once insolvency proceedings are commenced, there is a general moratorium on the levying of execution against the

property of the insolvent company. Pledged assets are segregated from other assets and may not be sold without the consent of the secured creditor.

Secured creditors can enforce their security at the financial rehabilitation and external administration stages, but only through the insolvency court with a sale of such secured property to be conducted at an auction organised by an insolvency administrator or a specialised organisation.

Enforcement against the secured property will be allowed if (i) there is a risk of damage to the secured property which will result in significant decrease of its value as well as the risk of loss of such property or (ii) enforcement against the debtor's secured property would not make it impossible to restore the debtor's ability to pay its debts (the impossibility to restore the ability to pay debts in the case of enforcement against secured property is to be proved by the debtor).

Enforcement proceeds from the sale of the secured property are applied against the secured debt of the respective secured creditor. Claims of secured creditors are treated as claims of unsecured creditors to the extent they are not discharged out of the relevant enforcement proceeds (see "*Priority of Claims*").

How the sale of the secured property is conducted at the liquidation stage?

At the liquidation stage the secured property must be sold in the same way as at the early insolvency stages and must be offered for sale at two consecutive auctions with the sale price at the first auction to be approved by the insolvency court and with the sale price at the second auction to be 10% lower than the initial sale price. If the second auction fails, the secured creditor is entitled to appropriate the secured property at a value which is 10% lower than the offered sale price at the second auction. If,

within 30 days from failure of the second auction, the secured creditor fails to appropriate the secured property, the secured property is to be sold by way of a public offer with a gradual decrease in the price. In the course of sale by way of such public offer the secured creditor is entitled, in the absence of any bidders, to appropriate the secured property at the starting price determined for such offer.

The starting price and the procedure and terms for conducting the auction in relation to the secured property are to be determined by the relevant secured creditor.

At the liquidation stage proceeds from the sale of the secured property or the value of the secured property appropriated by the secured creditor are applied against the secured debt subject to the limitations on allocation of proceeds or value described below in "*Claims of secured creditors*".

Creditors' rights

Creditors have a say on the key matters concerning the insolvency process by participating in the creditors' meetings.

Creditors' meeting

Generally the creditors' meeting has exclusive competence, among other things, on the following matters:

- to approve additional criteria for nominees for the positions of insolvency administrator at different stages of insolvency;
- to approve a voluntary arrangement to be submitted to the court;
- to determine what would be the next stages of insolvency (i.e. either to petition the court to declare the company bankrupt and commence liquidation or to proceed with pre-liquidation insolvency proceedings that may end up with the

restoration of solvency of the company and termination of insolvency proceedings).

Claims

In order to participate and vote at the creditors' meeting, creditors should file their claims (accompanied with either the court decisions confirming the claim or any other documents confirming the grounds for the claim) with the insolvency court requesting to include their claims in the register of creditors' claims.

In bankruptcy proceedings, as a rule only monetary claims (and not claims against non-cash assets) against the debtor can be filed with the insolvency court and can be included in the register of creditors' claims. However, at the liquidation stage claims against non-cash assets (such as on transfer of property, on performance of works and rendering services by the debtor) can be filed with the insolvency court and will be included in the register of creditors' claims (and will be discharged) in cash in the amount based on its monetary valuation. In any particular case the court should decide whether a non-monetary claim against the debtor is to be converted into a monetary claim and included in the register of creditors' claims or whether it can be considered and satisfied outside insolvency proceedings (such as, e.g. a claim for the return of the creditor's property retained by the debtor in breach of the contractual provisions or upon termination of the relevant contract in accordance with its terms).

The claims are included in the register on the basis of an insolvency court's ruling held after the insolvency court verifies the grounds for such claims and confirms that the claim is substantiated. As a result, while a loan granted before commencement of the insolvency process is automatically accelerated, only a debt that has been confirmed by an insolvency court ruling can be recorded in the register of

creditors' claims, thereby entitling the relevant creditor to attend and vote at creditors' meetings during that stage. If the claim under a loan is not submitted to the insolvency court within the set period of time, the lender can register its claim (and participate in creditors' meetings, etc.) only at the next stage of insolvency when its claim is included in the register of creditors.

The register is closed to new filings of claims within 2 months of public announcement of the company's bankruptcy and the commencement of liquidation. Claims which are required to be confirmed by a court or other authorised body decision which is pending on the date of the closing of the register of creditors, but which are submitted within 6 (six) months after the closing of such register are deemed to be submitted to such register in time.

How do creditors vote at the creditors' meeting?

Only creditors whose claims are included in the register of creditors' claims as of the date of voting (except for creditors of the first and second order of priority) have voting rights at the creditors' meeting. Creditors under employment claims do not have voting rights at a creditors' meeting, but their representative appointed by such creditors to act on behalf of their interests can participate in a creditors' meeting without a voting right.

Creditors vote at the creditors' meeting in proportion to their registered claims (in each case, excluding the amount of any claim for fines, penalty interest, damages and other financial sanctions). Decisions are generally adopted by a simple majority of votes of creditors attending the meeting (provided that not less than half of the registered creditors by claims were present at such meeting), although decisions on certain matters must be adopted by a majority of the total number of registered voters (e.g. on commencement of further stages of

insolvency and extension of the term of such stages, on conclusion of a voluntary arrangement, on dismissal of an insolvency administrator).

The decision of the majority creditors will be binding on the minority creditors and the company cannot influence any such decision. The validity of decisions can be challenged in a court.

Voting rights of secured creditors

The secured creditors are granted a right to vote at a creditors' meeting during:

- supervision where enforcement of the security is prohibited; and
- financial rehabilitation and/or external administration if the secured creditor decided against the sale of secured property during these stages or if the insolvency court rejects the sale of secured property on the enforcement of the relevant pledge or mortgage.

In addition, the secured creditors have a right to vote at a creditors' meeting (at any stage of insolvency to the extent their registered claim is not discharged out of the secured property) on the following matters:

- election of the administrator or the SRO;
- petitioning the bankruptcy court for removal of the administrator; and
- petitioning the bankruptcy court for termination of liquidation and a move to external administration.

Secured creditors that do not have a voting right can still participate in, and speak at, creditors' meetings.

Secured creditors still have voting rights with respect to voluntary arrangements (where a unanimous vote of all secured creditors is required) at the liquidation stage (where generally secured creditors do not have voting rights) and arguably at the earlier stages of insolvency in cases where the secured creditors generally do not have voting rights (i.e. when their right to enforce security was not rejected or they have not refused to enforce).

Priority of claims

Claims of unsecured creditors

At the liquidation stage (where all creditors' claims are subject to satisfaction), the satisfaction of unsecured monetary claims against the insolvent company is generally subject to the following statutory order of priorities:

- *first*, personal injury claims and claims for damages for suffering or distress;
- *second*, employment claims (wages and severance payments) and royalty claims under copyright agreements; and
- *third*, all other claims including claims of secured creditors to the extent their claims are not discharged out of the proceeds of sale of secured assets or the value at which the secured assets were appropriated by the secured creditor.

Claims within the third order of priority arising from a breach of obligations (such as default interest, penalties, lost profits and damages) would be discharged only after satisfaction of claims constituting the main obligations (such as principal and interest), disregarding the order of application set by the agreements constituting such claims.

Settlement of claims in the above order of priority is conducted in accordance with the register of creditors' claims. Within each order of priority, in the case of insufficient proceeds to discharge all creditors' claims in full, unsecured registered claims are discharged on a pro rata basis.

Claims submitted after the closing of the register of creditors are satisfied only after the discharge of all registered claims.

Current claims

So-called current claims (essentially, monetary claims that have arisen after the opening of insolvency proceedings, including court and bankruptcy costs, taxes, payments due to state budget and utilities and operational costs) together with the costs of any measures to prevent industrial or environmental harm, rank ahead of both claims under the statutory order of priorities and claims of all creditors which have arisen before the date of acceptance of a petition for the debtor's bankruptcy, and are settled in accordance with the statutory order of priority specifically established for current claims. Within the same order of priority for current claims, the claims are discharged in the calendar order of their occurrence.

Claims of secured creditors

The Insolvency Law expressly recognises only a pledge or mortgage as giving the holder the status of a secured creditor and it is therefore unclear what status, if any, would be afforded by other forms of security.

Claims secured by a pledge or mortgage over the company's assets are settled out of the proceeds of sale of such assets in priority to all other claims, subject to a requirement (arguably only at the liquidation stage) to allocate part of the proceeds to discharge claims with statutory priority of the first and second orders, and certain current claims.

Claims secured by a pledge of rights to the debtor's "secured" bank accounts are discharged by withdrawing funds standing to the credit of the secured account up to the available balance and up to the limits of the outstanding secured obligations, subject to the rules on allocation of proceeds referred below.

According to the Insolvency Law the following rules on allocation of proceeds of sale of secured property (allocation of funds sitting on the debtor's "secured" account pledged to a creditor) at the liquidation stage currently apply:

- 80% (under a credit agreement) or 70% (in all other cases) of the proceeds (in an amount not exceeding the aggregate amount of principal and interest included in the register of creditors' claims) is applied to discharge claims of the secured creditor; and
- the remaining 20% or 30% respectively is to be deposited in a "special account" to be further applied as follows:
 - (i) up to 15% or 20% respectively – for the satisfaction of unsecured claims with statutory priority of the first and second orders, if the unencumbered property of the debtor is insufficient to settle these claims; and
 - (ii) the balance – for the satisfaction of court and bankruptcy costs (including costs and fees incurred in connection with the sale of the secured property), payments of fees of the court-appointed administrator and persons retained by such court-appointed administrator for the purposes of administration and any remaining balance, for the satisfaction of other current claims.

If, following the failure to sell the secured property at the second auction, or in the absence of any bidders in the course of the public offer (see above), the secured creditor elects to

appropriate the secured property, it must transfer 20% or 30%, as appropriate, of the value of the property at which it was appropriated, to the “special account” for the purposes of satisfaction of the above statutory prioritised claims.

To the extent unsecured claims with statutory priority of the first and second orders are satisfied, the remaining proceeds of sale of the secured property are paid to the respective secured creditors. If the secured claim is discharged in full, the remaining proceeds are routed to satisfaction of outstanding current claims and the balance is included in the bankruptcy estate and channelled towards discharge of creditors’ claims of the third order of priority.

There is a strong argument that proceeds allocation rules described above should apply only at the liquidation stage and should not apply in the case of enforcement of the security by the secured creditor at the early stages of insolvency.

Third party security

The Insolvency Law states that claims of creditors under pledge or mortgage agreements that are provided by a debtor as third party security (i.e. not for its own debts) are satisfied in accordance with the procedure of satisfaction of claims of secured creditors. Secured creditors under third party pledges, although not creditors having direct monetary claims against the security provider, have the same rights as secured creditors of that security provider. However, the following restrictions and distinctions by comparison with the creditors having a direct monetary claim against the debtor apply:

- Creditors under third party pledges are not entitled to file for bankruptcy of the security provider as such secured creditor does not have a direct monetary claim against the security provider.

- Similarly to the secured creditors having a direct monetary claim against the debtor, secured creditors under third party pledges may claim enforcement of the security only upon filing an application to the insolvency court asking for their claims to be included into the register of creditors as a secured creditor. However, in the absence of a direct monetary claim against the debtor the amount of their claims is to be determined on the basis of the value of the secured property provided in the pledge agreement or established by the insolvency court as the starting sale price in the course of enforcement of such security. Although not specified by law, in order to be included in the register of creditors as a secured creditor under a third party pledge, the insolvency court should most likely be provided with evidence that the claim under the secured obligation against the debtor is due and not discharged (although no court decision confirming such claim would be required to be presented to the insolvency court).

The above will not apply if the security provider gives a guarantee of the primary debt obligation and this guarantee is secured by a pledge or mortgage as in this case the secured creditor will have a direct monetary claim against the security provider under a guarantee secured by the security provider’s property.

Claims of shareholders

Equity claims of shareholders may not be satisfied in insolvency proceedings and may be satisfied only upon liquidation of a company if any assets remain after all the creditors have been paid in full. Generally, shareholders with shareholder loans are treated as other creditors. However, according to recent court practice, claims of shareholders under shareholder loans can be rejected from inclusion in the register of creditors and may be treated as equity claims if such loans are proved to be detrimental to the interests of other creditors and it has not

been proved that the use of shareholder loans instead of equity contributions was commercially reasonable and/or in good faith.

Prior transactions

In addition to certain transactions that are prohibited or restricted (e.g. requiring the creditors' committee approval) at each stage of insolvency and which if entered into in violation of such restrictions may be challenged by an insolvency administrator, there are specific transactions that may be challenged in insolvency if entered into during suspect periods prior to the opening of insolvency proceedings or at any time thereafter.

Generally, the following two specific types of transaction can be challenged in the insolvency court at the stage of external administration or liquidation:

- so called "suspicious" transactions which include transactions "at an undervalue" and transactions "aimed at defrauding creditors"; and
- preferential transactions.

Transactions "at an undervalue" are transactions where the consideration received or to be received by a debtor is "inadequate" (if, for example, the market value of the transferred assets is significantly higher than the consideration received or to be received, taking into account the circumstances of the transaction, including where the price or other terms of such transaction are materially less favourable than those of comparable transactions concluded in comparable circumstances).

Suspect period: Transactions "at an undervalue" may be challenged if entered into or performed within 1-year preceding, or at any time after, the opening of insolvency proceedings.

Transactions aimed at defrauding creditors are treated as such if simultaneously the following conditions are to be met:

- the purpose of the transaction was to prejudice the rights of creditors (such purpose is presumed (unless proved otherwise), if the debtor at the time of entry into the transaction was or as a result of entry into the transaction became unable to pay its debts or the liabilities of a debtor exceeded the value of its assets and, among other things, (a) no consideration was paid to the debtor; or (b) the transaction was with an "interested party"¹⁷; or (c) the value of disposed property or assumed obligations equals 20% or more of the balance sheet value of the debtor's assets);
- such transaction resulted in infliction of "harm to creditors' rights" (i.e. such transaction or action resulted in (a) a decrease of the value or the size of the debtor's assets; (b) an increase of the value of claims against the debtor; or (c) other consequences that entail or could entail the inability of creditors to satisfy their claims (whether in full or part) from the debtor's assets); and
- the counterparty knew or should have known of the above purpose of the transaction at the time of entry into such transaction (an "interested party" is presumed to know of such purpose).

¹⁷ Interested parties include, among others, the CEO of the debtor and its directors as well as affiliates and companies comprising the so-called "group of entities" to which the debtor is attributable.

Suspect period: Transactions aimed at defrauding creditors may be challenged if entered into or performed within 3 years preceding, or at any time after, the opening of insolvency proceedings.

Preferential transactions are transactions that result or may result in preferential satisfaction of a claim of a particular creditor over other creditors, including, but not limited to, one of the following transactions:

- (i) granting of security or guarantees for pre-existing indebtedness;
- (ii) transactions that may alter the ranking of creditors' claims which arose before the entry into of such transaction;
- (iii) transactions that will or may result in the satisfaction of unmatured claims of creditors where the debtor has failed to satisfy its matured claims; or
- (iv) transactions which provide or may provide more priority in satisfaction of a creditor's claims which arose before the entry into such transaction when compared to the priority to be given to such claims if their settlement was exercised according to the statutory ranking of creditors in insolvency.

Suspect period: Preferential transactions may be challenged if entered into or performed within 1 month preceding, or at any time after, the opening of insolvency proceedings. However, preferential transactions falling within both (i) and (ii) above, or falling within any of the above where the counterparty knew of the debtor's inability to pay or that the debtor's liabilities exceeded the value of its assets, are subject to a 6-month suspect period. A counterparty that is an "interested party" is presumed (unless proved otherwise) to have such knowledge.

Any payments made by the debtor or any actions of other persons for the account of the debtor (such as set-off (including as a result of enforcement of the existing security), debiting the debtor's account without consent of a debtor, transfer of a debtor's property, etc.) in or towards discharge of the debtor's obligations (whether scheduled or under voluntary or mandatory prepayment according to the terms of the relevant agreements or, with respect to the transfer of property, in performance of an earlier effected prepayment) within 1 month prior to the commencement of insolvency proceedings may be challenged on the grounds of preferential satisfaction of claims of a particular creditor over other creditors. Such payments, property transfers and other actions are vulnerable irrespective of whether the recovering creditors knew or did not know of the debtor's inability to pay or insufficiency of the debtor's assets to satisfy its payment obligations at the moment of such payment or action.

However, payments made by the debtor towards discharge of monetary obligations under credit agreements (i.e. facility or loan agreements) with banks and credit institutions as lenders (which should arguably include foreign banks) and payments towards discharge of Mandatory Payments cannot be challenged as preferential transactions if:

- (i) such payments were made as scheduled payments according to the terms of the credit agreement or as provided by law; and
- (ii) when such scheduled payments were made, the debtor had no other mature monetary obligations which the respective creditor was aware of.

As the Insolvency Law also expressly provides that security granted after the date on which the debt obligations arose may be challenged, any security granted to support debt rescheduling or mark-to-market payments made by a borrower are potentially vulnerable. It is also clear that novation agreements and settlement agreements (*dogovor ob otstupnom*) are susceptible to challenge as preferential transactions.

In addition, within 3 months after commencement of external administration, an external administrator may disclaim executory contracts (i.e. contracts where the other party's obligations are contingent on the company first performing its own obligation) if performance of the company's obligations under such contracts will impede restoration of its solvency or will result in losses in comparison with similar transactions entered into in comparable circumstances. The aggrieved party is entitled to claim damages caused by the company's refusal to perform. Similar rights are given to a liquidator and similar rules apply at the liquidation stage, but contracts cannot be disclaimed in liquidation if return to solvency is in any case unlikely.

Vulnerable restructurings

The provisions of the Insolvency Law on preferential transactions give rise to a risk of challenging the restructuring of the financing of a Russian debtor, irrespective of whether there was an actual flow of funds (i.e. a deemed repayment of the existing loan by the debtor and provision of a new financing by the same creditor on new terms reflected by a book entry could also be vulnerable). As a result, any payments to the creditor under an existing facility effected within the suspect period (even if money was not actually transferred and irrespective of whether the refinanced facility agreement was entered into before the suspect period) may potentially be subject to a clawback to the debtor, while new money provided under a new facility and

money clawed back under a refinanced facility would be subject to repayment according to a statutory order of priority in the course of the debtor's bankruptcy. Accordingly, if refinancing is made within the suspect period, the creditor may be exposed to a double risk on the debtor against which bankruptcy proceedings are initiated (i.e. for the amount of the repaid facility to be returned by the creditor to the debtor and the amount of new monies extended to the debtor) unless any of the exceptions applicable in case of preferential transactions or else as referred below could be applied.

What cannot be challenged?

The Insolvency Law specifies certain transactions that cannot be challenged in insolvency. In addition to an exception referred to with respect to preferential transactions (see above), these are:

- transactions concluded on a stock exchange which cannot be challenged on any of the above grounds;
- transactions entered into in the ordinary course of business (i.e. transactions entered into on the key terms which are not significantly different from the terms of similar transactions entered into during a sustainable period of time) if the value of assets disposed of or obligations incurred does not exceed 1 per cent. of the balance sheet value of the debtor's assets, which cannot be challenged as transactions "at an undervalue" or as "preferential transactions"; and
- transactions where the debtor received adequate consideration unless such transactions are treated as "aimed at defrauding creditors".

Who can challenge?

A claim for the invalidation of a transaction in insolvency can be brought to the insolvency court by the liquidator or external

administrator of a debtor either at his own discretion on behalf of the debtor or when instructed by a creditors' meeting or committee. When voting at the creditors' meeting to decide whether a vulnerable transaction with a creditor, or with any of its affiliates, is to be challenged, the votes of such creditor shall be disregarded.

If an insolvency administrator fails to bring a claim for the invalidation of the transaction within the time limits set in the decision of the creditors, such claim may be filed by a representative of, or any person authorised by, the creditors' meeting or committee. A creditor or a government agency whose registered claim exceeds 10 per cent of the total amount of indebtedness included in the register of creditors' claims (disregarding the amount of claims of the creditor whose transaction is being challenged or its affiliates) have been given the right to bring a claim for the invalidation of the transaction. According to court practice, claims of several minor creditors can be consolidated to amount to the required 10 per cent threshold that would entitle a representative of such creditors to file for the invalidation of a vulnerable transaction.

What are the consequences of successful challenge?

As a general rule everything received under a successfully challenged transaction will be subject to clawback (and all

assets disposed of by the debtor under such transactions are to be returned to the bankrupt estate). In turn, counterparties of the debtor will have a monetary claim against the debtor for the value of returned property, and will generally rank *pari passu* with other unsecured creditors or, in certain cases (e.g. where the test of the knowledge of the counterparty of a harm inflicted to other creditors or of the debtor's inability to pay or insufficiency of assets compared to the debtor's liabilities at the time of entry into the transaction is met) will rank behind the claims of unsecured creditors. However, according to the clarifications of the Supreme *Arbitrazh* Court in certain cases the consequences of suspect and preferential transactions may have a more balanced approach when e.g. the good faith behaviour of the creditor is being taken into account (i.e. amounts subject to clawback may be decreased, security re-instated and the ranking of the restored claims may not be downgraded).

Liability of the management and shareholders

Liability of "controlling persons"¹⁸ (including directors) and its shareholders in the case of the company's insolvency are regulated by a number of Russian laws. Depending on the type of action and its gravity, a director may be subject to civil, administrative or criminal liability.

18 For the purposes of the insolvency regulation a controlling person means a person (whether an individual or a legal entity) who, within the three year period prior to the occurrence of any "signs of bankruptcy" and after their occurrence, but before accepting by courts of a petition for a company's bankruptcy, has or had the right to give binding instructions to the debtor or otherwise is or was able to determine the debtor's actions, including with respect to the debtor's transactions and their terms. The Insolvency Law expressly provides that the following persons are presumed (unless proved otherwise) to be "controlling persons": (i) a liquidation administrator or a member of the debtor's liquidation commission; (ii) a person that derived a benefit from illegal or bad faith actions of persons who were the debtor's authorised representatives; (iii) persons (entities) that themselves or together with other "interested" entities had the right "to dispose of 50 per cent. or more" of the voting shares (in the case of a joint stock company) or more than 50 per cent. of participatory interests (in the case of a limited liability company); (iv) a member of the management board; and (v) the CEO. The court may recognise a person as a controlling person at its discretion on other grounds not specified by law when it finds evidence presented to that effect convincing.

Civil liability

If bankruptcy of a company is caused by the shareholders (participants) or other persons who have the right to give binding instructions to such company or otherwise are able to determine the actions of the company, such persons can bear subsidiary liability for the company's obligations if the assets of the company are insufficient to discharge the debtor's obligations. Apart from limited liability companies in relation to which the liability of "controlling persons" is not restricted by any subjective test, the scope of the potential liability of "controlling persons" with respect to joint stock companies is restricted to situations where such "controlling persons" have used their right to give binding instructions to, or otherwise exercised their control over the company with the intention that the company follows those instructions and they know in advance that such action would entail the company's insolvency.

According to court practice, the above general rules on holding the CEO, a shareholder/participant and members of a company's boards liable are not applied in isolation to the concept of liability of "controlling persons" of the Insolvency Law (as provided below) and the latter concept may trigger liability of "controlling persons" without invoking the above general concepts of liability.

Liability of "controlling persons" for the insolvent company's debts

In addition to the general liability envisaged by civil legislation, the Insolvency Law sets out the specific grounds and the level of liability of the company's management, shareholders and other "controlling persons" for the company's debts.

The shareholder and management as well as other "controlling persons" of a Russian debtor that was declared bankrupt could jointly and severally bear secondary liability for monetary claims

of creditors (including current claims, claims included in the register of creditors' claims and those filed after the closure of the register) against, and Mandatory Payments due from, such debtor, when the bankruptcy estate is insufficient to satisfy the creditors' claims in full as a result of actions of, or a failure to act by, "controlling persons". Such cause and effect is presumed, among other things, if:

- a suspect or preferential transaction was entered into or approved by such person following instructions of such person and such transaction resulted in a significant "harm to creditors' rights"; or
- claims of creditors who rank in the third order of priority, arising as a result of a criminal, administrative or tax offence committed by a debtor or its CEO and confirmed as such by a legally binding decision, which holds such person liable, exceed 50 per cent. of the value of the total amount of claims of creditors of the third order of priority included in the register.

In a situation where the accounting or reporting documentation of the debtor that is required to be produced and maintained by Russian law appears to be missing, or the relevant information on the assets of the debtor appears to be incomplete or untrue, in each case as of the date of instigation of the supervision stage or declaration of the debtor's bankruptcy, and such situation results in significant difficulties for conducting bankruptcy proceedings, including making an inventory and realisation of the debtor's assets, the CEO of the debtor is also presumed as causing the company to be recognised as insolvent and therefore also bears secondary liability for the outstanding obligations of the debtor.

In addition, the controlling persons will be liable when the "signs of bankruptcy" occurred not as a result of actions of such

persons, but after the occurrence of the “signs of bankruptcy” such persons’ actions (or failure to act) caused significant deterioration in the financial condition of the debtor.

Controlling persons may be also held liable for damages caused to creditors by commencement of bankruptcy proceedings while the debtor was able to discharge its obligations in full or for an unreasonable failure to challenge unfounded creditors’ petitions to initiate bankruptcy.

The controlling persons may be liable up to the amount of creditors’ claims which remain undischarged as a result of any insufficiency of the debtor’s assets. Russian courts may reduce the liability of a “controlling person” if such person proves that the amount of harm caused to creditors at its fault is significantly lower than the amount claimed by creditors from this “controlling person”.

Furthermore, “controlling persons” are exempt from liability to the extent they can prove that they were not at fault, i.e. that they acted in accordance with normal business practice in good faith and reasonably in the interests of the debtor and without detriment to the interests of creditors and if proved that they acted to prevent bigger harm to the interests of creditors.

In addition to the above, the persons (generally the CEO and a liquidator, as appropriate) who failed to file for the company’s bankruptcy when they were obliged to do so by law (see “*Petition by the company*” above), may bear secondary liability for new debts of the company arising after the date when the bankruptcy petition should have been filed and until the date when the bankruptcy has been commenced.

Criminal liability

A court may find the CEO of a company or its founders (participants) criminally liable to a fine, compulsory community service, compelled labour, correctional labour, custodial restraint or imprisonment for a period of up to 6 years in cases provided in this section.

The Criminal Code imposes criminal liability for actions taken in anticipation of bankruptcy as well as for the actions taken during insolvency of a company.

In particular, the Criminal Code imposes criminal liability (which includes imprisonment as sanctions) for the following, provided that such actions, or failure to act, caused substantial damage:

- (a) deliberate bankruptcy when the CEO or a shareholder (participant) of the company takes or omits to take actions which he knows will result in the company’s inability to satisfy in full its creditors’ claims;
- (b) fraudulent bankruptcy when the CEO or a shareholder (participant) of the company knowingly makes a fraudulent public announcement of bankruptcy of that company; or
- (c) unlawful actions during bankruptcy proceedings that, among other things, contemplate:
 - (i) concealing property, rights to property or liabilities, withholding information on property, its size, location or any other information on property, rights to property or liabilities, transferring property to others, alienating or destroying property and concealing, destroying or falsifying accounting documents, in each case if such actions have been taken when there were signs of the company’s bankruptcy;

- (ii) unlawful satisfaction by the CEO or a shareholder (participant) of claims of certain creditors out of the company's assets made in the knowledge that this will defraud other creditors, if such actions have been taken when there were signs of bankruptcy of the company;
 - (iii) unlawful actions aimed at impeding the activity of a court-appointed administrator, including evading transfer of the documents necessary for performance of its duties or the debtor's property or refusal to do so, where the management power of the debtor's CEO is vested in a court-appointed administrator.
- (e) failure by a court-appointed administrator to perform its obligations under the Insolvency Law;
 - (f) non-performance of a legally binding court judgment imposing secondary liability on "controlling persons" for the insolvent debtor's obligations; and
 - (g) failure by the company's CEO to file a bankruptcy petition against a company in the cases provided for in the Insolvency Law.

For the above actions to constitute a crime, "substantial damage" (i.e. in the amount exceeding RUB 2.25 million) must be caused.

Administrative liability

The Administrative Offences Code also imposes liability on the CEO of a company, its shareholders (participants) or a court-appointed administrator (where appropriate) with respect to bankruptcy. This includes the following administrative offences:

- (a) fraudulent bankruptcy;
- (b) deliberate bankruptcy;
- (c) unlawful actions during bankruptcy, already mentioned in paragraph (c) of the *Criminal liability* section;
- (d) acceptance by a creditor of the unlawful satisfaction of its claims out of the debtor's assets knowing of the prejudice of other creditors, if such action was taken when there were signs of the company's bankruptcy;

The offences referred to in paragraphs (a) to (e) will be subject to administrative liability to the extent such offences are not subject to criminal liability (i.e. when the consequences of an offence are less serious (have not resulted in substantial damage) than in the case of criminal liability).

The Administrative Offences Code envisages administrative fines of up to RUR 100,000 or disqualification for a period from 6 months up to 3 years as the main sanction on directors.

Disqualification entails depriving an individual of the right to occupy any management position in the executive body of a legal entity, to sit on the board of directors, management (supervisory) board and to carry out entrepreneurial activity involving management of a legal entity.

THE SLOVAK REPUBLIC



THE SLOVAK REPUBLIC

Key Elements:

- Separate process for bankruptcy and restructuring
 - Trustee recommendation required for restructuring
 - Automatic stay prevents security enforcement
- Set-off allowed in bankruptcy

Introduction

The current insolvency law of the Slovak Republic is based on the Act on Bankruptcy and Restructuring (Act No. 7/2005 Coll., the “Bankruptcy and Restructuring Act”) which came into effect in the Slovak Republic as of 1 January 2006, replacing the Act on Bankruptcy and Compensation (Act No. 328/1991 Coll.).

Since its adoption, the Bankruptcy Act has been subject to a number of amendments. On 12 October 2017 the Slovak parliament approved an amendment (the “Amendment”) which, among others, specified liability of the persons obliged to file for bankruptcy of a debtor (such as directors) in a timely manner. According to the Amendment, if damage has been incurred by a creditor due to a failure to file bankruptcy the creditor may claim the damage against directors of the debtor within one year following termination or cancellation of bankruptcy proceedings or completion of execution or similar enforcement proceedings. In addition, if the court holds the directors liable for the damage caused, the directors will be prohibited from being members of a statutory and/or supervisory body of a company for up to three years.

The Bankruptcy and Restructuring Act also provides for discharge proceedings available to natural persons, but this area of the law is beyond the scope of this publication.

Bankruptcy and restructuring processes

Under the Bankruptcy and Restructuring Act, there are two main types of proceedings available to corporate debtors: bankruptcy (in Slovak *konkurz*), i.e. a sale of the estate (piecemeal or as a going-concern) with the satisfaction of creditors through distribution of the proceeds, and restructuring (in Slovak *reštrukturalizácia*), i.e. reconstruction of the right-hand side of the debtor’s balance sheet, based on a restructuring plan approved by creditors and the court. As of 1 July 2016, a register of debtors was launched. The register contains enumerative data on bankruptcy and restructuring proceedings, debtors and other information relevant for the support and protection of the business environment in Slovakia. The register can be accessed free of charge at <https://ru.justice.sk/ru-verejnost-web/>.

In bankruptcy, a trustee will displace existing management, gather the assets, list and verify liabilities (both subject to the possible adjustment via adversary proceedings where the ownership of assets or the amount or rank of claims is disputed), convert the assets into cash through a sale (piecemeal or going concern) and distribute the cash to creditors in an order of priorities that follows, subject to certain exemptions, the ranking of claims under non-insolvency law.

In a restructuring, the debtor’s management will remain in control, being monitored by a trustee and the court. Upon the court allowing a restructuring attempt through an initial ruling based on the restructuring report prepared by the trustee (see below), the debtor or the trustee attempt to propose and negotiate a restructuring plan, while the company’s business is being carried on.

If a debtor is threatened by insolvency or is insolvent, the debtor or the creditor/creditors (subject to the debtor’s consent) may

authorise a trustee to prepare a restructuring report on whether the debtor fulfils conditions for its restructuring. Authorising the preparation of a restructuring report, however, does not obviate a debtor's duty to file for bankruptcy in a timely manner.

The trustee examines any legal acts concluded between the debtor and its related parties (e.g. persons which hold or held at least 5% direct or indirect interest in the debtor and persons in which the debtor holds or held at least 5% direct or indirect interest, etc.) which might have led or contributed to the debtor's insolvency, especially with respect to the debtor's compliance with general corporate rules prohibiting the repayment of capital contributions to shareholders, any transactions with a conflict of interest, and the rules on profit distribution. The restructuring report also has to provide information on the profit distributed to shareholders over the period of the previous two years. The purpose of this measure is to examine both the financial management and financial transfers of the debtor, and to determine the minimum amount of new capital required to be injected into the debtor (see below).

Provided that the trustee in its restructuring report recommended the restructuring attempt, the court will allow it. The management (or in the event the restructuring is initiated by the creditor, the trustee) will then have 90 days (which the creditor's meeting may extend by up to another 60 days) to submit a proposal of a plan to the creditors' meeting. The restructuring plan must provide that the satisfaction of claims of the unsecured creditors will be at least 20% higher than in the bankruptcy.

The creditors' meeting will vote on the plan within 15 days from the plan being submitted to it. The plan may propose any lawful

measure of resolution of the company's insolvency as the Bankruptcy and Restructuring Act allows flexibility in this respect.

Creditors will be placed in classes, according to the criteria proposed in the plan. The plan will usually provide for classes of secured claims (with certain exceptions, the plan is to provide for a separate class for each secured creditor), a class of unsecured claims and subordinated claims, as well as a class of shareholders' claims. These classes (other than the secured claims classes) can be also divided into separate classes, in order to group together the claims which are substantially the same as regards their legal rights and their commercial nature.

Creditors will vote on the plan by classes; a majority by number of creditors and by amount of claims in each class combined with the approval of each class of secured claim and the approval of the simple majority of votes (based on the amount of their claims) of the present creditors is needed for the plan to be approved. A class of creditors whose claims are not impaired by the plan and a class of creditors in which no creditor voted on the plan due to their absence on the creditors' meeting will be deemed to have approved the plan.

If the creditors' meeting approved the plan, the plan is submitted for final confirmation to the court. A plan approved by the creditor's meeting will be confirmed by the court subject to several tests, most importantly, from the point of view of legality, the best interest (being the likely pay-out in bankruptcy). The court may also substitute the approval of the plan by a particular class of claims if (i) the relevant plan will not be noticeably worse in the position of such class, (ii) a majority of the classes voted in favour of the plan by the required majority, and (iii) the present creditors with a simple majority of votes (counted based on the

amount of their claims) voted in favour of the plan too. However, the approval of the plan by a particular class of unsecured claims (other than subordinated claims) cannot be substituted by the court if the creditors in that class are to be satisfied in accordance with the plan during a period exceeding 5 years.

In order for the plan to be approved by the court, the debtor has to raise new capital which must, as a minimum, be equal to the profit distributed to shareholders over the previous two years as stated in the restructuring report. New capital can be raised by the issuance of new shares or other capital interests in exchange for new monetary contributions, or by way of a debt for equity swap with respect to the debtor's unsecured creditors. This does not apply to subordinated creditors (e.g. claims held by parties related to the debtor). If the plan does not contain an obligation to raise new capital or to perform a debt for equity swap in the above minimal amount, the plan will be rejected by the court.

If the court rejects the plan, it will discontinue the restructuring proceedings and declare bankruptcy over debtor's assets. If the court approves the plan, it will simultaneously rule on termination of the restructuring. The plan becomes effective upon publication of the court resolution on confirmation of the plan in the Commercial Gazette.

The plan will not affect the rights of creditors to recover their original claims against co-debtors and guarantors of the debtor, nor will it affect the rights of creditors to satisfy their original secured claims from the assets of third parties.

The Bankruptcy and Restructuring Act allows the creditors to exchange their claims for shares or other capital interests in the

debtor following the approval of the plan and during its performance upon mutual agreement between the debtor and the relevant creditor. In such cases, the plan will be ineffective with regard to the relevant particular creditor in relation to its claim, i.e. the debt to equity swap may be realised up to the amount of the original claim (less any amounts satisfied pursuant to the plan).

In addition, the debtor cannot distribute any profit or other financial resources to its shareholders following the restructuring until the unsecured creditors' claims (other than subordinated claims, e.g. held by parties related to the debtor) registered in the restructuring process are satisfied by reference to their original claim. For these purposes, 50% of the original receivable does not cease to exist and the remaining 50% is transformed into specific capital interest which represents the creditors' right to be satisfied from the profits or other financial resources of the debtor. In other words, the creditors will still hold up to 50% of the amount of their original unsecured claims following the conclusion of the restructuring procedure regardless of the provisions of the plan, and the remainder of the claim will be converted into a specific right to be satisfied from the debtor's profit or other financial resources. The wording of the Bankruptcy and Restructuring Act seems to suggest that the unsecured creditors have to be satisfied in full prior to the distribution of any profit to the debtor's shareholders. However, this specific right cannot be enforced during the restructuring process. Following the conclusion of the restructuring proceedings and the performance (or ineffectiveness) of the plan, the unsecured creditors may commence an action against the debtor for non-compliance with the above mentioned obligations. The court judgment will constitute a valid and

enforceable claim (execution title). These claims can also be made against the legal successors of the debtor. Any distribution of profit or other financial resources contrary to the above rules may be challenged in any subsequent bankruptcy proceedings in respect of the debtor.

Furthermore, if the debtor generates any profit which is not needed for the operation of the debtor's business or a substantial part thereof pursuant to the restructuring plan, the creditors have the right to share in the profit in order to satisfy their original claims. By means of this provision, the legislator grants the unsecured creditors the quasi right to share in the profit of the debtor. This right is also binding upon the debtor's legal successors.

Impact on third party rights

Bankruptcy

Upon publication of the court resolution on declaration of bankruptcy in the Commercial Gazette, the enforcement and/or execution proceedings of the creditors' claims already existing are stayed. Moreover, no enforcement of the security interest over the assets of the debtor securing the debtor's obligations can be commenced save for the enforcement of the pledge established by the trustee.

Unlike in some other jurisdictions, the automatic stay does not extend to the termination of executory contracts. These are subject to (rather unclear) explicit rules – essentially, the trustee will be able to assume or reject an executory contract. The main difficulty with this rule is the fact that the Bankruptcy and Restructuring Act effects rejection (other than in case of contract for continuous or repeated performance) through the institution of rescission which, under Slovak law, results in the obligation to return performance previously rendered under the contract.

Although the counterparty's return claim will rank as an administrative priority claim, this solution is still very disruptive (not least to general pre-commencement creditors who will be subordinated to this claim) and seems out of line with rules dealing with executory contracts in other jurisdictions. Provided that the subject of the relevant contract is continuous or requires repeated performance, the trustee may reject the contract by giving 2 months' notice or a shorter period if the contract so provides. Whereas in a restructuring, executory contracts are arguably not regulated at all.

In bankruptcy, the stay of the proceedings, as described above, is de facto limited by a rule that allows the secured creditor to issue binding instructions to the bankruptcy trustee as regards the realisation of the collateral. The court may reverse such binding instructions only where they would prejudice the justified claims of the other relevant creditors or the rules of realisation of the estate prescribed by the Bankruptcy and Restructuring Act.

Upon commencement of the restructuring proceedings, withdrawal of a contractual party from a contract entered into with the debtor because of the debtor's delay in fulfilling its obligation under such contract which became due prior to the commencement of the restructuring proceedings would be considered ineffective. In addition, the contractual arrangements allowing a party to withdraw from a contract for reasons of commencement of restructuring proceedings or bankruptcy are also considered ineffective.

Where the contractual party will perform its obligations arising from an agreement concluded with the debtor prior to commencement of the restructuring in advance, it may reject its performance until the adequate security is created, or the counter-performance is secured.

Priority ranking of creditors

With certain exceptions, the Bankruptcy and Restructuring Act respects the ranking of claims as it follows from non-insolvency law, i.e. it respects both the priority of secured claims and the juniority of subordinated claims.

With respect to secured claims, the priority is absolute in bankruptcy, save for the costs of maintenance and sale of the collateral.

In bankruptcy, unsecured claims will be subject to secured pre-commencement and administrative (i.e. post-commencement) claims, as well as certain preferred post-commencement claims, most notably unpaid wages and other employee claims, taxes, and customs. In a restructuring, the post-commencement claims, trustee's wages, certain employee claims and non-monetary claims are considered "preferential claims". Preferential claims are not applied in the restructuring proceedings and remain unaffected by the commencement of the restructuring proceedings. Should bankruptcy be declared during the restructuring proceedings, the preferential claims which arose in connection with the running of a debtor's business during the restructuring will be satisfied in their unsecured part from the general bankruptcy estate prior to other unsecured claims.

Subordinated claims will be paid subject to the terms of their contractual subordination. The Bankruptcy and Restructuring Act provides for the statutory subordination of contractual penalties and any claims, which are or used to be owned by a person which is or used to be related to the debtor unless the creditor is not related to the debtor and at the time of acquisition of the relevant claim was not aware of such relation

even under due care. Any security established over subordinated claims will be deemed ineffective.

In addition, should bankruptcy be declared as a legal consequence of imposing a protective measure through the confiscation of property of an entity within criminal proceedings, claims of the state arising out of the final court decision on confiscation of property of an entity will be satisfied only after satisfaction of all the preferential claims and claims applied in the bankruptcy proceedings.

If criminal proceedings started before or after the declaration of bankruptcy imposed restrictive or security measures, the bankruptcy court may issue binding instructions to the bankruptcy trustee, to remove and appoint a bankruptcy trustee at any time and to hand over the secured assets only with the consent of a person imposing such security.

Directors' duties

These can be grouped into general duties of directors to avoid insolvency of the debtor; duties relating to the opening of the proceedings; and duties that directors have in the restructuring proceedings where they remain in control.

Insolvency is tested both on the cash-flow basis (i.e. the company's ability to meet current liabilities) and the balance sheet (i.e. the market value of the company's assets against the total amount of its liabilities excluding any subordinated claims and any liabilities corresponding to claims of unsecured creditors in the restructuring process which have to be satisfied prior to distribution by the debtor of any profit or other financial resources to its shareholders as mentioned above) determined either on the basis of the debtor's accounts or an expert opinion

which, if obtained, prevails over the accounts. Moreover, the balance sheet test has to take into account the future assets/revenues generated by the debtor's business.

The former duties include the directors' duty to file for the commencement of bankruptcy proceedings within 30 days after the directors have determined, or should have determined, that the company is insolvent under the balance sheet test. This statutory duty is subject to very stringent liability of directors – each director has to pay, upon breach of his duty, into the general bankruptcy estate a penalty equal to half of the minimum required registered capital of a joint stock company i.e. EUR 12,500, unless one of the conditions under the Bankruptcy and Restructuring Act is met, e.g. if a director proves that he did not breach the duty to file for the commencement of bankruptcy proceedings, that he acted with due care, that he was appointed during the insolvency and filed for bankruptcy immediately after he has determined or should have determined the insolvency, or that he appointed a trustee to draft a restructuring report. If the debtor has more than one director, the directors are jointly and severally liable for the breach of the duty to file for bankruptcy. Unless proven otherwise, the damage incurred by a creditor corresponds to its receivable which has not been satisfied after termination or cancellation of bankruptcy proceedings or completion of execution or similar enforcement proceedings against the debtor. Creditors may claim the damage within one year following termination or cancellation of bankruptcy proceedings or completion of execution or similar enforcement proceedings. In addition, if the court holds the directors liable for the damage caused due to a failure to file for the commencement of bankruptcy proceedings, they will be prohibited from being members of a statutory and/or supervisory body of a company for up to three years. Any stipulations excluding or limiting such

liability of directors are without legal effect. The court cannot moderate the amount of the penalty.

The directors who remain in control during the restructuring proceedings are obliged to act so that they do not diminish the value of the assets of the debtor and do not circumvent the success of the restructuring process.

Challenging antecedent transactions

The Bankruptcy and Restructuring Act allows the insolvency trustee or the creditors to challenge antecedent transactions that can be shown to constitute a preference, an undervalue or a transfer with actual fraudulent intent. The trustee and the creditors may bring the action within one year from the declaration of bankruptcy by the court. The standard claw-back period is one year for preferences and undervalues and five years for transactions with actual fraudulent intent. For preferences and undervalues, the trustee and/or the creditor must show that the debtor was either insolvent or became insolvent as the result of the transaction.

For transactions with connected parties, the claw-back period for preferences and undervalues is extended to three years and the debtor's insolvency will be presumed.

Set-off

Under the Bankruptcy and Restructuring Act, it is not possible for a creditor to set off a claim, which arose prior to the debtor's bankruptcy, against the debtor's claim over the creditor, which arose following such declaration. In addition, a claim not applied for in the bankruptcy as prescribed by law, a duly applied claim acquired by transfer after declaration of bankruptcy, and a claim acquired by an antecedent legal act

cannot be set off against the debtor's claims. Set-off of any other claims is allowed in bankruptcy.

Moreover, claims that have to be applied in the restructuring (e.g. monetary claims arising prior to the commencement of restructuring proceedings) cannot be set off against the debtor after the commencement of the restructuring proceedings.

Guarantees

Guarantees of creditors' claims are not affected by the debtor's insolvency, i.e. the guarantor will pay the creditor outside the insolvency proceedings and will be subrogated to the position of the creditor.

New money lending

The Bankruptcy and Restructuring Act does not specifically deal with new money lending in the case of bankruptcy proceedings. The new loans made to the debtor during restructuring proceedings, will, in the case of declaring bankruptcy, have priority over general creditors but not the secured creditors.

Recognition of foreign proceedings

With respect to European Union countries and the signatories of the EEA Agreement the Recast Regulation applies.

Cross border proceedings outside the EU are subject to the rules in the relevant bilateral agreement if in place, or if not in place, the principle of reciprocity with respect to acknowledgement of foreign judgments on bankruptcy and/or restructuring.

SPAIN



SPAIN

Key Elements:

- Flexible schemes of arrangement available
- One single procedure to facilitate restructuring or liquidation
- Security enforcement may be suspended for up to 1 year
- Directors' duty to file for insolvency within 2 months
- Set-off not available after insolvency proceedings commenced

The Insolvency Law

The Spanish Law on Insolvency (the “SLI”) entered into force on 1 September 2004. It has been substantially amended and completed by successive Laws, the last amendments included by the Ministerial Order JUS/2831/2015 of 7 December and the Law 40/2015 of 1 October.

The Insolvency Law encompasses all regulations applicable to court insolvency proceedings, namely “*concurso*” as opposed to out-of-court liquidation, which is only available when the debtor has sufficient assets to meet all its liabilities.

Now it also includes regulations regarding a pre-insolvency stage.

In March 2017 the Spanish Ministry published a draft proposal for a new Royal Decree to approve a recast version of the Insolvency Law. This is not yet in force.

General notes on insolvency proceedings

Before analysing the procedural aspects and the effects of insolvency proceedings, the following general considerations should be made.

Subject

The same types of insolvency proceedings are applicable to all persons or entities (excluding public administrations, which cannot become insolvent). These proceedings may lead either to the restructuring of the business or to the liquidation of the debtor’s assets.

The Insolvency Law is based upon the consideration that one company’s insolvency does not always imply that the other companies within the same group are also insolvent. However, certain rules try to coordinate the various proceedings being carried out in relation to companies pertaining to the same group.

Trigger point of insolvency proceedings

A debtor (if a company, its directors) is legally obliged to file for insolvency when it becomes insolvent, i.e. when it fails to meet its current outstanding obligations on a regular basis. This obligation must be fulfilled within two months starting from the time when the debtor did or should have become aware of the insolvency situation. Failure to comply with this obligation triggers the assumption that the directors have acted negligently (see further below).

A debtor is entitled to apply for insolvency proceedings to be commenced when it expects that it will become insolvent. In this sense, insolvency proceedings are available as a type of legal

protection that the debtor may request in order to avoid the attachment of its assets by its creditors.

5 bis Moratorium

The debtor is allowed to obtain an additional four-month moratorium upon application to the court, in order to allow the discussion of an advanced proposal for arrangement or a refinancing agreement. The debtor would have to file the application for the declaration of insolvency within the four-month period if it has not reached a restructuring agreement that resolves its financial difficulties.

Court and out-of-Court enforcement actions against assets which are necessary to enable the business to continue cannot be pursued by creditors from the time an application for a moratorium is filed with the court. Insolvency filings by creditors would also not be allowed. Nor will any creditors involved in a scheme of arrangement be allowed to enforce (against any assets) if at least 51% of the financial creditors have agreed not to do so while the scheme was being negotiated. Apart from that, business would continue as usual after the 5 bis filing.

The debtor will not be entitled to apply for any further moratorium within a year of the last moratorium being granted.

Costs arising from insolvency proceedings

The debtor must pay all costs arising from insolvency proceedings. The main costs are attorneys' fees (usually paid at the beginning of the proceedings), court agent's fees (a "*Procurador*" is a mandatory go-between whose duty is to liaise between the court and the parties, filing writs and receiving service of court decisions) and the fees of the insolvency receivers (according to the assets and liabilities).

Procedural aspects

Insolvency proceedings are formally initiated when the court declares insolvency, following an application filed either by the debtor or by its creditors.

Application

The application for insolvency proceedings may be filed either by the debtor (if a company, the managing body – not the shareholders) or by its creditors. In the first case, they are named "voluntary insolvency proceedings" (*concurso voluntario*); in the second case, "necessary insolvency proceedings" (*concurso necesario*).

When the debtor files the application, it must include several documents (among others, a power of attorney, an explanation of the situation of the company, a list of assets and a list of liabilities, and the accounting books and records).

When a creditor files the application, it must provide evidence of its debt as well as of the insolvency situation. The latter may be proven as follows:

- when a general inability to meet payments as they become due is proven, or when certain circumstances generally deemed as evidence of insolvency occur (such as failure to meet obligations with employees or tax liabilities for at least three months). In these cases, the debtor may challenge the petition either because the alleged facts do not occur or, even if they do, because the debtor is not insolvent; and
- when enforcement proceedings have been taken against the debtor but assets have not been found to cover the amount claimed. In this case, the debtor would have no grounds to challenge the petition. The amended SLI has

complemented this provision and foresees that when a creditor files for insolvency after having unsuccessfully tried to seize the debtor's assets, not only will an opposition by the debtor be inadmissible, but the judge will declare the insolvency the following day.

If the application is dismissed, the creditor would have to pay the corresponding legal costs and fees (and eventually damages caused).

If the necessary insolvency proceeding is finally declared the creditor who initiated the process has a priority ranking which amounts up to 50% of its unsecured debt.

Court decision declaring insolvency

When the debtor files the application, the judge shall issue a decision by virtue of which the insolvency proceedings will be instituted ("*auto de declaración de concurso*"). This may take on average 2-4 weeks. If the court considers that the application does not comply with the legal requirements because the debtor has failed to include the relevant documents, the debtor must remedy such deficiency within the time specified by the court.

For creditor applications, the debtor gets an opportunity to be heard by the court before any declaration of insolvency is made (unless the application is based on an unsatisfied judgment which, as already explained, means that the court must make a compulsory order for insolvency). In the meantime, the judge may impose interim measures to ensure that the debtor's assets remain unaltered.

In any event, the following is determined in the initial court decision:

- The identity of the receiver appointed by the court. The general rule is to appoint a single court receiver, unless it is in the public interest to appoint a second one, who would be chosen by a public administration creditor at the discretion of the court. Strictly speaking, a court receiver does not represent the creditors but acts as a court auxiliary, on behalf of the debtor and is subject to a liability regime, similar to that affecting the directors of a company.
- The scope of the restrictions imposed on the debtor. The general rule is that, in the case of voluntary insolvency proceedings, the court receiver supervises the company's activities, authorising (or refusing to authorise) any payment or transaction. In the case of compulsory insolvency proceedings, the debtor will cease to manage its estate and the court receiver will take control of the company, being in charge of all further decisions.

First stage (determination of assets and liabilities)

The objective of the first stage of the insolvency proceedings is to determine the assets and liabilities of the debtor, leading to the preparation by the court receiver of the inventory and the list of creditors, respectively.

However, the first stage may be ended when pending challenges against the list of creditors affect no more than 20% of the assets or liabilities, and also when an Early Proposal Agreement is reached between the debtor and its creditors (the legally required percentage of creditors that is foreseen in the SLI), and is authorised by the judge.

The insolvency order contains an express request for the creditors to give notice of their claims within a month of the insolvency declaration appearing in the Official Gazette (*Boletín Oficial del Estado*). Creditors must send their statement of claim directly to the court receiver.

Based on the documentation provided by the creditors and that held by the debtor, the court receiver shall draw up a list of acknowledged creditors and classify them according to the following categories:

- Secured claims (*créditos privilegiados especiales*) benefiting from special priority, representing attachments on certain assets (basically *in rem* security). These special priority claims entail separate proceedings, though subject to certain restrictions derived from a waiting period that may last up to one year (see below).

These creditors are not subject to the arrangement, except if they give their express support by voting in favour of the arrangement or if certain majorities are met (see further below). In the event of liquidation, they shall be the first to collect payment against the assets that are subject to the security.

Secured claims will be acknowledged only up to 90% of the reasonable value of the asset (as defined in the SLI) after deducting other liabilities that are preferentially secured by the same asset. The remaining claims will be ranked according to their nature (i.e. generally prioritised, ordinary or subordinated).

- Claims benefiting from general priority (*créditos privilegiados generales*), including the claims of public authorities (in general, for half their amount), certain employee claims and the claims of the creditor initiating the insolvency proceedings up to 50% of his total claim.

The holders of general privileges are not affected by the arrangement unless they consent or certain majorities are met (see below) and they shall be the first (subject to the secured creditors being paid) to collect payment, in the order established under law:

- Ordinary claims (*créditos ordinarios*), mainly trade creditors and lenders (when not secured or subordinated). This is the residual category.
- Subordinated claims (*créditos subordinados*), thus classified by virtue of an agreement or pursuant to law, including debt held by related entities: shareholders directly or indirectly owning at least 10% of the share capital (5% if a listed company) or group companies, actual or shadow directors of the company who have been in office within the 2-year period prior to the declaration of insolvency.

Claims of related entities will not be subordinated where they do not constitute loans or acts of a similar purpose (i.e. claims arising from the provision of intra-group services will not be subordinated).

Subordinated creditors may not vote on an arrangement and have very limited chances of recovery. Through these restrictions, the law tries to encourage the conversion of their debt into shares or company participations (the consent of the existing shareholders would be necessary for this purpose).

When subordination arises from a special relationship, the creditor will also lose any security over assets belonging to the debtor.

However, it should be noted that the recent amendments introduced in 2014 to promote refinancing agreements

include some important exceptions to the rules on subordination:

- Existing debt held by creditors that become a connected party as a result of a refinancing agreement will not be subordinated.
- Creditors supporting a refinancing agreement will not be considered *de facto* directors of the debtor, unless there is evidence to the contrary.

There are other claims which are not subject to the insolvency proceedings and that are therefore neither acknowledged nor classified. These include any claims accrued after the insolvency proceedings (e.g. those entered into in order to continue the business) as well as other claims prescribed by law, even if accrued earlier (i.e. salaries accruing during the last 30 days before the insolvency proceedings are initiated or new money lent within the context of protected refinancing agreements: 50% if lent after October 2016, 100% if lent before 2016). These claims are immediately payable (*créditos contra la masa*), although the Insolvency Law imposes some restrictions on their enforceability.

Insolvency debts (either priority, ordinary or subordinated claims) may be considered as contingent when they are subject to conditions precedent or pending litigation (*créditos contingentes*). In this case they would be acknowledged without a determined sum, until the contingency is resolved.

Finally, the court receiver's list of creditors includes a list of all those claims that have been excluded (or that have not been acknowledged), with the reason(s) for having done so.

Creditors and the debtor may challenge the list of creditors by appealing before the insolvency judge.

Second stage: arrangement or liquidation

The second stage may lead either to an arrangement between the debtor and its creditors, or to the liquidation of the debtor's assets.

As an exception, in certain cases the debtor may propose in the course of the first stage of the proceedings an advanced arrangement, or may request that the liquidation is anticipated.

An arrangement (*convenio*) may be entered into between the debtor and the majority of the creditors, involving a delay in payment or a partial cancellation of debts. The proposal for arrangement may be filed during the first stage of the proceedings (as an "Early Proposal Agreement/Arrangement"). However, it will not be approved until the first stage of the proceedings has concluded.

The arrangement is not effective until the court gives its approval. The court may refuse to do so when there has been a breach of the law or when the parties have shown that the debtor will not be able to fulfil the arrangement.

The arrangement may be imposed on creditors with a general priority and secured creditors if certain majorities are met within categories. For this purpose the insolvency legislation divides secured creditors and creditors with a general priority into 4 categories: (i) employees; (ii) public authority creditors; (iii) financial creditors (regardless of whether they are supervised by a regulatory body such as the Bank of Spain); and (iv) any other creditors – mainly commercial creditors.

Although upon approval of the arrangement most of the effects of the insolvency proceedings cease, strictly speaking the proceedings do not terminate until the terms of the arrangement are completely fulfilled.

In the case of liquidation, the debtor ceases to manage its assets (if a company, its directors would cease to act). The court receiver liquidates the debtor's assets by selling them (there are various different ways of realising the assets, e.g. direct sale, sale through a specialised entity, public auction), in order to distribute the money obtained among the creditors according to the priority rules established by the Insolvency Law (as explained above).

Effects of insolvency proceedings

The initial court decision declaring the insolvency determines the initiation of the effects of the insolvency proceedings. The varying effects of the insolvency proceedings on other court proceedings, bilateral agreements, obligations and prior transactions are set out below.

Other proceedings

As a general rule, insolvency proceedings are not compatible with other enforcement proceedings. When compatible, in order to protect the interests of the debtor and creditors, the Law extends the jurisdiction of the judge dealing with the insolvency proceedings, who then becomes authorised to handle any enforcement proceedings or interim measures affecting the debtor's assets (whether based upon civil, employment or administrative law).

Arbitration proceedings will continue if they were initiated before the declaration of insolvency.

Secured creditors

Creditors holding security "*in rem*", that had been traditionally allowed to enforce their claims against the secured asset notwithstanding the initiation of insolvency proceedings, are also subject to certain restrictions in relation to commencing

separate enforcement proceedings (or to continue with such proceedings, if they have already been commenced).

When the secured asset is necessary for the debtor's business to continue, enforcement by the creditor may be suspended for a maximum period of one year. This means that, following the declaration of insolvency, enforcement of security will no longer be possible until: (i) an arrangement that does not bind such creditor (this is the general rule, except if the creditor gives his approval to the arrangement) is approved, or (ii) one-year elapses from the date of declaration of insolvency and an arrangement has not been approved or the liquidation stage has not been initiated.

This moratorium on enforcement does not apply to shares of an SPV whose only purpose is to act as a holding company and a conduit for the financing arrangements, but this is on the condition that the enforcement of the security on said shares does not trigger the termination or amendment of other contractual relationships that allow the debtor to continue its operations. If the liquidation stage is initiated before the abovementioned one-year period, the creditor loses the opportunity to enforce the asset by means of separate enforcement proceedings. In any case, the proceeds from the liquidation sale would be used to pay the secured creditor up to the value of the original loan and regardless of the value of the asset used as reference for the purposes of the classification within the receiver's report.

Interest and set-off

Following the initiation of insolvency proceedings, interest no longer accrues, with the exception of interest due to secured creditors. Interest already accrued is considered to be a subordinated debt.

Set-off is applicable, provided that the legal requirements have been met before the company was declared insolvent. Set-off will no longer be possible after insolvency proceedings are initiated. Hedge agreements are subject to specific regulations (allowing close-out netting and enforcement of collateral) and are beyond the scope of this summary.

Bilateral agreements

The declaration of insolvency does not, *per se*, allow the parties to terminate a bilateral agreement, notwithstanding what has been agreed upon by the parties. Clauses allowing any of the parties to terminate a bilateral agreement due to the insolvency of the contractual counterpart would not be valid.

In principle, the declaration of insolvency does not alter the general contractual rules on termination. Therefore, following a default (either before or after insolvency is declared), the other party would be entitled to terminate the agreement and to receive compensation for damages caused (depending on when the default was committed, compensation will be a pre- or post-insolvency claim).

However, the Insolvency Law states the following exceptions to the general contractual rules:

- the judge may decide to cure an event of default caused by the insolvent party, thus reinstating the agreement (as if the default had never occurred). If this is the case, outstanding amounts and further payments under the agreement will be post-insolvency claims and become immediately payable; and
- if the court deems it appropriate, the insolvent party will be entitled to terminate the agreement at any time. If this is the

case, the counterparty will receive compensation for such termination, to be established by the court dealing with the insolvency.

There are specific rules for employment agreements, mainly affecting collective dismissals and senior executive employment contracts.

Prior transactions: claw-back

Under the Insolvency Law there are no prior transactions that automatically become void as a result of the initiation of the insolvency proceedings.

The court receivers may challenge those transactions that could be considered as having been detrimental to the debtor's interests, provided they have taken place within the period of two years of the declaration of insolvency (transactions taking place earlier than two years before the insolvency has been declared are not subject to challenge).

Transactions which are regarded as “ordinary course of business” transactions are not subject to challenge.

Legal presumptions of damage

Damage to the debtor's interest is deemed to exist, in any event, in the case of gifts and the pre-payment of obligations that are due after the declaration of insolvency (if unsecured).

Damage to the debtor's interest is also deemed to exist, as a rebuttable presumption, in the case of rights *in rem* that have been created in order to protect already existing obligations.

Refinancing agreements

Under the Insolvency Law claw-back regime, the court receiver is allowed to challenge acts and agreements executed in the context of a refinancing:

- Payment of existing obligations when not yet due and payable is deemed to be detrimental to the insolvency estate, and there is a non-rebuttable presumption when such obligations otherwise become due and payable after the insolvency declaration (this may be the case when the borrower uses the new financing to cancel existing obligations that were not due and payable or in the case of a debt for asset or equity swap when the debt was not due and payable).
- The creation of additional *in rem* security to guarantee existing (non-secured) obligations or new obligations created in exchange for the (non-secured) existing ones, is deemed to be detrimental, unless proved otherwise (which, according to case law, is extremely difficult).

Protected refinancing agreements

The amendments introduced to the SLI in 2009, 2011 and 2014 are aimed at reducing the risk of claw-back under certain circumstances, thus facilitating certain refinancing agreements between financial entities and companies in distress.

The refinancing agreement will avoid the risk of being subject to a claw-back action if certain conditions are met (Article 71 bis of the SLI):

- The refinancing agreement is deemed to be a transaction providing for:
 - a “significant” increase of the available funds, or

- a novation or writing off of the existing obligations (as a result either of the extension of the term, or the establishment of obligations to replace the existing ones).
- Requirements to be met by such refinancing agreements in order to be outside of the claw-back regime are the following:
 - Formalities: the agreement must be executed in a public instrument enclosing all of the documents that justify the fulfilment of the requirements set out below.
 - Creditors’ approval: the agreement must be signed by creditors representing at least three fifths of the debtor’s liabilities (including non-financial liabilities, e.g. trade creditors) at the date of the adoption of the refinancing agreement. In cases where refinancing agreements affect a group of companies, this majority needs to be achieved at an individual company level and at a consolidated group level, (intercompany debts are excluded for voting purposes).

For the purpose of calculating these majorities, in the case of syndicated loans, the approval by 75% of the syndicated creditors (or less if agreed in the syndicated facilities) will be binding in relation to 100% of the syndicated debt.

- Viability: the agreement must be supported by a viability plan that confirms the debtor’s ability to continue the business in the short and medium term.
- Certificate of auditors: The agreement must include a certificate issued by the auditors of the debtor confirming that the required majority has been duly calculated.

There is no longer a requirement to obtain a report from an independent expert for the agreement to be protected.

However, the debtor and/or the creditors may still choose to obtain such a report which provides an expert opinion on the adequacy of information provided, reasonableness and feasibility of the viability plan and proportionality of the security taken, taking into account market conditions at the time of signing the agreement. When the refinancing relates to group companies, a single expert may be appointed. The key advantage in seeking an expert's report is that it protects directors and shareholders from claims that they have been negligent in deciding not to pursue a recapitalization (see further below).

- Agreements that do not meet the requirements mentioned above will also be protected if the following conditions are all met:
 - They entail the reduction of the proportion between liabilities and assets i.e. write-off;
 - The resulting current assets exceed the resulting short term liabilities;
 - The resulting securities neither guarantee more than 90% of the resulting liabilities nor entail an increase of the percentage of liabilities secured prior to the agreement;
 - The resulting interest rate does not exceed by more than $\frac{1}{3}$ the former interest rate; and
 - The agreement is executed in a public instrument and includes a detailed explanation of the transaction.

Extended binding effects of the protected refinancing agreements

If judicially sanctioned, certain refinancing agreements shall be not only protected from future claw-back actions (51% majority of financial liabilities would be enough for this purpose), but also will cram down financial creditors who have dissented.

Dissenting unsecured financial creditors, or secured financial creditors with exposures that exceed the value of their security will be bound by the judicially sanctioned agreements as follows:

- If the agreement has been approved by 60% of the financial liabilities of the debtor, the aforementioned creditors will be bound by any debt extensions for up to 5 years and by any agreed conversion of debt into Profit Participating Loans ("PPLs") with a term of less than 5 years.
- If the agreement has been approved by 75% of the financial liabilities of the debtor, the aforementioned creditors will be bound by any debt extensions agreed for up to 10 years, write-offs and any agreed conversion of debt into PPL up to 10 years, debt to equity swaps and payments in kind of the loans.

Dissenting secured financial creditors will be bound by the judicially sanctioned refinancing agreements for the amounts covered by the security as follows:

- If the agreement has been approved by creditors holding 65% of the financial liabilities of the debtor, the aforementioned creditors will be bound by an extension of the debt for up to 5 years and by any agreed conversion of debt into PPL also with a term not exceeding 5 years.
- If the agreement has been approved by 80% of the financial liabilities of the debtor, the aforementioned creditors will be bound by an extension of the debt up to 10 years, write-offs and any agreed conversion of debt into PPL for up to 10 years, debt for equity swaps and payments in kind of the loans.

For this purpose, the security value will be 90% of the reasonable value of the asset (as defined in the SLI) after

deducting other liabilities that are preferentially secured by the same asset.

For the calculation of the aforementioned majorities, the following should be taken into account:

- Financial liabilities will include any financial claims apart from public, commercial, and connected party claims
- In the case of syndicated loans, the approval by 75% of the syndicated creditors (or less if agreed so in the syndicating facilities) will entail the approving vote of 100% of the debt.

The protected refinancing agreements are subject to the approval of an insolvency judge. By means of an expedited proceeding, the judge will verify that the above requirements have been met. Once approved, any affected creditors may file a challenge by way of incidental proceedings, only if they find that the majorities have not been properly calculated or if the refinancing agreement represents a disproportionate sacrifice for the affected creditors.

New money lending

Amendments in 2014 introduced two preferences for new money, in order to facilitate the obtaining of financing by companies with financial difficulties:

- Financing granted in the context of refinancing in accordance with Article 71 bis of the SLI will be split into a claim against the insolvency estate and a claim enjoying a general priority, in the event of subsequent insolvency proceedings.
- Financing in the context of an agreement will be made against the insolvency estate if liquidation arises later (unless it was granted by a connected party).

The amendment of 2014 has enhanced this regime, by providing that until 2 October 2016, financing granted in the context of refinancing in accordance with 71 bis of the SLI will be considered a claim against the insolvency estate, even if it was granted by a connected party. The provisional regime is no longer in force for new refinancing.

Insolvency liability

The declaration of insolvency generally involves an incidental procedure in order to examine whether management responsibilities and obligations were breached, causing or contributing to the insolvency (“Insolvency Specification Proceedings”).

General regime on directors’ liability

Under Spanish company law (in the absence of an insolvency scenario), directors are liable for damages and for debts:

- for damage caused through acts violating company law or the company’s articles, or acts undertaken without the necessary diligence. In cases of insolvency, directors have been found liable for damage caused, intentionally or by gross negligence, by making certain decisions (e.g. entering into agreements) while possessing knowledge of the loss to be caused to third parties as a result of the company’s inability to comply with its obligations; and
- for future debts, when the company’s assets have fallen below half of its share capital and the imbalance has not been remedied (e.g. by means of a capital increase or reduction) in two months. The directors must take all legal steps to initiate the liquidation of the company by calling a general shareholders’ meeting for this purpose. If this meeting does not resolve to liquidate the company, the directors must initiate the compulsory liquidation of the company through the courts.

In an actual insolvency scenario, the directors are obliged to file for insolvency within two months (subject to a further four-month extension, as explained above) from the time they become aware or should have become aware that the company is insolvent (it is a cash flow test). Should they fail to comply with this obligation, they could face civil liabilities in the context of the Insolvency Specification Proceedings.

Should the compulsory liquidation scenario and the insolvency situation coincide, the directors would be obliged to file for insolvency proceedings (within the referred two-month period), otherwise, they would face not only liability for the company's debts, but also the penalties arising from the insolvency legislation.

Aside from the insolvency proceedings, a criminal claim may be filed against the directors of the company. In general, criminal liability would not arise as a result of financial distress unless the directors have committed criminal offences in such a context, such as improper or fraudulent management or false accounting.

Insolvency specification proceedings

In the case of insolvency, incidental proceedings may be initiated in order to investigate the reasons which have led to the insolvency situation.

The Insolvency Specification Proceedings are only developed when the insolvency leads to liquidation or when creditors accept a severe delay or cancellation of their claims as a result of matters beyond the debtor's control (more than three years' delay or one third cancellation of such claims, respectively).

Incidental proceedings may lead to the conclusion that insolvency has been the result of either matters beyond the debtor's control or negligence.

- Negligent insolvency may either be based upon a causal analysis (the directors having caused or aggravated the insolvency fraudulently or through gross negligence) or based upon certain presumptions, set out by law. In this regard, the status of the accounts and compliance with legal duties (including the duty to apply for insolvency) will be essential. If the insolvency is deemed to be negligent, the directors or third parties (as "accomplices") may be liable to pay damages for the loss caused to creditors as a result of their actions.
- In the case of negligent insolvency leading to liquidation, the directors of the company may also be liable for outstanding company debts. The judge enjoys a wide discretion. The scope of this provision is pending clarification by the courts.

As mentioned above, the amendment of 2014 has introduced new provisions to promote refinancing agreements. Any subsequent insolvency proceedings will be considered negligent (unless proven otherwise), when directors, without a reasonable cause, refuse to accept a refinancing agreement proposed by the creditors and endorsed by an independent expert, which involves a debt for equity swap, thus preventing the approval of a refinancing agreement. This presumption will not be applicable if the agreement did not provide a pre-emptive acquisition right in cases where the resulting shares were to be sold to a third party. Directors can prove they had reasonable cause to refuse the capitalisation by means of a report issued by an independent expert. In the event that they cannot show that it

was reasonable to refuse the capitalization, both directors and shareholders shall be held liable. If the insolvency is considered negligent under this presumption, shareholders who refused to agree to such capitalization may also be held liable.

Group guarantees

The rescission of intra-group guarantees is a complex matter.

In 2017, the Spanish Supreme Court issued the latest precedent on this subject matter. In such precedent, the Supreme Court accepted the validity of a guarantee granted by an affiliate to secure the debts of its parent company on the basis of the countervailing benefits obtained by the insolvent company at a group level.

The judgment confirms that the assessment of any detriment should be done on a case by case basis.

Therefore, when aiming to avoid the rescission of intra-group guarantees, the beneficiary needs to prove that no damage arose as a result of the provision of the guarantee. When analysing the damage, the existence and scope of the consideration shall not only bear in mind the benefits at a group level, but also at an individual level between the debtor and not the guarantor but mainly the benefits for the grantor company.

Lender liabilities

In Spain there is no case law on “Abusive Lending”. We may only refer to the general theory of the “abuse of rights”, according to which, acts manifestly surpassing the normal limits of exercise of a right, causing damage to third parties, will give rise to liability.

This construction has not been applied to lenders agreeing to paralyse legal actions against the borrower and thus delaying the application for insolvency proceedings. However, the possibility of the concept of “Abusive Lending” being pursued in Spain in the future cannot be totally disregarded.

In addition, subordination may apply when the contractual counterparty unduly refuses to comply with a bilateral agreement (e.g. granting financing under a facility agreement).

Lenders may also be subject to shadow directorship (those who have assumed the decision-making power attributable to formally appointed Directors). Under Spanish law, a shadow director bears the same liabilities as a formal Director.

Although the current version of the SIA provides for a presumption of lenders not being shadow directors in connection with the obligations undertaken by the debtor by virtue of the viability plan attached to a protected refinancing agreement, in other cases it is important to note that according to Spanish case law rendered to date, Lenders may exceptionally be considered as “shadow directors” if they have acted in a way that may be considered to be attributable to functions of the management body. Therefore, care must be taken in order to avoid this effect.

Pre-insolvency mediation proceeding: extra judicial agreement

Law 14/2013 dated 27 September (the so-called “*Entrepreneurs Law*”) foresees the possibility of resolving the situation of insolvency by means of a mediation proceeding prior to requesting the declaration of insolvency by judicial means.

The aim of the mediation proceeding is to reach an extra-judicial agreement between the debtor and its creditors with the help of a mediator.

The Ministerial Order JUS/2831/2015 of 17 December, approved the form to apply for the commencement of a procedure to obtain an extra-judicial agreement and the Instruction of the General Direction of the Registers and Notaries, of 5 February 2018, establishes the rules for appointing a mediator.

If such agreement is not reached within three months time from the initiation of the mediation proceeding, the mediator will be obliged to request the declaration of insolvency. This “consecutive” insolvency proceeding will necessarily start at the liquidation stage, and the mediator will act as the insolvency receiver.

Publicity

By means of the Royal Decree 892/2013, dated 15 November (that entered into force on 3 March 2014), the Public Insolvency Registry (“*Registro Público Concursal*”, or, hereinafter, “PIR”) has been established. The PIR is managed by land registrars and provides universal advertising, free of charge, via the Internet.

The aim is that the PIR allows any interested party to access information via the Internet in relation to the insolvency proceedings taking place in respect of a company, the PIR provides details of the stage the process is at and the existence of out-of-court agreements.

Cross Border Insolvencies

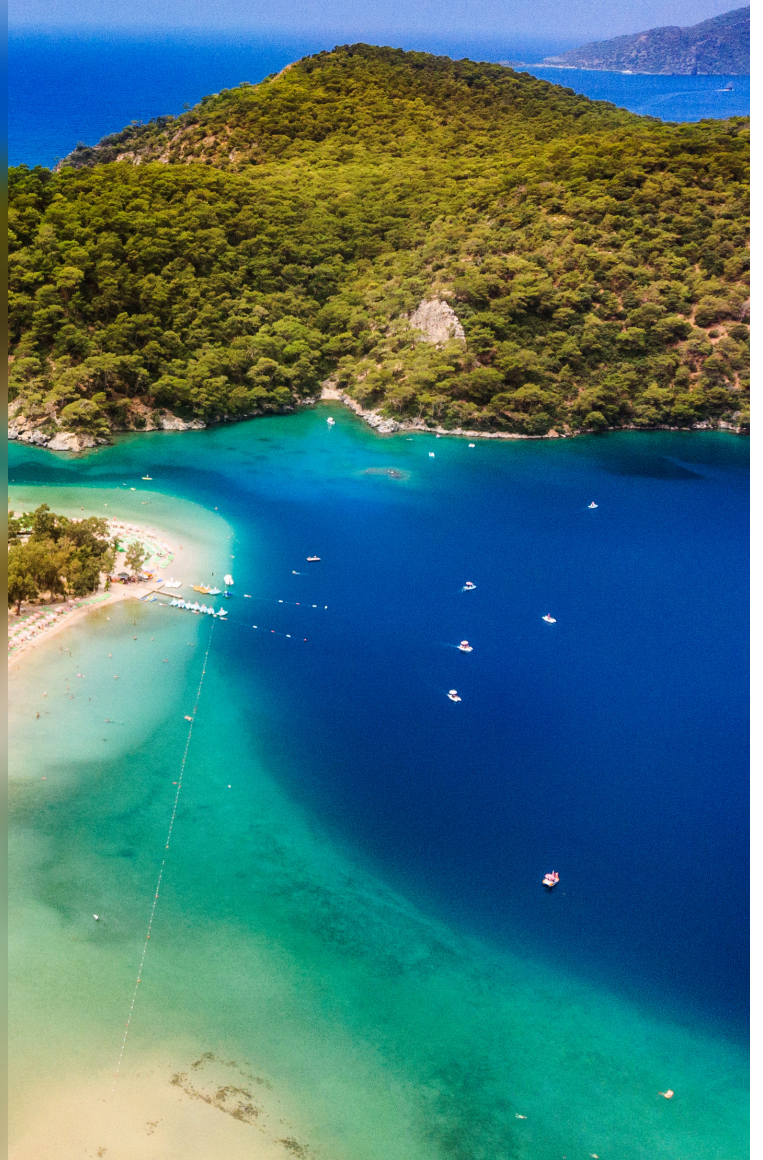
Within the EU (except Denmark)

The Recast Regulation applies, see first part of this note.

Outside of the EU

Recognition of proceedings outside the EU is subject to the general civil procedural rules: in the absence of a Treaty, a reciprocity principle would apply. In addition, only decisions not subject to appeal would be enforceable.

TURKEY



TURKEY

Key Elements:

- Emphasis on business rescue
- Avoidance actions
- Potential liabilities for management
- Guarantees
- Priority ranking of claims

Introduction

Insolvency proceedings are set out in the Enforcement and Bankruptcy Law (Law No. 2004) (“Enforcement and Bankruptcy Law”). A Turkish corporate entity will be deemed insolvent if:

- it becomes unable to pay its debts to its creditors; or
- it loses two thirds of its paid-up capital due to its losses; or
- its assets are not sufficient to cover its debts; or
- it ceases to make payments (*borçlunun ödemelerini tatil etmesi*). However, in order for a Turkish entity to be declared bankrupt, a bankruptcy judgment must be given by a commercial court. Bankruptcy is declared by the relevant commercial court on the initiative of a creditor or at the request of a Turkish entity itself.

Typically, a bankruptcy judgment by a commercial court is preceded by a debt enforcement procedure. Pursuant to the enforcement procedure under bankruptcy law (*iflas yoluyla icra takibi*), the legal procedure for collection of a debt may commence with a written application by a creditor to the relevant Enforcement Office (*İcra Müdürlüğü*) (an official debt collection agency). The Enforcement Office shall serve a payment order on the relevant debtor. The debtor may

contest the payment order within 7 days of its receipt or pay the relevant amount to the Enforcement Office within such time. In the event that the debtor neither raises an objection nor makes a payment within the 7-day period, a creditor may commence bankruptcy proceedings in the commercial court located where the creditor is incorporated. If the debtor objects to the payment order within the 7-day period, the creditor must seek permission from the court to proceed. In such proceedings, the creditor will ask for the debtor’s objection to be lifted and claim bankruptcy.

There are certain circumstances where a creditor may file a bankruptcy petition directly with the commercial court without first applying to the execution office and having a payment order served on the debtor, i.e. “direct bankruptcy”. Creditors may apply for direct bankruptcy when: (i) the residence of the debtor is not known; (ii) the debtor has fled for purposes of avoiding creditors; (iii) where the debtor carries out, or attempts to carry out fraudulent transactions which threaten the interests of creditors; (iv) the debtor has hidden assets during an attachment proceeding; (v) the debtor has suspended payments; (vi) the debtor has failed to pay a receivable evidenced by a final court award in spite of a payment order served by the enforcement office; (vii) a restructuring of debt proposal of the debtor is rejected by the court or the period given for restructuring of debt is cancelled; or (viii) the liabilities of the debtor are more than its assets.

In addition, the debtor itself may apply to the commercial court seeking its own bankruptcy stating that it is not able to pay its debts as they become due. Every creditor is authorised to intervene with the pending case within 15 days of the announcement of the application and request that the court rejects the application on grounds that the application is made

only to delay payment. The court itself is also authorised to investigate whether the applicant is in fact insolvent.

A debtor is obliged to apply to the competent court for its own bankruptcy if: (i) a debtor has lost half of its assets due to an attachment by any of its creditors and the remaining assets are not sufficient to meet its debts which are due or which shall become due within one year, and (ii) the management of the debtor, or in case of a debtor in liquidation the liquidators, declare, or a creditor proves, that the debtor's liabilities exceed its assets and receivables, the commercial court may decide to make a bankruptcy order without a prior payment order being required.

In order to protect creditors, until a final bankruptcy decision is obtained, the commercial court may, at its sole discretion, order protective measures. Such protective measures can be: (i) maintaining a record of the debtor's assets; (ii) determination of the debtor's assets; (iii) notification to the bankrupt's debtors to the effect that they should not pay due debts directly to the debtor but instead either to the commercial court or to the bankruptcy administration (*iflas idaresi*); (iv) notification to the land registries to prevent the transfer of the debtor's immovable property to third parties, etc.

Upon the issuing of the bankruptcy order, the commercial court will notify the bankruptcy office (an agency of the court), which in turn will notify the relevant governmental authorities including the land registry, commercial registry, the Turkish Banks' Association, Chamber of Industry and Commerce, the Istanbul Stock Exchange and the Capital Markets Board. It will also make an announcement in respect of the bankruptcy decision in newspapers and in the Turkish Trade Registry Gazette, to invite creditors to register their claims.

The date of the bankruptcy judgment is the bankruptcy date. Pursuant to Article 195 of the Enforcement and Bankruptcy Law, all debts of a bankrupt debtor, except for the receivables which were secured by way of a pledge over immovables, shall become due on the date of bankruptcy judgment.

Insolvency & bankruptcy

Once the conditions are triggered and the bankruptcy is declared by the court, all the assets owned by the bankrupt debtor at the time of declaration of bankruptcy and all assets acquired or received subsequently, will form together the bankruptcy estate (*iflas masasi*), which after deduction of costs and certain expenses, will be allocated to satisfy the creditors in proportion to their claims.

The bankruptcy estate will also include any assets that will belong to the bankrupt debtor until the closing of the bankruptcy. Similarly, any asset over which a security interest was created will also be a part of the bankruptcy estate without any prejudice to the pre-emption right of the secured creditors in the liquidation of the bankruptcy estate.

The bankrupt debtor loses its capacity to dispose of its assets and the management and liquidation of the estate is carried out by the bankruptcy administration (*iflas idaresi*) composed of receivers appointed by the relevant court.

Bankruptcy does not *per se* result in termination of the contracts to which the bankrupt entity is a party. However, parties are free to stipulate in contracts that the bankruptcy of a party shall result in the termination of such contract either automatically or by way of notice.

In accordance with Article 193 of the Enforcement and Bankruptcy Law, following the bankruptcy order, any debt collection proceedings initiated against the debtor will cease (excluding the foreclosure of security), and the relevant creditor must raise its claims against the bankruptcy administration (*iflas idaresi*) together with other creditors. New debt collection proceedings also cannot be initiated.

Thereafter, the distribution of the bankruptcy estate shall be made in accordance with the Enforcement and Bankruptcy Law while paying regard to the ranking of creditors as explained in detail in the Priority Rankings below.

Avoidance action

The bankruptcy administration (*iflas idaresi*) and certain creditors may file an avoidance action (*iptal davasi*) in the relevant court, challenging certain arrangements or dispositions made by an insolvent debtor during a certain defined period.

Gratuitous transactions

Pursuant to Article 278 of the Enforcement and Bankruptcy Law, gifts and gratuitous transactions (disposals without due consideration) made within 2 years preceding the bankruptcy or insolvency date may be cancelled by an avoidance action. Transactions with an excessive imbalance between the considerations of its parties may be void and subject to cancellation, if realised within the 2-year period preceding the date of the attachment, insolvency or bankruptcy of the debtor.

Voidable transactions entered into by insolvent debtor

In addition, as per Article 279 of the Enforcement and Bankruptcy Law, in the event that the transactions described below are made by the insolvent debtor within one year prior to

bankruptcy or insolvency of the debtor, they will be subject to avoidance action to be filed by the bankruptcy administration (*iflas idaresi*) or the creditors:

- (i) any pledge or security interest granted to secure an existing debt (save for the events where the creation of security was undertaken at the time of incurring the debt);
- (ii) settlement of a monetary claim which is not made by cash or commonly used payment methods (e.g. by cheque);
- (iii) any payment made to repay a debt which has not matured;
- (iv) annotations registered in a land registry to strengthen personal rights.

Please note that the Turkish Supreme Court is of the view that the foregoing list is not exhaustive.

However, if the counterparty benefiting from the above transactions can prove that it was not aware of the financial situation of the debtor, such a transaction cannot be declared void.

Finally, pursuant to Article 280 of the Enforcement and Bankruptcy Law, all transactions carried out by an insolvent or bankrupt debtor in the 5 years preceding the bankruptcy or insolvency date with the intention of defrauding or favouring certain creditors are voidable. It should also be noted that under Turkish law, any transaction which is not made on an arm's length basis or which is not in accordance with the market or is made without any consideration may be construed as a preferential and fraudulent transaction.

Solutions for an ailing company

Ordinary composition

According to the Enforcement and Bankruptcy Law, ordinary composition (*adi konkordato*) is an interim remedy available to the creditors of a debtor facing a financial difficulty or the debtor itself with which the debtor would be relieved from a portion of its debt and/or granted a revised payment schedule with the approval of a certain majority of the creditors and the commercial court. It aims to ensure the continuance of the debtor's business while preserving the rights of the creditors and preventing a formal bankruptcy.

The debtor or one of the creditors may apply to the court by submitting the documentation listed in the Enforcement and Bankruptcy Law. If the documentation is complete, the court will grant a temporary period of 3 months (which may be later extended for 2 months).

Three temporary commissar(s) at most will be appointed to determine the likelihood of the composition's success.

The temporary period decision will be announced to the public. The creditors may object to the grant of the temporary period within 7 days, however, decisions on granting/extending the temporary period, appointing temporary commissar(s) and taking protective measures cannot be appealed. The temporary period bears the same legal consequences with the definite period.

Upon receiving the commissar(s)' report, if the court determines that the financial situation of the debtor can be improved, it may grant a definite period of 1 year (which may later be extended for 6 months). For this definite period, 3 definite commissar(s) at most will be appointed.

According to Article 294 of Enforcement and Bankruptcy Law, the definite period decision will be announced to the public. The creditors may object to the decision within 7 days; however, the decisions on granting the definite period or rejecting a revocation request in respect of the grant of the definite period cannot be appealed against, while the decisions on rejecting the definite period or accepting a revocation request in respect of the definite period can be appealed against.

Status during the Temporary-Definite Period

As a rule, the debtor will continue to conduct its business under the supervision of the commissar(s). However, the court may also decide that some certain transactions of the debtor will be subject to the approval of the commissar(s); or, the commissar(s) will be responsible for carrying out the business activities of the debtor.

The debtor will be prohibited from granting pledges, guaranteeing a third party's obligation, transferring or encumbering (in part or in whole) any of its immovable properties or other substantial assets and entering into gratuitous transactions without the approval of the court (in consultation with the commissar(s)). Any such transaction carried out without the approval of the court will be null and void.

The agreements which are essential for the continuation of the debtor's business (e.g. sales, lease or facility agreements) cannot be terminated or the payments therein cannot be accelerated due to the initiation of the composition process even if the initiation of such is expressly regulated as an event of default, acceleration or prepayment event, or a termination ground in such agreements.

As a general rule, during the temporary and definite periods, enforcement proceedings cannot be initiated against the debtor

(even in respect of debts owed to the State or the public institutions such as taxes) and the previously initiated enforcement proceedings will be suspended. However, the secured creditors may enforce security and the existing enforcement proceedings for foreclosure of security can continue, although the secured assets cannot be foreclosed.

If a transfer of receivables agreement has been signed regarding a future receivable prior to the grant of the definite period and if such receivable becomes due after the grant of the temporary period, such transfer (assignment) would be invalid.

Unless the approved composition project as explained below contains a provision to the contrary, no interest will accrue on the unsecured receivables upon grant of the definite period. As a rule, the creditors may exercise their right to set-off unless the Enforcement and Bankruptcy Law expressly provides otherwise.

Composition Project and Declaration of Composition

During the definite period, a composition project is proposed with a view to improve the financial status of the debtor. The creditors are invited to consider the composition project at a creditors meeting.

The composition project will be accepted if (following the satisfaction of the claims excluded from the scope of composition) the majority of the creditors holding majority of total claims; or more than one quarter of the creditors holding two-thirds of the total claims approves the composition project. Other creditors may also join the composition decision within 7 days following the end of the meeting.

Once approved, the composition project will be binding for all debts except for the privileged ones, secured debts, public debts and the debts incurred during the temporary/definite

period with the approval of the commissar. The attachments established on the debtor's assets prior to the temporary period will also be revoked (except for privileged debts, secured debts and public debts).

Following the approval of the composition project by the creditors, the court will approve the composition if the (i) amount proposed to be paid under the composition project is more than the amount that the creditors would receive in case of the debtor's bankruptcy; (ii) the composition project is approved by the required threshold mentioned above; (iii) the amount subject to composition is proportionate with the assets of the debtor; (iv) the relevant security arrangements have been made in respect of the privileged receivables; and (v) the relevant charges and court expenses have been deposited by the debtor. The decision of the court accepting the composition will be publicly announced. The court may also appoint an administrator to supervise and manage the approved composition project. If the composition is not approved and if one of the causes of direct bankruptcy exists, the court will declare the debtor bankrupt. The composition judgment may be appealed within 10 days following the announcement of (or if the debtor, or its creditor who has requested the composition is appealing, the receipt of the formal notice regarding) the composition decision before the regional courts. The decision of the regional court may be further appealed before the Court of Appeal within 10 days following such decision.

If the debtor so requests, the court may postpone the foreclosure of debtor's pledged assets and/or the implementation of the protective measures in respect of the same for a maximum period of 1 year, provided that (i) the secured receivable has arisen prior to the composition request; (ii) there is no unpaid interest as of the composition request date; and (iii) the debtor has provided satisfactory proof that the

pledged asset is essential for its business and its economic existence will be jeopardized in case of foreclosure of the pledged asset. If the debtor requests so and the conditions set forth under the EBL are met, the court may also postpone the return of the leased goods under a financial leasing arrangement.

Composition following bankruptcy

The relevant provisions of the Enforcement and Bankruptcy Law also allow a bankrupt debtor, during the on-going bankruptcy proceedings, to come up with a composition project. The procedure of such composition following bankruptcy (*iflastan sonra konkordato*) is very similar to ordinary composition, however, in this case;

- (i) no composition term (i.e. temporary/definite period) is granted; and
- (ii) no commissar is appointed.

As per Article 309/II of Enforcement and Bankruptcy Law the duties of the composition commissar (so the management of composition proceedings) will be undertaken and carried out by the bankruptcy administration (*iflas idaresi*). For the composition project to be accepted by the creditors, same thresholds will be sought. If the composition is accepted, the composition will be reviewed by a commercial court and if the proposal meets the conditions, then the bankruptcy proceedings would be replaced with the composition. Similarly, as in the pre-bankruptcy composition proceedings the composition can be cancelled by any creditors if the debtor has acted in bad faith and in that case the debtor will continue to be deemed bankrupt. A composition following bankruptcy can only be requested once during the bankruptcy proceedings.

Composition through abandonment of debtor's assets

This type of composition was introduced into the Enforcement and Bankruptcy Law with the amendment made in 2003. Composition through the abandonment of a debtor's assets (*malvarlığının terki suretiyle konkordato*) enables a debtor to make a general assignment of its assets for the benefit of its creditors. As per Article 309/A, this type of composition grants the creditors the right to dispose of a debtor's assets and transfer its assets, in part or as a whole, to third parties. In other words, the debtor will abandon its assets so that the creditors may liquidate the assets and use the proceeds for the collection of their debts. Creditors exercise their rights through composition liquidators (*konkordato tasfiye memuru*) and a creditors' committee (*alacaklılar kurulu*).

As per Article 309/b of the Enforcement and Bankruptcy Law, composition through abandonment of a debtor's assets will comprise of the following mandatory content:

- (i) an indication of whether or not the creditors have waived their claims which are not satisfied upon liquidation of the assets or transfer of the ownership thereof to a third person, and if not, an indication of what the liabilities of the debtor will be in connection therewith;
- (ii) the appointment and details of the functions and powers of the composition liquidators and the members of the creditors' committee;
- (iii) unless it is specifically regulated by the laws, the method of liquidation of the debtor's assets, and if the assets are to be transferred to a third person, the method of transfer;
- (iv) a statement indicating that all notices and calls to the creditors will be published, in the Turkish Trade Registry Gazette and the official disclosure platform of the Media-Disclosure Institution (*Basın-İlan Kurumu*); and

- (v) if there are any, the assets kept out of scope of the composition.

This type of composition resembles the ordinary composition in relation to the treatment of the assets which are subject to the provisions of Article 290 of the Enforcement and Bankruptcy Law and require the debtor not to grant pledges, become a guarantor, transfer or encumber, in part or as a whole, its immovable properties or essential assets and enter into gratuitous transactions without the consent of the enforcement court.

This type of composition is in the interests of creditors and the debtor. For the creditors, it will shorten the time-consuming bankruptcy proceedings; allow them to sell the assets in a way that will generate the highest proceeds. For the debtor, it will release the debtor from being deemed bankrupt.

Restructuring of capital stock companies by conciliation

Pursuant to Article 309/m of the Enforcement and Bankruptcy Law, capital stock companies and cooperatives in financial difficulty are entitled to apply to the relevant commercial court for the restructuring by conciliation (*uzlaşma yoluyla yeniden yapılandırma*) by submitting a restructuring plan which is accepted by the affirmative votes of the required majority of the creditors affected by the plan. Under Article 309/m, a company would be considered to be in financial difficulty if it is unable to pay its overdue monetary debts or its current assets are not sufficient to meet its current liabilities, or it is under impending and imminent danger in terms of insolvency.

The Enforcement and Bankruptcy Law requires the restructuring plan content of which is defined in Article 309/n of the Enforcement and Bankruptcy Law, to have been discussed and approved beforehand by at least the majority of the creditors

affected by the plan and in attendance at the voting process and with no less than a two-third majority of the total amount of the debt which have cast a vote. Each class of creditors should approve the plan with the required majority if the plan involves more than one class of creditors. The classes of creditors shall be determined in accordance with the relevant regulation.

Upon the submission of relevant documents listed in Article 309/o of the Enforcement and Bankruptcy Law, the court is required to take, promptly upon a request by the company or a creditor, interim measures necessary to preserve the assets of the debtor and to ensure the sound operation of its business until the final judgment and to this effect, may appoint interim auditors (*ara dönem denetçisi*) to take over the management of the debtor's activities and to inspect the same.

In the event that the restructuring plan is approved, then the court would still appoint one or more plan inspector(s) whose duty would be more limited than that of an interim auditor and would principally consist of reporting to the creditors on regular basis on whether or not the terms and conditions of the plan are being met.

Personal liability for directors

Pursuant to Article 369 of the Turkish Commercial Code (Law No 6102) ("TCC"), the board of directors and managers need to perform their duties by acting as prudent executives and protect the interests of the company while performing their duties in accordance with the principle of good faith. A prudent executive must make business decisions in accordance with the principles of corporate governance. No liability will be stipulated with regard to the board of directors in case of the occurrence of damage or loss if the board of directors acted as prudent executives in good faith.

Duty of care

Article 369 of the TCC in reference to Article 528 of the Code of Obligations requires the members of the board of directors and managers of a company to perform their duties in a reasonable manner by showing the level of effort and care that a prudent businessman would exercise under the circumstances. However, if they are paid for their duties, then there is a higher standard of effort and care expected as an agent under Turkish law can be held responsible for negligence.

Limits of liability

As per Article 553/3 of the TCC, no person may be held liable for illegal acts, which have occurred out of his/her control, and neither the obligation of supervision, nor the duty of care may be used as grounds for holding such person liable.

Filing a lawsuit against the members of the Board of Directors

As per Article 550 of the TCC, the members of the board of directors who are aware of illiquidity of the shareholders who are undertaking to make a capital subscription and approve such capital subscription will be held liable for losses arising from non-payment. If this happens, under Article 562 of the TCC, those persons may be sentenced to imprisonment from between 3 months to 2 years or will be subject to a corresponding monetary penalty.

Similarly, as per Article 556 of the TCC, in case of the bankruptcy of the company, creditors also have the right to request the payment of the indemnities to the company however such requests of shareholders and creditors will be invoked by the bankruptcy administration (*iflas idaresi*). In addition, if the bankruptcy administration (*iflas idaresi*) does not file a lawsuit, each shareholder and creditor has the right to file the aforementioned lawsuit. The compensation, pursuant to the

relevant provisions of the Enforcement and Bankruptcy Law, is paid to (i) creditors, then will be distributed to (ii) the shareholders who filed the lawsuit and the remaining amount will be given to the bankruptcy estate.

The right to request the payment of the indemnities will have a statutory limitation of 2 years from the date of the claimant's loss where the person who will be held liable is known and in any other case within 5 years from the date that the wrongful act occurred.

Steps to be taken by the Board of Directors in the event of insolvency

Article 376 of the TCC regulates the issue of technical bankruptcy, which is a balance sheet insolvency. Pursuant to Article 376 of the TCC, if it is determined that the total of a company's capital and its legal reserves is reduced to half of its share capital, the board of directors is required to call the General Assembly for a meeting in which the board of directors submits the precautionary measures that should be taken to the approval of the shareholders. If two thirds of the paid-up capital of the company is already lost, then unless the General Assembly resolves to continue with one third of the paid-up capital or to inject more capital, the company will be automatically deemed bankrupt. If the assets of the company are insufficient to make payments to all the claims of the creditors, the company is obliged to forthwith notify the court that will adjudge and declare the company bankrupt, however, companies are given a last chance before the court to declare them as bankrupt on the condition that:

- (i) claims of creditors of a company can be postponed by means of a written undertaking/ agreement putting the same below the other claims of the creditors and become

sufficient to compensate the deficit of the company or to save it from being bankrupt; and

- (ii) the veracity and validity of such undertaking or agreement should be acknowledged by an expert to be appointed by the court.

However, if there is a possibility that the company can improve its financial condition, then the board of directors of the company or any creditor may request a composition during the bankruptcy proceedings by submitting the recovery plan (*yileştirme projesi*) in which the injection of capital and precautionary measures that will be taken by the company are presented.

An important point to note on the Communiqué on the Procedures and Principles for the Application of Article 376 of the Turkish Commercial Code Numbered 6102 (“Communiqué on Article 376”) is that the losses incurred due to exchange rate differences in respect of foreign exchange liabilities may be disregarded in the technical bankruptcy calculations. This option will be available until 01 January 2023, unless extended by the Ministry of Commerce.

Guarantees

Downstream guarantees may be issued under Turkish law. Upstream and cross-stream guarantees are subject to capital maintenance rules under the TCC. There must be a corporate benefit for the guarantor when entering into a guarantee.

Article 202 of the TCC provides that a parent company cannot use its dominant position to force its subsidiary to enter into transactions which may result in a loss for the subsidiary. These include giving sureties or guarantees, making payments or decreasing its assets in relation to the debts due from the

parent company. An exemption to this rule was also provided and so upstream guarantees or security can be provided if any such transaction is made for consideration. For the purposes of such consideration, Article 202 allows compensation by the parent of any loss suffered by the subsidiary within the operating year that the loss is suffered in or granting of an express right to the subsidiary against the parent (or a counter-guarantee) to claim any loss it may suffer as a result of providing such guarantee or security (so called, an “equal right of demand”).

Failure to provide the consideration explained above allows the shareholders of the subsidiary to claim compensation against the parent and its board of directors. Any creditors of the subsidiary may also request payment to the subsidiary of any loss suffered.

That being said, if a company directly or indirectly owns 100% of the shares and voting rights in another company, the board of directors of the controlling company can give orders to fully owned company concerning the direction and management of the dependent company, even if it is of a nature which can cause loss. However, no orders which exceed the ability of dependent company to pay and may endanger its existence or cause the loss of its important assets, can be given.

A guarantee by a joint stock company (*anonim şirket*) or limited liability company (*limited şirket*) to secure the acquisition of its own shares would be void under financial assistance rules pursuant to the TCC.

New money lending

Turkish jurisprudence and legal literature do not consider the granting of a loan to a distressed company under a rescheduling plan for the purpose of rehabilitation of the borrower’s financial

situation as unlawful. Any repayment of a loan by a distressed borrower granted during the hardening periods referred to in the Avoidance Action section above may be subject to a claw back action.

Priority ranking

Claims of secured creditors have priority over the sale proceeds of the secured assets after deduction of the relevant taxes (i.e. taxes arising from the use or mere existence of the secured assets such as real estate taxes, motor vehicle taxes, customs duty etc.) and expenses arising from the administration or preservation of the secured assets or from the auctions.

There are 4 classes of unsecured claims in respect of realisations of the insolvent estate.

First rank includes (i) the employees' claims, including notice and severance payments accrued within a year prior to the bankruptcy or due to the termination of the employment following the bankruptcy of the company; (ii) debts of the employer to the national insurance and social funds for employees; and (iii) any and all alimony claims arising from family law accrued within a year prior to the bankruptcy (if applicable).

Second rank includes claims of persons whose assets have been left to the administration of the bankrupt as a guardian or an administrator.

Third rank is comprised of claims that are given priority pursuant to the provisions of special laws.

And lastly, fourth rank is given to all other claims of the creditors which do not enjoy a priority.

Accordingly, the first and second rank comprise creditors with claims arising from employment contracts, pension funds and family law and third rank contains creditors whose claims are preferred by statutory provisions in law.

With regards to the third rank claims, for example, (i) claims that the Saving Deposit Insurance Fund ("SDIF") may have against a bankrupt bank that saving deposit holders (to the extent of any excess which such saving deposit holders could not recover from the SDIF); and (ii) claims which the Central Bank of Turkey may have against a bankrupt bank with respect to the loans made by it under Article 40.I(c) of the Central Bank Law (Law No. 1211) shall be preferred as third class claims.

Special insolvency proceedings applicable to banks

The Banking Act (Law No. 5411) sets out a detailed regime governing the insolvency and bankruptcy of banks in Turkey. The Banking Act grants broad powers to the Banking Regulatory and Supervisory Agency (*Bankacılık Düzenleme ve Denetleme Kurulu*) (the "BRSA") and SDIF. The BRSA has the authority to implement protective measures in cases of justified concern over a bank's insolvency.

In the event that: (a) the aforementioned protective measures are not (in whole or in part) taken by that bank within a period of time set forth by the BRSA or in any case within 12 months, (b) the financial structure of such bank cannot be strengthened despite having taken actions or the financial structure of such bank has become so weak that it could not be strengthened even if action were taken, (c) the continuation of the activities of such bank would jeopardise the rights of the depositors, the participation fund owners and the security and stability of the financial system, (d) such bank cannot cover its liabilities as they

become due, (e) the total amount of the liabilities of such bank exceeds the total amount of its assets, or (f) the controlling shareholders of such bank are found to have made use of that bank's resources for their own interests, directly or indirectly or fraudulently, in a manner that jeopardized the secure functioning of the bank or caused such bank to sustain a loss as a result of such misuse, then the BRSA, with the affirmative vote of at least 5 of its board members, may revoke the licence of such bank to engage in banking operations and/or to accept deposits and transfer the management, supervision and control of the privileges of shareholders (excluding dividends) of such bank to the SDIF.

Pursuant to Article 110 of the Banking Act, if it is determined that the managers and auditors of a bank, or its general manager and assistant general managers, or its authorized signatory officers have caused the application of the provisions of Article 71 for the bank through their decisions and actions that are in violation of the applicable laws, on the basis of a decision of the Fund Board and upon the request of the Fund, such person shall be held personally liable to the extent of the damage they have caused to the bank and a court may declare any such person bankrupt.

Out of court restructuring

The Regulation on the Restructuring of the Debts to the Financial Sector (the "Regulation") came into force on 15 August 2018 which aims to provide the opportunity for the debtors to fulfil their obligations by restructuring their debts towards the Turkish banks, the financial leasing, factoring and financing companies (the "Creditor Entities").

The Regulation envisages that a framework agreement is to be prepared by the Banks Association of Turkey (the "Association") to regulate the main conditions of the restructuring, the scope and minimum amount of debt that can be restructured, the rights and obligations of the Creditor Entities and the content of the restructuring agreements that can be executed under the framework agreement.

Pursuant to the Regulation once the framework agreement is signed by the Creditor Entities and approved by the BRSA, the debtors can approach the Creditor Entities which are parties to the framework agreement and if the conditions thereunder are fulfilled, they may execute the restructuring agreement to restructure their debts. In order to be valid, the restructuring agreements should be signed within 2 years following the approval of the framework agreement by the BRSA.

Framework Agreement

Scope

Pursuant to the provisions of the Regulation, the first framework agreement (the "Framework Agreement") was signed on 11 September 2018 by the Creditor Entities and published by the Association.

The main purpose of the Framework Agreement is to aid the debtors by (i) extending the maturity dates of the loans, (ii) renewing the loans provided to the debtors, providing additional loans, (iii) waiving or reducing all of the claims arising from the loans including the capital, interest or default interest, (iv) converting the receivables in respect of capital or interest partially or fully into shares, transferring these claims in exchange of cash or in-kind consideration or cash consideration with the condition of collection of these receivables, or (v) executing protocols with other creditors.

Conditions and Procedure

In order for a debtor to apply for and benefit from restructuring under the Framework Agreement:

- (i) its total debts towards the Creditor Entities should be higher than TRY 100 million on the date of application;
- (ii) the loans extended to it should have been classified as 1st group or 2nd group or as an illiquid claim pursuant to the Regulation on Classification of Loans and the Mandatory Reserves;
- (iii) the Creditor Entities should not have initiated any legal proceedings against it. However, if 25% of a debtor's total debt is towards the Creditor Entities and those Creditor Entities have initiated legal proceedings against it, such debtor can still apply for restructuring;
- (iv) it must not be declared bankrupt; and
- (v) it must be determined that the financial situation of the debtor will improve and it will be able to repay its debts following the restructuring.

The existence of the above conditions shall be assessed by a consortium formed by the Creditor Entities (the "Consortium") as per the Framework Agreement. The Creditor Entities may form one Consortium or several Consortiums for each debtor or debtor group.

If the Consortium determines that the above conditions are fulfilled, the Creditor Entities and the relevant debtor shall execute a restructuring agreement.

The restructuring agreement should determine and set out the receivables of the members of the Consortium from the debtor, the repayment amount and dates, the events of default and

consequences of the events of default, the pricing (interest, commission, etc.), issues in respect of monitoring and information undertakings, the authorisation for the access to all accounts and documents of the debtor, control mechanism, other obligations of the parties under the agreement, the security package and other issues deemed appropriate by the Consortium.

Once the restructuring agreement is signed, as long as the debtor continues to fulfil its obligations, all debt collection proceedings initiated against it shall cease and no new proceedings can be initiated, except for the cases which will cause loss of a right due to prescription period and lapse of time.

Pursuant to the Framework Agreement, other creditors may join the Consortium with the approval of the Consortium and by signing the Framework Agreement.

In order for other creditors to join the restructuring, the approval of (i) the Creditor Entities in the Consortium holding at least 75% of the total amount of receivables from the relevant debtor and (ii) at least 30% of the Creditor Entities in the Consortium, is required.

Pursuant to the Framework Agreement, if the Creditor Entities holding two thirds of the total receivables of the debtor towards all Creditor Entities execute a restructuring agreement with that debtor, then other Creditor Entities who are parties to the Framework Agreement are also obliged to sign the restructuring agreement.

Standstill Period

Pursuant to the Framework Agreement, a standstill period will apply starting from the date of application by the debtor for restructuring which essentially aims to preserve the status of the parties of the Framework Agreement, the assets of the debtor

and the rights of the Creditor Entities. The standstill period shall continue for a reasonable time enabling the parties to negotiate the terms of restructuring. The Framework Agreement does not set any parameters for the 'reasonable time'. The Consortium determines, in its first meeting, whether the standstill period will continue or end.

During this period, the debtor cannot take any steps that may result in a preferential treatment for a creditor including the members of the Consortium.

The most important effect of the standstill period is that during this period, all legal proceedings initiated against the debtor shall cease and no new proceedings can be initiated, except for the cases which will cause loss of a right due to limitation period or lapse of time.

Dispute Resolution

Any dispute arising under the Framework Agreement shall be submitted to arbitration. The arbitration committee shall consist of 3 members to be appointed in accordance with the procedure set out in the Framework Agreement.

Recognition of foreign insolvency proceedings

Under Private International Law, a judgment of a court established in a country other than Turkey may not be enforced in Turkish courts, unless the conditions specified under Private International Law are satisfied.

To date Turkish jurisprudence has refused to enforce foreign insolvency proceedings in Turkey on the basis that the enforcement of such proceedings would violate Turkish public policy.

Accordingly, a separate Turkish insolvency proceeding must be initiated in relation to any assets of an entity which is subject to insolvency proceedings outside Turkey.

UKRAINE



UKRAINE

Key Elements:

- How to commence insolvency proceedings in Ukraine
- The 3 main stages of insolvency proceedings
- Challenging transactions during insolvency proceedings
- Liability for insolvency and actions during insolvency
- Insolvency implications against banks
- Insolvency implications against state-owned companies
- Insolvency implications against foreign debtors

Introduction

The insolvency legislation in Ukraine may be divided into two types:

- Legislation regulating insolvency proceedings against banks. This is based on the Deposit Guarantee Fund Law dated 23 February 2012 and the Banks and Banking Activity Law dated 7 December 2000.
- Legislation regulating insolvency proceedings against debtors who are not banks.

This is based on two legislative acts:

- **The Code of Ukraine on Insolvency Proceedings** dated 18 October 2018, is the principal law on insolvency proceedings in Ukraine against debtors who are not banks. The new insolvency code will become operational from 21 October 2019.

- **The Commercial Proceedings Code** dated 6 November 1991 and significantly amended in 2001, regulates different court procedures within insolvency proceedings and is applicable if the Insolvency Code does not contain specific provisions on a particular issue.

In addition, numerous limitations and restrictions are set out with respect to the commencement and course of insolvency proceedings against certain types of debtors including for example, state-owned companies, significant enterprises employing more than 5,000 employees, certain financial institutions (stockbrokers, insurances companies, fund managers), and energy companies.

The courts (primarily, the Supreme Court of Ukraine and the High Commercial Court of Ukraine) have significant influence on the application of insolvency legislation and how it is interpreted when considering specific insolvency proceedings or when providing general clarifications as a part of summarizing and analysing the insolvency court practice.

Limitations

This note only discusses insolvency proceedings applicable to debtors registered in Ukraine. It does not discuss insolvency proceedings against banks or the companies listed above in detail. However, the main procedural and other differences applicable to insolvency proceedings against banks and state property companies are briefly outlined at the end of this note.

Commencement of insolvency proceedings

Insolvency petition by the debtor

Voluntary petition

Insolvency legislation in Ukraine provides the debtor with a right to file an insolvency petition with the court upon certain grounds. It also sets out a number of circumstances where the debtor is obliged to apply to the court for the commencement of insolvency proceedings against itself.

Compulsory petition

The debtor must initiate insolvency proceedings within one month if fulfilment by the debtor of its obligations to one or more creditors would result in the debtor being unable to satisfy the claims of its other creditors. A director of the debtor will be jointly and severally liable for failure to satisfy creditors' claims if the debtor fails to initiate insolvency proceedings within the one-month statutory period.

Insolvency petition by a creditor

Any creditor, including authorized governmental agencies (e.g. state tax authorities) is entitled to initiate insolvency proceedings. Multiple creditors are entitled to join the claims and initiate insolvency proceedings jointly.

The stages of insolvency proceedings

Property administration

This first stage of insolvency proceedings serves to prevent the debtor's assets from inappropriate disposal and establishes control over them before the creditors decide (with the court's subsequent approval) the debtor's fate (e.g. whether to rehabilitate or liquidate the debtor).

The above involves the following steps:

Appointment of a property administrator

The property administrator is a licensed independent entrepreneur who administers the property on the basis of a court ruling. The court approves the nomination of a property administrator randomly chosen by an electronic database of insolvency practitioners.

Role of the property administrator

The role of the property administrator is to preserve the debtor's assets from inappropriate use and disposal, to identify the debtor's creditors and to convene the first creditors' meeting.

Moratorium and restrictions on payments

The initiation of insolvency proceedings by a Ukrainian court normally triggers a moratorium on the satisfaction of certain creditors' claims.

During the moratorium period:

- the debtor will be prevented from satisfying claims and from entering into arrangements aimed at securing the claims which have become due before the date of the initiation of insolvency proceedings;
- enforcement against the debtor's assets shall be suspended irrespective of whether or not the obligation has matured¹⁷; and
- no default interest or any other penalties or sanctions for breaching the monetary obligations may be applied.

The moratorium will continue until the end of the insolvency proceedings, except for the moratorium on satisfaction of claims secured by debtor's assets, which will automatically terminate upon the expiry of 170 calendar days from the commencement of property administration, unless the debtor is declared insolvent or the court initiates the rehabilitation proceedings during this time.

Technically, the moratorium does not apply to payments which become due after the initiation of insolvency proceedings. After the initiation of insolvency proceedings, the debtor may, subject to various approval processes, be allowed to make contractual payments if the contract is not accelerated before the initiation of insolvency proceedings. However, in practical terms, if the debtor refuses to make contractual payments after the insolvency proceedings have been initiated, no enforcement (except for potentially the enforcement of the security) against the debtor is possible because, as mentioned above, the enforcement will be suspended during the moratorium.

The moratorium does not apply to: (i) payments which become due upon or after the initiation of bankruptcy proceedings; (ii) payments to creditors approved under the rehabilitation plan; (iii) payments made as a part of any liquidation proceedings in relation to the debtor; (iv) payments of salary, alimony, authorial remuneration and damages awarded for death or personal injury claims; and (v) set-off by creditors.

Restrictions on transactions

The property administration manager does not normally replace the CEO or other management of the debtor. However, if the CEO breaches the law, the court may, upon the application of the creditors, remove the CEO from office and temporarily

appoint a property administration manager as the CEO. During the property administration phase, the debtor's CEO is not allowed to enter into the following contracts and undertake the following actions: (i) any disposal of, or creating security interest over, real estate; (ii) granting or taking loans (credits), issuing sureties, guarantees, executing assignment agreements, entering into trust arrangements; any reorganisation or liquidation of the debtor, (iv) any creation or participation in any business entities, (v) payment of dividends, and (vi) issue securities. The entry into significant contracts (i.e., whereby the contractual amount exceeds one percent of the total value of the debtor's assets) and the disposal of material assets require the consent of the creditors' committee.

Termination of property administration

The property administration stage terminates with a court ruling made in a substantive court hearing. According to the time frame set out in the law, this hearing should be held not later than 6 months following of commencement of the insolvency proceedings by the court. The court ruling should be based on the decision of the creditors' meeting and include one of the following conclusions:

- initiation of rehabilitation proceedings against the debtor;
- initiation of liquidation proceedings against the debtor; or
- termination of insolvency proceedings against the debtor.

Rehabilitation proceedings

Once the property administration proceedings end, the creditors' committee is authorised to apply to the court for initiation of rehabilitation proceedings. The latter is a system of measures aiming to reinstate the debtor's solvency.

This stage involves the following steps:

Proposal for rehabilitation

The law does not set out any requirements regarding the content of the application to initiate rehabilitation proceedings.

Appointment of the rehabilitation manager

The court approves the nomination for rehabilitation manager

randomly chosen by an electronic database of insolvency practitioners. Once the court has given its ruling, the rehabilitation manager begins the debtor's rehabilitation. The creditors (including lenders) may not be directly involved in the management of the debtor because the rehabilitation manager is solely responsible for this. However, the creditors' committee must approve any significant contracts which the rehabilitation manager intends to enter into, unless the rehabilitation plan cancels this statutory approval requirement.

Powers of the rehabilitation manager

The rehabilitation manager should develop the rehabilitation plan, obtain consent for it from the creditors and file it with the court for approval. The rehabilitation manager supersedes the debtor's CEO and is responsible for carrying out the rehabilitation plan.

The powers of the rehabilitation manager also include producing an inventory of the debtor's assets, collecting the receivables, unilaterally terminating agreements and challenging antecedent transactions entered into by the debtor.

Within three months of the commencement of the debtor's rehabilitation, the rehabilitation manager may unilaterally refuse to perform the debtor's contracts which were concluded before

the date of commencement of insolvency proceedings provided that:

- the fulfilment of such contract would cause damage to the debtor;
- the contract is a long-term contract (i.e. exceeds one year) or is so structured that the debtor receives benefits from a long-term perspective; and
- fulfilment of the contract would prevent the restoration of the debtor's solvency.

The law is not clear as to whether all of these conditions or any of them must be fulfilled in order for the rehabilitation manager to be able to refuse to perform a contract. In 2009, the Supreme Court of Ukraine clarified that under the then effective insolvency legislation one condition for refusal would be sufficient. However, we are aware of several court cases that are not consistent on this issue and it is generally not clear how these provisions should apply.

Rehabilitation plan

Ukrainian insolvency law encourages the creditors' committee to come up with an action plan to rehabilitate the debtor. The rehabilitation plan must be approved by the court.

The main options for a "rehabilitation plan" are as follows: (i) the restructuring of the debtor; (ii) change of business activities of the debtor; (iii) termination of unprofitable production; (iv) temporary suspension of payments or deferral of payments as well as forgiveness of debt in respect of which an amicable agreement must be concluded; (v) collection of receivables; (vi) restructuring the debtor's assets; (vii) selling the debtor's assets; (viii) assignment of debts to the investors; (ix) discharge

of debtor's employees who will not be engaged in the realisation of the rehabilitation plan; (x) performance of the debtor's duties by third persons; (xi) exchange of the creditors' claims for debtor's assets or debtor's equity; and (xii) obtaining loans and credits, purchase of goods on credit terms.

Restrictions on payments

Upon commencement of rehabilitation proceedings the moratorium on satisfaction of creditors' claims remains effective. However, it has no effect upon the recovery of claims under the rehabilitation plan. Only the court that hears the insolvency proceedings may restrict the disposal of the debtor's assets (as well as imposing other limitations) **provided that** such limitations do not obstruct the rehabilitation of the debtor.

Restrictions on transactions

Only the rehabilitation manager is authorised to enter into agreements on behalf of the debtor during the rehabilitation proceedings. However, when it comes to the conclusion of considerable contracts and/or contracts with affiliated persons, the prior approval of the creditors' committee is required.

Termination of rehabilitation proceedings

The rehabilitation proceedings may either be converted into liquidation proceedings or be terminated. In the latter case, the debtor's solvency is deemed reinstated.

Transition to liquidation proceedings

If fulfilment of the rehabilitation plan has not actually reinstated the debtor's solvency, the court, upon the application of the creditors' committee, makes a ruling declaring the debtor bankrupt and initiates the debtor's liquidation.

Liquidation proceedings

Liquidation should last for one year and may not be extended. It involves the following steps:

Appointment of a liquidation manager

The court, while initiating the liquidation proceedings, will also appoint the liquidation manager.

Powers of the liquidation manager

The main role of the liquidation manager is to collect the debtor's assets and to agree to pay the claims according to the statutory rankings.

The main roles of the liquidation manager are to:

- sell the debtor's non-monetary assets;
- dismiss the debtor's management and employees;
- enter into an amicable settlement on behalf of the debtor; and
- request the court to invalidate agreements entered into by the debtor.

Restrictions on payments

Upon commencement of liquidation proceedings:

- the business activity of the debtor will be terminated;
- all monetary obligations owed by the debtor will become due and payable;
- economic sanctions in respect of the defaults in any obligations may no longer be imposed on the debtor; and
- all seizures of the debtor's assets will be cancelled and no new ones may be imposed.

Liquidation pool

At the liquidation stage, the debtor's entire assets are included in the pool of assets that comprise its bankruptcy estate. Creditors' claims are to be met during insolvency proceedings only in monetary form. If the pool includes non-monetary assets, then a liquidation manager must sell them and use the proceeds to satisfy such claims.

Closing of accounts

At the liquidation stage, all but one of the debtor's bank accounts are closed, and the balances are transferred to that single account.

Rankings

In the event that the court declares the debtor bankrupt, proceeds realised from the sale of its assets in the course of liquidation proceedings will be distributed in the following order of priority:

- (i) claims secured by a pledge/mortgage of the relevant assets (but only to the extent of the proceeds realised from that security);
- (ii) claims for employees' salaries and other payments due to the employees and expenses incurred in connection with insolvency proceedings;
- (iii) claims for taxes;
- (iv) unsecured creditors' claims;
- (v) claims of the employees to receive their contributions to the share capital of the debtor; and
- (vi) any other claims (in particular, penalty sums and other sanction payments).

Lenders providing new monies to the debtor during insolvency proceedings do not have any special priority or special ranking under the Insolvency Law.

Termination of liquidation

Liquidation proceedings normally end with the removal of the debtor from the Companies' Register.

Challenging transactions during insolvency proceedings

Under the laws of Ukraine, transactions entered into by a debtor prior to or after commencement of insolvency proceedings can be challenged (invalidated) on a number of grounds.

Void and voidable transactions

The Civil Code of Ukraine provides that a transaction can be classified as invalid if it is either a "void" or "voidable" transaction.

Once a transaction becomes invalid, it may no longer create legal rights and obligations and results in a reciprocal restitution. A void transaction is invalid by operation of law from the outset and does not require any court decision on its invalidation. In contrast, a voidable transaction can be declared invalid only by a court. For example, the latter includes transactions of legal entities made beyond their powers, fraudulent transactions and transactions entered into under duress. The limitation period for implementing the consequences of a void transaction is ten years from the date the void transaction was entered into. For voidable transactions, the limitation period is three years and a claim seeking a declaration of an invalid transaction must be filed within the earlier of: (i) the date the transaction occurred; and (ii) the date on which the claimant knew or should have known of the circumstances serving as grounds for invalidating the transaction.

Voidable transactions under the Insolvency Law

Following commencement of insolvency proceedings, under the Insolvency Law, a court-appointed insolvency manager will be entitled to challenge transactions and decisions of the debtor at any stage of insolvency proceedings on the general grounds for invalidation set out in the civil legislation. However, special provisions of the Insolvency Law also entitle the insolvency manager and a creditor, on the specific grounds described below, to challenge the transactions entered into by the debtor both up to three years before and after the commencement of insolvency proceedings, if such transactions caused damage to either the debtor or creditors. Since no special limitation periods are envisaged with respect to these powers of the court-appointed insolvency manager, the general principles of the Civil Code with respect to limitation periods of voidable transactions will apply.

Invalidation claim by the insolvency manager on specific grounds contemplated in the Insolvency Law

The insolvency manager or a creditor may apply to the court to challenge an agreement if such agreement resulted in the debtor:

- alienating assets, incurring undertakings or waiving proprietary claim(s) without consideration;
 - performing obligations before they became due (this would not include an acceleration or mandatory prepayment of a loan but it would include a voluntary prepayment of a loan);
 - entering into obligations as a result of which it became insolvent;
 - alienating or acquiring assets not at their market value and as a result of which it became insolvent;
- making any cash payments or receiving payments in kind when the amount of creditors' claims exceeds the value of the debtor's assets (this would mean that repayments or payments under loans and suretyships would potentially be challengeable if the value of the debtor's assets is lower than the aggregate amount of the creditor's claims at the time the payment occurred);
 - granting security; or
 - entering into gift transactions or related party transactions.

Liability for bankruptcy and actions during bankruptcy

Shareholders' civil liability for insolvency (bankruptcy)

The general principle of Ukrainian law is that shareholders (participants) of a company will not bear liability for the debts of the company unless otherwise stipulated by law and/or the constitutional documents of the company. The same rule applies to insolvency proceedings.

However, under the Ukrainian Commercial Code, if, due to acts or omissions of the holding company (as described below), the debtor is found to be insolvent and declared bankrupt, the holding company will be secondarily liable for the obligations of the bankrupt company. The law is not clear as to whether this provision of the Commercial Code applies to foreign holding companies. The Commercial Code defines the holding company as a public joint-stock company that owns shares issued by, at least, two or more companies (except for shares of state-owned companies).

The Commercial Code further refers to a separate Ukrainian law on holding companies (the “Holding Company Law”) which provides that an open joint stock company may qualify as a holding company provided that: (a) the block of shares controlled by the holding company exceeds 50% of all the issued shares; or (b) the holding company has some other decisive influence over the business activity of the controlled company. The Holding Company Law applies only to Ukrainian companies. It might be argued that the secondary liability for holding companies applies only to Ukrainian holding companies. We believe, however, that there is a risk that a court may apply the secondary liability rule to a foreign company that meets the criteria for a holding company under the Commercial Code. This issue has not yet been tested in the courts.

Under the Insolvency Law, any director or shareholder of a debtor or any other person which has control over the business or corporate governance of that debtor can be liable in the debtor’s bankruptcy to creditors of the insolvent debtor if:

- the assets of the debtor are insufficient to satisfy the creditors’ claims in full; and
- the actions of such director, shareholder or any other person resulted in the debtor’s bankruptcy.

No guidance is given in the law as to what actions may give rise to such liability. Furthermore, the reference to “any other person” in the category of those who may be liable arguably extends liability to those acting as “shadow directors”. Creditors will, therefore, need to be very careful that they cannot be deemed to have control over the business of a debtor to avoid being liable to other creditors.

Criminal liability for insolvency (bankruptcy)

The Criminal Code of Ukraine provides for criminal liability (a fine up to a maximum amount equivalent to approximately USD 2,000 with a restriction to occupy certain offices or to do certain business for up to 3 years) for deliberate bankruptcy, i.e. when the founder (participant, shareholder) or the official of the company knowingly performs actions that have resulted in the continuing financial insolvency of the company and caused gross material damage to the creditors or the State.

Administrative liability for insolvency (bankruptcy)

The Code of Ukraine on Administrative Offences will provide for administrative liability (fine up to USD 2,000) for the following offences:

- Fraudulent bankruptcy, i.e. when the founder (participant, shareholder) or the official of the company, as well as the individual entrepreneur, knowingly makes a false official statement about the financial insolvency and such statement causes gross material damage to the creditors or the State.
- Concealing permanent insolvency, i.e. when the founder (participant, shareholder) or the official of the company knowingly conceals, by means of applying false information, the company’s steady financial insolvency and this causes gross material damage to the creditors.
- Illegal actions during bankruptcy, i.e. when the founder (participant, shareholder) or the official of the company against which the insolvency proceedings are commenced by the court, knowingly conceals the property, information on property, illegally transfers the property or disposes of it

as well as forges, conceals or destructs the documents of the company's business activity and such illegal actions causes gross material damage.

In relation to all criminal and administrative offences mentioned above, the gross material damage exists provided that it equals to an equivalent of approximately USD18,261 or more. An individual convicted in any such offence, in addition to criminal/administrative sanctions, would also be obliged to compensate the actual amount of the damage caused.

Insolvency implications against the state and municipal property companies

The Ukrainian insolvency law applies to all legal entities and individuals, with the exception of treasury enterprises. It also provides for several restrictions in relation to the insolvency proceedings against the State companies or companies where the State has a significant participatory interest.

Insolvency implications against foreign debtors

The Insolvency Law applies only to Ukrainian legal entities, i.e. the ones having its registered address within the territory of Ukraine. Ukrainian bankruptcy courts will decline to assert their jurisdiction over foreign debtors in insolvency matters. In relation to potential secondary liability of a foreign holding company, please refer to section "Shareholders' civil liability for insolvency (bankruptcy)" above.

Ukraine has recently incorporated UNCITRAL Model Law on Cross Border Insolvency (came into effect in January 2013) which

would provide for a possibility of commencement of ancillary insolvency proceedings against foreign debtors in Ukraine.

However, foreign court judgments (including judgments of foreign insolvency courts) may be recognised in Ukraine: (a) if there is a relevant international agreement between the respective foreign jurisdiction and Ukraine (no such agreement exists between Ukraine and the UK); or (b) based on the reciprocity principle with a foreign jurisdiction (i.e., in the absence of the relevant agreement, Ukraine will recognise court judgments of the particular foreign jurisdiction if Ukrainian court judgments are recognised in such jurisdiction). From February 2010, Ukrainian procedural legislation presumes that "in the absence of the relevant international agreement, a reciprocity exists unless proved otherwise". We believe, however, that in the absence of the relevant international treaty, it is likely to be difficult to enforce a foreign court judgment on the basis of the reciprocity principle.

Insolvency implications against banks

The Insolvency Law does not apply to the insolvency of Ukrainian banks. The main regulatory authorities applicable in the event of the insolvency of Ukrainian banks are the National Bank of Ukraine (the "NBU") and the Deposit Guarantee Fund (the "DGF"). The courts do not play a significant role.

Ukrainian law provides for two insolvency procedures applicable to Ukrainian banks: temporary administration and liquidation. Both procedures may be introduced only by the NBU while the DGF is responsible for carrying out each of them.

Temporary administration is aimed at reinstating the solvency of a bank. By operation of law, a moratorium on satisfaction of creditors' claims is introduced during the temporary administration, which has much wider scope as compared to the moratorium applicable in general insolvency. The liquidation stage (i.e., when the bank goes bankrupt) may be introduced simultaneously with commencement of the insolvency procedure or may follow the temporary administration phase.

Ukrainian law does not provide for effective mechanisms which would allow creditors of banks to influence the NBU and DGF during bank insolvency.

The waterfall of claims recognises the ultimate priority of secured claims. Unlike the general insolvency procedure, the subordination of claims is recognised in the bank insolvency – subordinated claims are ranked the last.

CLIFFORD CHANCE CONTACTS

Belgium



Bert de Maeyer
Partner
T: +32 2 533 5055
E: bert.demaeyer@cliffordchance.com



Dorothee Vermeiren
Partner
T: +32 2 533 5063
E: dorothee.vermeiren@cliffordchance.com



Tomáš Richter
Of Counsel
T: +420 222 555 214
E: thomas.richter@cliffordchance.com



Miloš Felgr
Partner
T: +420 222 555 209
E: mils.felgr@cliffordchance.com



Adrian Cohen
Partner
T: +44 20 7006 1627
E: adrian.cohen@cliffordchance.com



Philip Hertz
Partner
T: +44 20 7006 1666
E: philip.hertz@cliffordchance.com



John MacLennan
Partner
T: +44 20 7006 1642
E: john.maclennan@cliffordchance.com



Gabrielle Ruiz
Director
T: +44 20 7006 1615
E: gabrielle.ruiz@cliffordchance.com



David Towers
Partner
T: +44 20 7006 8036
E: david.towers@cliffordchance.com



Iain White
Partner
T: +44 20 7006 2825
E: iain.white@cliffordchance.com



Giles Allison
Senior Associate
T: +44 20 7006 1105
E: giles.allison@cliffordchance.com



Tim Bennett
Senior Associate
T: +44 20 7006 2636
E: tim.bennett@cliffordchance.com



Jeanette Best
Senior Associate
T: +44 20 7006 1612
E: jeanette.best@cliffordchance.com



Niall Canny
Senior Associate
T: +44 20 7006 4651
E: niall.canny@cliffordchance.com

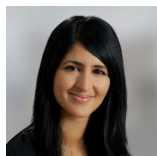


Melissa Coakley
Senior Associate
T: +44 20 7006 1963
E: melissa.coakley@cliffordchance.com

France



Timothy Lees
Senior Associate
T: +44 20 7006 6253
E: timothy.lees@cliffordchance.com



Seema Shukla
Senior Associate
T: +44 20 7006 8719
E: seema.shukla@cliffordchance.com



Reinhard Dammann
Partner
T: +33 1 44 05 5151
E: reinhard.dammann@cliffordchance.com



Gilles Podeur
Counsel
T: +33 1 44 05 2420
E: gilles.podeur@cliffordchance.com



Stefan Sax
Partner
T: +49 69 7199 1549
E: stefan.sax@cliffordchance.com

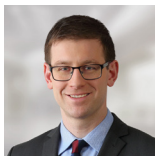
The Czech Republic

England & Wales

Germany



Cristina Weidner
Counsel
T: +49 69 7199 3145
E: cristina.weidner@cliffordchance.com



Joachim Ponseck
Counsel
T: +49 69 7199 1547
E: joachim.ponseck@cliffordchance.com

Italy



Carlo Felice Giampaolino
Partner
T: +39 06 42291 356
E: carlofelice.giampaolino@cliffordchance.com



Fabio Guastadisegni
Partner
T: +39 02 80634 353
E: fabio.guastadisegni@cliffordchance.com

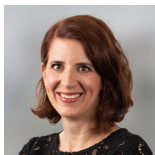


Carolina Piovano
Senior Associate
T: +39 02 80634 277
E: carolina.piovano@cliffordchance.com

Luxembourg



Steve Jacoby
Partner
T: +352 485 050 219
E: steve.jacoby@cliffordchance.com



Stefanie Ferring
Counsel
T: +352 485 050 253
E: stefanie.ferring@cliffordchance.com



Marc Mehlen
Partner
T: +352 485 050 305
E: marc.mehlen@cliffordchance.com



Hannes Westendorf
Avocat
T: +352 485 050 473
E: hannes.westendorf@cliffordchance.com



Ilse van Gasteren
Partner
T: +31 20 711 9272
E: ilse.vangasteren@cliffordchance.com

The Netherlands



Jelle Hofland
Partner
T: +31 20 711 9256
E: jelle.hofland@cliffordchance.com



Evert Verwey
Counsel
T: +31 20 711 9681
E: evert.verwey@cliffordchance.com



Miłosz Gołał
Partner
T: +48 22 429 9441
E: milosz.golab@cliffordchance.com



Bartosz Krużewski
Partner
T: +48 22 429 9514
E: bartosz.kruzewski@cliffordchance.com

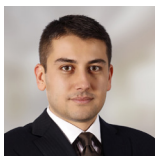


Jan Zdzienicki
Of Counsel
T: +48 22 429 9451
E: jan.zdzienicki@cliffordchance.com

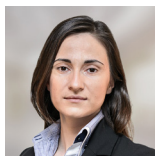
Poland



Grzegorz Namiotkiewicz
Managing Partner
T: +48 22 429 9408
E: grzegorz.namiotkiewicz@cliffordchance.com



Daniel Badea
Managing Partner
T: +40 21 6666 101
E: daniel.badea@cliffordchance.com



Raluca Coman
Senior Associate
T: +40 21 6666 130
E: raluca.coman@cliffordchance.com



Victoria Bortkevicha
Managing Partner
T: +7 495725 6406
E: victoria.bortkevicha@cliffordchance.com



Vladimir Barbolin
Partner
T: +7 495258 5071
E: vladimir.barbolin@cliffordchance.com

Romania

Russia

CLIFFORD CHANCE CONTACTS CONTINUED

Russia



Marina Kizenkova
Senior Associate
T: +7 495725 6401
E: marina.kizenkova@cliffordchance.com

Spain



Iñigo Villoria
Partner
T: +34 91 590 9403
E: inigo.villoria@cliffordchance.com



Alexandra Borrallo
Abogado
T: +34 91 590 9406
E: alexandra.borrallo@cliffordchance.com

Turkey



Mete Yegin
Partner
T: +90 (212) 339 001
E: mete.yegin@cliffordchance.com

Ukraine



Olexiy Soshenko
Redcliffe Partners
T: +38 044 390 22 13
E: olexiy.soshenko@redcliffe-partners.com

OUR INTERNATIONAL NETWORK

32 OFFICES IN 21 COUNTRIES



Abu Dhabi	London	São Paulo
Amsterdam	Luxembourg	Seoul
Barcelona	Madrid	Shanghai
Beijing	Milan	Singapore
Brussels	Moscow	Sydney
Bucharest	Munich	Tokyo
Casablanca	Newcastle	Warsaw
Dubai	New York	Washington, D.C.
Düsseldorf	Paris	
Frankfurt	Perth	Riyadh*
Hong Kong	Prague	
Istanbul	Rome	

*Clifford Chance has a co-operation agreement with Abuhimed Alsheikh Alhagbani Law Firm in Riyadh

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.



C L I F F O R D
C H A N C E

Clifford Chance, 10 Upper Bank Street, London, E14 5JJ

© Clifford Chance 2019

Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571.

Registered office: 10 Upper Bank Street, London, E14 5JJ

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications.

WWW.CLIFFORDCHANCE.COM